Concentrate Questions and Answers Equity and Trusts: Law Q&A Revision and Study Guide (3rd edn)

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8. Implied and Resulting Trusts

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Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans, suggested answers, and author commentary. This book offers advice on what to expect in exams and how best to prepare. This chapter covers questions on implied and resulting trusts.

Keywords: implied trusts, resulting trusts, constructive trusts, voluntary transfers, property, Quistclose trust, Law of Property, dissolution, unincorporated association, assets

Are You Ready?

In order to attempt the questions in this chapter you will need to have covered the following topics:

- Implied trusts
- Presumed and automatic resulting trusts
- Resulting trusts and the distinction with constructive trusts

Key Debates

Debate: the theoretical basis for resulting and implied trusts crops up frequently in case law as well as in academic journal articles.

There is a view that resulting trusts do not arise on the basis of unjust enrichment but instead reflect the presumed intention of the person transferring the property that they should have a beneficial interest in the property. But the debate in respect of an unjust enrichment basis for resulting trusts was developed by Professor Birks in his book, *An Introduction to the Law of Restitution*, and still is controversial. The US approach reflects this basis. Question 1 covers this debate.

Debate: the theoretical basis for the *Quistclose* trust is fatally flawed.

This debate continues to be fashionable and there is a wealth of academic articles on the subject. The issue is whether the resulting trust which protected unsecured creditors who had loaned money for a particular purpose which failed (in ***Quistclose*** to bail out a company by providing for a payment to cover the dividends on shares) fails to follow established principle. You might take the view that that is the point of equity—it does depart from time to time from established principle—but the topic does provide an opportunity for you to criticise academic writers on this. Question 2 provides on argument on this point. The reading material in 'Taking Things Further' underpins this debate and the question.

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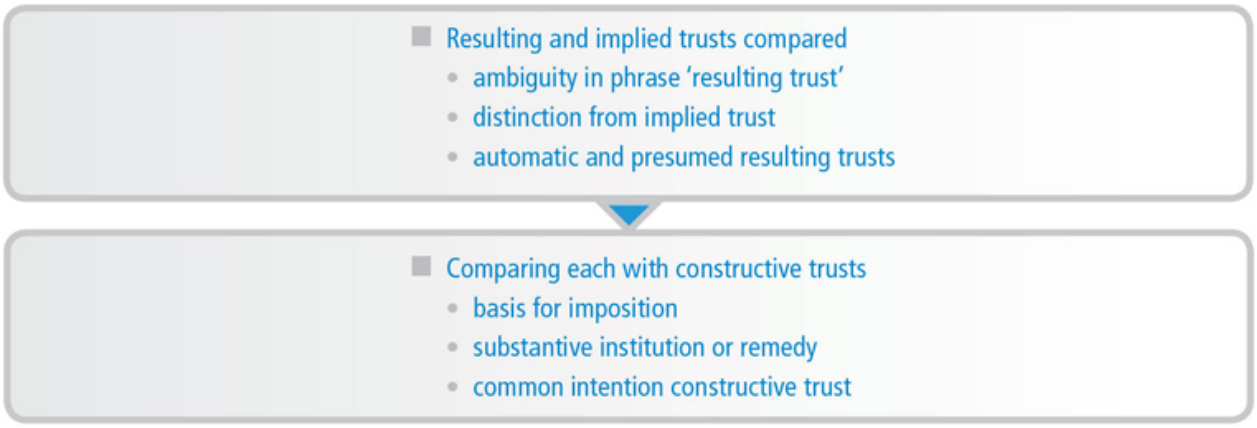
Question 1

Distinguish a resulting trust from an implied trust and a constructive trust.

Caution!

■ This question reflects the academic discussion of the theoretical basis for resulting and implied trusts and compares them with constructive trusts so you will need to have knowledge of that debate. It is a highly theoretical area so it's great if you like getting your teeth into such debates. You do need to have thought hard about this debate before tackling it in an exam though.

Diagram Answer Plan



Suggested Answer

The Law of Property Act 1925, s. 53(2) excludes from the scope of **s. 53(1)** the creation or operation of 'resulting, implied or constructive trusts'. This might suggest that these are different examples within a single classification; but this is not so. These are, in fact, examples drawn from different methods of classification, and the terms are not therefore necessarily mutually exclusive.[1]

[1] This is one way of introducing the question. It is helpful as in setting out the statutory reference it shows a linkage between the concepts. You could start though with the last phrase: 'Resulting, implied and constructive trusts are drawn from different methods of classification etc.'.

The term 'resulting trust', is ambiguous. As Professor Birks has indicated,[2] it appears to be used in two distinct senses: Birks, *An Introduction to the Law of Restitution*, pp. 57–64. First,[3] it is used merely descriptively, i.e. to denote a trust under which a transferor or settlor retains a beneficial interest. Birks calls such a trust 'resulting in pattern'. In this sense, a beneficial interest, retained by a settlor under even an express trust, can be described as resulting: e.g. where S transfers property to T in trust for B for life, remainder for S himself. ↵ Secondly, the term is used to denote, additionally, that the settlor's interest under such a trust arises only by implication—which therefore makes it a particular species of implied (or presumed) trust. Birks calls such a trust 'resulting in origin'.

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[2] This is a very academic debate so early reference to one of the leading thinkers is imperative.

[3] Here the two senses are set out making a good clear start to the discussion.

An implied trust[4] is a trust which arises from the presumed intention of the transferor. Thus if A transfers property into the name of B, who is in law a stranger, there is an equitable presumption (except in the case of land) that B holds the legal title in trust for A: ***Re Vinogradoff [1935] WN 68***. The presumption (which can easily be rebutted by evidence of a contrary intention) is therefore one of resulting trust. Where an implied trust leaves the beneficial interest with the settlor, it is also (in both senses) a resulting trust.

[4] The previous paragraph dealt with the resulting trust—now move on to the implied trust.

