

Implied, Resulting or Constructive Trust?

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In the past two or three decades, there has arisen “a new field of discord liable to explode into litigation. It arises whenever parties either within or without the bonds of matrimony have lived in a home owned by one, and the other has contributed to its acquisition, its maintenance, its equipment with furniture or the running expenses of the household and their relationship has been dissolved without any clear agreement as to their property rights.”¹ Given that the courts emphasise the need to adhere to established property rights, they have, in order to establish those rights in the “new fields of discord”, which indeed has exploded into litigation, had recourse, in the absence of precise statutory provisions, to the doctrines of Equity. The result seems to have been the creation of a new class of trusts, developed from, but distinct from these concepts, or at least not entirely coincident with them.

“Equity is not past the age of child-bearing. One of her latest progeny is a constructive trust of a new model”²

or as Glass JA expressed it, perhaps more cautiously, in *Allen v. Snyder*:

“New situations have, it appears, produced some new legal rules. It is inevitable that judge made law will alter to meet the changing conditions of society. That is the way it has always evolved. But it is essential that new rules should be related to fundamental doctrine. If the foundations of accepted doctrine be submerged under new principles without regard to the interaction between the two, there will be high uncertainty as to the state of the law, both old and new. So it seems to me that a construction of the new rules which can accommodate them within the old structure is to be preferred to one which does not.”³

The purpose of this article is to examine this new manifestation in the light of established fundamental doctrine to consider how far, if at all, it derives from or

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1. *Allen v. Snyder* (1977) 2 N.S.W.L.R. 685, per Glass JA.

2. *Eves v. Eves* [1975] 3 All E.R. 768, 771 per Lord Denning MR, although, of course, as Bagnall J opined in *Cowcher v. Cowcher* [1972] 1 W.L.R. 425, 430, the progeny must be legitimate.

3. (1977) 2 N.S.W.L.R. 685, 689 per Glass JA.

can be accommodated within the traditional framework; whether it is merely an extension of existing concepts, identifiable as such or, as it may appear, a rather new concept which borrows from, *inter alia*, each of the trust concepts, the resulting and constructive trust. Simply, the purpose here is to seek to find the real nature of the new trust, by discovering its relation to fundamental doctrine; its accommodation within old structures.

The problem of identity

There does seem to be some judicial uncertainty as to the most appropriate structural basis. So, for the moment, for want of any better description, the new trust may be called, in Lord Denning's phrase, "a constructive trust of a new model". This is simply a term of convenience, and is not to be taken as implying either that the term is accurate, or that the criticism of what Lord Denning has proceeded to do in the guise of the new model constructive trust is unfounded. As Glass JA stated in *Allen v. Snyder*: "There is a problem of no inconsiderable dimensions in determining what is the nature of the trust to which the courts give effect upon proof of such an agreement or common intention . . . Is it a new kind of constructive trust, an express trust or a resulting trust?"⁴ Acknowledging, as did Glass JA, that this is a problem of no inconsiderable dimensions, it is intended here, in no doubt a somewhat slight way, to seek a solution to the problem which may have contributed in no small measure to the sense of confusion which appears to surround the post-*Gissing v. Gissing* trust.

Certainly the courts have been rather liberal in their use of descriptive classification often calling it constructive trust but occasionally resulting.⁵ While also, there have been judicial observations that the name is irrelevant. Thus, Lord Diplock's famous observation in *Gissing v. Gissing* begins with the words: "A resulting, implied or constructive trust – and it is unnecessary for present purposes to distinguish between these three classes of trust . . ."⁶ Similarly in the judgment of Fox LJ in *Burns v. Burns*, there occurs the sentence: "Whether the trust which would arise in such circumstances is described as implied, constructive or resulting does not greatly matter."⁷ Even Lord Denning, whose development of the doctrine has been much criticised, expressed the same uncertainty: "Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust: but this is more a matter of words than anything else. The two run together."⁸ The result may be that the already fine lines between the various accepted classes of

4. *Ibid.*, at p.691.

5. *E.g.*, *Burns v. Burns* [1984] 1 Ch. 317, 326, 336; and *Cowcher v. Cowcher* [1972] 1 W.L.R. 425, 432.

6. [1971] A.C. 886, 905.

7. [1984] 1 Ch. 317, 326.

8. *Hussey v. Palmer* [1972] 1 W.L.R. 1286, 1289.

trust are blurred and the way is open for a judicial free-for-all, possibly at a litigant's expense.⁹

The views of American courts will be considered later in the article, but it is pertinent to note the remark of Smith J in *Page v. Clark*.¹⁰

“One major problem is that the point of view taken, or the time frame chosen, by a court for scrutinising a given fact situation will likely determine the label that is eventually applied . . . The same fact situation which gives rise to a resulting trust may also legitimately be labelled one which justifies a constructive trust, if the court chooses to concentrate on an injustice – a broken fiduciary relationship or the like which arose after the original vesting of title, even though the court might decide to relate the wronging back to the date of the transaction. Occasionally a court has conspicuously woven both approaches into one opinion.”

And that can hardly be satisfactory if the law is to retain a semblance of certainty. One manifestation of the free-for-all will now be noted, with the criticism which has been levelled at it, and the subsequent reaction.

The new model constructive trust – a wide trust?

The acknowledged point of departure of the new trust seems to be the decision of the House of Lords in *Gissing v. Gissing* and in particular the much quoted dictum of Lord Diplock:

“A resulting, implied or constructive trust – and it is unnecessary for present purposes to distinguish between these three classes of trust – is created by a transaction between the trustee and the *cestui que trust* in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the *cestui que trust* a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the *cestui que trust* to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.”¹¹

This is a dictum of some width, and therefore perhaps rather apt to be taken out of context, but its very breadth seems to have attracted the later Court of Appeal in England, and in particular Lord Denning. Thus in *Cooke v. Head*, for example, he observed: “It is now held that, whenever two parties by their joint efforts acquire property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust.”¹² Likewise in *Hall v. Hall*, he expressed the

9. See, e.g., *Cowcher v. Cowcher*, *supra*, n.5, at p.430 *per* Bagnall J: “Otherwise, no lawyer could safely advise on a client's title and every quarrel would lead to a lawsuit.”

10. 572 P.2d. 1214 (1977), *per* Smith J at p.1217.

