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Resulting trusts

1 Introduction to resulting trusts

(1) What are resulting trusts?¹

The previous two chapters have examined the circumstances in which a trust relationship may be created by the deliberate intention and act of the settlor. Such trusts are known as ‘express trusts’. However, in some situations property will be regarded as subject to a trust despite the absence of any express intention on the part of the settlor. In English law ‘resulting trusts’ are one of the two main categories of such informal trusts, the other being that of ‘constructive trusts’. The circumstances in which property will become subject to a resulting trust were recently examined by the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council.*² Lord Browne-Wilkinson identified two circumstances in which a resulting trust would arise:

‘Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B; the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchaser by A and B in shares proportionate to their contributions. It is important to stress that this is only a *presumption,* which presumption is easily rebutted either by the counter presumption of advancement or by direct evidence of A’s intention to make an outright transfer . . . (B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest.’³

Resulting trusts of the second type will be examined in Chapter 19, where it will be seen that they operate to ‘fill the gap’ in the beneficial ownership of property where an express trust fails. This chapter will be concerned largely with resulting trusts of the first type, commonly termed ‘presumed resulting trusts’.

(2) Distinguishing resulting and constructive trusts

In some cases, the House of Lords seem to have used ‘resulting’ and ‘constructive’ trusts as interchangeable terms, suggesting that it is not necessary to distinguish between them. However, it is submitted that they are fundamentally different, operating on different principles, and that they need to be strictly differentiated.

Constructive trusts are imposed by the court as a consequence of the conduct of the party who becomes a trustee. Resulting trusts are not imposed as a response to the conduct of the trustee, but to give effect to the implied intentions of the owner. Where a transfer of property has occurred and the legal title has been transferred, but the transferor has failed to show an intention to divest himself fully of all his interest in that property, the transferee will not be permitted to receive the property absolutely for his own benefit. Instead, he will hold it on trust for the transferor. The equitable interests is said to ‘result back’ to the transferor, thus ensuring that he retains his interest in the property. Practical imperatives may also demand that a distinction be drawn between beneficial entitlements taking effect under resulting and constructive trusts. Re Densham (A Bankrupt) concerned a dispute as to the ownership of a matrimonial home. Whilst the husband was the sole legal owner of the house, his wife had contributed towards the purchase price and they had also agreed that the ownership should be jointly shared. Goff J held that, in consequence of the agreement, the wife was prima facie entitled to a beneficial half share in the ownership of the house by way of a constructive trust, and that through her direct financial contribution to the purchase price she was also entitled to a ninth share of the beneficial ownership by way of a resulting trust. However, because the husband was bankrupt, she was held unable to assert any entitlement by way of the constructive trust, because it was not a settlement made for ‘valuable consideration’ and therefore void against his trustee in bankruptcy. Nevertheless, she was able to assert her entitlement by way of the resulting trust.

Re Densham therefore illustrates the need to distinguish between the operation of resulting and constructive trusts. This need was reiterated by the Court of Appeal in Drake v Whipp, where the central issue was as to the proportion of the equitable interest that the plaintiff enjoyed in a barn owned by her erstwhile partner by virtue of her contributions to the purchase price and work done, where there was also a common intention that she was to enjoy a share of the ownership. Peter Gibson LJ remarked:

‘A potent source of confusion, to my mind, has been suggestions that it matters not whether the terminology used is that of the constructive trust, to which the intention, actual or imputed, of the parties is crucial, or that of the resulting trust which operates as a presumed intention of the contributing party in the absence of rebutting evidence of actual intention.’

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5 See Chapter 9.
6 [1975] 1 WLR 1519.
7 Bankruptcy Act 1914, s 42.
8 [1996] 1 FLR 826.
9 [1996] 1 FLR 826 at 827.
Thus, whilst by means of a resulting trust the plaintiff would only be entitled to a share of the beneficial interest directly equivalent to the proportion of her contribution to the purchase price of the barn (which was 19.4%), by way of a constructive trust she was entitled to a third interest.10

(3) Rationale of resulting trusts

In Westdeutsche Landesbank Girozentrale v Islington London Borough Council11 Lord Browne-Wilkinson stated that resulting trusts arise to fulfill the implied intentions of the parties:

'Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intentions of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention.'12

However, this formulation should be subject to question. Whilst it is certainly the case that a presumed resulting trust arises in consequence of the presumed intention of the transferor of the trust property (or contributor to its purchase as the case may be) it is not necessarily the case that the trustee who received the legal title intended the property to be held on trust. In many cases, a resulting trust has been found in circumstances where the transferee of the legal title anticipated that a gift had been made divesting the transferor of his entire interest in the property. This can be seen from the fact that many cases involve a dispute as to whether a presumption of resulting trust has been rebutted. As Lord Browne-Wilkinson himself observed, a resulting trust of the first type arises because 'there is a presumption that A did not intend to make a gift to B'.13 A resulting trust will arise in favour of A in such circumstances even though B anticipated that he was the beneficiary of an absolute gift, and in this sense B will be required to hold the property on resulting trust against his intentions. More significantly, a resulting trust may even arise where the transferee of property was unaware that the transfer had occurred.14 Therefore, it should not be thought that a resulting trust will only arise on the basis of the mutual intention of the parties. Instead, a resulting trust should arise whenever a transferee (or contributor) cannot be shown to have possessed the intention to make a gift. As Lord Goff stated, a presumed resulting trust arises when there are:

'...voluntary payments by A to B, or for the purchase of property in the name of B or in his and A's joint names, where there is no presumption of advancement or evidence of intention to make an out-and-out gift.'15

A number of earlier cases provide a less confusing analysis of the rationale for the creation of resulting trusts. In Re Sick and Funeral Society of St John's Sunday School, Golcar16 Megarry V-C stated that:

14 As, for example, in Re Vinogradoff [1935] WN 68. See Chambers, Resulting Trusts (1997), p 37.
'A resulting trust is essentially a property concept: any property that a man does not effectually dispose of remains his own.'

This clearly recognises that a resulting trust arises because of the failure of the transferor to make an absolute gift of his property. As Lord Reid observed in Vandervell v IRC:

‘... where it appears to have been the intention of the donor that the donee should not take beneficially, there will be a resulting trust in favour of the donor.’

A more nuanced understanding of the operation of resulting trusts was provided by the Privy Council in Air Jamaica Ltd v Charlton, where Lord Millet stated:

‘Like a constructive trust, a resulting trust arises by operation of law, although unlike a constructive trust it gives effect to intention. But it arises whether or not the transferor intended to retain a beneficial interest—he almost always does not—since it responds to the absence of any intention on his part to pass a beneficial interest to the recipient.’

2 Presumed resulting trusts

Presumed resulting trusts arise where it is presumed that the transferor of property did not intend to dispose of his entire ownership interest in the property transferred. Under English law there is a rebuttable presumption that a transferor of property does not intend to make a gift of it, and unless this presumption is rebutted the transferee will hold it on resulting trust for the donor. However, in some circumstances the nature of the relationship between the transferor and the transferee gives rise to an opposite presumption, namely that the transferor did intend to benefit the transferee, in which case unless the presumption of a gift is rebutted there will be no resulting trust. This counter-presumption is known as the ‘presumption of advancement’.

(1) The basic presumption of resulting trust

English law adopts two basic presumptions about the intentions of property owners, both of which are rebuttable by evidence of a contrary intention.

(a) A presumption against gifts

First, it is presumed that, outside of certain relationships, an owner of property never intends to make a gift. If an owner voluntarily transfers the legal title of his property to a third party without receiving any consideration in return, he is presumed to have intended to retain the equitable interest for himself. The transferee will therefore hold the property on resulting trust for him. This presumption was invented by equity to
defeat the misappropriation of property as a consequence of potentially fraudulent or improvident transactions.20

(b) A presumption in favour of the provider of purchase money

By extension of this first presumption, it is also presumed that a person who provides the money required to purchase property intends to obtain the equitable interest in the property acquired. Therefore, when the property is purchased in the name of someone who did not provide the purchase money, he will be presumed to hold the legal title on trust for the provider thereof. This presumption is long established and was recognised in Dyer v Dyer, where Eyre CB stated:

‘... the trust of a legal estate ... whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name of several; whether jointly or successive, results to the man who advances the purchase-money.'21

Where a person has only contributed a part of the purchase price of property a resulting trust will be presumed in his favour of an equivalent proportion of the equitable interest.22

(2) Voluntary transfers of property

Where an owner makes a voluntary transfer of property, either into the sole name of the transferee or into the joint names of himself and the transferee, without receiving any consideration in return, a resulting trust will be presumed in his favour unless rebutted by evidence that he intended to make a gift. The presumption of a resulting trust clearly operates in the context of voluntary transfers of personal property, but it is less certain whether it operates in respect to voluntary transfers of land.

(a) Operation of the presumption of resulting trust in the context of personal property

The operation of the presumption of a resulting trust is well illustrated by Re Vinogradoff.23 Mrs Vinogradoff transferred a £800 War Loan into the joint names of herself and her infant granddaughter. Farwell J held that the stock was held on resulting trust for her,24 and that therefore on her death it belonged in equity to her estate. In Thavorn v Bank of Credit and Commerce International SA25 a resulting trust was found to exist where a woman opened a bank account in favour of her infant nephew. In 1981 Mrs Thavorn opened an account with some £20,000 in her nephew’s name. She had directed the bank that she alone was to operate the account. Lloyd J held that in these circumstances there was no evidence to rebut the presumption of a resulting trust:

20 Lynch v Burke [1995] 2 IR 159, per O’Flaherty J. 21 (1788) 2 Cox Eq Cas 92 at 93.
23 [1935] WN 68. See also Re Muller [1953] NZLR 879.
24 The granddaughter was held to be a trustee of the resulting trust despite her minority. See Law of Property Act 1925, s 20.
‘There was not the slightest evidence on which I could hold that, by opening the account in his name, she intended to transfer any beneficial interest to him during her lifetime.’