Because of this closeness of identity, resulting trusts have sometimes been treated as synonymous with implied trusts. This, however, disregards the fact that some trusts classifiable as implied (e.g. those arising under mutual wills) are not resulting. It is equally wrong to treat resulting trusts solely as a sub-species of implied trust because, as Megarry J lucidly explained at first instance in ***Re Vandervell's Trusts (No. 2) [1974] Ch 269***, not all resulting trusts are implied. Megarry J there distinguished between 'presumed resulting trusts', which arise from the implied intention of the transferor, and 'automatic resulting trusts',[5] which do not depend upon intentions or presumptions, but are an automatic consequence of the transferor's failure to dispose of what is vested in him. An automatic resulting trust therefore arises where, for instance, S transfers property to T upon trust for B for life, but does not state what is to happen to the property on B's death. In this instance, the resulting trust arises, not from S's implied intention, but merely from S's failure to dispose of the entire beneficial interest in the property transferred to T.

[5] Here comes the Megarry classification.

The distinction between the two types of resulting trust emerged in the litigation involving the Vandervell family. In ***Vandervell v IRC [1967] 2 AC 291***, the House of Lords held that Mr Vandervell was liable to pay tax on dividends declared on shares which he had transferred to a charity. One reason was that he had failed to dispose of his interest under a resulting trust of an option to repurchase the shares. The retention of an interest under a resulting trust was probably the last thing Mr Vandervell

intended, since it deprived the scheme of the very tax advantages which it was designed to secure. As Megarry J pointed out in ***Re Vandervell's Trusts (No. 2)***, however, Mr Vandervell's interest under a resulting trust was automatic, and not based upon his presumed intention.

A different view was taken in ***Davis v Richards & Wallington Industries Ltd [1990] 1 WLR 1551***,[6] where
p. 108 Scott J inferred from the ↵ circumstances that the members of a pension scheme should not be taken to have intended to retain any interest in a surplus by way of resulting trust. Similarly, in ***Westdeutsche Landesbank Girocentrale v Islington LBC [1996] AC 669***, at p. 708, Lord Browne-Wilkinson doubted that there was such a thing as an automatic resulting trust; in his view, all resulting trusts are based on intention. More recently, however, Lord Millett, giving the advice of the Privy Council in ***Air Jamaica Ltd v Charlton [1999] 1 WLR 1399***, at p. 1412, whilst expressing the view that a resulting trust gives effect to intention, said that a resulting trust can arise even when the transferor positively wishes to part with the beneficial interest, and he expressed the view that, on this point, ***Davis v Richards & Wallington Industries Ltd*** was wrongly decided. Lord Millett's observations effectively support the automatic resulting trust, since, in the light of his comments, it is difficult to see how evidence of intention could ever rebut a resulting trust of this sort: see Harpum [2000] Conv 170, at p. 178. Rickett and Grantham[7] suggest that the resulting trust is a default mechanism which deals with the situation where there is uncertainty about the location of the beneficial interest. The Supreme Court decision in ***Prest v Petrodel [2013] UKSC 34*** deals with the question of the deduction of intention through inference.

[6] This paragraph contains the differing views and sets out the cases accordingly.

[7] See 'Looking for Extra Marks?' for the references to these writers. There is a doctrinal debate as to whether a resulting trust arises when there is an *absence* of intention to gift the beneficiary.

It has been said that both resulting and constructive trusts arise by operation of law, although only the former give effect to intention: ***Air Jamaica Ltd v Charlton***, at p. 1412 (Lord Millett). Indeed, a constructive trust frequently arises regardless of intention. In English law, a constructive trust is not founded on a single principle, but it might be broadly stated that it is a trust imposed by equity in specific circumstances to promote justice and good conscience. In some circumstances, these objectives might involve the imposition of a constructive trust in order to ensure that effect is given to the intention of a settlor (as under the rule in ***Re Rose [1952] Ch 499***) or of parties to an agreement. Examples within the latter category are the trusts which arise under mutual wills, or the common intention constructive trust in relation to a family home (as illustrated in ***Grant v Edwards [1986] Ch***

638). Since these sorts of constructive trust are based upon the intention of the parties, they might also be classified as implied trusts. Such constructive trusts are also closely akin to the doctrine of proprietary estoppel: ***Yaxley v Gotts [2000] Ch 162, CA***.

A resulting trust is always a substantive trust, and therefore arises from the moment the defendant has the property in his hands. A constructive trust, by contrast, although generally treated as a substantive institution, does sometimes have remedial overtones[8] (as in the case ↵ of the trust which arises under mutual wills). In the ***Westdeutsche Landesbank*** case, Lord Browne-Wilkinson opined that there might be merit in developing the concept of a remedial constructive trust in English law as part of the broader development of the law of restitution. The advantage of a remedial constructive trust (which is recognised in the USA) would be that it would arise only when imposed by the court instead of when the property was acquired by the defendant, and so would not interfere unjustly with the property rights of third parties.

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[8] This raises the issue of the constructive trust as a remedial (rather than a substantive) trust.

An area in which the distinction between a resulting and a constructive trust has not always been made clear is in the determination of beneficial interests in a family home[9] where the parties have failed to specify what their interests should be. The original source of the confusion is to be found in dicta of Lord Diplock in ***Gissing v Gissing [1971] AC 886, HL***. In various cases in the Court of Appeal, Lord Denning MR attempted to develop the concept of a new model constructive trust of a remedial nature. This approach was subsequently rejected in ***Burns v Burns [1984] Ch 317, CA***, and in ***Lloyds Bank plc v Rosset [1991] AC 107, HL***.

[9] This is a big issue and very practical in terms of the case law. You could spend longer on this section and go into a deeper analysis of the cases. But be careful about that—is it how your lecturer taught this topic?

Some recent cases have, however, renewed the confusion between resulting and constructive trusts in relation to the family home. Under a resulting trust the size of the claimant's share is determined by the amount of his or her contribution: ***Re Densham [1975] 1 WLR 1519***. By contrast, under a common intention constructive trust the size of the share depends upon the agreement of the parties. In ***Midland Bank plc v Cooke [1995] 4 All ER 562***, however, the Court of Appeal held that a wife who had contributed less than 7 per cent of the purchase price was nevertheless entitled to a half share in the matrimonial home. The fact that she had contributed financially indicated that she was to have a beneficial interest; and the court inferred from the circumstances that the parties intended her to have an interest, even though there was no evidence that they had ever discussed this matter. Furthermore, in calculating the size of that interest, the court considered that it could have regard to

the parties' overall conduct, whether such conduct related to the acquisition of a beneficial interest or not. The decision seems to revive the confusion between resulting and constructive trusts which it was thought that ***Lloyds Bank plc v Rosset*** had finally expunged. Similar criticisms can also be made of ***Drake v Whipp [1996] 1 FLR 826, CA***.