11. [1971] A.C. 886, 905.

12. [1972] 1 W.L.R. 518, 520.

doctrine in the following terms: "If a man and a woman have been living together as husband and wife, and the woman has been contributing towards the establishment of the joint household, although the house is in the man's name, there is a resulting trust as a matter of common justice for her."¹³

In *Hussey v. Palmer* Lord Denning appears to have extended the same doctrine beyond the familiar situation by stating a much wider basis for the new model trust:

"By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it . . . It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution."¹⁴

However, this approach, though recently embraced,¹⁵ has been generally castigated as too broad, indeed a perversion of the principles of equity, designed to do no more than justify the individual judge's ideas of "common justice". Thus, Mahon J, perhaps New Zealand's principal antagonist to the Denning approach, lambasted the application of this new approach expressed in *Hussey v. Palmer* in no uncertain terms:

"I must say that on the facts of this case I think I am being asked to apply a supposed rule of equity which is not only vague in its outline but which must disqualify itself from acceptance as a valid principle of jurisprudence by its total uncertainty of application and result. It cannot be sufficient to say that wide and varying notions of fairness and conscience shall be the legal determinant. No stable system of jurisprudence could permit a litigant's claim to justice to be consigned to the formless void of individual moral opinion."¹⁶

Similar criticism of the Denning approach has been stated by academic writers: "Unfortunately the views of the Courts in these cases [*Gissing and Pettitt*] have been exploited (particularly by Lord Denning) to attain unjustifiable ends which have led to confusion in the meaning to be attributed to the terms 'resulting' and 'constructive' trusts."¹⁷ Reacting, perhaps, to such criticism, the courts have sought to narrow the doctrine of the new model constructive trust to within recognisable limits, and to relate its scope within specific criteria though not, perhaps, identical with established forms of resulting and constructive trust.

13. [1982] 3 F.L.R. 379, 381.

14. [1972] 1 W.L.R. 1286, 1289-90.

15. See, e.g., the observations of Cooke J in *Hayward v. Giordani* [1983] N.Z.L.R. 141, and see *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 87-88 per Toohey J.

16. *Carly v. Farrelly* [1975] 1 N.Z.L.R. 356, 367; and see also *Avondale Printers and Stationers Ltd. v. Haggie* [1979] 2 N.Z.L.R. 124, 154; *Sullivan v. Evans* (1985) 3 N.Z.L.R. 449, 453 per Hardie Boys J.

17. J. Maxton, *Nevill's Law of Trusts, Wills and Administration in New Zealand* (1985), pp.58-59. See also Meagher, Gummow, and Lehane, *Equity-Doctrines and Remedies*, 2nd Ed. (1984), p.69.

The new model constructive trust – narrow form

The context of *Gissing v. Gissing* suggests that the introductory dictum of Lord Diplock is phrased rather too widely, that what that decision expresses is a much narrower doctrine of trust. The tenor of the speeches of the majority in that case, including that of Lord Diplock, is to the effect that rather than seeking to do some sort of pure justice, the courts ought to be giving effect to the agreement, whether express or inferred from their conduct, which the parties had for the distribution of property; that is to say that common intention construed from the circumstances.

“Where there was a common intention at the time of the acquisition of the house that the beneficial interest in it should be shared, it would be a breach of faith by the spouse in whose name the legal estate was vested to fail to give effect to that intention, and the other spouse will be held entitled to a share in the beneficial interest. The difficulty where the dispute is between former spouses arises with regard to proof of the existence of any such common intention . . . If the wife provided part of the purchase price of the house, either initially or subsequently by paying or sharing in the mortgage payments, the inference may well arise that it was the common intention that she should have an interest in the house.”¹⁸

It is therefore established that by whatever name the trust may be called, it is based entirely on notions of common intention, and some direct or indirect contribution to the acquisition or maintenance of the property, which can be regarded as a substantial contribution. As Cooke J said in *Hayward v. Giordani*:¹⁹ “Since *Pettitt v. Pettitt* and *Gissing v. Gissing* it has been orthodox doctrine that when substantial capital contributions have been made to the acquisition or the improvement of a property, and where a common interest of shared beneficial ownership can be inferred, the Court may hold a trust of an appropriate share to exist. It is immaterial that the legal title may be in the name of one party only.”¹⁹

The element in the new model trust in its narrow form can now perhaps be summarised in three heads:-

- (i) the nature of the common intention
- (ii) the nature of the contribution
- (iii) the time for forming that intention

(i) *The nature of the common intention*

The common intention may be expressed as a written or oral agreement, or may be inferred from conduct even though it has been no more than a belief, and not directly communicated. Whether or not there is such common intention is essentially a matter of evidence, but the courts merely give effect to an intention

18. [1971] A.C. 886, 890 *per* Viscount Dilhorne.

19. [1983] N.Z.L.R. 141, 143-4.

which is established, and are not at liberty to impute to them an intention they might have had if they had applied their minds to the question. The intention, therefore, comes from the parties, and not from the courts, or notions of justice: and the intention must be supported by a consideration, in the form of contribution or some detriment in order to be enforceable and not merely a voluntary declaration of trust.²⁰

(ii) *The nature of the contribution*

The common intention may be inferred from conduct, but essentially that seems to mean from some contribution direct or indirect referable to the payment for the property, and may include payments of or towards the deposit, the mortgage repayments, the furniture, or household expenditure. But the payment must be substantial, and not *de minimis*,²¹ and in connection with the household expenditure this must amount to a degree of thrift which allows the other party to make property related payments more easily, or as Lord Denning put it “more than most wives would do”, or at least more than ordinary domestic tasks.²²

Despite the contrary view taken by Lord Denning in *Hall v. Hall* and now enacted in such legislation as the Matrimonial Property Act 1975 (NZ),²³ that: “It depends on the circumstances and how much she has contributed not merely in money but also in keeping up the house and, if there are children, in looking after them”,²⁴ the courts are reverting towards the attitude expressed by Lord Diplock in *Pettitt v. Pettitt*:

“If the husband likes to occupy his leisure by laying a new lawn in the garden or building a fitted wardrobe in the bedroom, while the wife does the shopping, cooks the dinner and bathes the children, I, for my part, find it quite impossible to impute to them as reasonable husband and wife any common intention that their domestic activities or any of them are to have any effect upon the existing proprietary rights in the family home . . .”²⁵

20. *Austin v. Keele* (1987) 72 A.L.R. 579, 587 (P.C.).