The bank was therefore liable to pay damages when they paid the money into his current account. A presumption of resulting trust will also arise where a person transfers money into a bank account in joint names. In the recent case of Aroso v

(i) Voluntary transfer: Re Vindogradoff

(ii) Contribution to purchase price: Tinsley v Milligan

Presumed resulting trusts
Coutts it was held that the presumption of resulting trusts operated when Sr Aroso transferred money into a joint account opened in the names of himself and his nephew, although the presumption was held to have been rebutted by evidence that a gift had been intended.

(b) Operation of the presumption of resulting trust in the context of land

Whilst the presumption of resulting trust clearly operates in respect of voluntary transfers of personal property, a more difficult question is whether the presumption against gifts continues to apply in the context of voluntary transfer of land. Section 60(3) of the Law of Property Act 1925 provides:

‘In a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee.’

There has been much debate as to whether this provision was enacted to remove the presumption of resulting trust where land is conveyed voluntarily, or whether it was merely intended to remove a conveyancing inconvenience. Prior to the enactment of s 60(3), it was necessary to declare in a voluntary conveyance that land was granted ‘unto and to the use of’ the grantee to ensure an effective transfer. It has therefore been argued that s 60(3) was intended to render such a declaration unnecessary, so that the mere absence of it will not alone lead to a resulting trust, whilst leaving the operation of the presumption intact. The true effect of s 60(3) has not fallen for determination by the higher courts. In Tinsley v Milligan Lord Browne-Wilkinson commented that it was ‘arguable that the position has been altered by the 1925 property legislation’, and in Hodgson v Marks the Court of Appeal held that a resulting trust arose in favour of an elderly lady who had transferred the legal title to her house to her lodger on the basis of an oral understanding that he would look after her affairs. However in Lohia v Lohia Nicholas Strauss QC recently held that although both proposed interpretations of s 60(3) could reasonably be adopted by the court, on a ‘plain reading’ the presumption of resulting trust had been abolished in respect of a voluntary conveyance of land. Thus a presumption of resulting trust will only arise if there is some fact in addition to the lack of consideration, such as that the parties are strangers. In the light of this interpretation, he held that no resulting trust had arisen where a son had conveyed his share in the family home to his father. The mere fact that there was no evidence of any sensible reason why he had so conveyed his share in the house to his father, and that he had continued to share mortgage payments and rental income, was not sufficient to lead to the inference of a resulting trust.

It remains to be seen whether this interpretation is supported by the higher courts. It is submitted, however, that the alternative interpretation is preferable. As Nicholas

28 [1993] 3 All ER 65, HL.
29 See also Hodgson v Marks [1971] Ch 892, where Russell LJ described the proposition that s 60(3) has put an end to the presumption resulting trusts of land as ‘debatable’.
Strauss QC himself indicated, it is doubtful whether the differences between land and personality, and between methods of making apparent gifts, provide meaningful bases for distinction. The presumptions of resulting trust and advancement operate in practice primarily to allocate the burden of proof where property has been transferred and there is a dispute as to the effect of the transfer. To eliminate the presumption of resulting trust in relation to land is, in effect, to introduce something akin to the presumption of advancement where land has been voluntarily conveyed. The transferor will therefore have to bring forward evidence to show that the beneficial interest was not intended to be transferred. The facts of Lohia v Lohia demonstrate that it may prove difficult to discharge such a burden.

(3) Purchase money resulting trusts

The presumption of a resulting trust in favour of a contributor to the purchase price of property applies to both personal property and land.

(a) Operation of the presumption of resulting trust in the context of personal property

The presumption of a resulting trust of personal property was raised in Fowkes v Pascoe.33 John Pascoe was the son of Elizabeth Anne Pascoe, the widow of the only son of Sarah Baker. Over a period of some five years, Sarah Baker purchased annuities totalling £7,000 in the joint names of herself and John Pascoe. The Court of Appeal accepted that there was thus a presumption of a resulting trust in favour of Sarah Baker, but held the evidence rebutted this presumption and demonstrated that a gift had been intended. In The Venture34 a resulting trust was held to have arisen in favour of a contributor to the purchase price of a yacht. In Abrahams v Trustee in Bankruptcy of Abrahams35 it was held that a presumption of resulting trust operated where a wife, who was separated from her husband, contributed to a syndicate purchasing National Lottery tickets in the names of her husband. Since the presumption was not rebutted the husband held his share of the winnings, some £242,000, on resulting trust for his wife.

The recent case of Foskett v McKeown36 concerned the question whether a contributor to the premiums of a life insurance policy thereby gained a proportionate share of the proceeds of the policy. A Mr Murphy had taken out a life insurance policy in 1986 which would provide a death benefit of £1 million. He paid the annual premiums for the first two years using his own money, but paid subsequent premiums using misappropriated trust money. He committed suicide in 1991, at which point at least 40% of the premiums had been paid using trust money. The question was whether the beneficiaries were entitled to a proportionate share of the proceeds of the policy. Whilst there was no doubt that the trust money had been used to pay premiums, under the terms of the policy the death benefit would still have been payable even if they had not been made, due to the payment of the earlier premiums. In Re Policy No 6402 of the

Scottish Equitable Life Assurance Society had held that resulting trust principles were applicable to a life policy. In the Court of Appeal Scott V-C held that this case was distinguishable because the contributions giving rise to the resulting trust had been made from the outset of the policy, so that it did not apply in favour of contributors of latter premiums which would have the effect of divesting those already entitled to the proceeds of the policy. Morritt LJ dissented and, whilst he was unwilling to decide whether a resulting trust could arise from the payment of some premiums due on an insurance policy taken out in the name of another, he held that contributions to the purchase of property by installments could give rise to a resulting trust:

‘... in principle if property is acquired by a series of payments a resulting trust in respect of the due proportion may arise from the payment of one or more in the series; hire purchase or installment payment transactions would be examples.'

The majority of the House of Lords approved the dissenting judgment of Morritt LJ, and held that the beneficiaries were entitled to a proportionate share of the proceeds of the policy. Lord Millett explained:

'It is true that the last two premiums were not needed to provide the death benefit in the sense that in the events which had happened the same amount would have been payable even if those premiums had not been paid... But the fact is that Mr Murphy, who could not foresee the future, did choose to pay the last two premiums, and to pay them with the purchaser’s money; and they were applied by the insurer towards the payment of the internal premiums needed to fund the death benefit. It should not avail his donees that he need not have paid the premiums, and that if he had not then (in the events which happened) the insurers would have provided the same death benefit and funded it differently.'

Contribution to the premiums required under an insurance policy will therefore entitle the contributor to a proportionate share of the proceeds.

However Foskett v Mckeown also illustrates the potential problems of determining the exact extent of an interest acquired by resulting trust where contributions have been made to a purchase by installments. Lords Hoffman and Browne-Wilkinson held that the extent of the interest in the proceeds of the policy should be proportionate to the contributions the parties had made to the premiums. Lord Millett considered that, since the policy was unitlinked in nature, the appropriate division was in proportion to the number of units which were acquired by the respective premiums.

(b) Operation of the presumption of resulting trust in relation to land

In the context of the acquisition of land it is clear that a presumed resulting trust will arise in favour of a contributor to the purchase price. The general principle was stated by Lord Reid in Pettitt v Pettitt:

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in the absence of evidence to the contrary effect, a contributor to the purchase-price will acquire a beneficial interest in the property.\textsuperscript{44}

This was reiterated by Lord Pearson in \textit{Gissing v Gissing}, where the issue was whether a wife was entitled to a share of the ownership of her matrimonial home, which had been purchased in the sole name of her husband:

‘If [the wife] did make contribution of a substantial amount towards the purchase of the house, there would be a resulting trust in her favour. That would be the presumption as to the intention of the parties at the time or times when she made and he accepted the contributions. The presumption is a rebuttable presumption: it can be rebutted by evidence showing some other intention . . .\textsuperscript{45}

These cases clearly show that a contribution to the purchase price of land will give rise to a presumption of a resulting trust. The major area of controversy has concerned the nature of ‘contributions’ sufficient to give rise to the presumption. Whilst ‘indirect’ contributions may constitute sufficient detriment to call for the imposition of a constructive trust if there was an express common intention to share the ownership of the land,\textsuperscript{46} only ‘direct’ contributions to the purchase price will give rise to a presumption of resulting trust in favour of the contributor. In \textit{Ivin v Blake} \textsuperscript{47} the Court of Appeal therefore held that a daughter who had helped her mother to run a pub, drawing only weekly pocket money from the business, had not acquired any interest in a house purchased by her mother by way of a resulting trust because she had not made a direct contribution to the purchase price.