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Looking For Extra Marks?

■ There is a doctrinal debate as to whether a resulting trust arises when there is an *absence* of intention to gift the beneficiary (rather than a positive, albeit imputed, intention to create a trust). While this makes little practical difference, it entertains some academics so for extra marks read and discuss: C. E. F. Rickett and R. Grantham, 'Resulting trusts—the true nature of the failing trust cases' (2000) 116 LQR 15. M. Hsiao, 'A shift in the objective deduction of secondary fact in presumption' [2017] Conv 101 is a useful discussion of ***Prest v Petrodel*** and W. Swadling, 'Explaining resulting trust' (2008) 124 LQR 72–104, gives a comprehensive analysis of the resulting trust. There is some support for this view of resulting trusts to be found in the High Court decision of ***McKenzie v McKenzie [2003] EWHC 601 (Ch)***. Otherwise, reference to P. Birks, *An Introduction to the Law of Restitution*, Oxford University Press, 1989, which places many different areas of law, including the law of trusts and the rules relating to tracing in a restitutionary framework, may be fruitful if your lecturer is keen on the restitution debate, as well as R. Chambers, *Resulting Trusts*, Oxford University Press, 1997. Check your lecturer's reading list for which particular parts of these works would be especially useful.

Question 2

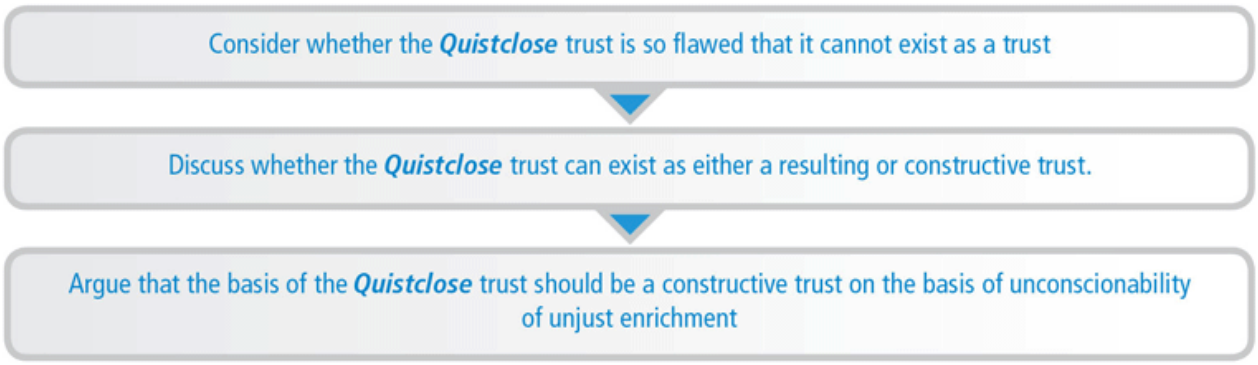
Critically discuss the concept of a *Quistclose* trust.

Caution!

■ This question reflects the controversy over the ***Quistclose*** trust. You need to have read not only the cases carefully but also the academic literature (see 'Taking Things Further'). Many worthy academics have made their careers on the basis of this controversy and any critical reflection on the case needs to demonstrate knowledge and understanding of their arguments. So, the question requires a critical reflection of this literature. This suggested answer takes one view but you are fully entitled to take a different position. For instance, you may consider that the dual trust theory is

correct or you may consider that ***Quistclose*** offends against the principles of insolvency law. If so, then you will gain a first class answer if you argue your case critically based on the literature. This question may well appear as coursework so suggestions are made in the commentary as to how you could develop it for that purpose.

Diagram Answer Plan



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Suggested Answer

Barclays Bank v Quistclose Investments Ltd [1970] AC 567 decided that money advanced as a loan for a specific purpose could be held on trust if that purpose was not fulfilled. The decision was revisited in ***Twinsectra v Yardley [2002] 2 AC 164***.[1]

[1] For coursework you could expand this introduction to discuss the extent to which this may be regarded as the most controversial development in trust law this century.

Is the *Quistclose* trust fatally flawed?[2]

[2] In an exam it is vital to marshal your arguments carefully. Decide your headings in your plan and stick to them. They will help you structure your work. Headings are just as useful in coursework where a longer piece of work is required.

In ***Quistclose***, money had been loaned into a separate bank account for a specific purpose and it was held that the money would initially be held on a primary trust. A secondary trust would arise for the lender if the purpose of the loan had not been fulfilled before the insolvency. This 'dual trust' is the controversial element of this decision and presents considerable difficulties in terms of trust principles. Academic writers have sought to analyse this dual trust by assuming that the primary trust would take the form of a private express trust as, if it fails, then it results back to the lender under an automatic resulting trust.

One academic critic of this decision, Swadling, argues that the fundamental principle of certainty of intention is breached and that it is not correct to assume such an intention in relation to what is a loan arrangement. To do so, he argues, would be economically outrageous. This flaw is difficult to support and even proponents of the ***Quistclose*** trust, such as Chan, question it. On the other hand, further to the decision in ***Re Kayford Ltd*** approved by Scarman LJ in ***Paul v Constance [1977] 1 WLR 527***, Megarry J deduces an intention to hold the money separately from the act of opening a separate bank account. Nevertheless, justifying this inference of intention is problematic and weakens the fundamental and well-established principles required to create a trust.[3]

[3] This suggested answer takes one critical approach. There is no reason why you shouldn't consider that it is perfectly acceptable to deduce intention from the action. After all, several judges have said so and they (not the academics) make the law.

