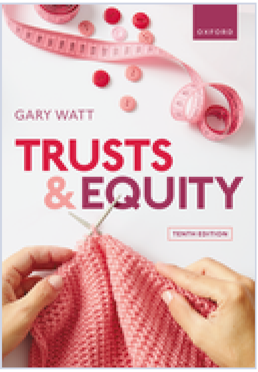

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p. 145

5. Ineffective disposition of benefit: resulting trusts

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Abstract

If the beneficial owner of an asset transfers the asset to another who does not give or promise anything in return, and where there is no evidence of any intention on the former's part to make a gift or trust of the property, it is impossible to determine to whom the benefit of the asset belongs. In this case, the beneficial ownership of the asset is assumed to be held by the beneficiary for the owner under a resulting trust. The resulting trust is therefore a type of trust that arises when there is no express intention to create it. This chapter examines the ineffective disposition of benefit, focusing on the resulting trusts. It also discusses the established factual categories of the resulting trust, the theory behind resulting trusts, rebutting the presumption of a resulting trust, resulting trusts of surplus benefits, the *Quistclose* trust, and pension fund surpluses.

Keywords: resulting trusts, surplus benefits, Quistclose trust, pension fund surpluses, gift, property, disposition, benefit

Context

Suppose that you transfer an asset to someone who neither gives nor promises anything in return, and where there is no evidence that you intended to make a gift or trust of the benefit of the asset or to transfer it under a valid common law contract or loan. Or maybe you did transfer the asset expressly on trust or there was evidence that you intended an outright gift, but the transfer is for some reason ineffective (suppose the trust is impossible to fulfil or the gift was made to a company that never existed). What happens in such transactions to the undisposed benefit of the assets transferred? The beneficial ownership of the assets cannot be left in this uncertain state, so it is said to be held by the transferee under a resulting trust for you. In this chapter we will discover the reasoning behind this response and the controversies surrounding it.

Watch the author give a three-minute lecture on the subject of resulting trusts *<https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-resulting-trusts?options=showName>*.

5.1 Introduction

In Chapters 3 and 4, we considered the creation and complete constitution of a trust in circumstances in which the settlor expressly intended to create the trust. In this chapter, we will examine a type of trust that arises in the absence of any express intention to create it.

This legal response to transfers of undefined intent is of very long standing. Thus, in 1530, St German commented that:

> [i]f a man seised of land make a feoffment thereof, and it appeareth not to what use the feoffment was made, nor it is not upon any bargain or other recompence, then it shall be taken to the use of the feoffor, except the contrary can be proved.[1]

p. 146 ↵ The word 'resulting' is derived from *saltare*, the Latin verb 'to jump'.[2] This gives the impression that a resulting trust is descriptive of the process by which benefits 'jump back' to a transferor. In fact, the key to understanding the resulting trust is to appreciate that the benefit 'jumps back' because the apparent disposition had actually been ineffective, in other words that the benefit jumps back because it had never really left. As Plowman J once said:

> [A] man does not cease to own property simply by saying 'I don't want it.' If he tries to give it away the question must always be, has he succeeded in doing so or not?[3]

A simple example of a resulting trust is the one that arises where someone pays money into the bank account of a company that no longer exists.[4] Without a beneficial owner to receive the transfer, the disposition of the beneficial interest is ineffective, and it will jump back ('result') to the transferor.

5.2 The two orthodox categories of resulting trust

In *Westdeutsche Landesbank Girozentrale v. Islington LBC*,[5] Lord Browne-Wilkinson confirmed that all resulting trusts are capable of being placed in one of two categories according to the factual circumstances in which they arise.

The first category covers cases in which B makes a voluntary payment to A or pays (wholly or in part) for the purchase of property that is vested either in A alone or in the joint names of A and B. (It is important to note that the 'family home' is an exception to the usual rules.)[6] In such cases, there is a presumption that B did not intend to make a gift to A. Lord Browne-Wilkinson stressed that '*this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement*[7] *or by direct evidence of A's intention to make an outright transfer*'.[8] The second category covers cases in which B transfers the property on express trusts, but the trusts declared do not exhaust the entirety of the beneficial interest.[9] In both situations, B becomes the beneficiary of the resulting trust when it arises.

p. 147 ↵ We will encounter resulting trusts of both types as we proceed through this chapter. Resulting trusts in the first category, which are sometimes called 'purchase money resulting trusts', are particularly relevant where the asset purchased is land. Special issues concerning resulting trusts of land are considered in Chapter 8, including the fact that the presumption of resulting trust no longer applies where 'romantic' cohabitants contribute unequally to the purchase of land in joint names.[10] Purchase money resulting trusts are also relevant to the purchase of property other than land.[11] An interesting contemporary example is provided by the purchase of a winning lottery ticket. In *Abrahams v. Trustee in Bankruptcy of Abrahams*,[12] a wife paid £1 each week into a National Lottery syndicate in the name of her husband, from whom she had separated. The syndicate won. The court held that the right to winnings had the character of a property right and that this right, although in the husband's name, was presumed to be the wife's under a resulting trust because she had contributed the winning £1.

5.3 The theory behind resulting trusts

All resulting trusts arise as a consequence of a transferor's failure effectively to dispose of all or any of her beneficial ownership in an asset purportedly transferred. Thus, there will be a resulting trust if certain property is transferred to trustees on trust to distribute the property among persons whose identity is incapable of being ascertained. A resulting trust will also arise when an express trust is successful if the trust is fulfilled leaving a surplus of funds. As Russell LJ stated in *Hodgson v. Marks*:

> If an attempted express trust fails, that seems to me just the occasion for implication of a resulting trust, whether the failure be due to uncertainty, or perpetuity, or lack of form.[13]

The integrity of property law and the inviolability of proprietary rights automatically raise a presumption that a beneficial owner retains beneficial ownership (and must receive the transferred asset back) if a transfer is ineffective to dispose of it. This presumption will not apply, however, if she intends and succeeds in transferring the asset in some manner effective in law.[14] An equitable presumption of a resulting trust of the benefit of an asset cannot prevail over an actual common law disposition. It follows that a resulting trust will not arise where a transfer is made by way of absolute gift or contract or loan.[15] Suppose B lends money to A, who agrees to repay the money by instalments with interest. In this case, B has intentionally bargained for a mere contractual, personal right to recover her money from A and, all other factors being equal, that p. 148 ↵ contractual intention to create a loan rebuts the presumption that B intended to recover the money under a resulting trust.

One important question is whether resulting trusts arise in response to the settlor's (or donor's) *presumed* intention in circumstances that were not anticipated by her expressed intentions or whether they arise automatically (even if, in some cases, the transferee does not desire to receive the wealth back again). Another question is whether it is ever appropriate to impose a resulting trust on a transferee who was not aware of the facts that are alleged to have given rise to the resulting trust. That transferee's situation is very different to that of the transferee who receives the original transfer expressly 'on trust'. Such a transferee will have been in no doubt that he received as a trustee and was therefore obliged to keep the transferred property separate from his own. Various schools of thought in response to such questions are discussed in the following sections.

5.3.1 Automatic resulting trust

The first school of thought maintains that a resulting trust arises automatically when a transferee, who is not entitled to the benefit of the transferred assets, holds them for no ascertainable object and subject to no identifiable obligation. In such circumstances, the benefit of the assets must belong to the transferor under a resulting trust, or belong to nobody and pass to the Crown as *bona vacantia*. Private property will only be declared ownerless as a last resort, so the resulting trust solution will be adopted unless it is necessary to conclude from the facts that the transferor has abandoned the benefit or irrevocably disclaimed his entire beneficial interest in the transferred assets. According to this school of thought, the resulting trust is an automatic incident of the splitting of legal and equitable title to the assets. In short, the trust arises as an incident of property law and the obligation on the transferee's conscience (the obligation to transfer back under a resulting trust) arises because a trust has been created.

5.3.1.1 The *Vandervell* affair

In 1958, Mr Vandervell (V) instructed his bank to transfer to the Royal College of Surgeons ('the college') 100,000 shares in a company controlled by him. It was intended that the college should keep the shares for a limited period only and should relinquish them after receiving £150,000 in dividends. To ensure that the college did not keep the shares forever, the college granted an option in favour of a trustee company set up by V. The terms of the option provided that, in the event of the trustee company paying £5,000, the college should transfer the shares to the trustee company. By 1961, the college had received over £150,000 in dividends from the shares, so the trustee company exercised the option to repurchase the shares for £5,000. However, although it was clear that the trustee company now held the shares on trust, it was not clear for whose benefit the shares were held. The Inland Revenue claimed that V had retained beneficial ownership of the option (and hence the shares) between 1958 and 1961, and should be taxed on dividends declared on the shares in that time. It argued, *inter alia*, that V, in directing the bank to transfer the shares
p. 149 to the college, had purported to dispose of his ↵ equitable interest in the shares, but had failed to do so because the disposition had not been made in writing.[16]

The House of Lords rejected that argument, but held in favour of the Revenue on other grounds: a bare majority of their Lordships held that the option had been held by the trustee company upon unspecified trusts and that, accordingly, V had failed to dispose of the benefit of the option. It followed that the trustee company held the benefit of the option, and hence the shares, under a resulting trust for V, who was therefore liable to pay tax on the dividends declared on the shares.[17] Lord Wilberforce held that a resulting trust had arisen as an automatic consequence of Mr Vandervell's ineffective attempt to dispose of his beneficial interest in the shares and that there was no need to attribute the creation of the trust to Mr Vandervell's presumed underlying intentions:

> There is no need, or room, as I see it, to invoke a presumption. The conclusion, on the facts found, is simply that the option was vested in the trustee company as a trustee on trusts, not defined at the time, possibly to be defined later. But the equitable, or beneficial interest, cannot remain in the air: the consequence in law must be that it remains in the settlor. Mr. Vandervell … had, as the direct result of the option and of the failure to place the beneficial interest in it securely away from him, not divested himself absolutely of the shares which it controlled.[18]

In 1965, in response to the Revenue's action, V executed a deed under which he transferred to the trustee company all or any right, title, or interest that he *might* have in the option, to be held by it on trust for his children according to the terms of an existing children's settlement. In 1967, V died and his executors brought an action against the trustee company, claiming that V had owned the shares for the period between 1961 (when the option was exercised) and 1965 (when V executed the deed transferring the entirety of his equitable interest).[19] The trustee company claimed that the shares should be treated as belonging to the children's settlement. (In a preliminary action, the executors had tried to join the Revenue as second defendants to their action against the trustee company, but the trustee company objected and the executors were unsuccessful,[20] so the executors' appeal against the Revenue's assessment was stood over pending their action against the trustee company.)