21. *Young v. Young* [1984] F.L.R. 375.

22. *Nemeth v. Nemeth* (1977) 17 A.L.R. 500; *Sullivan v. Evans* (1985) 3 N.Z.L.R. 449.

23. This Act provides generally, that husband and wife will share equally in the matrimonial home, and applies the same principle to other matrimonial property except where “his or her contribution to the marriage partnership has been clearly greater than that of the other spouse.” Such contributions may also be of importance in determining shares in the matrimonial home itself in cases of marriages of short duration: sections 11,13,15. Contributions to marriage partnership are widely defined and include, *inter alia*, not only financial contribution but also the care of dependants, and the “management of the household and the performance of household duties.” (s.18); see *Hayward v. Giordani* [1983] N.Z.L.R. 141, 145.

24. (1982) 3 F.L.R. 379.

25. [1970] A.C. 777, 826. See also the observation of Lord Morris of Borth-y-Gest at p.805: “I do not think that the mere circumstance taken by itself that one spouse does work of renovation to a house belonging to the other spouse has the result that some beneficial interest in the house is acquired by the former.”

This view was applied by the Court of Appeal in *Burns v. Burns*, when Fox LJ stated: "But the mere fact that parties live together and do the ordinary domestic tasks is, in my view, no indication at all that they thereby intended to alter the existing property rights of either of them."²⁶

(iii) *The time for forming the intention*

The clear picture which has emerged is that the contribution must be clearly, even if indirectly, related to the property, and this is so whether the analogy of unjust enrichment or proprietary estoppel is taken as the philosophical basis of the new trust. It must almost follow that the common intention finds expression in a contemplation that the parties contribute in accordance with a possibly tacit and unspoken agreement and belief at the time the property was acquired. In other words that the property was acquired on the basis that the contribution would in fact be made. *Prima facie*, therefore, the intent must exist at the outset, though it seems also to be recognised that the common intention may be formed at a later stage and either referred back to the original acquisition or to improvements later undertaken, as the family circumstances alter.²⁷

Such then are the criteria, in brief, of the new trust. In its development, which perhaps began as long ago as 1952, in the case of *Rimmer v. Rimmer*²⁸ it has taken many turns, once treated widely, now more narrowly. Without a doubt it is related to the structure of other trusts. The notion that there must be a contribution seems to derive from traditional resulting trusts, though constituted on a wider footing. On the other hand, the shadow of the doctrine of proprietary estoppel, that a person has expended money or suffered a detriment in reliance upon a belief which has been fostered expressly or tacitly by the title owner, seems to underlie the new trust, and indeed has recently been suggested as a fruitful analogy for development.²⁹

Alternatively, the overall approach may suggest the kind of fraud found in the constructive trust of the *Bannister v. Bannister* type – that of backing out of an agreement or undertaking for which valuable consideration has been given. In this way it perhaps comes close to the express trust employed in *Rochefoucauld v. Boustead* which decision was clearly influential on the Court of Appeal in *Bannister*. Thus the trust contains elements of the more traditional trust absorbing its elements. However there remains the question raised by Glass JA in *Allen v. Snyder*: "Is it a new kind of constructive trust, an express trust or a resulting trust?"³⁰

26. [1984] 1 Ch. 317, 331: in the same case, Nourse LJ said: "In my judgment it must be conduct on which the woman could not reasonably have been expected to embark unless she was to have an interest in the house."

27. *Pettitt v. Pettitt* [1970] A.C. 777, per Lord Morris of Borth-y-Gest; *Bernard v. Josephs* [1982] 1 Ch. 391, 404 per Griffiths LJ.

28. [1953] 1 Q.B. 63.

29. E.g., *Grant v. Edwards* [1986] 1 Ch. 638, per Browne-Wilkinson VC.

30. (1977) 2 N.S.W.L.R. 685, 691.

The New Zealand approach

In the main, the New Zealand Courts³¹ have generally been content to follow the narrower approach of establishing from the circumstances, if at all, the common intention of the parties and giving effect to that intention or agreement,³² and so to eschew the wider approach of Lord Denning. Indeed, as will already have become apparent, there has been strong judicial criticism of Lord Denning's doctrines in New Zealand. The basic application of the common approach in New Zealand can be illustrated by *Buddle v. Russell*³³ where a couple living together in a *de facto* relationship jointly purchased a house which was vested in the name of the woman. The purchase was financed partly from their joint savings and by a loan from her parents, but mainly by means of a mortgage. Heron J observed in the course of the judgment:

"I am not of the view that these two parties were proceeding along different tracks, mistaken as to the intention of one another, and I am of the clear view that at the time the transaction was entered into, the bank arrangements made and the property settled, both parties intended that this house was being purchased for them both."³⁴

On the other hand, the New Zealand Courts have shown some inclination to find that, in the absence of a common intention, some other doctrine of Equity might still be called on: thus in *Beech v. Beech* and *J. N. Elliott and Co Ltd v. Murgatroyd*,³⁶ where the courts found insufficient evidence of a common intention so as to establish a trust, they held that there was nonetheless sufficient to allow the claimant an interest, in the one case of a freehold, in the other a licence, based on the doctrine of proprietary estoppel.

Although in these various ways, the Courts have generally sought to avoid connection with Lord Denning, and possibly in *Gough v. Fraser*³⁷ might be seen as taking some pains to distance itself from *Cooke v. Head*, there is perhaps nonetheless a feeling, at least, that the approach suggested by Lord Denning in that case might have some relevance, if not for determining the existence of an

31. And also apparently those of Australia after *Allen v. Snyder*, *supra*, though this decision may be doubted after *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75.

32. See, e.g., *Gough v. Fraser* [1977] 1 N.Z.L.R. 279, at p.286, where Cooke J expressed the finding of the Court in these terms: "In the light of those findings and the terms of the documents themselves, I think the case is one of the kind mentioned by Lord Diplock in *Gissing v. Gissing* . . . there is an express agreement between the parties as to their respective beneficial interests in land conveyed into the name of one of them, an agreement which itself discloses the common intention required to create a resulting, implied or constructive trust." But the common intention must relate to the property and be more than "a common intention to share the responsibilities and pleasures of day to day living": *Sullivan v. Evans* (1985) 3 N.Z.F.L.R. 449, 453 *per* Hardie Boys J.