\textit{(i) Contribution to the purchase price.} A direct contribution to the purchase price of the land will give rise to a presumed resulting trust, normally in proportion to the amount of the contribution. In \textit{Tinsley v Milligan}\textsuperscript{48} a lesbian couple purchased a house in the sole name of Tinsley. The purchase price of £29,000 was raised by way of a mortgage of £24,000, with the remainder derived from the sale of a car that they owned jointly. The House of Lords held that this direct contribution gave rise to a presumption of a resulting trust in favour of Milligan of a half share in the house.\textsuperscript{49} In \textit{Midland Bank plc v Cooke}\textsuperscript{50} a house was purchased in the sole name of a husband for £8,500. Whilst the majority of the purchase price was raised by way of a mortgage, the deposit was provided largely by a wedding gift of £1,100 from the husband’s parents. As this gift had been made to the husband and wife jointly, it was held that she had contributed £550 to the purchase price, and that this gave rise to a presumption of a resulting trust in her favour. Where such a direct contribution has been made to the purchaser price, the contributor will be entitled to a proportionate share of the beneficial interest mathematically equivalent to the proportion of her contribution. In \textit{Midland Bank plc v Cooke} it was held that Mrs Cooke’s contribution of £550 to the purchase price entitled her to a 6.74% share of the beneficial interest of the house by way of a presumed

\textsuperscript{44} [1970] AC 777 at 794.
\textsuperscript{45} [1971] AC 886.
\textsuperscript{46} See Chapter 29.
\textsuperscript{47} (1994) 67 P & CR 263.
\textsuperscript{48} [1994] 1 AC 340.
\textsuperscript{49} The mortgage was repaid from the proceeds of their joint business.
\textsuperscript{50} [1995] 4 All ER 562; (1997) 60 MLR 420 (O’Hagan); [1997] Conv 66 (Dixon). See also \textit{McHardy and Sons (A firm) v Warren} [1994] 2 FLR 338.
resulting trust. A contributor will only be able to demonstrate an entitlement to a share of the beneficial interest greater than the exact mathematical equivalent of her contribution if she can demonstrate that the land was held on constructive trust.\(^{51}\) The Court of Appeal subsequently held that there was sufficient evidence to conclude that Mrs Cooke was entitled to a 50% share of the property by way of a constructive trust. This aspect of the case is discussed in the following chapter.

\textbf{(ii) Contribution to mortgage repayments.} In the majority of cases land is not purchased outright but with the help of a mortgage. In such circumstances it might be thought that a person who contributes to the mortgage repayments should be treated as having contributed to the purchase price, thus raising a presumption of resulting trust in his or her favour in proportion to his contributions. However a distinction must be drawn between contributions made to the repayment of a mortgage on the basis of an agreement made when the mortgage is taken out, and subsequent payments of mortgage installments. In the former case the payment of mortgage installments will be taken to give rise to a resulting trust. This was explained in \textit{Cowcher v Cowcher}\(^{52}\) where Bagnall J considered the consequences of a conveyance of a house to A for £24,000, where A had provided £8,000 of his own money and the remainder was provided by a mortgage taken out in the name of B:

‘...suppose that at the time A says that as between himself and B he, A, will be responsible for half the mortgage repayments ... Though as between A and B and the vendor A has provided £8,000 and B £16,000, as between A and B themselves A had provided £8,000 and made himself liable for the repayment of half the £16,000 mortgage namely a further £8,000, a total of £16,000; the resulting trust will therefore be as to two-thirds for A and one-third for B.’\(^{52}\)

Applying this principle, Bagnall J held that a resulting trust was presumed in favour of a wife who had made some of the repayments on a mortgage taken out by her husband.\(^{53}\) Similarly in \textit{Tinsley v Milligan}\(^{54}\) the House of Lords held that there was a resulting trust where the parties had agreed that the mortgage repayments would be made form an account containing the proceeds of their joint business operation, even though this was in the sole name of Tinsley.

However, in the absence of any such prior agreement, the payment of mortgage instalments subsequent to the initial acquisition of the property will not give rise to any interest by way of a resulting trust, since they are not regarded as being contributions to the purchase price of the property. This was so held by the Court of Appeal in \textit{Curley v Parkes}.\(^{55}\) In this case Mr Curley and Miss Parkes were living together. A house was purchased in 2001 in the sole name of Parkes. The purchase was funded exclusively by the proceeds of sale of her previous solely-owned house, cash she provided and a


\(^{53}\) In \textit{McQuillan v Maguire} [1996] 1 ILRM 394 a wife was held entitled to a 50% share of a matrimonial home purchased in the name of her husband because she had contributed indirectly towards the discharge of the mortgage. In \textit{Cowcher v Cowcher} Bagnall J’s analysis was based upon the intention of the parties at the date of purchase. Where there is no clear intention at that date, and a share of the ownership arises from contributions to repaying a mortgage, backward tracing appears to be operating: see Chapter 31, pp 771–772.

mortgage of £138,000 which was taken out in her sole name. Curley subsequently paid some £9,000 into Park’s bank account, from which the mortgage instalments were paid, as a way of assisting her with the huge commitments she was taking on. Curley claimed that these payments entitled him to an 8.5% share of the equitable ownership of the house by way of a resulting trust. The Court of Appeal rejected his claim on this basis, holding that the payments could not be regarded as a contribution to the purchase price. Peter Gibson LJ explained the relevant principles:

‘The relevant principle is that the resulting trust of a property purchased in the name of another, in the absence of contrary intention, arises once and for all at the date on which the property is acquired. Because of the liability assumed by the mortgagor in a case where monies are borrowed by the mortgagor to be used on the purchase, the mortgagor is treated as having provided the proportion of the purchase price attributable to the monies so borrowed. Subsequent payment of the mortgage instalments are not part of the purchase price already paid to the vendor, but are sums paid for discharging the mortgagor’s obligations under the mortgage.”

This decision to exclude subsequent payments of mortgage instalments, or of capital repayments which similarly discharge the obligations of the mortgagor under the mortgage, will thus further reduce the importance of resulting trusts in determining the ownership of co-habited land. It will prevent the need for difficult calculations to determine the proportion of the ownership of property acquired by way of subsequent contributions to mortgage payments, a difficulty which was acknowledged by the House of Lords in *Gissing v Gissing*, and for which no easy solution had been found.

However even though such contributions may be insufficient to gain an interest by way of a resulting trust they may be relevant for the purposes of a constructive trust, whether by way of establishing an implied common intention to share the ownership of the property, or as a ‘detriment’ on the part of the contributor where there was there was an express common intention between the parties to share the ownership of the land. If such a constructive trust can be established, the contributor may be entitled to a share of the beneficial ownership of the land far in excess of the exact mathematical equivalent of their contributions.

(iii) Contribution by qualification for a discount in the purchase price. If a house is purchased at a discounted price, the amount of the discount is regarded as a contribution to the purchase price. Therefore, the person who qualified for the discount will be presumed to be the beneficiary of a resulting trust to that extent in the property. In *Marsh v Von Sternberg*, Bush J held that a discount gained on the market value of a long lease because one of the parties was a sitting tenant was to be treated as a

56 Ibid at [14].
57 [1971] AC 886 at 987, per Lord Reid: ‘… where [the contributor] does not make direct payments towards the purchase it is less easy to evaluate her share. If her payments are direct she gets a share proportionate to what she has paid. Otherwise there must be a more rough and ready evaluation. I agree that this does not mean that she would as a rule get a half-share. … There will of course be cases where a half-share is a reasonable estimation, but there will be many others where a fair estimate might be a tenth or a quarter or something even more than a half.’
58 See Chapter 10.
contribution to the purchase price in assessing their respective interests under a resulting trust. In Springette v Defoe a discount of 41% of the market value of a council flat obtained because the plaintiff had been a tenant for more than eleven years was counted as a contribution to the purchase price by the Court of Appeal.

(**iv**) Contributions to the cost of repairs or renovation. Where the property is repaired or renovated, and its value is thereby increased, a person who contributes towards the cost of such repairs or renovations will be entitled to an interest in the land by way of a resulting trust proportionate to the extent to which the increase was attributable to their contribution. Improvements made much later than the date of purchase may give rise to a constructive trust.

(**v**) Contributions to general household expenses. In contrast to indirect contributions to the purchase price of land, it seems that contributions made to general household expenses will not give rise to a presumption of resulting trust in favour of the contributor because they are not sufficiently referable to the purchase price. In Burns v Burns Mr and Mrs Burns began living together as man and wife in 1961. In 1963 a house was purchased in the sole name of Mr Burns, who financed the purchase by way of a mortgage. Mrs Burns began to work in 1975. She used part of her earnings to pay the rates and telephone bills and to buy various domestic chattels for the house. When they split up in 1980, she claimed to be entitled to an equitable interest in the house by reason of her contributions. The Court of Appeal held that she was not entitled to an interest by way of resulting trust because she had ‘made no direct contribution to the purchase price’. It should be noted that although such contributions to family expenses will not give rise to a presumption of resulting trust, they may, if substantial, constitute sufficient detriment to lead to the imposition of a constructive trust.

(**vi**) Contributions to removal expenses. In Curley v Parkes the Court of Appeal held that neither the payment of solicitor’s fees and expenses, nor the payment of removal costs, were capable of giving rise to a resulting trust. Although such costs might be substantial they do not form any part of the purchase price of the property itself, and hence do not give rise to a presumption of resulting trust. They may, however, be relevant for the purposes of a constructive trust.

(4) Rebutting the presumption of resulting trust

In Pettitt v Pettitt Lord Diplock observed that the presumptions of resulting trust and advancement are:

‘... no more than a consensus of judicial opinion disclosed by reported cases as to the most likely inference of fact to be drawn in the absence of any evidence to the contrary.’

It therefore follows that they can be rebutted by evidence that in a specific situation the ‘most likely inference’ was not, in fact, intended. The presumption of a resulting trust,
whether arising from a voluntary transfer or a contribution to the purchase price of property, will be rebutted by evidence that the transferor or contributor had no intention to retain any beneficial interest in the property. The strength of the evidence required to rebut the presumption of a resulting trust will depend upon the strength of the presumption, which will in turn depend upon the facts and circumstances which gave rise to it.\(^{68}\)

(a) Circumstances rebutting the presumption of resulting trust

(i) Evidence a gift was intended.\(^{69}\) It was noted above that in *Fowkes v Pascoe*\(^{70}\) a presumption of a resulting trust was raised when Sarah Baker purchased annuities in the joint names of herself and John Pascoe. However, this presumption was rebutted by evidence indicating that a gift had been intended. Two initial purchases of stock were made by Sarah, one of £250 in the joint names of herself and John Pascoe, and another of £250 in the joint names of herself and her companion. She also held large quantities of the same stock in her own name, besides other property. The court considered this ‘absolutely conclusive’ that a gift was intended. As James LJ said:

‘Is it possible to reconcile with mental sanity the theory that she put £250 into the names of herself and her companion, and £250 into the names of herself and [John Pascoe], as trustees upon trust for herself? What..... object is there conceivable in doing this?’\(^{71}\)

In *Re Young*\(^{72}\) it was similarly held that the presumption of a resulting trust had been rebutted. Colonel and Mrs Young had a joint bank account, which contained money derived from Mrs Young’s separate income. The account was used to pay for household expenses, and Colonel Young, with his wife’s consent, withdrew money to purchase investments in his own name. Pearson J held that the evidence showed that the money in the account was intended to be joint, and that the investments purchased in his own name were his own property, and were not held on resulting trust for his wife.