Having decided that the trustee company had taken the option on trust, Megarry J asked: '*Was the option held on a resulting trust or other trust for [V], or was it held on the trusts of the children's settlement?*'[21] His Lordship concluded that a resulting trust in favour of V had arisen automatically:

> I cannot see how an intention not to get the shares back can negative a resulting trust if in the event he made no effective disposition of his beneficial interest in them and the operation of equity brought them back to him in ways never considered by him. Whatever may be the position under a presumed resulting trust, I do not see how the donor's intention not to have the beneficial interest can prevail where the resulting trust is automatic.[22]

p. 150 ↵ Megarry J's reasoning, which follows very closely the reasoning advanced by Lord Wilberforce in *Vandervell v. IRC*,[23] exemplifies what was referred to earlier as the 'first school of thought' on resulting trusts, in that it contemplates that a resulting trust may arise as an automatic consequence of undisposed-of proprietary benefits. Megarry J's judgment was, however, reversed by the Court of Appeal, where their Lordships seemed to disagree more with the result than with the reasoning in the court below.[24] Their Lordships held that, after the exercise of the option in 1961, the trustee company had held the shares on the trusts of the children's settlement. Lord Denning MR reasoned that it had been the (unexpressed) intention of V and the trustee company that the shares should be held for the benefit of the children's settlement—a conclusion reinforced by the fact that the £5,000 used to exercise the option had been taken from the existing fund of the children's settlement. From this, it followed that, after the exercise of the option, the shares did not form part of V's estate and his estate could not be taxed on the shares for the period 1961 to 1965. Lord Denning MR stated that, when the option was exercised, the 'gap in the beneficial ownership' came to an end. According to his Lordship, the resulting trust under which the shares had previously been held for the benefit of V ceased to exist upon the exercise of the option and the registration of the shares in the name of the trustee company.

The Court of Appeal was very generous to V and, arguably, generous to a fault. There was certainly evidence that the trustee company believed that it was acquiring the shares on behalf of the children's settlement, but V's intention was the all-important one and V did not appreciate, until 1965, that he might still have a beneficial interest in the shares.

The approach taken by Megarry J at first instance would have led to a less satisfactory outcome from V's point of view, but his Lordship did, at least, hold that the benefit should be held for V under a resulting trust. Other judges might have declared the shares to be *bona vacantia*. Thus, in *Westdeutsche Landesbank Girozentrale v. Islington LBC*,[25] Lord Browne-Wilkinson cast doubt on Megarry J's suggestion that a resulting trust of a surplus operates automatically: '*If the settlor has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is in my view no resulting trust.*'[26]

With respect to Lord Browne-Wilkinson, it must surely be a very rare case in which it is 'necessary' to imply that an owner has simply abandoned his beneficial interest in his property. If Mr Vandervell had cast gold coins into the ocean from his yacht, that would look like abandonment; likewise, if he had dropped the coins into a collection box anonymously—but he did nothing of the sort. He gave property subject to strict directions and it is reasonable to presume that, in relation to any property surplus to those directions, he would have preferred to recover it himself than see it pass to the Crown. Megarry J's analysis recognizes that V still owned his property precisely because he had neither disposed of it effectively nor abandoned it
p. 151 outright. Figure 5.1 summarizes the *Vandervell* facts and decisions. ↵

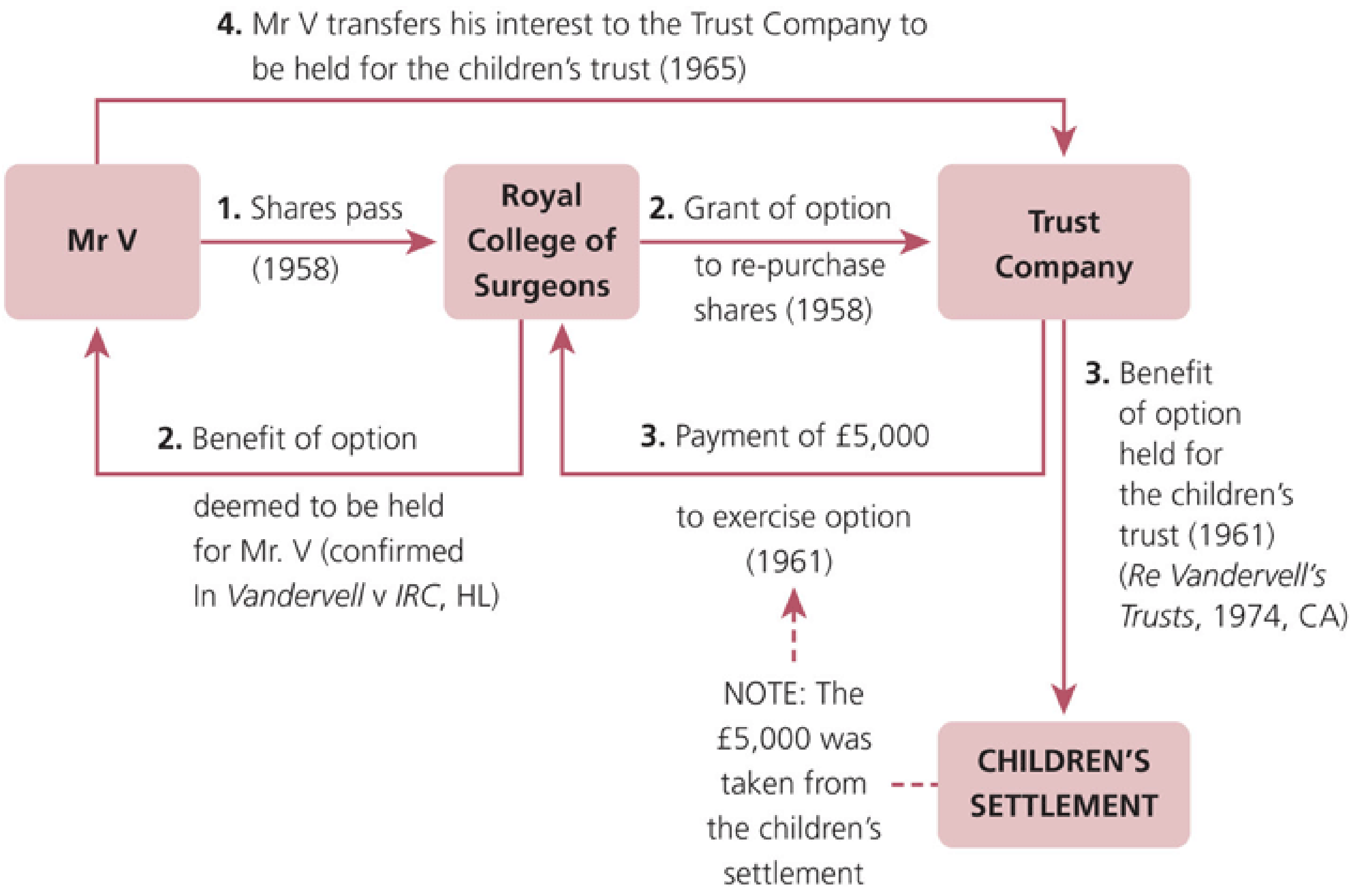

Figure 5.1 The Vandervell affair

5.3.2 Knowledge (or conscience-based) resulting trust

The second school of thought maintains that a person can never become a trustee until he knows, or ought to know, of the facts that give rise to the trust, because, until such time, his conscience must be unaffected. According to this school of thought, the resulting trust arises because there is a burden on the trustee's conscience and not, as the first school of thought would have it, the other way around. The principal authority for the second school is the speech of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale*:

> Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience.[27]

It is respectfully submitted that Lord Browne-Wilkinson attached too little weight to the great volume of authorities in which, in all manner of factual contexts, trusts have arisen despite the trustee's ignorance of facts affecting his conscience. Our system of property law conceives of two distinct forms of ownership: ownership at law and ownership in equity. When absolute ownership of an asset is divided into legal title and equitable property, and the two forms of ownership are vested in different persons, a trust arises.[28]

p. 152 ↵ Lord Browne-Wilkinson acknowledges that resulting trusts have been held to arise in '*cases where property has been put into the name of X without X's knowledge but in circumstances where no gift to X was intended*'.[29] His Lordship seeks to explain such cases away on the basis that:

> by the time action was brought, X or his successors in title have become aware of the facts which gave rise to a resulting trust; his conscience was affected as from the time of such discovery and thereafter he held on a resulting trust under which the property was recovered from him.[30]

The problem with this explanation is that it leaves the beneficial interest floating in the air until such time as the transferee's conscience is 'affected'. In any case, it assumes that knowledge of the transferor's claim to the assets is the same as knowledge of the transferor's right to the assets. Clearly, it is not: the transferee may dispute the transferor's claim to the benefit of the assets; he cannot deny that he has knowledge of the facts that *allegedly* give rise to the trust, but why should his conscience be bound by a mere allegation?[31]

A compromise may be possible between the first and second schools of thought, which would provide that if the first school of thought is correct, and the recipient is a trustee as a matter of property law, there is no reason why, as a matter of obligation, the recipient should be held liable to account as a trustee before such time as he becomes aware, or ought to be aware, of the obligation to restore it.[32]

5.3.3 Reversal of unjust enrichment

The 'third' school of thought is a variation on the first school, in that it acknowledges that a trust arises whenever a transferee receives another's property, regardless of the transferee's state of knowledge. Supporters of this school maintain that the transfer of property to a transferee who was not intended to take beneficially results in the unjust enrichment of the transferee, and that the role of the resulting trust is to reverse this unjust enrichment.[33] According to Robert Chambers '[a]*ll resulting trusts effect restitution of what would otherwise be the unjust enrichment of the recipient*'.[34] Chambers' related assertion that '[t]*he resulting trust is not merely the passive preservation of the provider's pre-existing property interest, but is one of equity's active responses to non-voluntary transfer*'[35] is unproblematic for supporters of the first school of
p. 153 thought outlined in section 5.3.1. ↵ This supporter of the first school would not accept that the resulting trust is active in the sense that it aims to reverse unjust enrichment per se, but would accept that it is active in the sense that it aims to avoid the least desirable of all possible outcomes (and the one outcome we can be sure the transferor never intended): the passing of unallocated proprietary benefits to the Crown as *bona vacantia*.