33. (1985) 3 N.Z.F.L.R. 506.

34. *Ibid.*, at p.509

35. (1982) 1 N.Z.C.P.R. 454.

36. (1982) 3 N.Z.F.L.R. 119.

37. [1977] 1 N.Z.L.R. 279, see also and more particularly, *Brown v. Stokes* (1980) 1 N.Z.L.P.R. 209, 211-12 *per* Richmond P.

equitable interest, then of the quantification of shares.³⁸ More recently, perhaps spurred by developments in Canada,³⁹ the New Zealand Court of Appeal has been inclined to reconsider the concept of Lord Denning and the allied notion of unjust enrichment. Perhaps this process started with the *obiter* comments of Cooke J in *Browne v. Stokes*⁴⁰ where, after stating that the Denning approach should be regarded as open in New Zealand, he observed:

“In any resolution of the point in New Zealand it will be appropriate to consider *inter alia* whether Lord Denning’s approach is not more consistent with the current and perhaps widely-accepted philosophy that the rights of a partner to a union should not necessarily depend on whether it is a union in law rather than *de facto*.”⁴¹

In the leading case of *Hayward v. Giordani*,⁴² although that case was actually determined on the orthodox doctrine of common intention, Cooke J again explored, *obiter* but with some apparent enthusiasm, the wider possibilities of unjust enrichment and the Denning approach. This theme was continued in the most recent case of *Pasi v. Kamana*⁴³ in which he opined:

“In conducting that enquiry I respectfully doubt whether there is any significant difference between the deemed, imputed or inferred common intention spoken of by Lord Reid and Lord Diplock (and now by the English Court of Appeal in *Grant v. Edwards*) and the unjust enrichment concept used by the Supreme Court of Canada. Unconscionability, constructive or equitable fraud, Lord Denning’s ‘justice and good conscience’ and ‘in all fairness’: at bottom in this context these are probably different formulae for the same idea. As indicated in *Hayward v. Giordani*, I think we are all driving in the same direction.”⁴⁴

In the result in this case, however, neither common intention nor unjust enrichment were found to be established where the parties, having established a *de facto* relationship, moved into a house purchased by the man (Kamana) with the aid of a sum obtained in settlement of a common law injury claim, and a mortgage, but where the woman (Pasi) had made no more than ordinary domestic contributions. Because Cooke P, as he now is, has shown some interest in North American models, as allied with the views of Lord Denning, and before considering further

38. *Ibid* at p.283, per Richmond P.

39. *E.g.*, *Pettikus v. Becker* (1980) 117 D.L.R. (3d) 257.

40. (1980) 1 N.Z.C.P.R. 209.

41. *Ibid.*, at p.213, thus referring to the philosophy underlying the Matrimonial Property Act 1976, which applies only to lawful marriages (see, *supra*, n.23).

42. [1983] N.Z.L.R. 140.

43. [1986] 1 N.Z.L.R. 603.

44. *Ibid.*, at p.205; see also the judgment of McMullin J (at p.607). Some support for this seems to be growing in the High Court of Australia in *Muschinski v. Dodds* (1984) 62 A.L.R. 429 and more recently in *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, 88 *per* Toohey J.

the elements in the new model trust based on common intention, it might be pertinent and helpful to digress momentarily, to see if and how the amalgam of common law jurisdictions which is the substantial part of the United States of America, has approached similar problems.

The analogous American approach

In great measure the criticism of the Denning approach to the new model constructive trust, has been that the approach is essentially American and therefore foreign and different from the English approach. Thus Mahon J observed:

“If, therefore, it is right to say that the constructive trust is now being used by the English Court of Appeal as a general remedial device against unjust enrichment, then one can only reply that such a course is a novel departure from the accepted modes of restitution, and is also a departure from the manner in which English Courts have treated the constructive trust as a legal concept. In England the constructive trust is treated as a substantive principle of liability normally imposed where a fiduciary relationship exists. The American concept is different. The constructive trust in that jurisdiction has merely the status of a procedural device to prevent unjust enrichment, and the latter concept is the controlling principle pursuant to which the remedies of quasi-contract and constructive trust and related equitable remedies together operate.”⁴⁵

Such dismissal of American views of the constructive trust as something rather irrelevant, certainly different, is perhaps a little unfair. Certainly there are elements of great breadth in the American concept of constructive trust as a remedy for unjust enrichment, yet often behind much judicial rhetoric may be found examples similar to those familiar to jurisdictions within the orbit of the House of Lords. The difference between the two approaches is perhaps more of theory than absolute practice but may be more noticeable at the extreme limit of the constructive trust doctrine. In between these extremes, English and American cases seem to run parallel courses on like principles.⁴⁶ The point, simply, is that

45. *Avondale Printers and Stationers Ltd v. Haggie* [1979] 2 N.Z.L.R. 124, 147; and see also A. J. Oakley, *Constructive Trusts* 2nd. Ed. (1987), pp.13 and 36. However see *Baumgartner v. Baumgartner* (1987) 76 A.L.R. 75, 87 where Toohey J noted this doctrine of unjust enrichment as a “Unifying legal concept.”

46. In *Binions v. Evans* [1972] 2 All E.R. 70, 76 Lord Denning had the audacity to cite a generalisation made by Cardozo J in *Beatty v. Guggenheim Exploration Co* (1919) 225 N.Y. 380. Yet apart from the rhetoric of that *dictum*, the decision was simply a case of breach of fiduciary relationships, and might seem to rest happily with such English decisions as *Regal (Hastings) Ltd. v. Gulliver* [1942] 1 All E.R. 378 and more recently *Island Export Finance Ltd. v. Umunna* [1986] B.C.L.C. 460. Indeed the same basic principles of breach of fiduciary relationship can be seen in the more recent decision of the U.S. Supreme Court in *Snepp v. United States* 444 U.S. 507 (1980), a case which is perhaps a shadow of the “Spycatcher” controversy.

because there are differences between the two systems of common law jurisprudence, the similarities ought not to be dismissed.