In the recent case of *Arosos v Coutts & Co*\(^{73}\) Collins J held that the presumption of resulting trust was rebutted where a wealthy Portuguese gentleman had transferred money into a joint account in the names of himself and his nephew. The evidence, primarily the mandate establishing the account which clearly stated that the beneficial interest was to be held jointly and the evidence of the bank client relationship officer who had explained the effect of the account, established that he had intended the nephew to take the property beneficially.

It appears that a presumption of resulting trust may be rebutted even where money has been paid into a joint bank account with the intention that the transferee is not allowed to draw on the account until the death of the transferor. This approach was adopted in *Russell v Scott*\(^{74}\) where an aunt had opened a joint account in the names of herself and her nephew, but did not intend her nephew to benefit during her lifetime.

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\(^{68}\) Vajpeyi v Yijsaf [2003] EWHC 2339, per Peter Prescott QC at [71].

\(^{69}\) See Sekhon v Alissa [1989] 2 FLR 94, where there was insufficient evidence of a gift to rebut the presumption of a resulting trust.

\(^{70}\) (1875) LR 10 Ch App 343.

\(^{71}\) (1875) LR 10 Ch App 343 at 349.

\(^{72}\) (1885) 28 Ch D 705.

\(^{73}\) [2002] 1 All ER (Comm) 241.

\(^{74}\) (1936) 55 CLR 440.
The Australian High Court held that she had nevertheless conferred an immediate beneficial interest on him which would only fall into possession on her death through the operation of the right of survivorship. Because of her control over the account, the interest that she conferred on him remained revocable by her during her lifetime. This decision was followed in England in *Young v Sealey*.75 In contrast in Ireland it was held in *Owens v Greene*76 that the presumption of resulting trust could not be rebutted in such cases because the transferor’s intention amounted to an intention to make a testamentary gift, and that evidence of this intention was not admissible, since otherwise the requirements for making a will would be avoided. However as many commentators have observed,77 rebutting the presumption of resulting trust in such circumstances is no more offensive to the policy of the Wills Act than the recognition of secret trusts. *Owens v Greene* has since been overruled by the Irish Supreme Court in *Lynch v Burke*.78 In *Arosos v Coutts & Co*79 Collins J indicated that he would have followed *Russell v Scott* and *Young v Sealey*, but the point did not arise for decision.

(ii) Evidence a loan was intended. The presumption of a resulting trust will also be rebutted where evidence shows that money was advanced by way of a loan. In *Re Sharpe (a bankrupt)*80 Mr and Mrs Sharpe lived in a maisonette with their 82-year-old aunt, Mrs Johnson. The property had been purchased in the name of Mr Sharpe for £17,000. Mrs Johnson had contributed £12,000 towards the purchase price, whilst the remainder was raised by way of a mortgage. Mr and Mrs Sharpe were subsequently declared bankrupt and Mrs Johnson claimed to be entitled to a proprietary interest in the maisonette by means of a resulting trust presumed from her contribution to the purchase price. Browne-Wilkinson J held that the money had in fact been advanced by way of a loan, with the intention that it would be repaid. She was not therefore entitled to any share of the equitable interest of the property. A presumption of a resulting trust was also rebutted by evidence that a loan was intended in the more recent case of *Vajpeyi v Yijaf*.81 In this case the claimant provided the defendant, who was her lover, with £10,000 to enable him to purchase a house in his sole name. At the time of the purchase in 1980 the defendant was a young man of limited means. The claimant alleged that by virtue of this payment she was entitled to a 33.89% share of the equitable ownership of the property on the basis of a presumed resulting trust, whereas the defendant claimed that the money had been advanced by way of a loan, which he had repaid. Peter Prescott QC held that the following factors had rebutted the presumption of a resulting trust in favour of a loan: the fact that the defendant had been a young man of limited means who was anxious to get on the property ladder whereas the claimant was a lady who was already on the property ladder when the money was advanced; the fact that the claimant had tolerated the defendant collecting rents from the property and keeping them for himself for some 21 years; the fact that the claimant had failed to propound her claim to an interest for 21 years and the fact that she had never said

anything about her alleged interest in the house when it was mortgaged by the defendant to enable him to purchase her matrimonial home some years previously.

(b) Evidence required to rebut the presumption of resulting trust

Fowkes v Pascoe\(^\text{82}\) makes clear that the quality of evidence required to rebut a presumption of a resulting trust will vary depending on the circumstances in question, because the presumption of resulting trust will be given varying weight depending upon the context. As Mellish LJ stated:

‘... the presumption must ... be of very different weight in different cases. In some cases it would be very strong indeed. If, for instance, a man invested a sum of stock in the name of himself and his solicitor, the inference would be very strong indeed that it was intended solely for the purpose of a trust, and the court would require very strong evidence on the part of the solicitor to prove that it was intended as a gift; and certainly his own evidence would not be sufficient. On the other hand, a man may make an investment of stock in the name of himself and some person, although not a child or wife,\(^\text{83}\) yet in such a position to him as to make it extremely probable that the investment was intended as a gift. In such a case, although the rule of law, if there was no evidence at all, would compel the Court to say that the presumption of trust must prevail, even if the court might not believe that the fact was in accordance with the presumption, yet, if there is evidence to rebut the presumption, then, in my opinion, the court must go into the actual facts.’\(^\text{84}\)

One situation where the presumption of resulting trust is weak and easily rebutted is where a wife conveys property into the name of her husband, or when property is purchased in the name of the husband with money provided by the wife. As no presumption of advancement arises between a wife and a husband, there will be a prima facie presumption of resulting trust. However, this will be rebutted by the slightest evidence that a gift was intended. As Lord Upjohn observed in Pettitt v Pettitt:

‘If a wife puts property into her husband’s name it may be that in the absence of all other evidence he is a trustee for her, but in practice there will in almost every case be some explanation (however slight) of this (today) rather unusual course. If a wife puts property into their joint names I would myself think that a joint tenancy was intended, for I can see no other reason for it.’\(^\text{85}\)

In Knightly v Knightly\(^\text{86}\) the Court of Appeal went so far as to say there is no room for the presumption of a resulting trust in favour of a wife unless ‘a wife advances money to her husband for the purchase of either realty or personality and there is no evidence of any agreement or understanding between them as to who is to own the property and no evidence from conduct and circumstances going to show what their intentions as to rights and interests were’.\(^\text{87}\)

\(^{82}\) (1875) LR 10 Ch App 343.
\(^{83}\) Where the presumption of advancement would apply. See below, p 253.
\(^{87}\) (1981) 11 Fam Law 122 at 123, per Lawton LJ.
(c) Admissibility of evidence to rebut a presumption of resulting trust

Any acts or declarations by the parties forming part of the transaction to which the presumption of a resulting trust relates will be admissible in favour of, or against, the parties performing them. However, in Shephard v Cartwright⁸⁸ the House of Lords held, in the context of the rebuttal of a presumption of advancement, that subsequent acts and declarations are admissible only as evidence against the party who made them, and not in his favour.

(5) Presumed resulting trust arising in the context of an illegal purpose⁸⁹

In Tinsley v Milligan⁹⁰ the House of Lords was faced with the question whether a plaintiff was entitled to rely on a presumption of resulting trust arising in the context of a transaction entered to facilitate an illegal purpose. As was mentioned above, a house had been purchased in the sole name of Tinsley, using the joint money of Tinsley and Milligan. The reason for this was to enable Milligan to appear to be a mere lodger in the property, rather than a co-owner, so that she could make false claims for various state social welfare benefits. After the breakdown of their relationship, Milligan claimed that Tinsley held the house on trust for them in equal shares. Tinsley claimed that the court should not enforce Milligan’s claim because of the illegal purpose for which the transaction had taken place, demanding a strict application of the maxim that ‘he who comes to equity must come with clean hands’. This would obviously have the consequence that Tinsley was solely entitled to the house, despite the fact that she had been as much party to the illegality as Milligan. Whilst this might have seemed a harsh result between the specific parties, especially given that the falsely claimed social security money had been repaid, the strict rule was intended to operate as a deterrent to those who might be tempted to involve themselves in illegal transactions.

The majority of the Court of Appeal rejected the application of such a strict principle in favour of the adoption of a ‘public conscience test’, which would vest the court with a discretion to balance the consequences of either granting or refusing relief to the person seeking to claim an interest.⁹¹ The House of Lords in turn rejected this discretionary approach, favouring the application of a strict rule to determine when a plaintiff could assert an interest. However it was divided as to the appropriate rule. Lord Goff and Lord Keith held that the equitable maxim requiring clean hands should be strictly applied. Lord Goff explained how this would operate:

‘... once it comes to the attention of a court of equity that the claimant has not come to the court with clean hands, the court will refuse to assist the claimant, even though the claimant can prima facie establish his claim without recourse to underlying fraudulent or illegal purpose.’⁹²

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In contrast the majority adopted an evidential approach, whereby a claimant is entitled to enforce an equitable interest provided that he or she did not have to rely on the fact of the illegal purpose in order to establish that interest. Lord Browne-Wilkinson stated the principle:

‘In my judgement the time has come to decide clearly that the rule is the same whether a plaintiff founds himself on a legal or equitable title: he is entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction.’