More problematic is the failure of the ***Quistclose*** trust to comply with the requirement of certainty of objects. As Swadling argues, the ↵ beneficiary principle is essential to the law of private trusts. Deviation from the principle is only permitted in public charitable trusts (or those few aberrant private trusts which the judges maintain will never be extended). Hudson criticises ***Quistclose*** on the basis that there is a time gap between the collapse of the primary trust and the operation of the secondary trust during which the beneficial interest goes missing. As McCormack argues, the location of the beneficial interest must be identified at all times and Stevens argues that during this 'beneficial vacuum' the liquidator would have taken the loan money into the company assets as part of normal insolvency procedure. On the other hand, Deepa Parmar cites the 'Denley exception' as evidence that 'purpose trusts can be upheld as long as the purpose confers an indirect benefit on a class of human beneficiaries' and, interestingly, Lord Sumption in ***Angove's Property Ltd v Bailey [2016] UKSC 47*** described ***Quistclose*** trusts as 'special purpose trusts' (at paras 21 and 29).

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By contrast, Millett and Smolyansky have offered other, albeit conflicting, interpretations justifying ***Quistclose*** trusts.[4] Millett, in his dissenting judgment in ***Twinsectra v Yardley [2002] 2 AC 164***, adopts a single resulting trust theory arguing that the beneficial interest of the property is held throughout by the lender under a resulting trust. The money is subject to a power as to how it is to be used and, once used for the specified purpose, the trust is extinguished. Chambers argues in sympathy with this

interpretation that a resulting trust takes effect at the start where the lender does not intend to benefit the recipient and Birks describes this as a presumed absence of intention. This analysis of the single resulting trust backed up by contractual rights for repayment where the purpose is carried out is endorsed in ***Bellis v Callinor [2015] EWCA Civ 59***. Unfortunately, this approach was misused in ***Re EVTR [1987] BCLC 646*** where the purpose was carried out to buy equipment with the money. But then, when the company went into receivership, the supplier of the equipment retook it and repaid the money. The lender was allowed under the ***Quistclose*** approach to take the *supplier's* money back. ***Re EVTR*** is definitely a bridge too far in the application of the resulting trust.

[4] Now introduce some other arguments which support the trust.

Penner, however, opposes this interpretation emphasising the lack of beneficiary and criticising Millett's view that the use of the money is a mere power not amounting to a purpose trust[5] although Chan suggests that Millett's argument can be aligned with the argument for certainty of objects in discretionary trusts in ***McPhail v Doulton*** where the test for certainty of objects in powers was adopted. But Glister argues that Millett's classification of the ***Quistclose*** trust as a resulting trust does not conform with Megarry J's analysis of resulting trusts in ***Re Vandervell's Trusts (No. 2) [1974] Ch 269*** (as refined in ***Westdeutsche Landesbank v Islington [1996] AC 669***). It cannot be a presumed resulting trust as the money is transferred as a loan ↵ not a trust and it cannot be an automatic resulting trust as there is a lack of intention to create the trust. However, as Chan observes, there is room for development in the law relating to resulting trusts and no good reason why ***Quistclose*** trusts could not be added to Megarry's classification. But this is not the case as the law stands at the moment.

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[5] If you examine Millett's dissenting judgment in ***Twinsectra*** you will see some contradictions in his description at one point of the power giving rise to fiduciary duties.

By contrast, Smolyansky argues for a constructive trust interpretation making the case that such a trust does not rest upon the intentions of the parties. He argues that it would be unconscionable for the loan money to go to unsecured creditors where the purpose failed. Chan, however, supported by Rickett, condemns this approach as taking too wide a view of the meaning and application of unconscionability and suggests that the development of this principle through case law would be unacceptable as creating confusion in the commercial world.

But this seems to be contrary to the whole development not just of constructive trusts but to trust law in general. It has been a gradual development and accretion of principle through the slow process of judicial authority. Why stop now? Not only does the ***Quistclose*** trust provide protection for lenders but

it adds a useful commercial practice which can support companies in financial difficulties. If lenders were not so protected then they might be less willing to risk assets on a company in difficulty. ***Romalpa*** clauses[6] have been well understood by the commercial world for decades and it is not unreasonable to suppose that commerce will grasp the development of principle with the ***Quistclose*** trusts. Historically, equity has intervened to prevent unconscionable behaviour and it is argued that the court of equity should reflect the intention of the lenders in seeking to make a loan for a specified purpose through the medium of a constructive trust. There are too many breaches of fundamental principle in the use of the dual trust theory and its reliance on resulting trusts. The beneficiary principle and the requirement of certainty of intention to create a trust require a step too far in the interpretation of the ***Quistclose*** trust. But the same cannot be said for the constructive trusts. The ***Quistclose*** trust allows lenders to advance money on loan for a specific purpose which is to provide some succour for a company whether in straitened circumstances or otherwise. This is a straightforward commercial transaction which, as Chan argues, does not involve the complexity of finding security for that arrangement. If the purpose is made clear then no commercial uncertainty arises and no breach of the rules of insolvency arises.

[6] These are contractual and come from the decision in ***Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd [1976] 1 WLR 686***.

Conclusion[7]

[7] A conclusion is useful at the end of an essay. Unlike a problem question where the advice is wrapped up in the discussion, an essay needs tying up at the end especially when there has been a whole lot of he says this but he says that ...

The ***Quistclose*** trust is a classic example of the evolution of equity which is still producing offspring. What is lacking is a clear and arguable ↵ basis for its formulation which should be a constructive trust given the unconscionable nature of the outcome if the clearly stated nature of the commercial transaction is not recognised. In the absence of any reform, such as that advocated by the Law Commission in its 2003 consultation paper *Registration of Security Interests: Company Charges and Property other than Land*, unsecured creditors should not be able to receive an undeserved enrichment from what would amount to a windfall.

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Looking For Extra Marks?

■ Some further analysis of the Law Commission consultation paper *Registration of Security Interests: Company Charges and Property other than Land* (2003) would be useful. To tackle this question (especially if coursework) you need to have read all the literature listed in 'Taking Things Further'.

Question 3

Five years ago, Rook bought shares which he transferred into the name of his nephew, Pawn, then aged 17. Pawn, however, delivered the share certificate to Rook, and always paid the dividends he received in respect of the shares into Rook's own bank account.