In this vein, Harman J once described the resulting trust as '*the* last resort *to which the law has recourse when the draftsman has made a blunder or failed to dispose of that which he has set out to dispose of* '.[36] Elsewhere, his Lordship stated that the resulting trust:

> does not, in my judgment, rest on any evidence of the state of mind of the settlor, for in the vast majority of cases no doubt he does not expect to see his money back; he has created a trust which, as far as he can see, will absorb the whole of it. The resulting trust arises where that expectation is, for some unforeseen reason, cheated of fruition, and is an inference of law based on after-knowledge of the event.[37]

The pragmatic nature of the transferor's presumed intention to create a resulting trust has also been acknowledged in the House of Lords in the important case of *Vandervell v. IRC*:[38]

> In reality the so-called presumption of a resulting trust is nothing more than a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution.[39]

The problem with the claim that a resulting trust is active in the sense that it aims to reverse unjust enrichment per se is that it only makes sense to describe that enrichment as 'unjust' if it has already been acknowledged that the transferee holds the benefit under a resulting trust for the transferor. It is the trust that arises as an automatic incident of the transferor's ongoing beneficial interest that renders 'unjust' the apparent or claimed beneficial ownership of the transferee.

Very often, the language of unjust enrichment is simply out of place. Suppose, for example, that B had transferred property to A on trust for C 'for so long as C shall live' but had failed to direct for whom the property should be held on C's death. The resulting trust that arises in favour of B when C dies is, in no sense, a response to the possibility that A will be personally unjustly enriched. A is fully aware that he has taken the property on trust and, if he is unaware that B retains an interest in the property entitling him to retake possession when C dies, A should seek the directions of the court. At no point will A appear, or claim, to own the property beneficially—so he will never be enriched—and if he does claim the property beneficially, he will have breached his trust and will have to account to B. It is artificial, and takes insufficient account of the nature of the office of trustee, to suggest that, when a trustee accounts to trust beneficiaries he is merely acting in a negative way to prevent his own unjust enrichment, rather than
p. 154 ↵ acting in a positive way to discharge his trust in accordance with the best interests of the beneficiaries. Supporters of the restitution school acknowledge that:

> [t]he sanctity of property and its immunity to discretionary 'adjustment' is deeply rooted in legal thought. It is dictated by respect for the individual and individual preferences and by the fear of prejudicing third parties.[40]

But the fear remains that certainty of proprietary title will be undermined if the current focus of the law of trusts, which aims to give effect to beneficiaries' proprietary rights, is refocused on the reversal of unjust enrichment.

5.3.4 Resulting trust—public policy coinciding with transferor's ultimate intentions

Each of the three theories outlined in the previous sections responds to the presence of a determining factor between the parties. 1) The automatic resulting trust responds to the presence of the transferee's ongoing property right, and in many cases this will coincide with the presence of a presumed intention in the transferee to retain (or recover) the benefit of the transferred asset in the event of failure of disposition. 2) The conscience-based resulting trust responds to the presence of the transferee's knowledge of the transferor's original and ongoing beneficial ownership. 3) The unjust enrichment resulting trust responds to the fact of the transferee's unjust enrichment at the transferor's expense. My own approach, which is the fourth in the list, is slightly different. 4) It responds not to the presence of any factor between the parties but to the presence of a public policy that prefers private property to remain private and not to be expropriated to the Crown. It also responds to the fact that the ultimate intention of the transferor can be presumed to coincide with this public policy, because the very last thing the transferor should be presumed to have intended is that their wealth should pass out of private hands entirely and go to the Crown as bona vacantia ('ownerless assets').

Consider again the case discussed in the introduction of money paid into the bank account of a company that no longer exists. The money cannot belong to the company. If no other recipient is entitled to the money under a contract or such like, this leaves two possibilities. Either the money belongs to nobody, in which case it will pass to the Crown as '*bona vacantia*', or it will return to the original owner under a resulting trust. Judges know that the former outcome is the last that any donor would intend, so the latter outcome is preferred—not only on the basis of the donor's intention, but because as a matter of policy private property should be kept in private ownership where possible. One way to imagine the mechanism of the resulting trust is to picture the benefit of the asset as a bouncy ball that is thrown to a person who
p. 155 ↵ does not exist. The law is most reluctant for the benefit to be deemed ownerless, so the court erects a notional barrier or wall to prevent the wealth from passing into Crown ownership. The bouncy ball of benefit, having missed the intended donee, hits the wall raised to prevent *bona vacantia* and bounces straight back to the person who put the benefit in to begin with. Since ancient times it has been acknowledged to be politically proper to build a wall between private and public wealth. As the Roman poet Horace wrote:

> Amphion too, the builder of the Theban wall, was said to give the stones motion
>
> with the sound of his lyre, and to lead them whithersoever
>
> he would, by engaging persuasion. This was deemed
>
> wisdom of yore, to distinguish the public from private weal.[41]

Very different considerations apply where it is clear that the donor intends (and perhaps prefers) to retain no interest in the asset whatsoever (an example would be throwing a coin in the fountain in the town square) he or she will in such a case be deemed to have launched the ball so high and out-of-sight that if it is not caught it will clear the barrier and pass to the Crown.[42]

5.4 Rebutting the presumption of a resulting trust

We know that, when property is transferred and there is no evidence of the transferor's reason for making the transfer, he is presumed to recover it. The flip-side of this is that the presumption of a resulting trust is easily rebutted by evidence that the transferor intended the transfer to take effect in some other way.[43] It may be that the transferor intended an outright gift, or that he intended to transfer the property by way of loan[44] or some other contractual arrangement.[45] Even evidence of a particular relationship between the transferor and transferee may be sufficient to rebut the presumption of a resulting trust. In the following sections, we will take a closer look at some of the circumstances that rebut the presumption of a resulting trust.

p. 156

5.4.1 Evidence of an intention to make a gift

The usual situation, as we know, is that, in the absence of evidence of the transferor's intentions, a voluntary transfer is presumed to give rise to a resulting trust. *Re Vinogradoff*[46] is a typical case. Mrs V placed £800 worth of stock into the joint names of herself and her granddaughter, and, when Mrs V died, it was held that Mrs V's estate was entitled to the benefit of the stock under a resulting trust. Nevertheless, when quite similar facts came to be considered in *Fowkes v. Pascoe*,[47] the Court of Appeal held that the presumption of a resulting trust had been rebutted by evidence that a gift had been intended. Mrs B had purchased certain stock in the joint names of herself and P, the son of her daughter-in-law. On the same day, she purchased more of the same stock in the joint names of herself and a lady companion. Mrs B's will left the residue of her estate to her daughter-in-law for life, thereafter to P and his sister equally. Mellish LJ could think of no other reason, unless it was to make a gift, why Mrs B, who already owned £5,000 worth of the stock in her own name, should invest £250 in the joint names of herself and P on the same day as investing £250 in the joint names of herself and her companion.

5.4.2 Evidence raising the presumption of advancement

Where a voluntary conveyance is made by a man in favour of his wife or fiancée or to his child or any person to whom he stands *in loco parentis* there is a presumption that the transferor intended to make a gift for the advancement of the transferee. This so-called 'presumption of advancement' rebuts the presumption that the transferor intended to recover the benefit of the transferred property under a resulting trust. Equity raised the presumption in the past in order to offset the injustice inherent in the general law, which tended to concentrate the power of property ownership in marriage in the man. Nowadays it is widely accepted that the presumption also applies to gifts made by mothers to their children,[48] but this possibility was rejected in the days before the Married Women's Property Act 1884 introduced much needed financial protection for married women.[49]

The presumption of advancement can itself be rebutted if there is evidence that the transferor did not intend to make a gift, but the presumption in favour of a child should not 'give way to slight circumstances'.[50] In *McGrath v. Wallis*,[51] when a father bought a house subject to a mortgage, and placed both the house and the mortgage in the name of the son, Nourse LJ held that the presumption of

advancement had been rebutted by evidence that the father merely intended to make provision until his unemployed son could afford to purchase a house on his own.[52] Likewise, in *Lavelle v. Lavelle*,[53] the
p. 157 ↵ presumption of advancement from father to daughter was rebutted by evidence that the transfer of land into the daughter's name had been made with the legitimate intention of avoiding inheritance tax. 'Intention' was a key word in *Lavelle*. Lord Phillips MR stressed that where a purchaser or owner transfers legal title of the property to another without receipt of any consideration: 'equity searches for the subjective intention of the transferor'.[54]

The court in *Wood v. Watkin*[55] considered the scope and strength of the presumption of advancement when trustees in bankruptcy sought to establish that the bankrupt was the sole beneficial owner under a resulting trust of three properties purchased for his daughter. The daughter was a financially independent adult. The judge held that the presumption was not limited to minor children or to those who were still financially dependent on their parents and rejected the trustees' submission that the presumption was nowadays a very weak one.[56] The judge placed weight on the fact that the property purchases were at locations convenient to the daughter and were consistent with an historic pattern of parental support. In *Kelly v. Kelly*, the court acknowledged that the presumption of advancement could be rebutted easily in the case of an adult, financially independent child,[57] but in this case the presumption of advancement was held to apply in favour of the son because the evidence didn't support the father's claim that he had intended a loan.

In *Kyriakides v. Pippas*,[58] it was held that in the absence of a declaration of trust, the court puts itself in the position of a jury and considers all the circumstances of the case so as to arrive at the purchaser's real intention. Gabriel Moss QC, sitting as a High Court judge, went so far as to describe the presumptions of resulting trust and advancement as default solutions that apply where the actual intention cannot be fathomed. Or perhaps (see next) where the actual intention is inadmissible on account of illegality.