He explained how this principle applied where the alleged equitable interest had arisen through the operation of a presumption of a resulting trust:

‘The presumption of resulting trust is . . . crucial in considering the authorities. On that presumption . . . hinges the answer to the crucial question: does a plaintiff claiming under a resulting trust have to rely on the underlying illegality? Where the presumption of resulting trust applies, the plaintiff does not have to rely on the illegality. If he proves that the property is vested in the defendant alone but that the plaintiff provided part of the purchase money, or voluntarily transferred the property to the defendant, the plaintiff establishes his claim under a resulting trust unless either the contrary presumption of advancement displaces the presumption of resulting trust or the defendant leads evidence to rebut the presumption of resulting trust. Therefore, in cases where the presumption of advancement does not apply, a plaintiff can establish his equitable interest in the property without relying in any way on the underlying illegal transaction.’

Applying this principle it was therefore held that Milligan was entitled to assert her entitlement to a half-share of the equitable ownership of the house, since all she needed to do to establish her interest was to prove that she had contributed to the purchase prices. This would give rise to a presumption of resulting trust in her favour, and she did not need to rely on the illegal purpose underlying the transaction.

The evidential approach adopted in Tinsley v Milligan has been applied in subsequent cases. In Silverwood v Silverwood an elderly lady had transferred money to her grandchildren to enable her to claim income support to contribute towards the costs of her residential care. The Court of Appeal held that the plaintiff, who was a beneficiary under her will, was entitled to maintain that the money was held on resulting trust by the recipients, as he did not need to rely on the illegality to establish the resulting trust. Peter Gibson LJ also stated that it would be absurd and unjust if he could not lead evidence of fraud in order to disprove a spurious defence by the recipients. In Lowson v Coombes a man had purchased a flat together with his mistress, but it was conveyed into her sole name so that his wife would not be able to maintain any claim to it. The Court of Appeal held that he was entitled to assert a half-interest by way of a resulting trust, despite the illegal purpose of frustrating any potential claim under Matrimonial Causes Act 1973, because he did not need to rely on the illegal purpose to establish his entitlement.

However it has also been subjected to criticism. In *Silverwood v Silverwood* Nouse LJ described the principle adopted in *Tinsley v Milligan* as a 'straightjacket' and indicated that he would have preferred a more flexible approach. In particular the approach adopted by the House of Lords arbitrarily differentiates between situations where a presumption of resulting trust and a presumption of advancement are operative. Whilst Milligan was held able to assert her interest by way of a presumed resulting trust without the need to rely on the fact of her illegal conduct, a more difficult problem would have arisen if the countervailing presumption of advancement had applied between Tinsley and herself. In such circumstances she would only have been entitled to assert her interest if she could rebut the presumption, which would require evidence of the illegal purpose of the transaction. The Court of Appeal was forced to grapple with such a difficulty in *Tribe v Tribe*, where a presumption of advancement did arise between the parties. As Nourse LJ observed in *Silverwood v Silverwood*:

'It is not at all easy to understand or to see any public or other policy or advantage behind a rule which regulates the claimant’s right of recovery solely according to whether the other party to the transaction is his wife, child or fiancée on the one hand or his brother, grandchild or anyone else on the other.'

Lord Goff, in his dissenting judgment, also pointed to the arbitrary consequences which might follow from the application of the principle adopted by the majority in *Tinsley v Milligan*:

‘But it is not to be forgotten that other cases in this category will not evoke the same sympathy on the part of the court. There may be cases in which the fraud is far more serious than that in the present case, and is uncovered not as a result of a confession but only after a length police investigation and a prolonged criminal trial. Again there may be cases in which a group of terrorists, or armed robbers, secure a base for their criminal activities by buying a house in the name of a third party not directly implicated in those activities. In cases such as these there will almost certainly be no presumption of advancement. Is it really to be said that criminals such as these, or their personal representatives, are entitled to invoke the assistance of a court of equity in order to establish an equitable interest in property?’

In the light of such criticisms the law regarding illegality has recently been reviewed by the Law Commission, which has recommended the abandonment of the ‘reliance principle’ adopted in *Tinsley v Milligan* in favour of granting the court a discretion to declare a trust illegal or invalid. The operation of this proposed discretion is discussed in more detail below in the context of the operation of the presumption of advancement, since this has provided the context for the more serious difficulties.

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100 [1993] 3 All ER 65 at 79.
3 The presumption of advancement

(1) Nature of the presumption

In some circumstances where a person voluntarily transfers property into the name of another, or contributes to its purchase, the law presumes that a gift was intended and that the transferor/contributor did not intend to retain any interest in the property concerned. This presumption, known as the ‘presumption of advancement’, displaces the presumption of resulting trust. The presumption of advancement arises as a consequence of a pre-existing relationship between the parties to the transfer or acquisition, where the transferor/contributor is regarded as morally obliged to provide for the person benefiting. As Lord Eldon stated in Murless v Franklin:

‘The general rule that on a purchase by one man in the name of another, the nominee is a trustee for the purchaser, is subject to exception where the purchaser is under a species of natural obligation to provide for the nominee.’

The range of relationships where equity recognises a presumption of advancement reflects a nineteenth-century understanding of family responsibility, and it is clear that, today, the strengths of the presumptions vary to reflect differing social circumstances. However, the state of the law in this area remains far from satisfactory.

(2) Relationships giving rise to a presumption of advancement

(a) Father and child

Traditionally, there was a strong presumption of advancement between a father and his child. In Re Roberts (Decd) Evershed J held that the presumption of advancement applied where a father had made payments on a policy of assurance taken out on his son’s life. He said that:

‘... It is well established that a father making payments on behalf of his son prima facie, and in the absence of contrary evidence, is to be taken to be making and intending an advance in favour of the son and for his benefit.’

In B v B a Canadian court held that the presumption of advancement applied where a father had purchased a winning lottery ticket in the name of his 12-year-old daughter. She was therefore entitled to the winnings absolutely. The rationale for the presumption of advancement between a father and child is that a father, by the very nature of his position, is under a duty to provide for his child. This may include the child’s mother.
if she stands in loco parentis. There is no presumption of advancement in the case of other family relationships.108

The strength of this presumption of advancement between a father and child was questioned by the Court of Appeal in *McGrath v Wallis*,109 where Nourse LJ stated:

‘Ever since the decision in *Pettitt v Pettitt* it has been my understanding that, in its application to houses acquired for joint occupation, the equitable presumption of advancement has been reclassified as a judicial instrument of last resort, its subordinate status comparable to that of the contra proferentem rule in the construction of deeds and contracts . . . For myself, I have been unable to recollect any subsequent case of this kind in which the presumption has proved decisive . . .’110

(b) Persons standing in loco parentis

A presumption of advancement also arises between a child and a person standing in loco parentis.111 The rationale for this extension of the presumption was stated by Jessel MR in *Bennet v Bennet*:

‘. . . as regards a child, a person not the father of the child may put himself in the position of loco parentis to the child, and so incur the obligation to make provision for the child . . .’112

(c) Husband and wife

The presumption of advancement also arises between a husband and his wife. The principle was stated in *Re Eykyn’s Trusts*, by Malins V-C:

‘The law of this court is perfectly settled that when a husband transfers money or other property into the name of his wife only, then the presumption is, that it is intended as a gift or advancement to the wife absolutely at once, subject to such marital control as he may exercise. And if a husband invests in money, stocks, or otherwise, in the names of himself and his wife, then also it is an advancement for the benefit of the wife absolutely if she survives her husband . . .’113

The operation of the presumption in this context reflects a nineteenth-century social understanding of a husband’s obligation to provide for his wife.

Although these comments were cited in *Pettitt v Pettitt*,114 the House of Lords acknowledged that the presumption between husband and wife had reduced in significance.115 Lord Reid suggested that the only reasonable basis for the presumption had been the economic dependence of wives on their husbands, and that given the

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108 Eg sister ([Noack v Noack](1959) VR 137; [Gorog v Kiss](1977) 78 DLR (3d) 690); son-in-law ([Knight v Biss](1954) NZLR 55); and nephew ([Dury v Dury](1675) 75 SS 205; [Russell v Scott](1936) 55 CLR 440).


111 [1870] LR 11 Eq 10; [Re Orne](1883) 50 LT 51; [Shephard v Cartwright](1955) AC 431; [Re Paradise Motor Co Ltd](1968) 1 WLR 1125, CA.

112 (1878–79) LR 10 Ch D 474. 113 (1877) 6 Ch D 115 at 118.


115 See [Silver v Silver](1958) 1 All ER 523 at 525, per Evershed MR. The presumption of advancement between husband and wife also applies in Ireland and Australia: *[Heavey v Heavey]* [1971] 111 ILTR 1; *[M v M]* [1980] 114 ILTR 46; *[Doohan v Nelson]* [1973] 2 NSWLR 320; *[Napier v Public Trustee (Western Australia)]* (1980) 32 ALR 153.
changes in social circumstances ‘the strength of the presumption must have much diminished’.116

Lord Diplock considered that it was not appropriate that transactions between married couples should be governed by presumptions ‘based upon inferences of fact which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era’.117 The presumption of advancement also applies between a man and his fiancée.118

(3) Relationships where no presumption of advancement arises

(a) Mother and child119

No presumption of advancement arises between a mother and her child, and therefore if a mother transfers property voluntarily to her child the counter presumption of resulting trust will apply.120 In *Bennet v Bennet*121 Jessel MR explained the absence of the presumption on the basis that ‘there is no moral legal obligation . . . no obligation according to the rules of equity—on a mother to provide for her child’.122 Again, such reasoning reflects nineteenth-century concepts of the family, and in modern social conditions mothers almost invariably share the responsibility to provide for their children.123 Despite the socially archaic rationale, more modern cases have confirmed that there continues to be no presumption of advancement between a mother and child. The presumption of resulting trust was applied by the Court of Appeal in *Gross v French*,124 and by Hoffmann J in *Sekhon v Alissa*.125 In the latter case, a mother had provided £22,500 to help her daughter purchase a house. In the absence of sufficient evidence to rebut the presumption of a resulting trust, the mother was held entitled to an interest in the property.