So in point, perhaps, for the trusts of the new model arising particularly in the familial context, are these words from a leading U.S. authority, *Scott on Trusts*, illustrating that the approach may fundamentally be the same, though labelled as a resulting trust:

“In determining whether the plaintiff has an enforceable claim, the courts may apply the same principles that are applied in the case of married couples. They will consider whether there was an agreement or understanding as to how the property should be shared. They will consider the contributions that the parties have made, directly or indirectly, to the purchase price of the property acquired, and if this cannot be ascertained with any exactness may award a half, or in some cases a third or other fractional interest. As in the case where the parties are married, it is not fatal that the agreement, if any, involves land and is oral. It is not to be expected that they should reduce their agreement to writing. The technical rules as to consideration are not applied, and at any rate the reliance of the one on the undertaking of the other involves the situation of promissory estoppel.”⁴⁷

Perhaps this ought now to be followed up with a few illustrative decisions.

(i) Resulting trust

In *Beal v. Beal* the Supreme Court of Oregon held a resulting trust to exist where a woman and man lived together having jointly entered into a contract as husband and wife to purchase land for \$22,500. Of the \$2,000 deposit, the man paid \$500 and the woman the remaining \$1,500. The balance of the purchase price was to be paid in monthly instalments. All but the first were paid by the man before and after the relationship ended. The woman's income however was used for family expenses, and for those furnishings which were not otherwise paid for from the joint savings account. It was held that there was evidence of an intention to pool their resources for their common benefit and the common intention indicated that the property was to be shared equally in equity, notwithstanding the disproportionate cash contributions to its purchase.

In the course of the judgment of the Court, Howell J said:

“We believe a division of property accumulated during a period of cohabitation must be begun by inquiring into the intent of the parties, and if an intent can be found, it should control the property distribution. While this is obviously true when the parties have executed a written agreement it is just as true if there is no written agreement. The difference is often only the

47. Supplement to *Scott on Trusts*, Ed. Fratcher (1987), p.347. As to the employment of the doctrine of promissory estoppel, see also *Maharaj v. Chand* [1986] 1 A.C. 898.

48. 577 P2d 507 (1978).

sophistication of the parties. Thus absent an express agreement, courts should closely examine the facts in evidence to determine what the parties implicitly agreed upon.”⁴⁹

In *Edwards v. Woods*,⁵⁰ a man and woman in a *de facto* relationship (often in U.S. still termed a ‘meretricious relationship’) had to move from a shared apartment, on the sale of the reversion, but the man used a coincidentally received accident compensation cheque as a down payment on a house, legal title to which was put in the woman’s name. Having determined that no gift was intended in favour of the woman all that remained was to quantify the shares. Harris J in the District of Columbia Court of Appeals defined a resulting trust as “a property relationship designed to effectuate the parties’ intent when a party takes title to property for which another has furnished the consideration . . . if the parties intended each to have equal (or disproportionate) shares that intent should be recognised. As we have said, a purchase money resulting trust is a means to enforce the parties’ intent. If their intent cannot be found a resulting trust must be recognised in Edward’s favour in the same proportion on the amount of consideration furnished by him.”⁵¹

In *Carlson v. Carlson* the facts were rather different. As part of a divorce settlement, the former husband agreed to transfer his undivided half share in the matrimonial property held as tenant in common with his wife, in consideration for a waiver by her of her rights to alimony. Contemporaneously with this transfer of the half share, the wife conveyed the whole to her husband, but continued to live in the property and to pay outgoings on it, except the mortgage repayments which were paid by the husband. It appears that the conveyance to the husband was simply to prevent the property becoming subject to a lien for the wife’s legal expenses and was subject to an oral agreement for further reconveyance back to the wife on request. Although these facts might suggest clearly a resulting trust based simply on a voluntary conveyance on the old authority of *Dyer v. Dyer* and that any question of intent is to be regarded simply for purposes of rebutting a gift or advancement, it seems that the court, while appearing to recognise this, also saw the general intent of the circumstances as going to the root of the resulting trust. Thus Linn J giving the decision of the Appellate Court of Illinois said this:

“A resulting trust is created by operation of law from the presumed intention of the parties. The intent of the parties is inferred from their conduct, relationship and surrounding circumstances . . . If the proof discloses that the parties did not intend the conveyance as a gift, or advancement, equity will effectuate the intention of the parties by declaring a resulting trust.”⁵³

49. *Ibid.*, at p.510.

50. 385 A2d 780 (1978)

51. *Ibid.*, at pp.783-84.

52. 393 NE 2d 643 (1979).

53. *Ibid.*, at pp.664-65.

In *Jiminez v. Jiminez*,⁵⁴ the same court held, in an opinion delivered by Romiti J, that “if one spouse has directly contributed funds which have been used by the other spouse to acquire property, the contributing spouse has an equitable claim to a portion of the property”, but that the court could give effect to an ante-nuptial verbal agreement “to pool their money together in order to purchase real property”, and that such a verbal agreement was not affected by the Statute of Frauds, if the agreement was fully performed by the party seeking to enforce it, as it was held to be here, by the wife’s contribution to the purchase funds. Further it is suggested that the same would apply in the case of *de facto* relationships for, “people who live together as man and wife without benefit of legal marriage may still be bound by express or implied contracts between themselves relating to their acquisition of property.” The court in this case did not attempt to define or categorise the trust found, in favour of the wife. It seems that the basis of the trust was the resulting trust; hence the initial reference to contributions creating an equitable claim. Yet the court seems to go beyond that form of trust in connection with this oral agreement and by raising the issue of the Statute of Frauds, seems to be importing an element of the constructive trust.

ii) Or constructive trust?

That the possibility that the solution to such familial disputes, or wherever the courts are giving effect to an actual agreement, or even an inferred agreement, may alternatively be found not in the resulting, but in the constructive trust, is to a degree recognised in the judgment in *Beal v. Beal*, which set out several alternatives: “One approach taken by the Washington Supreme Court . . . was to hold that where a man and woman had lived together in a close familial type relationship, the joint operations of a ranch created an implied partnership agreement. Another approach has been to use either a resulting trust . . . or a constructive trust.”⁵⁵

The same point is made in *Omer v. Omer*.⁵⁶ In this case, before the Court of Appeal of Washington, it was held that where property was taken in the name of the defendant with the intent that the property would ultimately be shared by both the plaintiff and defendant, the constructive trust remedies were appropriate even though the relationship was meretricious, albeit only technically so, for the parties had been married in Israel. However, the husband had initiated and directed changes in the marital situation, and the parties had divorced so as to enter into different, sham marriages solely for the purpose of obtaining U.S. citizenship. Nonetheless they continued to regard themselves as married to each other, and to live together until the ‘husband’ went to Washington state to build “a paradise” for

54. 386 N E 2d 647 (1979), at p.649.