If the father in *Lavelle* had made the transfer to his daughter to *evade* tax or in order to carry out any other illegal purpose, he would have been unable to rely on evidence of the true purpose of the transaction and the presumption of advancement would have stood. Thus, a husband who purchased a lease in his wife's name for the illegal purpose of defrauding his creditors was unable to recover it from her,[59] and a father suffered the same fate when he transferred a freehold to his daughter for the same illegal purpose.[60]

When (and if ever) s. 199 of the Equality Act 2010 becomes law, the presumption of advancement will be abolished. This is because the presumption is discriminatory to the extent that it applies to husbands but not to wives. However, s. 199 does not affect past transactions, with the result that existing discrimination will continue.[61] This might not be as worrying as it seems, because the survival of the 'presumption of
p. 158 advancement' as ↵ between husband and wife has for many years been doubtful at common law. As long ago as *Pettitt v. Pettitt*,[62] the House of Lords observed that, even if it does survive, it will seldom play a decisive part in disputes between living spouses.[63] In any case, modern courts can legitimately conclude that the presumption is incompatible with the anti-discrimination provisions in the European Convention on Human Rights and decide that it is inapplicable on that basis.[64]

5.5 Mistaken payments

A mistaken transfer of money raises a particularly difficult issue. Suppose that B paid off a £100 debt to A, but, some time later, B transferred another £100 to A in the mistaken belief that the debt was still due. There is authority to suggest that a mistaken payment of this sort affects A's conscience so as to make A a trustee for B under a 'constructive' trust, because A's conscience is affected by the receipt of B's property,[65] but the authority is at first instance and it has not enjoyed a great deal of academic support. Some commentators have argued that there should be no trust in such a case;[66] others have argued that a mistaken payment gives rise to a new proprietary right in favour of the transferor under a resulting trust.[67] There is certainly an arguable case for a resulting trust, in so far as the second payment is not any orthodox legal transfer and is therefore ineffective to dispose of B's beneficial interest, with the consequence that A ought to hold the £100 on resulting trust for B in accordance with B's presumed intention to recover. There is, however, a powerful objection to the resulting trust analysis of these facts—namely, that B's evident (albeit mistaken) intention to pay off a debt leaves no room to presume any intention on B's part to recover the payment under a resulting trust.[68] A similar argument, as we shall shortly see, persuaded the House of Lords in *Westdeutsche Landesbank Girozentrale v. Islington LBC*[69] to decline to find any resulting trust arising from a contractual payment made under a mistake of law. The House of Lords held that money paid under an ultra vires contract was held by the recipient subject to a mere personal obligation to return it.

Mistakes, by their nature, do not admit of perfect theoretical solutions, but even if we were to work out a solution to the question of whether there should be a proprietary or personal remedial response to mistaken payments, we would no doubt find the courts willing to throw the spanner of policy into the works. However compelling might be the theoretical case for a proprietary remedy to recover a mistaken
p. 159 payment under ↵ a resulting or constructive trust, the courts will be reluctant to infer such trusts into a commercial transaction. As Lord Browne-Wilkinson stated in *Westdeutsche Landesbank Girozentrale v. Islington LBC*:[70]

> [W]ise judges have often warned against the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs.[71]

One reason for judicial reluctance to infer a trust into a commercial transaction is the proprietary nature of the trust and the consequent prejudice to the trustee's innocent third-party creditors. Another is that courts are unwilling to infer a trust into a commercial transaction where the parties ought to have anticipated the possibility that the type of mistake in question might occur. Thus one justification for the decision not to find a resulting trust in *Westdeutsche* is that the commercial parties in that case had the benefit of top-class legal advice and therefore ought to have entered an express term in their contract to deal with the reasonably foreseeable possibility that the contract might, for some reason, prove to be ultra vires the authority of the defendant council.

Robert Chambers argues in his book *Resulting Trusts* that a resulting trust will arise because the transferor lacked any positive intention to confer a benefit,[72] but against this is the prevailing view that there will be no resulting trust if the transferor intended (albeit mistakenly) to fulfil some other positive intention, contractual or otherwise. The arguments on both sides turn upon the state of the transferor's (B's) intentions, but it can be argued that a resulting trust should arise, independently of the state of B's intentions, by looking at the matter from the recipient's (A's) perspective—not in terms of A's conscience, as was advocated in *Chase Manhattan*, but on the basis that A, having failed to take the property by any valid contract or proprietary transfer, cannot be the absolute owner of it, and, in the absence of any other obligation, must be obliged to return the property to the transferee under a resulting trust. A is really just like a lucky 'finder' who has come into possession of property that does not belong to him. It is submitted, in short, that a resulting trust should arise not only in the absence of the transferor's contrary intention, but also in the absence of the transferee's contrary entitlement.

5.6 Resulting trusts of surplus benefits

A resulting trust will arise in favour of a transferor if the property transferred proves to be more than sufficient to satisfy in full the claims of all persons with a beneficial interest in it, or if a beneficiary disclaims their beneficial interest in it.[73] In short, there will be a resulting trust of any 'surplus' benefits in the property. So, if B transfers assets to A p. 160 'on trust for the use and benefit of C, so long as C shall live', when C dies, there will be a resulting trust in favour of A of any remaining benefits.[74] Of course, if the assets were 'wasting' or 'comestible'—such as a case of wine—and have been entirely exhausted during C's lifetime, there will be no surplus and no resulting trust. A relevant surplus may be of capital[75] or income.[76]

5.6.1 The destination of surplus donations

Sometimes, courts decide that an apparent surplus is not really a surplus at all. Consider the example of a donation to a fund 'for the education of the children of the Revd Jones'. If the donation is construed to have been made on trust for the sole purpose of educating the children, they will be unable to keep any surplus when their formal education is complete, but if the donation is construed to have been an absolute gift to the children, merely 'motivated' by the desire to educate them, the children will be able to do whatever they like with the donation when their formal education is complete.[77] In the latter circumstance, it appears that the children are acquiring the surplus; in substance, however, there never was a surplus. The benefit of the donation had always belonged to the children as a result of the donor's absolute gift. Likewise, if a donation is made to an unincorporated association, any apparent surplus remaining after the dissolution of the association will not be a true surplus if the donation had been made by way of absolute gift to the members for the time being.[78] In theory, any 'surplus' remaining after the dissolution of the association always belonged to the present members beneficially and, at the date of dissolution, the present members were entitled to depart with a share of it, subject to the association's rules.[79]

In *Cunnack v. Edwards*,[80] members paid subscriptions to an association on the basis of a contract that obliged the association to provide annuities for the widows of deceased members. The last member died in 1879 and the last widow died in 1892, the association having then a surplus of £1,250. It was held that the widows, not the members, were the beneficiaries of the society's funds and, accordingly, the personal representatives of the deceased members were unable to make a direct claim to the benefit of the surplus.

Neither could the members' estates claim the surplus under a resulting trust, because the members had already received everything that they had bargained for under their contract with each other.[81] A. L. Smith LJ held that:

> as the member paid his money to the society, so he divested himself of all interest in this money for ever, with this one reservation, that if the member left a widow she was to be provided for during her widowhood.[82]

p. 161 ↵ Because the donation did not belong to the members' estates either directly or under a resulting trust, and because no other identifiable persons could claim to be beneficial owners of the surplus, there was no option but for the surplus to pass to the Crown as *bona vacantia*.

The *bona vacantia* solution may be undesirable from the donor's point of view, but it at least has the merit of finality. There have, however, been cases in which courts have chosen to leave surplus assets in a state of limbo rather than declare them to be *bona vacantia*. One such case is *Re Gillingham Bus Disaster Fund*.[83] In 1951, a bus careered into a column of Royal Marine cadets who were marching along a road near Chatham, Kent. Twenty-four were killed and others were injured. The Gillingham Bus Disaster fund was set up for the purpose of meeting funeral expenses, caring for the disabled, and for other related purposes. It was decided that the surplus should be held on resulting trust for the donors. Harman J held that:

> where money is held on trust and the trusts declared do not exhaust the fund it will revert to the donor or settlor under what is called a resulting trust. The reasoning behind this is that the settlor or donor did not part with his money absolutely out and out, but only *sub modo* to the intent that his wishes, as declared by the declaration of trust, should be carried into effect. When, therefore, this has been done, any surplus still belongs to him.[84]

With some invention, the court might have construed the donations to have been out-and-out gifts to the disabled survivors, but then the questions would have been asked: 'Why were they not out-and-out gifts to the parents of the deceased?' and 'How could they be out-and-out gifts when there was an imperative intention to pay funeral expenses and to care for the disabled?' So the court declined to go that way. The donations were clearly not contractual in any sense (the donee had given nothing in return for the donation) so the only remaining conclusion was that the donations had been given for a particular purpose and, that purpose having been fulfilled, the benefit of any surplus belonged to the donors under a resulting trust.

Harman J was unimpressed by the Crown's submission that the resulting trust solution should be avoided due to the impracticalities of identifying anonymous donors. His Lordship reasoned that, if the resulting trust solution is appropriate to donations from known persons, it must likewise be appropriate to donations made anonymously. If the anonymous donors could not be found, the surplus should be held on the court's account, but by no means should it pass to the Crown as *bona vacantia*:

> The trustees must pay the money into court like any other trustee who cannot find his beneficiary. I conclude, therefore, that there must be an inquiry for the subscribers to this fund.[85]

If it were possible to imagine any outcome worse than *bona vacantia*, then this would surely be it. *Bona vacantia* might be the death of private property, but consigning property to the court's account is to
p. 162 consign it to a fate worse than death, because it will be ↵ condemned to languish there, subject to an expensive and probably fruitless scheme to identify the numerous anonymous donors to the fund.

This undesirable outcome was decisively rejected by Goff J in *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts*.[86] Disapproving Harman J's decision to impute to the anonymous donors in the *Gillingham* case an intention to create a resulting trust, Goff J stated that '*equity will not impute an intention which it considers would be absurd on the face of it*'.[87] It is important to appreciate that Harman J's reasoning was, for the most part, perfectly sound, but his Lordship's judgment could have been immeasurably improved by one refinement—namely, to recognize that the donor's presumed intention to recover his donation under a resulting trust is rebutted by evidence (including his anonymity and the small size of his donation) that he actually intended to make an outright disposition of the donation, regardless of its ultimate destination. The fund in *Re West Sussex* had been established to provide for widows and orphans of deceased members of the West Sussex constabulary, but when the constabulary amalgamated with other forces in 1968, it was not clear how the fund should be distributed. The sources of the fund were:

1. members' subscriptions;
2. receipts from entertainments, raffles, and sweepstakes;
3. collecting boxes;
4. donations and legacies.

Goff J held that surplus of sources (1), (2), and (3) would pass to the Crown as *bona vacantia*, but surplus of source (4) would be held on resulting trusts for the donors. His Lordship reasoned that the members had received everything they had bargained for in return for the surplus of sources (1) and (2). Furthermore, source (2) did not comprise direct donations to the fund, but merely donations of net profits after payment out of prizes and so on. Regarding source (3), his Lordship held, in contrast to Harman J in the *Gillingham* case, that anonymous donors to collecting boxes intend to part with their monies outright.[88]

Goff J was equally pragmatic when it came to quantifying how much of the surplus should be declared *bona vacantia* and how much should be held on resulting trust: he held that equity would '*cut the Gordian knot*' by dividing the surplus in proportion to the sources from which it had arisen. However, in *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society*,[89] Walton J suggested an even more pragmatic solution to the problem of surplus funds on the dissolution of an unincorporated association—namely, that, regardless of the source of the surplus, a term should be implied into the contractual rules by which the members are bound together to the effect that any surplus should be divided equally between existing members at the date of dissolution. His Lordship suggested that if there is only one—or, perhaps,
p. 163 depending on the type of ↵ association, only a very few—existing member(s) of the association at the date of dissolution, there will be no association at all, and the surplus funds will pass to the Crown as *bona vacantia*.[90] More recently, it has been held that even the sole surviving member of an association should

take the association's assets (in part to avoid a possible breach of Art. 1 of Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms 1950, which guarantees the peaceful enjoyment of possessions).[91]

5.6.2 Pension fund surpluses

While a 'defined benefit'[92] pension scheme is on foot, there is no way to know for sure whether the fund will be sufficient to satisfy in full the pension entitlements of all present and future pensioners. The most that can be done is to make actuarial estimates from time to time as to the likely future performance of the fund according to the best available statistical information. In the late 1980s, after several years of stock market growth and increases in the value of real estate, many pension funds were greatly in surplus.[93] Today, after several years of declining performance on the stock markets, pension surpluses are looking increasingly to be a thing of the past. Nowadays, many pension funds are notionally in deficit.