Two years ago, Rook voluntarily, and without any expression of intention, conveyed his freehold land known as 'Castle' into Pawn's name.

Last year Rook handed Pawn a cheque in the sum of £5,000 which he had made out in Pawn's favour. At the same time Rook declared: 'This is to enable you to pay your creditors'. In fact Pawn's debts at the time amounted to only £3,000. Having paid off his creditors, Pawn gave the balance of £2,000 to his girlfriend, Queenie.

Rook died last month. In his will he gave all his property to Knight.

Advise Knight whether he has any claim to the shares, to 'Castle', or to the money received by Queenie.

Caution!

■ This question is clearly in three parts, each dealing with a different item of property, so you need to deal with each part in turn using separate headings. All three parts involve a discussion of resulting trusts, although the last part (involving the cheque to enable Pawn to pay his creditors) also requires a more wide-ranging discussion of other concepts. As all the issues turn on matters of construction and evidence, it is not possible to reach any definite conclusion upon the facts.

■ At the time of writing, s. 199 of the **Equality Act 2010**, which will abolish the presumption of advancement, had not been implemented but check before your exam.

Diagram Answer Plan

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Suggested Answer

Introduction[1]

[1] Very brief introduction to show what the key issue is.

As the sole beneficiary under Rook's will, Knight will have a claim to these items of property if he can establish that Rook retained a beneficial interest in them by way of a resulting trust. I will deal with each item in turn.

The Shares[2]

[2] Use sub-headings even though the question is not set out in that way. It makes for clarity in your answer and shows clear thinking (a mark earner).

In certain cases, where a person puts his property into the name of another, it is presumed (in the absence of evidence to the contrary) that he intended the legal title to carry with it the beneficial interest.[3] This is known as the presumption of advancement. It arises in three instances: transfers from husband to wife; transfers from a father to his legitimate child;[4] and transfers from a person *in loco parentis* to his quasi-child. Transfers which do not fall within these three categories are known as transfers to strangers. Here the presumption is reversed, i.e. there is a presumption of resulting trust. It is presumed that the transferor did not intend the legal title to carry with it the beneficial interest. These presumptions are weak and are easily rebutted by evidence of the transferor's intention. Even evidence of a close ↵ relationship between the parties may be sufficient: ***Fowkes v Pascoe (1875) LR 10 Ch App 343***; contrast ***Re Vinogradoff [1935] WN 68***.

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[3] The law.

[4] Note 'Caution!' point on future effect of the **Equality Act 2010**.

There is nothing in the question[5] to indicate that, at the time he transferred the shares into the name of his nephew, Pawn, Rook stood *in loco parentis* to Pawn. In the absence of contrary evidence,[6] therefore, the presumption is that Pawn holds the shares on a resulting trust for Rook. It is necessary to consider the impact upon this presumption of Pawn's acts subsequent to the transfer. The payment of the dividends to Rook is somewhat equivocal: it could indicate that Pawn considers himself merely a trustee for Rook, who (under a resulting trust) would have the entire equitable interest under the trust and thus (*inter alia*) a right to the dividends received. On the other hand, the payment to Rook of the dividends could be characterised as merely a series of independent gifts to Rook, of property which is now Pawn's both at law and in equity: see the judgment of Lord Denning MR in ***Re Vandervell's Trusts (No. 2) [1974] Ch 269, CA***.

[5] Application of law to problem.

[6] You have to say that because although there may well be such evidence in a real case, in the context of your exam question you are not going to have much information to go on.

Pawn's delivery of the share certificate to Rook per se is evidence of a resulting trust, since it effectively puts it out of Pawn's power to deal with the shares. Unless this can be explained on some other basis—that the certificate was returned, for instance, to Rook for safe-keeping[7]—it points away from Pawn having the beneficial interest in the shares. However, were Rook found to be *in loco parentis* to Pawn in 1993, the mere delivery to Rook of the share certificate might not be sufficient to rebut the presumption of advancement: see ***Scawin v Scawin (1841) 1 Y & CCC 65***. Some additional evidence may be needed: in ***Warren v Gurney [1944] 2 All ER 472, CA***, this was supplied by a contemporaneous declaration by the father that no gift was intended. In the present case, the additional factor may be the gift of the dividends. Such evidence is not as cogent, however, as that in ***Re Gooch (1890) 62 LT 384***. There, a father bought shares in a company in the name of his son, but the latter always paid the dividends to his father and even handed him the share certificate. Additionally, it was shown that the shares were transferred to the son in order that he could qualify as a director of the company. The presumption of advancement was rebutted.

[7] Again—you will have only a few facts on the question to play with so you could offer a possible alternative. But don't speculate too much about other possibilities. Stick with the facts as given.

'Castle'

Although the normal presumption upon a transfer to a stranger is one of resulting trust, it was for many years uncertain whether this presumption applied to a voluntary transfer of land.[8] The uncertainty arose because the **Law of Property Act 1925, s. 60(3)**, states: 'In a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee.' **Section 60(3)** could be ↵ interpreted to mean that in a voluntary conveyance of land there is always a presumption that the equitable interest passes to the grantee even if the conveyance does not state that it is for his use or benefit. Another interpretation, however, is that **s. 60(3)** is merely intended to ensure that, with the repeal of the Statute of Uses 1535, a beneficial interest can pass post-1925 if intended to pass even where the words 'use or benefit' are not contained in the conveyance. In ***Hodgson v Marks [1971] Ch 892***, the court found evidence of the transferor's intention and therefore found it unnecessary to consider the effect of **s. 60(3)**, which Russell LJ considered to be debatable, as did Lord Browne-Wilkinson in ***Tinsley v Milligan [1994] 1 AC 340***.

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[8] Statement of the law here.