55. 577 P 2d 507, 509

56. 523 P 2d 957 (1974).

them. The 'wife' continued to live in New York but sent some or most of her earnings to assist her husband's aims.⁵⁷

Although these cases may be distinguished from those American cases previously noted, and may seem more appropriately to be constructive trusts, especially as the contributions were of a more general intent, and not directed to the acquisition of specific property, there are, it is suggested, the same essential elements:

- (i) common intention, or implicit agreement;
- (ii) acquisition of property pursuant to that intention;
- (iii) contribution in cash also pursuant to the common intention;

and the categorisation of the consequent trust would seem to depend in general upon a very nice distinction as suggested in a recent opinion of the Supreme Court of Virginia.

"Resulting and Constructive trust comprise two categories of trust by operation of law arising without any express declaration of trust. Thus resulting trust arises where one person pays for property or assumes payment of all or part of the purchase money, but has title conveyed to another with no mention of a trust in the conveyance. Although a subsequent payment of or promise to pay the purchase price will not create a resulting trust such a trust arises when prior to purchase a person binds himself to pay the purchase money and stands behind his commitment, but title is conveyed to another . . . Constructive trusts are those which the law creates independently of intention of the parties to prevent fraud and injustice. While there is a distinction between resulting and constructive trusts, albeit often difficult to determine, the same remedial principles apply to both."⁵⁸

(iii) Therefore a New Trust?

If the distinction is often difficult to determine, and the same remedial principles apply to both, it may be attractive to suggest that any pretence at distinction might now be eliminated. Indeed, perhaps thinking along the same line as Lord Denning, the Colorado Court of Appeal made that precise suggestion. In *Page v. Clark*,⁵⁹ a case involving a conveyance of land, with the simultaneous but oral agreement for reconveyance on request, the Court of Appeal opined that there should be a single category of Equitable trust, "because the distinctions become blurred", and in Colorado, "the dividing line between resulting and constructive trusts has, in fact become transparent, many cases involving elements of both

57. Pearson CJ concluded (at p.961): "It is true, there is no specific finding of fraud or misrepresentation or overreaching. There is however, a clear element of unconscionability inherent in the findings of the trial Court which in our view, justifies application of the doctrine of constructive trust."

58. *Leonard v. Counts* 272 S E 2d 190 (1980).

59. 572 P 2d 1214 (1977).

decided under the aegis of one . . . Other decisions while alluding to both have reached this result in such a way as to be traceable to neither.” . . . adding:

“In brief the ‘conscience of equity’ has become clouded by labels that are difficult to pin down and discuss in a cogent manner . . . We have therefore determined to deal with this case and others like it based upon whether the equitable responsibilities of the court require that a trust be decreed, irrespective of how that trust is denominated. The underlying theories of course remain unchanged. It is hoped that the emphasis which has hitherto been placed on labels, instead of a relationship between the parties, will diminish along with the very real possibility that appropriate relief may be denied because the proof in a genuine case does not precisely fit one theory to the exclusion of the other. We recognise that our de-emphasis of the traditional labelling process runs counter to the advice of some commentators who maintain without explanation that the distinction should be retained intact, and that a blurring of the lines would yield an equitable result . . . at the expense of accurate legal theory . . . We are constrained to observe, in response, that equity had its birth in the unjust results that arose from the rigid insistence of the law upon ‘accurate legal theory’ and that the value of the accuracy or precision of a legal theory should be measured by whether its application deals a just and equitable result.”⁶⁰

These suggestions were met, on appeal, by the Supreme Court⁶¹ in the manner with which the similar views of Lord Denning have been met – with clear rejection after a review of the authorities and the traditional distinctions between the two classes of trust:

“Against this background, the error of the Court of Appeals in supplanting the remedies made available through resulting and constructive trusts with an ‘equitable trust’ becomes apparent. The equitable remedies which the Court of Appeals replaced have served the courts of this state for nearly a century. These remedies have enabled the courts to prevent unjust enrichment for nearly half a millenium . . . The experience and precedent thus gained are not lightly to be cast aside. The Court of Appeals cited no authority for its action . . . [It] expressed the fear that a too rigid adherence to the prescribed elements of constructive and resulting trusts could present a ‘very real possibility’ that a deserving party would be denied relief, because he could not fit his cause of action into the prescribed forms. Yet we have been referred to no decision of the Court in which a deserving party has been denied equitable relief because of a doctrinaire adherence to form. Rather the doctrines of resulting and constructive trusts have proven to be extremely flexible.”⁶²

60. *Ibid.*, p.1218.

61. 592 P 2d 729 (1979).

62. *Ibid.*, p.799: see also the similar observation of Fox LJ in *Ashburn Anstalt v. Arnold* [1988] 2 W.L.R. 706, 725.

From the foregoing sample, it may be possible to suggest that the American courts are dealing with like problems in a substantially similar way to that of courts elsewhere. Possibly even, the results may be seen as reasonably consistent with the *dictum* of Lord Diplock and the spirit of *Gissing v. Gissing*. Thus whatever label may be attached to the trust finally held to exist, the approach consists basically of seeking some common intention, either express or inferred from contribution and conduct, particularly conduct which puts one party at some detriment. Thus if one or more parties to a relationship acquire property, the question is whether the contributions, especially financial contributions, made by the other party, are made pursuant to some intention. If so the beneficial interest will be apportioned according to their perceived intention.