Although pension surpluses may be a thing of the past, the question of who should be entitled to them is still pertinent to the relationship between pensions and trusts, and, correspondingly, the relationship between contract and trusts.[94]

The employer and the employee will both claim to recover the pension surplus under a resulting trust. However, neither party can claim to be in the usual situation of the transferor who voluntarily makes a gift or sets up an express trust for another's benefit. Their contributions to the fund were not made voluntarily, but under the terms of the contract made between them,[95] and therefore their entitlement to any surplus will turn, in large part, upon the terms of the trust deed and the contract (the pension 'plan' or 'scheme') by which the trust deed is established:

> Where a trust deed is silent as to the destination of a surplus the law will supply a resulting trust in favour of the provider of the funds in question.[96]

p. 164 ↵ If the trust deed expressly provides that any surplus should be applied in such and such a way, this will normally be conclusive. In fact, as was stated in *Davis v. Richards and Wallington Industries Ltd*:[97]

> [A] resulting trust will be excluded not only by an express provision but also if its exclusion is to be implied. If the intention of a contributor that a resulting trust should not apply is the proper conclusion, it would not be right, in my opinion, for the law to contradict that intention.[98]

Scott J went to great lengths in *Davis* to justify the employer's entitlement to the surplus, but he dismissed the employees' claim on the ground that a resulting trust would have infringed a statutory limit on the amount of benefits that the employees were entitled to receive from the pension scheme. Accordingly, that part of the surplus representing employees' contributions was declared *bona vacantia*. However, the essence of a resulting trust, in my opinion, is that in the interests of public policy judges will assume that the last thing any transferor intends is that their wealth should pass to the Crown as *bona vacantia*. A pension surplus is quite unlike the surplus arising where anonymous donors have paid different amounts of petty cash into a collection box for some deserving cause. Employees do not intend to part with their contributions outright (least of all to the Crown), so the presumption that the employees should recover any surplus under a resulting trust (whether or not they expressly intended that outcome) should stand. The *Davis* employees might fare better today as a result of *Air Jamaica Ltd v. Charlton*,[99] in which the Privy Council went to great lengths to preserve the members' interests in the fund. The pension scheme of employees of Air Jamaica was discontinued in 1994, when the company was privatized. Defined benefits were paid out under the terms of the scheme, but there remained a surplus of $400m. The claimants, who were members of the discontinued pension scheme, claimed to be entitled to the surplus. Section 13.3(ii) of the rules of the scheme provided that, in the event of discontinuance of the scheme:

> any balance of the fund shall be applied to provide additional benefits for members and after their death for their widows or their designated beneficiaries in such equitable and non-discriminatory manner as the trustees may determine in accordance with the advice of an actuary.

Clause 4 of the trust deed provided that: '*[n]o moneys which at any time have been contributed by the company under the terms hereof shall in any circumstances be repayable to the company*'. Despite these terms (and because of them), the company purported to amend the pension plan so as to acquire the surplus itself, and had to be restrained by means of an interlocutory junction from implementing its intended amendments. When the matter eventually came before the Privy Council, the amendments were disallowed on three grounds: first, that the power to amend the plan was void for perpetuity; second, that the amendments had been made in bad faith;[100] third, that they infringed Clause 4 of the trust deed. However, p. 165 the company argued that, even if it could ↵ not recover under the terms of the original or amended scheme, it ought to be permitted to recover its contributions by a resulting trust operating outside the scheme. To make matters worse for the claimants, their claims were resisted not only by the company, but also by the Attorney General. The Attorney General argued on behalf of the Crown that the surplus had become *bona vacantia*. The Crown argued that the employees' claim must fail because the pension trust was void for perpetuity and that the employer's claim must fail because of Clause 4.[101]

The opinion of the Privy Council, delivered by Lord Millett, reaffirms the 'first school of thought' on resulting trusts and its applicability to pension surpluses:

> Prima facie the surplus is held on a resulting trust for those who provided it. … Contributions were payable by the members with matching contributions by the company. In the absence of any evidence that this is not what happened in practice, the surplus must be treated as provided as to one half by the company and as to one half by the members

His Lordship held that Clause 4 prohibited repayment of contributions under the terms of the pension scheme, but did not rebut the resulting trust arising outside the scheme.[102]

In reaching this conclusion his Lordship relied on the *Vandervell* principle with which we started this chapter, and with which it seems appropriate to bring it to an end: that 'a resulting trust is not defeated by evidence that the transferor intended to part with the beneficial interest if he has not in fact succeeded in doing so'.[103]

5.7 The doctrine of acceleration

Where an express trust establishes successive interests in a fund, as in a traditional settlement trust 'for X for life and Y in remainder', the failure, for perpetuity or any other reason, of X's beneficial interest in the income of the fund will not always produce a resulting trust of the income for the benefit of the settlor. The doctrine of acceleration provides that, in such a case, the benefit of the income should pass to Y. However, the doctrine will only apply if Y's interest is merely postponed by X's interest; it will not apply if Y's interest is also contingent upon some other event. For example, it would not apply to a trust 'for X for life and Y in remainder provided that Y is a qualified lawyer'.[104] In fact, the doctrine will only prevent a resulting trust to the settlor if it can be presumed that the settlor intended the income to be accelerated to Y. For this reason, it may be especially hard to make out a case for acceleration if Y is some quite remote
p. 166 friend or relation whom the settlor probably intended should receive nothing greater than ↵ a remainder interest in capital. It has also been suggested that an intention to accelerate may be harder to establish where the settlement was made *inter vivos*, because, in such a case, it can be presumed that the settlor intended to receive surplus income under a resulting trust.[105]

5.8 The quizzical '*Quistclose* trust'

We have encountered the *Quistclose* trust in earlier chapters, where we saw that it is a useful illustration of the way in which courts handle the relationship between common law and equity, and, in particular, the interaction between contract (or debt) and trust. The case is worth revisiting here because it is frequently cited as an example of a resulting trust. The facts were that Quistclose Investments Ltd (Q), a finance company, made a loan to Rolls Razor Ltd (RR) for the express purpose of paying a dividend that RR had declared in favour of its shareholders. The loan monies were placed in a separate account at Barclays Bank. Q knew that RR was teetering near the brink of insolvency when the loan was made and, in the event, RR became insolvent before the dividend could be paid. When it came to distributing RR's funds to those entitled on its insolvency, Barclays Bank—which happened also to be the principal secured creditor of RR—naturally assumed that its claims would take priority over Q's unsecured claim for damages under the loan contract. Q argued, however, that it had retained a proprietary interest in the loan monies. This argument, if correct, would mean that the loan monies had never belonged beneficially to RR and would not be available to satisfy the personal claims of RR's creditors, whether secured or unsecured.

A majority of the House of Lords decided in favour of Q.[106] Lord Wilberforce held that the arrangement between Q and RR was basically contractual, but that, alongside the contractual arrangement, there was a primary trust in favour of the shareholders in whose favour the dividend had been declared and a secondary trust in favour of Q, which had arisen when the first trust became impossible to perform. His Lordship held that Barclays Bank had notice of the primary and secondary trusts (and was therefore bound by them) by virtue of a covering letter which accompanied the payment of the loan monies into RR's account with Barclays Bank.

Despite the intervention of the House of Lords and, in large part, because of it, academic controversy regarding the nature of the *Quistclose* device is still ongoing. It was said of Jarndyce and Jarndyce (the fictional case at the centre of Dickens's *Bleak House*) that '*no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises*'; the same thing can be said of the *Quistclose* trust.[107]

p. 167 ↵ The main candidates to be recognized as the 'correct' theoretical analysis of the *Quistclose*-type trust are as follows:

1. The secondary trust is a resulting trust arising because the primary express trust was incapable of being fulfilled.[108]
2. The primary and secondary trusts are in fact two limbs of a single express trust.[109]
3. The *Quistclose* trust is an illusory trust under which the beneficial interest remains in the lender throughout, with the borrower taking the money subject to a power (sometimes a duty) to apply it towards the lender's designated purpose, in accordance with a mandate that the lender can revoke if his purpose is frustrated.[110]

In addition to, or as an alternative to, these analytical candidates, it can also be argued that the recognition of the *Quistclose*-type trust—and certainly that in *Quistclose* itself—is explicable on policy grounds, because it protects lenders who advance money to companies on the brink of insolvency. In the following sections, we will consider the strengths and weaknesses of some of the leading analyses of the *Quistclose* trust, but, before we do so, it is worth bearing in mind that it may be impossible perfectly to align the *Quistclose* trust with any orthodox category of trust or power. Ultimately, the *Quistclose* trust is a special commercial arrangement that is (or should be) limited to a narrow range of special fact situations. Its appeal is practical in that it enables the borrower to have recourse to the lender's money for a particular purpose without entrenching on the lender's property rights more than necessary to enable the purpose to be achieved.[111] The *Quistclose* trust continues to be employed because, for whatever reason, it continues to work.

5.8.1 The resulting trust explanation for Quistclose

The difficulty with the argument that the primary trust was 'express' and the secondary trust was 'resulting' involves the identity of the type of primary express trust, and the reason why it failed. The express trust would have been void as a private purpose trust if it existed for the sole purpose of paying the dividend. Clearly, the express trust could only be valid if, in addition to the expressed purpose, there was p. 168 an identifiable ↵ beneficiary. At one level, the obvious candidate beneficiaries are the shareholders, because they are the persons intended to receive the money, but the insolvency of RR would not have prevented a primary express trust for the shareholders from being carried out. To put it another way, if the shareholders had had a vested beneficial interest by virtue of the primary express trust, the subsequent insolvency of RR would not have prevented them from enforcing the primary trust in their favour.[112]

Another possibility is that Q intended to benefit RR. However, it would be odd for a commercial lender to enter into a valuable loan transaction for the benefit of the other party: the natural presumption in a commercial transaction entered into at arm's length is that the party who created the trust intended it to be for their own benefit, unless there is a clear intention to benefit some other person. This presents a problem if one believes that resulting trusts necessarily describe the 'jumping back' of entirely disposed-of benefits, but it presents less difficulty if one accepts the view that resulting trusts are more accurately understood as arising from the transferor's omission to dispose entirely of his beneficial interest in the first place.