The former interpretation was preferred at first instance in ***Lohia v Lohia [2001] WTLR 101*** (left open on appeal at ***[2001] EWCA Civ 1691, CA***), and has since been accepted as the correct interpretation by the Court of Appeal: ***Ali v Khan (2002) 5 ITELR 232***. In neither of those cases, however, did the result ultimately depend on the interpretation of **s. 60(3)**. In ***Lohia v Lohia***, any statutory presumption of resulting trust would in any event have been rebutted by evidence that the transferor intended to pass his beneficial interest. In ***Ali v Khan***, where a father had transferred a house into the names of his daughters, it was held that there was a resulting trust. This decision was, however, based on evidence of the father's intention to retain his interest, such evidence being sufficient to rebut the presumption of advancement. ***Prest v Petrodel Resources Ltd [2013] UKSC 34***, a case centred in matrimonial legislation (and subsequently followed in ***M v M [2013] EWHC 2534 (Fam)***), is a decision where the Supreme Court decided that a resulting trust arose on the basis of the conduct of the parties from which they inferred evidence of intention and failed to refer to **s. 60(3)** at all. The dispute involved the application of the **Matrimonial Causes Act 1973** and the determination of what interests the husband had in various items of property and is possibly coloured by the testy nature of the divorce proceedings where the husband was described as 'obstructive'. But the apparent failure to deal with **s. 60(3)** is not helpful in clarifying the interpretation of the sub-section.

In the light of these decisions, therefore, it appears that a resulting trust is not presumed *merely* because the conveyance is voluntary. This interpretation of **s. 60(3)** does not, however, rule out the possibility that a resulting trust might be inferred from *other* circumstances as is evidenced by the Supreme Court decision in ***Prest v Petrodel***. A relevant circumstance might be the relationship between the parties, so that, where the voluntary transferee is in law a stranger to the transferor, that fact alone might be sufficient for the court to infer a resulting trust: see Chambers, *Resulting Trusts*, Oxford University ↵ Press, 1997, at pp. 18–19. On this basis, in the absence of direct evidence of Rook's intention, the court might infer a resulting trust if Pawn was a stranger to him, but infer an intention that the beneficial interest should pass if Rook was *in loco parentis* to Pawn (i.e. the presumption of advancement).[9]

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[9] This conclusion sums up the options as you cannot come to a firm view because of lack of information in the question (which is perfectly normal).

Money Received by Queenie

In order to determine whether Knight has a claim to the surplus, it is necessary to construe Rook's intention when he handed Pawn the cheque.

First,[10] if certainty of intention can be found,[11] his words might be interpreted as creating a trust in favour of Pawn's creditors, so that the creditors became beneficiaries (and thereby acquired proprietary rights in equity) from the outset. If this is so, the normal principle is that once the trust has been performed, the surplus is held on a resulting trust for the settlor—in this case, Rook. Other outcomes are, however, possible, depending upon a construction of Rook's intention. Thus, it might be found that he intended that, once the trust had been performed, any surplus should belong to the trustee (Pawn) beneficially: ***Re Foord [1922] 2 Ch 519***. This might be presumed if Rook stands *in loco parentis* to Pawn. Yet again, it might be found, as in ***Smith v Cooke [1891] AC 297***, that Rook intended that the beneficiaries (in this case the creditors) should take any surplus.

10 There is going to follow a listing of points. You could even number them if you prefer. But it helps you tick off the points (and helps your examiner see clearly that you have them all).

11 A cross-over here from certainties—be ready for this and don't assume that, if this is not a 'certainty' question, you may not have to deal with them.

Secondly,[12] the transaction might be treated as giving rise to what has become known as a '***Quistclose*** trust': ***Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567***. Applying the analysis of such a trust suggested by Lord Millett in ***Twinsectra Ltd v Yardley [2002] 2 AC 164***, the beneficial interest in the £5,000 would have remained with Rook under a resulting trust, subject to Pawn's having a mandate to apply it in payment of his creditors. Such payment would have reduced Rook's beneficial interest under the resulting trust to an interest in the remaining £2,000.

12 Another point of law here followed by several more which are all numbered.

Thirdly, Rook's words could be held to indicate a gift of the money subject to an equitable charge in favour of the creditors. Upon this construction, it is presumed that the recipient of the fund (in this case Pawn) takes the beneficial interest in it subject only to the payment of the creditors.

Fourthly, the matter could be construed as a contract, whereby Rook pays Pawn £5,000 in consideration for Pawn paying off his own creditors. On this basis, Pawn has performed his part of the agreement. Strictly, there is no surplus because no debts are charged upon the £5,000, but, in effect, the remaining £2,000 is Pawn's own.

Fifthly, it might be possible to treat Rook as making Pawn a conditional gift of £5,000, i.e. a gift subject to a condition that Pawn pays his own creditors.

p. 119 ↵ In each of these last three constructions, neither Rook nor Knight, as the beneficiary under Rook's will, has any claim to the money paid to Queenie. Knight will therefore have a claim to trace the money into the hands of Queenie only if the first or second construction is adopted, with a resulting trust of the surplus.[13]

[13] Notice that in each of the above points the application of the law to the problem incorporates the conclusion. So don't try to put one in here.

Looking For Extra Marks?

■ You will see that there is reference to obiter dicta in some of the cases—this gets you extra marks. Critical discussion of the rationale for presumed resulting trusts and reference to Hsiao [2017] Conv 101 and Swadling 'Explaining resulting trust' (2008) 124 LQR 72–104 would be another extra mark point—although time and space in a problem question limits the opportunity for exploring their views in greater detail than a passing reference.

Question 4

Three years ago, a bowling club was set up in Plymouth as an unincorporated non-charitable association. Under the rules of the club, members were required to pay an annual subscription of £20, which entitled them to play bowls at the club throughout the year, to use its tea room and other facilities, and to be considered for inclusion in the team for matches with other clubs. Non-members could also play bowls at the club, subject to the payment of £2 per game. Additional funds to support the club were raised through street collections in Plymouth.