Despite the absence of a presumption of advancement between mother and child the presumption of resulting trust arising in default is relatively weak and easily rebutted. As Jessel MR said in *Bennet v Bennet*:

‘We arrive then at this conclusion, that in the case of a mother . . . it is easier to prove a gift than in the case of a stranger: in the case of a mother very little evidence beyond the relationship is wanted, there being very little additional motive required to induce a mother to make a gift to her child.’126

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120 *Re De Visme* (1863) 2 De GJ & Sm 17; *Bennet v Bennet* (1878–79) LR 10 Ch D 474. See also: *Sayre v Hughes* (1867–68) LR 5 Eq 376; *Gore-Grimes v Grimes* [1937] IR 470.
121 (1878–79) LR 10 Ch D 474. 122 ibid at 478.
122 Compare *Dullow v Dullow* [1985] 3 NSWLR 531.
124 (1879) 10 Ch D 474 at 480. See, however, *Sekhon v Alissa* [1989] 2 FLR 94, where Hoffmann J held that the evidence was inconsistent with there being a gift.
In *Nelson v Nelson*\(^{127}\) the Australian High Court has held that a presumption of advancement should operate between a mother and child.\(^{128}\) In England the recent decision in *Re Cameron (Decd)*\(^{129}\) suggests a possible avenue by which it might be found that the presumption should operate between a mother and child. Lindsay J held that, in the light of the difference between Victorian and modern attitudes to the ownership and ability to dispose of property, it would be appropriate nowadays to take both parents to be in loco parentis unless the contrary is proved for the purposes of the succession rule against double portions.\(^{130}\)

(b) Wife and husband

Similarly, no presumption of advancement operates between a wife and her husband, so that if a wife voluntarily transfers property into the name of her husband, or contributes to the purchase of property in his name, a presumption of resulting trust arises. Thus, in *Re Curtis*,\(^{131}\) in the absence of evidence that a gift was intended, a wife was presumed to enjoy the equitable interest in shares, which she had voluntarily transferred into the name of her husband, by way of a resulting trust.\(^{132}\) The absence of the presumption seems to have been accepted in the more recent case of *Mossop v Mossop*,\(^{133}\) and led to the presumption of a resulting trust in *Abrahams v Trustee in Bankruptcy of Abrahams*,\(^{134}\) where a wife contributed to a syndicate purchasing National Lottery tickets in the name of her husband.

The absence of the presumption of advancement between a wife and her husband reflects nineteenth-century social circumstances. As was noted above,\(^{135}\) in *Pettitt v Pettitt*\(^{136}\) the House of Lords held that the presumption of resulting trust between a wife and her husband was of much diminished strength and would be rebutted by very slight evidence that a gift was intended.

(c) Co-habiting couples/mistresses

There is no presumption of advancement between cohabiting couples (whether heterosexual or homosexual),\(^{137}\) nor between a man and his mistress.\(^{138}\) The presumption of resulting trust will therefore apply if property is voluntarily transferred in such cases.

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128 In *Re Dreger Estate* (1994) 97 Man R (2d) 39 it was held that in modern conditions the presumption of advancement ought to be applicable between mother and child.
129 [1999] 2 All ER 924.
130 [1999] 2 All ER 924 at 939.
131 (1885) 52 LT 244.
132 See also *Mercier v Mercier* [1903] 2 Ch 98; *Pearson v Pearson* (1965) Times, 30 November; *Pettitt v Pettitt* [1970] AC 777; *Heseltine v Heseltine* [1971] 1 WLR 342; *Northern Bank Ltd v Henry* [1981] IR 1; *Allied Irish Banks Ltd v McWilliams* [1982] NI 156.
135 See above, p 249.
138 *Diwell v Farnes* [1959] 1 WLR 624.
(4) Rebutting a presumption of advancement

(a) Evidence required to rebut a presumption of advancement

A presumption of advancement will be rebutted by evidence that the transferor (or contributor) did not intend to make a gift but wished to retain an interest in the property transferred or acquired. In Re Gooch Sir Daniel Gooch transferred shares into the name of his eldest son. The son paid the dividends from the shares to his father, who also retained the share certificates. Kay J held that the presumption of advancement was rebutted by evidence that the shares had been transferred to qualify the son to become a director of the company, and that no gift had been intended. In Warren v Gurney a father purchased a house in the name of his daughter prior to her wedding. He retained the title deeds until his death. The Court of Appeal held that the presumption of advancement was rebutted by evidence that at the time of the transaction the father had intended her husband to repay the money. The retention of the title deeds was considered a very significant fact, as ‘one would have expected the father to have handed them over either to [his daughter] or her husband, if he had intended the gift’. In McGrath v Wallis a house was acquired for joint occupancy by a father and son in the sole name of the son. The purchase price was provided partly by the proceeds of sale of the father’s previous house and partly by means of a mortgage. The Court of Appeal held that the presumption of advancement was rebutted by evidence that the father had intended to retain an interest in the ownership of the house, including an unsigned declaration of trust which would have shared the beneficial ownership in the proportions represented by the deposit and mortgage respectively.

The mere fact that any rents and profits generated from the property concerned are returned to the purchaser or transferor will not conclusively rebut a presumption of advancement. In Stamp Duties Comrs v Byrnes a father had purchased property in Australia in the name of his sons. They paid over to him the rents received from the properties, and he paid for rates and repairs. The Privy Council held that as it was not unusual for a father to transfer property to a son whilst continuing to receive any rents and profits during his lifetime, the presumption of advancement had not been rebutted:

‘Having regard to the state of the family and the relations subsisting between Mr Byrnes and his two sons who were living at home, it seems very natural that the sons receiving advances should yet feel a delicacy in taking the fruits during their father’s lifetime. They had all they wanted as things were, and if they were unduly favoured it might possibly have created some feeling of jealousy among the rest.’

Although the opening of a bank account by a husband in the joint names of himself and his wife will lead to the presumption of a joint tenancy of the money therein, the

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139 (1890) 62 LT 384.
140 [1944] 2 All ER 472. See also Webb v Webb [1992] 1 All ER 17; refd [1994] 3 All ER 911.
141 [1944] 2 All ER 472 at 473, per Morton LJ.
143 [1911] AC 386.
144 [1911] AC 386 at 392.
presumption of advancement operating between them may be rebutted. In *Marshal v Crutwell* 146 it was held that the presumption of advancement was rebutted where a husband had transferred his bank account into the joint names of himself and his wife. The court held that the transfer was merely for convenience, since the husband was in ill health and could not draw cheques himself. His wife was not therefore entitled to the balance in the account on his death. In *Anson v Anson* 147 the presumption of advancement was rebutted where a husband had entered a guarantee of an overdraft on a bank account in his wife’s name. After their divorce he was called to pay £500 to the bank under the guarantee, and demanded repayment from the wife. Pearson J held that the intention was that the debt would remain her debt, and the guarantee to the bank was not intended to relieve her of her obligation but merely to solve her immediate banking emergency.

(b) Rebuttal of a presumption of advancement by evidence of an illegal purpose 148

It has been seen above that, as a general rule, a plaintiff will not be permitted to rely on evidence of his own illegal conduct to rebut a presumption of resulting trust. 149 He will similarly be prevented from relying on evidence of an illegal purpose to rebut a presumption of advancement. In *Gascoigne v Gascoigne* 150 a husband took a lease of land in his wife’s name. The judge at first instance held that the presumption of advancement was rebutted by evidence that he had not intended to make a gift of the lease to his wife because it had been taken in her name only to defeat the claims of his creditors. However, the Court of Appeal held that he was not entitled to rebut the presumption by raising evidence of the illegal purpose underlying the transaction:

‘... what the learned judge has done is this: He has permitted the plaintiff to rebut the presumption which the law raises by setting up his own illegality and fraud, and to obtain relief in equity because he has succeeded in proving it. The plaintiff cannot do this...’ 151

This restriction was followed by the Court of Appeal in *Tinker v Tinker (No 1)*, 152 where a husband had purchased a house in the name of his wife, on the advice of his solicitor, again with the intention of preventing the house being seized by creditors if his business failed. On the breakdown of the marriage it was held that he could not rebut the presumption of advancement. Lord Denning MR stated:

‘... he cannot say that the house is his own and, at one and the same time, say that it is his wife’s. As against his wife, he wants to say that it belongs to him. As against his creditors, that it belongs to her. That simply will not do. Either it was conveyed to her for her own use absolutely; or it was conveyed to her as trustee for her husband. It must be one or the other. The presumption is that it was conveyed to her for her own use: and he does not rebut that presumption by saying that he only did it to defeat his creditors...’ 153

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In *Re Emery’s Investments Trusts*¹⁵⁴ a husband was held unable to rebut a presumption of advancement when he had purchased American stock in the name of his American wife to avoid taxation under American Federal law, and in *Chettiar v Chettiar*¹⁵⁵ a father could not rebut a presumption of resulting trust where he had purchased a rubber estate in the name of his son to avoid a provision restricting the maximum area of rubber land that an individual could own.