Robert Chambers argues that the secondary trust in *Quistclose* is a resulting trust under which the entire beneficial ownership is transferred to the borrower while the lender retains some other beneficial interest in the monies transferred:

> The borrower receives the entire beneficial ownership of the money, subject only to the lender's right to prevent it being used for any other purpose [and] upon failure of that purpose, there is a resulting trust in favour of the lender, which arises because the lender did not intend the borrower to keep the beneficial ownership of the money for any other purpose.[113]

A potential problem with Chambers' analysis is that it concedes that the lender does not retain an ownership interest in the loaned monies, but only some equitable interest that is less than ownership, in which case the usual inference is that the lender will have no proprietary right to recover its monies in the event of the borrower becoming insolvent before paying the loan. However, this problem can be overcome by recognizing that the lender's retained 'beneficial' interest in the money, whilst not an ownership interest *in* the money, may be some species of proprietary interest *over* the money.[114]

Lord Millett has suggested that it would sit well with Chambers' general thesis to regard the *Quistclose* trust as a '*resulting trust for the transferor with a mandate to the transferee to apply the money for the stated purpose*'.[115] However, an alternative resulting trust analysis of the *Quistclose* trust is, it is submitted, to
p. 169 regard Q as having transferred ↵ beneficial ownership of the loaned monies to RR for the sole purpose of 'paying the shareholders *provided RR is still solvent*', the words in italics being necessarily implied into the primary trust to make commercial sense of the transaction. The moment it became impossible to fulfil the purpose as intended, the loaned money could not belong to RR, because its ownership was from the outset conditional upon paying the shareholders; neither could the loaned monies belong to the shareholders, because, by then, it was too late to transfer it to them. The only remaining possibilities were to declare the money ownerless or to return it to the lender. Because it can be presumed that the *last thing* the lender would have intended is that the money should be declared ownerless and pass to the Crown as *bona vacantia*, the court will automatically return the money to the lender under a resulting trust arising in accordance with his presumed intention: not that he should recover it, but that it should not pass to the Crown.

5.8.2 The express trust explanation for Quistclose

It is hard to account for Q's success unless Q, in fact, retained a beneficial interest in the loaned monies throughout the sequence of events, so the real issue is the basis on which Q retained that beneficial interest. The problem with the resulting trust analysis is twofold. First, a resulting trust normally arises when the primary expressed purpose is incapable of being carried out and, in *Quistclose*, the expressed purpose 'to pay the shareholders' was arguably still capable of being carried out. That problem is fairly easily overcome, as we have already observed, by inferring that the true expressed intention was 'to pay the shareholders *provided RR is still solvent*'. The second problem is, as we also observed earlier, that the primary expressed purpose 'to pay a dividend' will be a void trust for a purely private purpose unless construed to be for the benefit of an identifiable beneficiary. In other words, the identification of the beneficiary is not a secondary stage that comes after the express trust, but a limb of the express trust that is a fundamental prerequisite to the validity of the express trust. On this view, Lord Wilberforce's primary and secondary trusts are, in fact, merely primary and secondary limbs of the same express trust for an identifiable beneficiary.[116] Lord Wilberforce said himself that '*the intention to create a secondary trust for the benefit of the lender … is clear*'.[117] A leading Australian judge and commentator on equity has held that the arrangement in *Quistclose* was '*indicative of an express trust with two limbs rather than an express trust in favour of the shareholders and a resulting trust in favour of Quistclose*'.[118] The significance of this analysis, as William Swadling has argued,[119] is that it takes the *Quistclose* trust outside of the realm of restitution, because, quoting Birks, '*express trusts never create restitutionary beneficial interests*'.[120] The analysis is therefore in direct competition with Robert Chambers' assertion that all resulting trusts, including the
p. 170 *Quistclose* trust, ↵ are restitutionary. There is, though, a clear problem with the express trust analysis: at no stage did Q actually express its intention to retain or recover its wealth upon failure of its primary expressed intention to lend monies to pay the dividend.

5.8.3 The revocable power explanation for Quistclose

A settlor cannot revoke an express trust after it has been fully constituted,[121] but *Quistclose* had the right to recover its monies in the event of the loan being misapplied. In the light of this, and other observations, Sir Peter Millett (as he then was), has argued extra-judicially that the primary trust in *Quistclose* was not a true trust at all, but an '*illusory trust*'.[122] The argument is that, apart from where the transferor (Q) has a private interest of its own—separate and distinct from any interest of the transferee (RR)—in seeing that the loaned sums are applied for the stated purpose, the purpose of arrangements such as those in *Quistclose* would be fulfilled if they were treated '*as leaving the beneficial interest in the fund in* [Q] *throughout, but subject to a power in* [RR], *revocable by* [Q] *at any time, to apply the fund for the stated purpose*'.[123]

A close variant of Lord Millett's analysis has now been approved by the House of Lords in *Twinsectra v. Yardley*.[124] Twinsectra loaned £1m to Yardley for the sole purpose of investing in property, but Yardley used around a third of the loan otherwise than in investment in property. Lord Hoffmann (with whom Lords Slynn and Hutton agreed) accepted that the transferee in such a case holds the money on trust for the transferor subject to a power to apply it in accordance with the contract between them, and Lord Millett (with whom Lord Hutton agreed) held that:

> the borrower is treated as holding the money on a resulting trust for the lender but with power (or in some cases a duty) to carry out the lender's revocable mandate, and [if] the lender's object in giving the mandate is frustrated, he is entitled to revoke the mandate and demand the return of money which never ceased to be his beneficially.[125]

The Court of Appeal in *Challinor v. Juliet Bellis & Co*, following Lord Millett's analysis in *Twinsectra*,[126] has summarized the *Quistclose* trust in the following terms:

> Where property is transferred on terms that do not leave it at the free disposal of the transferee then the *Quistclose*-type trust thereby established is one under which the beneficial interest in the property remains in the transferor unless and until the purposes for which it has been transferred have been fulfilled: see *Twinsectra* at paragraph 100. That beneficial interest ceases to exist if and to the extent that the property is used for the stated purposes, but not otherwise. The application of the property for the stated purpose is a power vested in the transferee, not (usually at least) a primary purpose trust.[127]

p. 171 ↵ One problem with Lord Millett's *Twinsectra* analysis is that it blurs the crucial conceptual distinction between power and duty, as expressed in the legal ideas of the power and the trust.[128] This distinction can be a fine one in practice, as we saw in the context of discretionary trusts,[129] but it is so fundamental a theoretical distinction that it should, so far as possible, be kept distinct in the cases.

In summary, then, we can say that the resulting trust is genuine, but that the so-called primary 'trust' is illusory, because the obligation on the borrower is not a positive obligation to apply the money for the designated purpose, but merely a negative obligation to refrain from applying it for any other purpose.[130] Ultimately, the dogmatic question 'Is the *Quistclose* trust a form of express, implied, constructive or resulting trust?' demands a pragmatic answer:

> [i]t may be any of them … From a commercial point of view … the trust is simply a mechanism … The commercial need for such a mechanism is obvious.[131]

Lord Millett's speech in *Twinsectra* expressed the same desire for practical and doctrinal clarity. His Lordship placed the *Quistclose* trust in the context of trusts law generally when he held that:

> a person who makes money available on terms that it is to be used for a particular purpose only and not for any other purpose thereby places his trust and confidence in the recipient to ensure that it is properly applied. This is a classic situation in which a fiduciary relationship arises, and since it arises in respect of a specific fund it gives rise to a trust.[132]

It is arguable, however, that something more is required to show that the relationship between transferor and recipient is fiduciary rather than merely contractual, and, arguable also, that the fiduciary factor was missing on the facts of *Twinsectra* itself.[133] Doctrinal clarity yields new doctrinal questions. It may be that the real reason why we have the *Quistclose* trust is (as Lord Millett suggested previously) because of its practical utility and it may be that the original case was a response not to doctrinal principle, but to policy.

5.8.4 A policy explanation for the Quistclose trust

One might wonder whether any policy could be more compelling than the well-established policy of protecting the priority of secured creditors such as Barclays Bank in *Quistclose*, but there is one policy that might be: the desire to protect lenders who make emergency loans with the purpose of 'saving' corporations on the brink of insolvency.

p. 172 ↵ The fact is that *Quistclose* trusts frequently provide an injection of capital designed to rescue a company in financial difficulties.[134] A rescued company is a rescued trader and a rescued employer; a failed company very often results in unemployment with all the social ills that entails. (It is notable that the authorities relied upon by Lord Wilberforce in support of the *Quistclose* trust concerned money loaned for the purpose of staving off the borrower's insolvency.)[135]

Yet despite the 'political' desirability of the *Quistclose* trusts, the irony is that, if the loan in *Quistclose* itself had actually been applied to pay the dividend to the shareholders, the lender would, at that point, have lost its priority over other creditors even though the loan had not at that time been repaid. Thus the *Quistclose* trust provides, at best, only a short-term form of security. It is perhaps this 'short-termism' that, more than any other feature, explains judicial willingness to recognize '*Quistclose* trusts', despite the conceptual difficulties that they raise for orthodox trust law.

5.8.5 Are judges too indulgent of Quistclose claims?

We might be persuaded that the *Quistclose* trust is defensible where it promotes the public interest in saving a failing company, but we might doubt that the *Quistclose* trust should be employed to protect purely private contractual interests. A case in the latter category is *Cooper v. PRG Powerhouse*,[136] where the departing managing director of a company paid money to the company on the understanding that it would be paid onwards to allow him to complete the private purchase of his company car. The company went insolvent before the money was paid. A *Quistclose* trust was held in the director's favour, but one surely has to question whether the former director of an insolvent company should be able to use a trust to get a good deal on a company car in priority to the company's general creditors.[137] *Mundy v. Brown*[138] is more easily justified. In this case, an accountant to an insolvent company recovered his fees by virtue of a *Quistclose* trust, but he was a truly independent party.