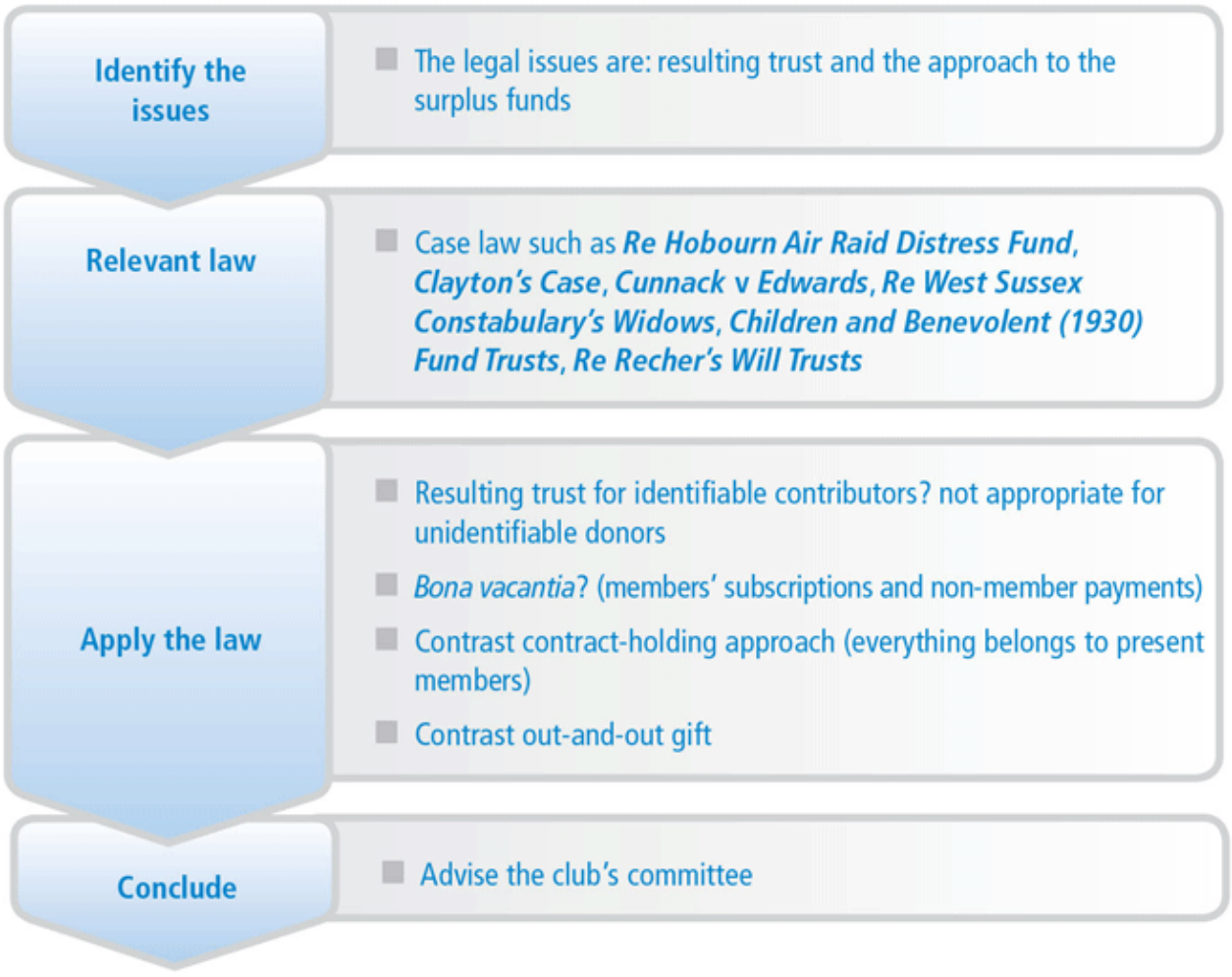
The opening of a massive new sports complex in Plymouth has caused interest in the bowling club to decline, and the club's committee has now decided to disband the club. At present, some £20,000 remains in the club's 'Common Fund', into which all payments and donations had been placed.

Advise the club's committee how they should deal with this fund.

Caution!

■ This is the sort of question frequently found in examinations. Sometimes it will involve a members' club, sometimes more outward-looking types of association. Make sure you deal with the allocation of each part of the fund. Note that the question-setters have been kind, and have expressly told you that the club is a non-charitable unincorporated association. Do not look this gift horse in the mouth.

Diagram Answer Plan



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Suggested Answer

A number of different legal approaches have been applied to resolve the issue of entitlement to the surplus funds of an unincorporated association upon its dissolution.[1]

[1] Brief introduction to establish the key issue.

One approach is to treat the contributors to the fund as entitled to the surplus by way of a resulting trust.[2] Such a trust arises because the court will presume, in the absence of an expression of intention on the part of the contributors, that they did not intend to part with their contributions out and out. This principle was applied in ***Re Hobourn Air Raid Distress Fund [1946] Ch 194***, where factory employees raised a fund to provide for those amongst them who suffered in air raids. The Court of Appeal held that the surplus was held on a resulting trust for the contributors in proportion to the amount each had paid in.

[2] You could give a heading as in the diagram answer plan but this paragraph opener also does the trick of establishing the first key point.

This approach can cause administrative problems, however, where there are many contributors and where the fund has existed for a long time. In such circumstances, two alternative outcomes are possible without abandoning the concept of the resulting trust.

First, it might be presumed that each contributor initially retained an interest in his contribution under a resulting trust until his ↵ contribution is spent. On this basis, withdrawals from the fund could be treated as being made according to the rule in ***Clayton's Case (1816) 1 Mer 572***, i.e. first in, first out. This would clearly favour later contributors over earlier ones. No reported decision, however, has applied ***Clayton's Case*** in this context.

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Secondly, in ***Re Printers [1899] 2 Ch 184***, upon dissolution of a trade union, the surplus of the funds (which had been raised by weekly contributions from members) was held by way of resulting trust for existing members only, rateably according to their contributions. As was pointed out in ***Re St Andrews Allotment Association [1969] 1 WLR 229***, however, it is difficult to see how the existing members could take by way of resulting trust a surplus partly derived from the contributions of past members.