Whilst the policy objective of this strict approach is to discourage persons from entering illegal transactions, in the more recent case of *Tribe v Tribe*¹⁵⁶ the Court of Appeal demonstrated a marked reluctance to disallow a father from rebutting the presumption of advancement arising when he had transferred property voluntarily to his son to achieve an illegal purpose. The father was the owner of a majority shareholding in a family company and the tenant of two properties occupied by the company as licensee. The landlord of these premises served notice of various alleged dilapidations on the father, requiring him to carry out substantial repairs. The father was advised by his solicitor that, if the claims were valid, he might be forced to sell the company shares to pay for the repairs. He therefore transferred them to his son as a means of safeguarding his assets. The transfer was stated to be made for a consideration of £78,030, but no money was ever paid. In the event, the father was never required to carry out the repairs and he sought to recover the shares from his son. The son refused to re-transfer them to him, and the father alleged that he held them on bare trust for him. The son argued that the presumption of advancement applied in his favour and that the father could not rebut it by evidence of an illegal attempt to evade his creditors. Whilst accepting that the decision of the House of Lords in *Tinsley v Milligan*¹⁵⁷ had the general effect that a presumption of advancement cannot be rebutted by evidence of an underlying illegal purpose, the Court of Appeal held that this general rule was subject to an exception if the ‘illegal purpose has not been carried into effect’. As Nourse LJ explained:

‘The judge found that the illegal purpose was to deceive the plaintiff’s creditors by creating an appearance that he no longer owned any shares in the company. He also found that it was not carried into effect in any way. [Counsel for the defendant] attacked the latter finding on grounds which appeared to me to confuse the purpose with the transaction. Certainly the transaction was carried into effect by the execution and registration of the transfer. But *Wright’s*¹⁵⁸ case shows that that is immaterial. It is the purpose which has to be carried into effect and that would only have happened if and when a creditor of the plaintiff had been deceived by the transaction. The judge said there was no evidence of that and clearly he did not think it appropriate to infer it. Nor is it any objection to the plaintiff’s right to recover the shares that he did not demand their return until after the danger had passed and it was no longer necessary to conceal the transfer from his creditors. All that matters is that no deception was practised on them. For these reasons the judge was right to hold that the exception applied.’¹⁵⁹

¹⁵⁷ [1993] 3 All ER 65.
¹⁵⁸ *Perpetual Executors and Trustees Association of Australia Ltd v Wright* (1917) 23 CLR 185.
¹⁵⁹ [1995] 4 All ER 236 at 248.
Millet LJ reached the same conclusion but stated the principle more broadly, holding that a person is entitled to recover property transferred for an illegal purpose if he withdrew from the transaction before it was carried out. He attempted to formulate a single unitary principle derived from the equitable doctrines regarding the rebuttal of presumptions of resulting trust and advancement and common law cases where it had been held that a party was entitled to withdraw from an illegal contract. Whilst he made clear that effectual withdrawal from a transaction did not require ‘genuine repentance’ on the part of the wrongdoer, he held that he must have withdrawn voluntarily. There would therefore be no effective withdrawal if ‘he is forced to [withdraw] because his plan has been discovered’.160

Despite the superficial attraction of simplicity, this proposed general approach is inadequate because it is unclear when a transaction has been carried into effect so as to prevent withdrawal. As Millet LJ noted, early common law cases indicated that a party to an illegal contract could withdraw only so long as it has not been completely performed, whereas later decisions held that any recovery under the contract was barred once partial performance had occurred.161 He formulated his general proposition in the following terms:

‘The transferor can lead evidence of the illegal purpose whenever it is necessary for him to do so provided that he has withdrawn from the transaction before the illegal purpose has been wholly or partly carried into effect.’162

It is submitted that this is extremely confusing, as it fails to indicate whether withdrawal is possible in cases where the transaction was partially carried into effect.

Tribe v Tribe is therefore only good authority to the extent that it decides that evidence of an illegal purpose may be admitted to rebut a presumption of advancement if the illegal purpose has not been carried into effect at all. However, even when assessed in the light of this limited proposition, the decision remains unsatisfactory. The conclusion that the illegal purpose had not been carried into effect was artificial, as in reality the act which was intended to achieve the illegal purpose was the transfer of the legal title of the shares to the son, thus on the face of it divesting the father of any interest. It is surely arguable that the illegal object was carried into effect at the very moment that the legal title was effectually transferred to the son. Far from rebutting the presumption of advancement, the very act of transferring the shares to the son with the illegal aim of defeating the creditors reinforces the presumption of a gift to the son. As Millet LJ stated:

‘The only way in which a man can protect his property from his creditors is by divesting himself of all beneficial interest in it. Evidence that he transferred the property in order to protect it from his creditors, therefore, does nothing by itself to rebut the presumption of advancement; it reinforces it. To rebut the presumption it is necessary to show that he intended to retain a beneficial interest and conceal it from his creditors.’163

The reality is that in both Tribe v Tribe and Tinsley v Milligan164 the respective courts...
were attempting to avoid the perceived unfairness that would result from the application of a strict rule against illegality intended to serve a general public policy of deterring wrongdoers. It would seem unfair if Milligan were to be prevented from asserting any entitlement to an equitable share of the house owned at law by Tinsley when they were both parties to the illegal purpose, and the consequence would be that Tinsley received a large windfall gain at Milligan’s expense. The majority of the House of Lords were conveniently able to avoid such a result by exploiting the logic that Milligan merely needed to prove that she had contributed to the purchase price of the house to raise an unrebuttable presumption of resulting trust in her favour. Whilst achieving justice between the parties, the decision represented a move away from the traditional position that a transferor could not recover property transferred in pursuit of an illegal purpose irrespective of whether the presumption of advancement or the presumption of resulting trust applied. *Tinsley v Milligan* therefore introduced an arbitrary distinction, whereby the general rule would apply where there was a presumption of advancement between the parties, but not where there was a presumption of resulting trust. As has been noted above, the circumstances in which a presumption of advancement arises are largely derived from out-dated conceptions of family responsibility. They are riddled with inconsistency, to such an extent that the courts have tended to treat them as of relatively little weight and easily rebutted. Given the inadequacy of the law determining the circumstances in which a presumption of advancement arises, any differentiation between the effects of illegality on such grounds is highly unsatisfactory. As Judge Weekes stated at first instance in *Tribe v Tribe*:

‘Finally, it is not for me to criticise their Lordship’s reasoning, but with the greatest respect I find it difficult to see why the outcome in cases such as the present one should depend to such a large extent on arbitrary factors, such as whether the claim is brought by a father against a son, or a mother against a son, or a grandfather against a grandson.’

What is needed is an approach which operates consistently, irrespective of the nature of the presumption applicable. Such consistency could have been obtained by retention of the traditional rule that an equitable interest cannot be asserted by a transferor of property if the purpose of the transfer was to give effect to an illegal purpose, irrespective of whether there was a presumption of advancement or resulting trust. Instead, the estate would ‘lie where it falls’. However, this approach was rejected by the majority in *Tinsley v Milligan* precisely because it would lead to unfairness in individual cases. It was also rejected by the High Court of Australia in *Nelson v Nelson*, where Deane and Gummow JJ described it as a ‘harsh and indiscriminate principle’. In that case the approach of the House of Lords in *Tinsley v Milligan* was also rejected on the grounds that it generated different results which were ‘entirely fortuitous being dependent upon the relationship between the parties’, and therefore ‘wholly unjustifiable on any policy ground’. The High Court held that a person should only be prevented from asserting an equitable right if to allow him to do so would be inconsistent with the public policy

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165 Quote by Nourse LJ [1995] 4 All ER 236 at 244. See also *Collier v Collier* [2003] WTLR 617 at 654–655, per Mance LJ.

166 (1995) 132 ALR 133.

167 (1995) 132 ALR 133 at 166, per Dawson J.
applicable to the specific right claimed. Applying this test, the High Court held that public policy did not prevent a mother asserting an equitable interest in property she had transferred to her children. Mrs Nelson had provided the purchase money for a house which was transferred into the names of her two children to enable her to obtain a subsidised advance towards the purchase of another house under the Australian housing legislation. To obtain such an advance she had to declare that she did not own, or have an interest, in any other house. After she had received the advance the first house was sold, and one of the children claimed that he was entitled to half the proceeds of sale. It was held that Mrs Nelson could rebut the presumption of advancement operating in favour of the children because the policy of the particular legislation concerned would ‘not be defeated if the court enforces her equitable right’. Thus, the court was willing to allow Mrs Nelson to assert her equitable entitlement even though the illegal purpose had been carried into effect, a result which would not have been possible through an application of the principles adopted in Tribe v Tribe. However, the majority further held that her right to assert her equitable interest should be conditional on repayment of her unlawful benefit to the state.

As was noted above the current law regarding illegality has recently been reviewed by the Law Commission.\textsuperscript{168} Given its unsatisfactory nature the Law Commission has recommended the abandonment of the ‘reliance principle’ adopted in Tinsley v Milligan in favour of a granting the court a discretion to declare a trust illegal or invalid. This discretion would be structured so that a court would have to take into account a number of specified factors in reaching its decisions:

‘... those factors should be: (a) the seriousness of the illegality; (b) the knowledge and intention of the illegal trust beneficiary; (c) whether invalidity would tend to deter the illegality; (d) whether invalidity would further the purpose of the rule which renders the trust “illegal”; and (e) whether invalidity would be a proportionate response to the claimant’s participation in the illegality.’\textsuperscript{169}

It remains to be seen whether this proposal is implemented. Whilst there are undoubtedly problems with the current law, especially the arbitrary distinction between situations where the presumption of resulting trusts and the presumption of advancement apply, it should be noted that all members of the House of Lords in Tinsley v Milligan rejected a discretionary approach to the effect of illegality on equitable property rights, preferring strict rules which would determine whether a right could be asserted. In many ways the only logical and consistent approach was that advocated by the dissenting minority, namely that those who seek to assert equitable interests must come to the courts with clean hands.