In *Quistclose*, it is clear that the contract of loan had been frustrated by the insolvency of RR and it is equally clear that, if the dividend had been paid to the shareholders prior to the insolvency, RR would thereby have performed its side of the contract—leaving Q with nothing but its contractual remedy in damages. Suppose, however, that B (a lender) had transferred monies to A (a borrowing company in financial
p. 173 ↵ difficulties) 'for the sole purpose of buying new equipment', and A *had paid* C for the equipment, but had gone into receivership before taking delivery of the equipment. Clearly, A has done more to perform the contract than the borrower in *Quistclose*, but has the purpose of the loan still failed? These were the facts of *Re EVTR*,[139] and the decision of the Court of Appeal was that the sole purpose of the contract, 'to purchase equipment', had failed. As Dillon LJ put it: '*I do not see why the final whistle should be blown at half time.*' Accordingly, when A's receivers recovered part of the purchase price from C, they were obliged to hold it on trust for B. Dillon and Bingham LJJ agreed that the trust was a resulting trust. Of course, it could

be argued to the contrary that a trust for 'buying' new equipment is complete when the contract is made and does not depend upon actual receipt of the goods. If you purchase an item on 'eBay' or such like and the seller becomes insolvent before sending you the item, you can hardly deny that you did buy it. *Re EVTR* is yet another example of judges using clever rhetoric (in this case the metaphor of the full-time whistle) to persuade us to accept an unorthodox but practical outcome.

Despite judicial indulgence, *Quistclose* claims do not always succeed. Merely to show that money is transferred for a specific purpose will not suffice.[140] In *First City Monument Bank plc v. Zumax Nigeria Ltd*,[141] the Court of Appeal made the sensible decision to refuse a *Quistclose* trust in favour of a bank's customer where the bank executed an international money transfer between bank accounts on the customer's instruction. It is clear from Lord Millett's speech in *Twinsectra* that there will be no *Quistclose* trust where, as in this case, the monies transferred were 'at the free disposal of the borrower'.[142] It does not follow from this that transfers not 'at the free disposal of the borrower' must give rise to a *Quistclose* trust. Clearly other factors must be present, although whether such factors as 'segregation' and 'specific purpose' are, separately or together, essential (indeed sufficient) to found a *Quistclose* trust has not been conclusively determined.[143] Senior courts are apparently content with a lack of doctrinal definition in this regard, an instance being the judicial committee of the Privy Council in *Prickly Bay Waterside Ltd v. British American Insurance Company Ltd (Grenada) (Rev2)* which declined to describe segregation as prerequisite to a *Quistclose* trust but nevertheless held that '[t]he absence of a provision for segregation is a powerful factor which indicates that there is no *Quistclose* trust'.[144]

Test your understanding of this chapter with essay questions and problem scenarios *<https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-chapter-5-essay-questions-and-problem-scenarios?options=showName>* and accompanying answer guidance *<https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-chapter-5-guide-answers-to-the-essay-questions-and-problem-scenarios?options=showName>*. Further improve your approach by reading general guidance on answering essay questions and problem scenarios *<https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-general-guidance-on-answering-essay-questions-problem-scenarios?options=showName>*.

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p. 174

5.9 Further reading

In addition to the following print sources, expand your learning with web links *<https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-chapter-5-web-links?options=showName>* to further reading on this topic.

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SWADLING, W., 'Explaining resulting trusts' (2008) 124 LQR 72.

Notes

[1] Christopher St German, *Dialogue in English between a Doctor of Divinity and a Student in the Laws of England etc* (London: Treverys, 1530). Cited in W. Swadling, 'A new role for resulting trusts?' (1996) 16 Legal Studies 133.

[2] Hence *somersaults* and a balletic *saut*.

[3] *Vandervell v. IRC* [1966] Ch 261 at 275. This view was confirmed by Lord Upjohn on appeal in the same case [1967] 2 AC 291 at 314 and by Lord Millett in *Air Jamaica Ltd v. Charlton* [1999] 1 WLR 1399, PC.

[4] See the facts of *Omojole v. HSBC Bank plc* [2012] EWHC 3102 (Comm).

[5] [1996] AC 669. See Chapter 2. The case involved an attempt by a German bank to recover money paid to a London Council under a contract the council had no authority to make.

[6] This category of resulting trust goes back at least as far as *Bird v. Blosse* (1683) 2 Vent 361, but as a result of the decision of the House of Lords in *Stack v. Dowden* [2007] UKHL 17; [2007] 2 WLR 831 and the related decision of the UK Supreme Court in *Jones v. Kernott* [2011] UKSC 53; [2011] 3 WLR 1121 (discussed in detail in Chapter 8), there is no longer a presumption of resulting trust when a 'family home' is transferred into cohabitants' joint names.

[7] See later.

[8] [1996] AC 669 at 708. It has long been acknowledged that a resulting trust is rebuttable by contrary evidence (see *Graham v. Graham* (1791) 1 Ves Jun 272, 275–6).

[9] See *Vandervell v. IRC* [1967] 2 AC 291.

[10] *Stack v. Dowden* [2007] UKHL 17; [2007] 2 WLR 831.

[11] *Dyer v. Dyer* (1788) 2 Cox Eq Cas 92.

[12] [1999] BPIR 637.

[13] *Hodgson v. Marks* [1971] 1 Ch 892, *per* Russell LJ at 933C–D, CA.

[14] For example, *Prest v. Petrodel* [2013] UKSC 34. Here Lord Sumption advised (at para. [52]) that where cohabitees reside in a home held in the name of a company controlled by one of them, judges should suspect that the cohabitee who controls the company intends to retain beneficial ownership of the land.

[15] *Muschinski v. Dodds* (1985) 160 CLR 583, *per* Deane J at 612.

[16] Law of Property Act 1925, s. 53(1)(c). See, further, the discussion of this statutory section in relation to the *Vandervell* case in Chapter 6.

[17] *Vandervell v. IRC* [1967] 2 AC 291.

[18] Ibid. at 329B.

[19] *Re Vandervell's Trusts* (*No. 2*) [1974] Ch 269.

[20] *Re Vandervell's Trusts* [1971] AC 912, HL.

[21] *Re Vandervell's Trusts (No. 2)* [1974] Ch 269 at 288B.

[22] Ibid. at 298G.

[23] [1967] 2 AC 291, HL.

[24] *Re Vandervell's Trusts (No. 2)* [1974] Ch 269.

[25] [1996] AC 669.

[26] Ibid. at 708D.

[27] [1996] AC 669 at 705.

[28] See Millett, 'Restitution and constructive trusts' (1998) 114 LQR 399 at 403–4.

[29] [1996] AC 669 at 705. The cases to which his Lordship referred include *Birch v. Blagrave* (1755) 1 Amb 264; *Childers v. Childers* (1857) 1 De G & J 482; *Re Muller* [1953] NZLR 879; and *Re Vinogradoff* [1935] WN 68. In the latter case, a lady placed £800 worth of stock into the joint names of herself and her granddaughter, who was then only four years old.

[30] [1996] AC 669 at 705H.

[31] See *Carl Zeiss v. Herbert Smith* [1969] 2 Ch 276, CA. See Chapter 15.

[32] For a similar argument, see R. Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1997) at 212.

[33] See Chambers, ibid.; P. Birks, *Restitution and Resulting Trusts in Equity: Contemporary Legal Developments* (S. Goldstein, ed.) (Jerusalem: Hebrew University of Jerusalem, 1992) at 335; P. Birks, 'No consideration: restitution after void contracts' (1993) 23 WALR 195. For a critical response to Birks' argument, see W. J. Swadling, 'A new role for resulting trusts?' (1996) 16 Legal Studies 133. See, also, Swadling, 'Restitution for no consideration' [1994] RLR 73 and Swadling, 'Explaining Resulting Trusts' (2008) 124 LQR 72.

[34] See Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1997) at 220.

[35] Ibid.

[36] *Re Cochrane's Settlement Trusts* [1955] 1 All ER 222 (emphasis added).

[37] *Re Gillingham Bus Disaster Fund* [1958] Ch 300 at 310.

[38] [1967] 2 AC 291.

[39] Ibid. *per* Lord Upjohn at 313D.

[40] P. Birks, 'Proprietary rights as remedies' in *Frontiers of Liability* (P. Birks, ed.) (Oxford: Clarendon Press, 1999) 214 at 223.

[41] Horace, *De Arte Poetica* 391–9 (*C.* Smart trans.)

[42] *Re West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts* [1971] Ch 1. If the collection is for a disaster fund, it will be charitable, and, in most situations, surplus monies donated to collecting boxes, raffles, entertainments, and other gifts made by donors 'unknown or disclaiming' may be applied cy-près without having to obtain the donors' consent (Charities Act 2011, ss. 63A, as introduced by the Charities Act 2022).

[43] W. Swadling, 'A new role for resulting trusts?' (1996) 16 Legal Studies 133.

[44] *Re Diplock* [1948] 1 Ch 465, *per* Lord Greene MR at 519; *Vajpeyi v. Yusaf* [2003] All ER (D) 128 (Sep) (approved judgment).

[45] So, for example, if a sole depositor opens a bank account in joint names the agreement with the bank will generally make it clear that the account holders are jointly entitled to the benefit of the monies in the account, thereby rebutting the presumption of a resulting trust in favour of the depositor (*Aroso v. Coutts & Co* [2002] 1 All ER (Comm) 241).

[46] [1935] WN 68.

[47] (1875) LR 10 Ch App 343.

[48] *Musson v. Bonner* [2010] WTLR 1369, Ch D, para. [19].

[49] See *Bennett v. Bennett* (1879) 10 Ch D 474, CA.

[50] *Shephard v. Cartwright* [1954] UKHL 2; [1955] AC 431, HL, per Viscount Simonds at 445.

[51] [1995] 2 FLR 114, CA.

[52] See, also, *Sekhon v. Alissa* [1989] 2 FLR 94. But *obiter dicta* in *Laskar v. Laskar* emphasize the weakness of the presumption in gifts from parent to child, especially where the child is adult ([2008] EWCA Civ 347 at para. [20]).

[53] [2004] EWCA Civ 223, CA.

[54] Ibid. at para. [19].

[55] [2019] EWHC 1311 (Ch).

[56] Ibid paras [82]–[89], [97].

[57] [2020] EWHC 3930 (QB).

[58] [2004] EWHC 646.

[59] *Gascoigne v. Gascoigne* [1918] 1 KB 223.

[60] *Collier v. Collier* [2002] BPIR 1057. The effect of illegality on trusts is considered further in Chapter 6.

[61] J. Glister, 'Section 199 of the Equality Act 2010: how not to abolish the presumption of advancement' (2010) 73(5) MLR 807.

[62] [1970] AC 777, confirmed in *Gissing v. Gissing* [1971] AC 886.