An alternative approach[3] is to treat the matter, not as one of trust, but as one of contract. Thus in ***Cunnack v Edwards [1896] 2 Ch 679***, a surplus remained in a friendly society's funds after the death of the last widow annuitant. The Court of Appeal held that the members had contributed on the basis of

contract, i.e. each payment was made in consideration for the payment of an annuity to the subscriber's widow. Each member had therefore enjoyed their full contractual entitlement from the fund. Thus the surplus went *bona vacantia* to the Crown. This contractual approach was also used in ***Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts [1971] Ch 1***, to deal with parts of the surplus remaining on the dissolution of a police benevolent fund. Goff J held that members' contributions, together with funds raised by way of entertainments and raffles, had all been given on a contractual basis, and should therefore go *bona vacantia* to the Crown. There, in contrast to ***Re Gillingham Bus Disaster Fund [1958] Ch 300***, the judge said that anonymous contributors must be taken to have given out and out, so that this part of the surplus also went to the Crown. That part which represented the contributions of identifiable donors, however, was held for such donors on a resulting trust. However, this principle regarding the disposition of surplus in ***Re West Sussex*** was rejected in ***Hanchett-Stamford v AG [2008] EWHC 330 (Ch)*** where it was held that where there was one remaining member of the unincorporated association the contract inevitably came to an end and the property was then held absolutely by that survivor.

[3] Here is the second analytical approach to the problem (see 'Diagram Answer Plan').

A different line of reasoning,[4] however, emerges from a more recent line of authorities. Thus in ***Re Recher's Will Trusts [1972] Ch 526***, Brightman J considered that the property of an unincorporated association was held for the members beneficially for the time being subject to the contract which exists between them, i.e. the association's rules. On this basis, unless the rules provide otherwise, the

p. 122 ↵ assets are held for the members at the date of dissolution equally, not on any principle of resulting trust, but simply because it is their property.

[4] Here is the third approach.

Problems with the contract-holding approach[5] remain to be addressed: how, for instance, interests can be acquired and lost by new and old members respectively without written assignments complying with the **Law of Property Act 1925, s. 53(1)(c)**. Nevertheless, for the time being at least, this approach has found favour with the courts, e.g. in ***Re Sick and Funeral Society of St John's Sunday School, Golcar [1973] Ch 51***, ***Re GKN Bolts Nuts Ltd (Automotive Division) Birmingham Works Sports and Social Club [1982] 1 WLR 774***, ***Re Horley Town Football Club [2006] EWHC 2386 (Ch)***, and it could also explain ***Re St Andrews Allotment Association***. The contract-holding approach was applied to a friendly society in ***Re Bucks Constabulary Friendly Society (No. 2) [1979] 1 WLR 936***. Walton J considered that the judge in ***Re West Sussex*** was wrong to rely on ***Cunnack v Edwards***. In Walton J's view, ***Cunnack v***

Edwards turned on the friendly society statutes then in force which forbade distribution of surplus to the members. ***Hanchett-Stamford v AG [2008] EWHC 330 (Ch)*** confirms this point and it seems clear now that a surplus under the contract-holding approach will go to the members.

[5] There are problems so here is where you set them out.

In the context of outward-looking associations and those which benefit members' widows and orphans, the authorities remain in some disarray. Furthermore, pension funds may be a special case, where contractual principles are not necessarily incompatible with a resulting trust: ***Davis v Richards & Wallington Industries Ltd [1990] 1 WLR 1511***. In the context of members' clubs, however, such as the bowling club in the problem, where the benefits are confined to the members alone, there is now a fair body of opinion favouring the contract-holding approach of ***Re Recher***. Thus, subject to a contrary indication in the bowling club's rules, that part of the surplus representing members' subscriptions belongs to the members at the date of dissolution.

The members' club cases, however, have not substantially had to deal with outside contributions. Assuming the criticisms of ***Re West Sussex*** made in ***Re Bucks*** and confirmed in ***Hanchett-Stamford v AG*** are sound, the receipts from non-members for use of the green are paid under a contract and therefore form part of the general assets of the club. The contributions from street collections will probably be treated as absolute gifts, whether or not for the reasons stated in ***Re West Sussex***. Greater difficulties might arise in the case of donations from identifiable donors. Dicta in ***Re Bucks*** suggest that even these would belong to the present members.

p. 123 ↵ In conclusion then, in the absence of anything to the contrary in the club's rules, it is probable that the whole 'Common Fund' belongs equally to those who were members at the date of dissolution.[6]

[6] This is as strong a conclusion as you can get really.

Looking For Extra Marks?

■ For extra marks (or additional discussion in essays), you will find valuable analyses by Rickett (1980) 39 CLJ 88, and by Green (1980) 43 MLR 626 which could usefully be incorporated.

Taking Things Further

■ Birks, P., 'Restitution, resulting trusts in equity: contemporary legal developments', Hebrew University of Jerusalem, 1992.

This article provides an analysis of the unjust enrichment theory.

■ Chambers, R., 'Is There a Presumption of Resulting Trust?', in *Constructive and Resulting Trusts* (Mitchell, ed.), Hart Publishing, 2010.

This chapter gives a broad discussion of the way in which resulting trusts are presumed.

This list of references comprises essential reading for the thorny area of ***Quistclose*** *trusts:*

■ Chambers, R., *Resulting Trusts*, Clarendon Press, 1997.

■ Chan, B. D., 'The enigma of the *Quistclose* trust' (2013) 2 UCL Journal of Law and Jurisprudence 1.

■ Glister, J., 'Review of "The *Quistclose* Trust: Critical Essays" by William Swadling' (2004) 67 MLR 1032.

■ McCormack, G., 'Conditional payments and insolvency—the *Quistclose* trust' (1994) 9 Denning Law Journal 93.

■ Parmar, D., 'The uncertainty surrounding the *Quistclose* trust—Part One' (2012) 9(2) International Corporate Rescue.

■ Penner, J., 'Lord Millett's Analysis', in *Quistclose Trust: Critical Essays* (W. Swadling, ed.), Oxford University Press, 2004.

■ Rickett, C., 'Unconscionability and commercial law' (2005) 24(1) University of Queensland Law Journal 73.

■ Smolyansky, M., 'Reining in the *Quistclose* trust: a response to *Twinsectra* v *Yardley*' (2010) 16(7) Trusts & Trustees 558.

■ Stevens, R., 'Insolvency' in *Quistclose Trust: Critical Essays* (W. Swadling, ed.), Oxford University Press, 2004.

■ Swadling, W, 'Orthodoxy' in *Quistclose Trust: Critical Essays* (W. Swadling, ed.), Oxford University Press, 2004.

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