While the U.S. courts seem to have similar problems of labelling, they do, if the sample is, as is believed, typical, on the whole more easily distinguish between a resulting trust and a constructive trust. Thus, the description of resulting trust would be appropriate, if the contribution pursuant to the intention is more specifically referable to the acquisition of particular property; whereas constructive trust is better if the intention and contributions are more general, or if there is some clear antecedent agreement. In passing, it might be observed that, in the USA, the resulting trust seems to be regarded as more of a general intention trust, than in the anglophile common law jurisdictions. In the latter, as will be shown, the resulting trust is based on presumed intention, to be shared strictly in accordance with cash contribution. Secondly, that presumed intention may be displaced and rebutted by a contrary intention to increase the proportionate shares, or alternatively to deny a trust at all. By focusing on a single intention of the parties, gleaned from the circumstances, the American courts circumvent this double process.⁶³

While this may suggest a difference in the law, it is nonetheless submitted that the essential features are the same as those required in other jurisdictions:

- (i) the acquisition of property by one or some of the parties;
- (ii) a shared intention, express or inferred, as to the beneficial ownership
- (iii) some relevant contribution, principally financial, made by the non-titled party, which is directly or indirectly referable to the acquisition.

The U.S. approach to the distinction may be one which, on the whole, appears clear, but it is not necessarily that favoured in other courts where more traditional definitions are maintained.

So having digressed, perhaps it is pertinent at this stage to look briefly at the categories of resulting and constructive trust, to see how, bearing in mind the apparent U.S. distinctions, the new model constructive trust, or the common intention trust, stands measured against them.

63. It may be that in the cases of *Edwards v. Woods*, *supra* n.50, and *Carlson v. Carlson*, *supra* n.52, some distinction seems preserved between the presumed intention of a bare resulting trust and the additional intention for rebutting that presumption. Nonetheless, it seems to be the general approach that because the one is a resulting trust, the further intention should be classified similarly.

(i) The resulting trust

The classic resulting trust emerges in two distinct forms possibly linked by the common presumptions of intention.⁶⁴ The first form which is not within the scope of this article arises where an express trust fails, or fails to exhaust the beneficial interest.⁶⁵

The second form is, of course, pertinent. It arises where property is purchased in the name of another. Perhaps the classic statement of such a trust is that of Eyre CB in *Dyer v. Dyer*.⁶⁶ "The clear result of all the cases without single exception is that the trust of a legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; . . . whether in one name or several, whether jointly or successive, results to the man who advances the purchase money; . . . and it goes on a strict analogy to the rule of common law, that where a settlement is made without consideration, the use results to the feoffor." Such principle has now extended from land to other forms of property, and a more recent analysis of the situations which give rise to this purchase money resulting trust have been examined in *Bateman Television Ltd. (in Liquidation) v. Bateman*.⁶⁷ In this case, where cars were bought, substantially with company funds, but which were vested and registered in the names of individual directors, Turner J in the N.Z. Court of Appeal identified three situations where such a trust might arise:

"First there is the case in which A purchases a property with his own funds, putting it in the name of B . . .

The second class of cases is that in which A, using funds provided by B, purchases, *in the absence of B*, a property, putting it in his own name. Here, if the evidence is such that B, can be said to have advanced the money to A *in the character of a purchaser*, there will be a resulting trust; *aliter*, if the money appears to have been advanced by him to A in the character of a lender.

There is a third class of case, perhaps the most common of all, where both parties take part in the purchase, the funds or part of them being found by one and the title being taken in the name of the other. On these facts without more being proved a presumption arises that the advance was made 'in the character of a purchaser', though the evidence may show that this was not so, and that the advance was a loan, or partly a loan."⁶⁸

Thus three situations are identified, to which may be added the voluntary conveyance of property by its owner to another person. However, whatever form it

64. In *Re Vandervell's Trusts (No 2)* [1974] 1 Ch.269, 289-90 Megarry J seems to have doubted that the two forms actually operate on the same principle.

65. Apparently also if an implied or constructive trust fails: *Barclays Bank Ltd. v. Quistclose Investments Ltd.* [1975] A.C. 567.

66. (1788) 2 Cox Eq. 92, 93.

67. [1971] N.Z.L.R. 453.

68. *Ibid.*, at p.462.

takes essentially some or all of the consideration moves from one party, while the title moves to another. In each case there is raised a presumption that the supplier of the consideration intends no benefit to accrue to the title holder beyond what that person has contributed personally to the acquisition of the title.

a) Contribution

Perhaps a typical case of the classic contribution and purchase money resulting trust is the well-known case of *Bull v. Bull*,⁶⁹ where contribution by a mother to the purchase price of a house vested in her son's name was held sufficient to give an interest equivalent to the proportionate value of that contribution. However, the question of contribution is limited to the purpose of acquiring property and the resulting trust is consequently bound to the fact of acquisition. Only payments which can be interpreted clearly as part of the consideration or capital outlay can raise the presumption of resulting trust. Thus, in *Savage v. Dunningham*⁷⁰ contribution to the rent payments, where a premium had been paid, did not raise a resulting trust, for in such circumstances it was the premium not the rent service which represented the capital for acquisition. The situation would be different where no premium is paid for a lease or tenancy, but where the rent has the dual purpose of rent-service and consideration, and the courts, it has been said, ought to recognise the realities of the situation.⁷¹

It is the very realities of the situation which cause a small problem for calling the new model trust, a resulting trust. The problem is that of indirect contribution. Few people can, of course, these days purchase property, particularly residential property, paying the full price in cash. Rather property is purchased with the aid of a mortgage, which involves a lender paying outright the balance of the purchase money, and the actual purchaser of the property repaying the loan over a period of time. In practical terms the purchaser-mortgagor may regard the mortgage repayments as a kind of glorified hire-purchase, that each instalment pays off the purchase price, but as Mason and Brennan JJ opined in a joint judgment in *Calverley v. Green*:

“It is understandable but erroneous to regard the payment of mortgage instalments as payment of the purchase price of a home. The purchase price is what is paid in order to acquire the property; the mortgage instalments are paid to the lender from whom the money to pay some or all of the purchase price is borrowed. In this case, the price was \$27,250 of which \$18,000 was borrowed from the mortgagee by the plaintiff and defendant jointly . . . They mortgaged that property to secure the performances of their joint and several obligation to repay principal and to pay interest. The payment of instalments under the mortgage was not a payment of the purchase price but a payment

69. [1955] 1 Q.B. 234.

70. [1973] 3 W.L.R. 471.