[63] *Pettitt v. Pettitt* [1970] AC 777, *per* Lord Diplock at 824A–D.

[64] The Convention is binding on English courts according to the Human Rights Act 1998. (See, further, G. Andrews, 'The presumption of advancement: equity, equality and human rights' [2007] Conv 340.)

[65] *Chase Manhattan Bank v. Israel-British Bank* [1981] Ch 105.

[66] P. Millett, 'Restitution and constructive trusts' (1998) 114 LQR 399 at 412–13 and W. Swadling, 'A new role for resulting trusts?' (1996) 16 Legal Studies 133.

[67] R. Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1997) at 129.

[68] See the papers by Millett and Swadling mentioned earlier.

[69] [1996] AC 669.

[70] Ibid.

[71] Ibid. at 704G. See, also, *Barnes v. Addy* (1874) LR 9 Ch App 244 at 251, 255; *Scandinavian Trading Tanker Co AB v. Flota Petrolera Ecuatoriana* [1983] 2 AC 694 at 703–4.

[72] R. Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1997).

[73] *Re Guinness's Settlement* [1966] 1 WLR 1355.

[74] Subject to the rules against perpetuities. Law Commission Report No. 251: *The Law of Trusts: The Rules Against Perpetuities and Excessive Accumulations*, 11 February 1998, recommends that the rule against perpetuities should continue to apply to '*an estate or interest which arises under a resulting trust on the determination of a determinable interest*' (para. 11.2(1)(b)).

[75] *Re The Trusts of the Abbott Fund* [1900] 2 Ch 326.

[76] *Re Wragg* [1954] 1 WLR 922.

[77] *Re Andrew's Trust* [1905] 2 Ch 48.

[78] See Chapter 3.

[79] See ibid.

[80] [1986] 2 Ch 679.

[81] See, also, *Braithwaite v. AG* [1909] 1 Ch 510.

[82] [1896] 2 Ch 679, *per* A. L. Smith LJ at 683.

[83] [1958] 1 Ch 300.

[84] Ibid. at 310.

[85] [1958] 1 All ER 37 at 314.

[86] [1971] Ch 1.

[87] Ibid. at 14B–*C.* See, also, *Re Welsh Hospital (Netley) Fund* [1921] 1 Ch 655.

[88] [1971] Ch 1 at 13.

[89] [1979] 1 WLR 936.

[90] Ibid. at 943–4.

[91] *Hanchett-Stamford v. HM Attorney-General* [2008] EWHC 330 (Ch). The law governing the distribution of the association's funds on dissolution was considered in Chapter 3.

[92] A pension scheme that fixes the final pension entitlement rather than giving the pensioner a proportionate share of the whole fund.

[93] The pension fund in *Mettoy Pension Trustees Ltd v. Evans* [1990] 1 WLR 1587 was in surplus to the order of £9m in 1988. The surplus in *Davis v. Richards and Wallington Industries Ltd* [1990] 1 WLR 1511 had reached £3m by 1986.

[94] See, generally, R. Ellison, 'Pension fund surpluses' (1991) 5 TLI 60; R. Nobles, 'Who owns a pension surplus?' (1990) 19 ILJ 204.

[95] *Kerr v. British Leyland (Staff) Trustees Ltd*, unreported, 26 March 1986; EWCA Civ Transcript No. 286 of 1986, *per* Fox LJ: '*the employees … have purchased their rights as part of their terms of employment*'.

[96] *Jones v. Williams*, unreported, 15 March 1988, Knox J.

[97] [1990] 1 WLR 1511.

[98] Ibid. *per* Scott J at 1541 H.

[99] [1999] 1 WLR 1399, P*C.*

[100] Having been made with no regard for the interests of the members of the scheme (see *Imperial Group Pension Trust Ltd v. Imperial Tobacco Ltd* [1991] 1 WLR 589).

[101] As it happened, the government owed money to the newly privatized company under the privatization agreement, so the court allowed the company to take the surplus in return for an undertaking from the government that it would pay an equivalent sum to the plaintiffs if they succeeded.

[102] *Air Jamaica Ltd v. Charlton* [1999] 1 WLR 1399, PC, at 1412.

[103] *Vandervell v. Inland Revenue Commissioners* [1967] 2 AC 291, *per* Lord Upjohn at 314.

[104] *Re Scott (decd); Widows v. Friends of the Clergy Corporation* [1975] 1 WLR 1260.

[105] *Re Flower's Settlement Trusts* [1957] 1 All ER 462, *per* Jenkins LJ at 465.

[106] *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567.

[107] For an overview of competing analyses, see C. Rickett, 'Different views on the scope of the *Quistclose* analysis' (1991) 107 LQR 608. A whole book has been devoted to the debate (see W. Swadling (ed.), *The* Quistclose *Trust: Critical Essays* (Oxford: Hart Publishing, 2004), which is reviewed by this author at [2004] Conv 418).

[108] This is the analysis favoured by Lord Wilberforce in the *Quistclose* case itself.

[109] This argument is advanced by W. Swadling, 'A new role for resulting trusts' (1996) 16 Legal Studies 133.

[110] Sir P. Millett, 'The *Quistclose* trust: who can enforce it?' (1985) 101 LQR 269. Approved in *General Communications Ltd v. Development Finance Corpn of New Zealand Ltd* [1990] 3 NZLR 406 (by the New Zealand Court of Appeal) and by Lord Millett himself in *Twinsectra Ltd v. Yardley* [2002] 2 AC 164, HL, with whom Lord Hutton agreed.

[111] *Twinsectra Ltd v. Yardley* [2002] 2 AC 164, HL, at 187. Given the strongly pragmatic flavour of the *Quistclose* trust, we may doubt Lord Millett's suggestion (in *Twinsectra*) that it can be explained by 'orthodox' trust law. Compare Lord Millett's more pragmatic approach in his Lordship's foreword to W. Swadling (ed.), *The* Quistclose *Trust: Critical Essays* (Oxford: Hart Publishing, 2004). Contemplating the competing conceptual analyses in that collection, his Lordship wrote that 'it may be any of them … From a commercial point of view … the trust is simply a mechanism … The commercial need for such a mechanism is obvious.'

[112] P. Millett, 'The *Quistclose* trust: who can enforce it?' (1985) 101 LQR 269 at 275–6. See, also, W. Goodhart and G. H. Jones, 'The infiltration of equitable doctrine into English commercial law' (1980) 43 MLR 489 at 494; F. Oditah, 'Assets and the treatment of claims in insolvency' (1992) 108 LQR 459 at 475.

[113] R. Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1997) at 68.

[114] But see *Twinsectra Ltd v. Yardley* [2002] 2 AC 164, HL, at 190–1, approving L. Ho and P. St J. Smart (see 'Further reading' at the end of this chapter). See, also, W. Swadling, 'Orthodoxy' in *The* Quistclose *Trust: Critical Essays* (W. Swadling, ed.) (Oxford: Hart Publishing, 2004) for an argument that it would be unorthodox to afford proprietary status to a mere equitable right of restraint.

[115] *Twinsectra Ltd v. Yardley* [2002] 2 AC 164, HL, at 190.

[116] An argument advanced by Swadling, 'A new role for resulting trusts?' (1996) 16 Legal Studies 133.

[117] [1970] AC 567 at 582.

[118] *Re Australian Elizabethan Theatre Trust* (1991) 102 ALR 681, *per* Gummow J at 691.

[119] W. Swadling, 'A new role for resulting trusts?' (1996) 16 Legal Studies 133.

[120] P. Birks, *An Introduction to the Law of Restitution* (Oxford: Oxford University Press, 1985; revd edn 1989) at 55.

[121] Unless, of course, the trust instrument provides, or the court orders otherwise.

[122] Sir P. Millett, 'The *Quistclose* trust: who can enforce it?' (1985) 101 LQR 269.

[123] Ibid. at 275–6. Surprisingly, Lord Millett has described this complex, inventive analysis as 'orthodox' trust law (*Twinsectra Ltd v. Yardley* [2002] 2 AC 164, HL, at 187). His Lordship has also defended his *Twinsectra* analysis extra-judicially: 'The *Quistclose* trust: a reply' (2011) 17(1) Trusts & Trustees 7–16.

[124] [2002] UKHL 12; [2002] 2 AC 164.

[125] Ibid. at para. [98].

[126] [2015] EWCA Civ 59.

[127] Ibid. *per* Briggs LJ, at para. [63].

[128] P. Birks, 'Retrieving tied money' in *The* Quistclose *Trust: Critical Essays* (W. Swadling, ed.) (Oxford: Hart Publishing, 2004) 121 at 128.

[129] See Chapter 3.

[130] *Re Margaretta Ltd; Freeman v. HM Commissioners of Customs and Excise* [2005] BCC 506; [2005] EWHC 582 (Ch), Ch D (Companies Ct). This interesting case concerned a company that owed VAT. Money to pay the VAT was advanced to an accountancy firm, which misappropriated it. The company was made insolvent as a result, but because the accountant had received the money for the purpose of paying VAT, HM Customs and Excise was able to recover the VAT under a *Quistclose* trust.

[131] Lord Millett, from his Lordship's foreword to W. Swadling (ed.), *The* Quistclose *Trust: Critical Essays* (Oxford: Hart Publishing, 2004), reviewed G. Watt [2004] Conv 418.

[132] *Twinsectra Ltd v. Yardley* [2002] 2 AC 164, HL, at para. [76].

[133] T. Hughes-Davies., 'Redefining the *Quistclose* trust' [2015] Conv 26–46.

[134] J. Ulph, 'Equitable proprietary rights in insolvency: the ebbing tide?' [1996] JBL 482 at 495.

[135] W. Swadling, 'A new role for resulting trusts?' (1996) 16 Legal Studies 133.

[136] [2008] EWHC 498.

[137] Another case where a *Quistclose* trust was upheld almost as if it were a resulting trust of first resort is *Wise v. Jimenez* [2013] All ER (D) 123. The successful claimant, the former professional footballer Dennis Wise, recovered money given to his business partner on the (unfulfilled) understanding that it would be used to develop a golf course to their mutual profit.

[138] [2011] EWHC 377 (Ch).

[139] [1987] BCLC 646.

[140] *Tuthill v. Equine FX Ltd* [2013] EWHC 1207, QBD (Comm Ct).

[141] [2019] EWCA Civ 294.

[142] *Twinsectra v. Yardley* [2002] UKHL 12; [2002] 2 AC 164, HL, at para. [73].

[143] *Eleftheriou v. Costi* [2013] EWHC 2168 (Ch); *Patel v. Mirza* [2013] EWHC 1892 (Ch).

[144] [2022] UKPC 8, para [42].

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