(c) Admissibility of evidence to rebut a presumption of advancement

As in the case of the rebuttal of presumptions of a resulting trust,\textsuperscript{170} only evidence of the plaintiff’s acts and declarations contemporaneous with the transaction are


\textsuperscript{169} [2000] RLR 82 at para 8.63.

\textsuperscript{170} See above, p 250.
admissible in his favour to rebut the presumption of advancement. Evidence of subsequent acts and declarations are only admissible as evidence against him. This principle was stated and applied by the House of Lords in _Shephard v Cartwright_, where Lord Simmonds approved a summary of the law in Snell’s _Equity_

‘The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the acts or made the declaration . . . But subsequent declarations are admissible as evidence only against the party who made them, and not in his favour.’

In 1929 Philip Shephard subscribed for shares in the name of his children. In 1934 the shares were sold to a company promoted by him, and the children signed the requisite documents at his request without knowing what they were doing. The proceeds of sale were paid into separate deposit accounts in the children’s names. They later signed documents, unaware of their contents, authorising him to withdraw money from the accounts, whereupon he withdrew money from them without their knowledge. In an action by the children against his executors the central issue was whether the presumption of advancement had been rebutted. The House of Lords held that evidence of the father’s acts after the transaction of 1929 were not admissible to prove the rebuttal of the presumption of advancement as they did not form part of the original transaction.

### 4 Reform of presumed resulting trusts

The presumptions of resulting trusts largely operate as a mechanism for allocating the burden of proof when there is a dispute as to intended effect of a transaction on the beneficial ownership of property. As the Australian High Court stated in _Russell v Scott_

‘The presumption of resulting trusts does no more than call for proof of an intention to confer beneficial ownership.’

Thus where the presumption of resulting trust applies a transferee will have to discharge the burden of proof by demonstrating that a gift was intended, whereas if the presumption of advancement applies the transferor will bear the burden of proving that no gift was intended. The presumptions may serve the purpose of protecting vulnerable individuals where property has been transferred, or contributions made, in circumstances where there was very little evidence as to the intended nature of the transaction.

However the operation of the presumptions can be criticised on the grounds that they are archaic and anachronistic. The presumptions themselves are based on

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173 Similarly, evidence of the children’s acts in signing the documents at their father’s request were not admissible against them, because they had been unaware of the contents.
174 (1936) 55 CLR 440, per Dixon and Evatt J.
nineteenth-century concepts of the family. Despite judicial comments that they are often inappropriate to modern situations, that they have lost much of their force, or are easily rebutted, they continue to enshrine outdated paternalistic and chauvinistic values. In the area of matrimonial property the inconsistencies are glaring, for example the presumption of advancement is applied between a husband and wife, but the presumption of resulting trust between a wife and a husband. These difficulties were recognised by the Law Commission in their Report, *Family Law: Matrimonial Property*.\(^ {175}\) It concluded that the present law was unsatisfactory because:

‘... its application may not result in co-ownership of property even when a married couple desire this. Actual ownership may be held to depend on factors which neither party considered significant at the time of acquisition. In its treatment of money allowances and gifts of property the law discriminates between husband and wife.’\(^ {176}\)

In the light of this inadequacy, the Law Commission considered a number of alternatives for reform. They rejected the wholesale introduction of community of property during marriage, whereby some or all of the property of a married couple would be automatically co-owned during the marriage, as unacceptable because it does not permit independent management during the marriage.\(^ {177}\) Instead, they proposed a rewriting of the presumptions between a married couple in a manner which accords more closely to their likely intentions:

(i) Where money is spent to buy property, or property or money is transferred by one spouse to the other, for their joint use or benefit the property acquired or money transferred should be jointly owned.

(ii) Where money or property is transferred by one spouse to the other for any other purpose, it should be owned by that other.

In both cases, the general rule should give way to a contrary intention on the part of the paying or transferring spouse, provided that the contrary intention is known to that other spouse.\(^ {178}\)

Under these revised presumptions, a presumption of advancement would apply to both husbands and wives.\(^ {179}\) The proposal would apply to married or engaged couples. In any event the gender bias of the presumptions may also contravene the European Convention on Human Rights.\(^ {180}\)

5 Resulting trusts operating to reverse unjust enrichment?

At the beginning of this chapter it was noted that there are two categories of resulting trusts recognised in English law, historically differentiated as ‘presumed’ and ‘automatic’ resulting trusts. However, a great deal of recent debate has been addressed to the

\(^ {175}\) Law Com No 175 (1988).
\(^ {176}\) Para 2.8.
\(^ {177}\) Paras 3.3–3.6.
\(^ {178}\) Para 4.1.
\(^ {179}\) Para 4.19.
question whether a third type should be recognised, namely a restitutionary resulting trust which arises for the purpose of reversing unjust enrichment. Although English law did not historically recognise a right to restitution founded on a general principle against unjust enrichment, in Likpin Gorman v Karpnale Ltd the House of Lords held that ‘unjust enrichment’ should be recognised as a valid autonomous cause of action. This recognition has been reiterated in many subsequent decisions and is now beyond doubt. A plaintiff will be entitled to restitution whenever he can demonstrate that the defendant was unjustly enriched at his expense. Where a plaintiff can demonstrate an entitlement to receive restitution from the defendant, the question arises as to the nature of the remedy available to him to effect such restitution. The plaintiff will generally be entitled to a personal remedy, requiring the defendant to pay over to him an amount equivalent to the enrichment that had been received, but this remedy will be of little use if the defendant is insolvent. If, however, it can be shown that property constituting the enrichment received by the defendant was subjected to a trust, the plaintiff will be able to assert a proprietary claim to any assets remaining in the defendant’s hands which are the traceable proceeds of the enrichment received. Such a trust will not arise expressly and there would be no grounds for finding a presumed resulting trust.

However, in a significant article, Professor Birks argued that a resulting trust should arise whenever a defendant receives an unjust enrichment conferred by mistake or under a contract the consideration for which wholly fails. If such a resulting trust were to arise from the mere fact of enrichment in such cases the plaintiff would be entitled to a proprietary remedy. This thesis was considered in Westdeutsche Landesbank Girozentrale v Islington London Borough Council, where it was comprehensively rejected by the House of Lords, which preferred the critical approach of William Swadling. The case involved an interest rate swap agreement entered between the plaintiff bank and the defendant local authority. Under the agreement the bank made a payment of £2.5m to the authority. However, as a consequence of the decision of the House of Lords in Hazell v Hammersmith and Fulham London Borough Council, the contract between the parties was ultra vires the local authority and therefore void. The bank sought restitution of the balance of the payment it had made, less the repayments the authority had already made, together with interest. In the House of Lords the sole remaining question was as to the nature of the interest payable on the award of restitution. If the bank was only entitled to restitution at common law then the court had no jurisdiction to award compound interest. However, the bank alleged that the payment had been received subject to a resulting trust, because the contract under which it was made was void, thus rooting their claim in equity and entitling the

court to award compound interest. However, Lord Browne-Wilkinson explained that
the circumstances of the payment could not have given rise to a resulting trust:

‘Applying these conventional principles of resulting trust to the present case, the bank’s
claim must fail. There was no transfer of money to the local authority on express trusts:
therefore a resulting trust of type (B) above could not arise. As to type (A) above, any
presumption of resulting trust is rebutted, since it is demonstrated that the bank paid, and
the local authority received, the upfront payment with the intention that the moneys so
paid should become the absolute property of the local authority. It is true that the parties
were under a misapprehension that the payment was made in pursuance of a valid contract.
But that does not alter the actual intentions of the parties at the date the payment was
made . . . ’187

He further elucidated three reasons for rejecting Professor Birks’ thesis that the concept
of the resulting trust should be extended to provide a plaintiff with a proprietary
remedy whenever he had transferred value to a defendant under a mistake or subject to
a condition which is not subsequently satisfied. First, he held that trust interests could
not arise in relation to the restitutionary concept of ‘value transferred’ but only in
relation to defined property. Secondly, he considered that a trust would only arise at the
moment that a defendant received a payment if he was aware of the circumstances
alleged to give rise to the trust. Since a recipient of a payment subsequently found void
for mistake or failure of consideration will not have been aware of the circumstances
rendering it void at the date of receipt his conscience cannot have been effected so as to
generate a trust. Thirdly, he noted that the thesis was flawed by the need to artificially
exclude cases of partial failure to perform a contract, despite the fact that the wider
concept logically led to a resulting trust in such cases.

Alongside these conceptual objections to the recognition of restitutionary resulting
trusts, the House of Lords considered that the consequential expansion in proprietary
entitlements would have unacceptable practical consequences for third parties.188 For
example, if money paid under a void contract was subject to a resulting trust, third
parties who entered into transactions with the recipient of the payment might be
affected by the trust interest of the payor, even though no one knew that the contract
was void, so that they could not have been aware of the supposed trust. In the light of
these considerations Lord Browne-Wilkinson concluded:

‘If adopted, Professor Birks’ wider concepts would give rise to all the practical consequences
and injustice to which I have referred. I do not think it right to make an unprincipled
alteration to the law of property (ie the law of trusts) so as to produce in the law of
unjust enrichment the injustices to third parties . . . and the consequential commercial
uncertainty which any extension of proprietary interests in personal property is bound to
produce.’189

Although the House of Lords has rejected the adoption of a wider restitutionary

188 See [1995] RLR 15 (Burrows) for a fuller consideration of the practical implications of the adoption of
restitutionary resulting trusts.
resulting trust, this does not mean that a trust interest will never be raised for the purpose of reversing an unjust enrichment. Lord Browne-Wilkinson stated: ‘Although the resulting trust is an unsuitable basis for developing proprietary restitutionary remedies, the remedial constructive trust, if introduced into English law, may provide a more satisfactory road forward.’\textsuperscript{190}

The nature of the remedial constructive trust is examined in the following chapter.

\textsuperscript{190} [1996] AC 669 at 709, 716.