71. *Malayan Credit Ltd. v. Jack Chia Ltd.* [1983] 1 All E.R. 711.

towards securing the release of the charge which the parties created over the property purchased.”⁷²

Quite clearly the resulting trust is tied to payment of the consideration of the property, or contributions to that payment. While possibly there may be circumstances in which a commitment, at the time of acquisition of the property, to repay a loan will represent an appropriate contribution to the purchase price, and even though some judges might regard the new model trust as essentially a resulting trust, the extension to other indirect contributions as suggested in Lord Reid’s minority opinion in *Pettitt*⁷³ seems to go beyond the simple concept of a purchase price resulting trust. Hence in order to accommodate the realities of the property acquisition situation the majority of judges appear to have moved in a different direction, which can more confidently permit a variety of indirect contributions to be made and considered, namely by considering them as evidence of some common intention. The idea of common intention involves that of agreement and as the two terms may be interchangeable⁷⁴ essentially point to a rebuttal of the basic resulting trust.⁷⁵

If the resulting trust, as genes accepted in US and elsewhere, is designed to give effect to an intention, it is generally a presumed intention only and is a rebuttable presumption,⁷⁴ which can be rebutted by either the reverse presumption of advancement, or a contrary intention.⁷⁷

b) Rebutting the trust

This is a factor which cannot be overlooked. The resulting trust is presumed because no other solution is appropriate. It is an act of Equity.

“Equity operates on conscience but is not influenced by sentimentality. When a man (usually it is a man) purchases property and his companion (married or unmarried, female or male) contributes to the purchase price, or contributes to the payment of a mortgage, equity treats the legal owner as a trustee of the property for himself and his companion in the proportions in which they contribute to the purchase price because it would be unconscionable for the legal owner to continue to assert absolute ownership unless there is some express agreement between the parties, or unless the circumstances in which the contributions were made established a gift or loan or some relationship incompatible with the creation of a trust.”⁷⁸

72. (1984) 56 A.L.R. 483, 493. Cf. Lord Templeman in *Winkworth v. Edward Baron Development Co. Ltd.* [1987] 1 All E.R. 114, 116.

73. [1970] A.C. 777, 795; and also in *Gissing v. Gissing* [1971] A.C. 886, 897.

74. Apparently so used by Bagnall J in *Cowcher v. Cowcher* [1971] 1 W.L.R. 425, 427-32.

75. *Ibid.*, at p.432.

76. The exact degree of evidence needed to rebut the presumption may, of course, vary with the circumstances of each case: *Fowkes v. Pascoe*, *supra* n.74, (1875) L.R. 10 Ch. App. 343.

77. E.g., *Cowcher v. Cowcher*, *supra* n.74, at p.432 and the cases noted in note 63, *supra*.

78. *Winkworth v. Edward Baron Development Co. Ltd.* [1987] 1 All E.R. 114, 118 *per* Lord Templeman.

In this passage Lord Templeman clearly recognised that a resulting trust is rebuttable, but suggests only two possible means of rebutting the presumption: a) an agreement that the title owner is to have sole beneficial ownership; or b) which probably amounts to the same thing, that the contribution is a gift or loan or is otherwise “incompatible with a trust.”⁷⁹ It may however, be suggested that further alternative ways of rebutting a bare resulting trust are to show a different type of trust was intended, or can be inferred from the common intention of the parties. The idea of common intention, as the basis of the kind of trust of the new model perhaps first appeared in *Rimmer v. Rimmer*,⁸⁰ where it clearly arose to rebut the proportionate purchase money resulting trust, and for which purpose it seems to have been used since. Therefore, if there can be demonstrated an intention that, instead of the share found simply and strictly on the exact proportion of monetary contribution to purchase price of the property or an improvement to it, the various contributors should get different or even equal shares, then the resulting trust is rebutted, for the intention *presumed* by equity is displaced. Thus in *Muschinski v. Dodds*⁸¹ the High Court of Australia held explicitly that a resulting trust of unequal proportions was rebutted by evidence that it was the common intention of the parties that the property should be held in equal shares. Gibbs CJ quite unequivocally stated “. . . the presumption that there is a resulting trust may be rebutted by evidence that in fact the real purchaser intended that the other transferee should take a beneficial interest.”⁸²

However, if common intention trusts of the new model can be viewed in one way as arising out of a rebuttal of a bare resulting trust, to increase the proportionate shares, it can only be so if there was a contribution made which would by itself raise the presumption of resulting trust. Yet it is clear that the common intention trust is more independent and can arise where no resulting trust could otherwise be claimed. Thus in *Eves v. Eves*⁸³ a *de facto* spouse was awarded a beneficial interest in a home, despite the fact that she made no cash contribution. Leaving aside Lord Denning’s possibly controversial judgment in the case, it is clear that a result in her favour might have been achieved through proprietary estoppel, yet the matter was possibly resolved by common intention, based on their implied bargain or agreement.

“If, however, it was part of the bargain between the parties, expressed or to be implied, that the plaintiff should contribute her labour towards the reparation of a house in which she was to have some beneficial interest, then I think that

79. For a recent example, see *Annen v. Rattee* (1985) 1 E.G.L.R. 136.

80. [1953] 1 Q.B. 63.

81. (1984) 62 A.L.R. 429.

82. *Ibid.*, at pp.431-32. Perhaps in a negative way this can also be illustrated by *Beech v. Beech* where, although the case was ultimately decided on proprietary estoppel, the claimant might have relied on a 16% contribution to the purchase price for a 16% interest as a resulting trust. However no such claim was made but a greater interest was sought on the basis of a common intention.

83. [1975] 3 All E.R. 768.

the arrangement becomes one to which the law can give effect. This seems to be consistent with the reasoning of the speeches in *Gissing v. Gissing*.⁸⁴

Here the common intention or bargain could not rebut the resulting trust, because without cash contributions, the presumption of such a trust could not be raised, unless the idea of contribution were extended, a step which it seems the House of Lords has not yet been prepared to countenance, and even the U.S. courts seem to look first for cash contributions.

It is therefore suggested here that while the element in the new form of trust which emphasises contribution is a development from resulting trusts, in part as a rebuttal of the *prima facie* presumption, then unless the resulting trust is seen from the apparent American perspective as a total intention-based trust, it goes beyond that form of trust and operates as a more independent basis of trust.

(ii) Constructive trust

The classic denomination of the common intention trust employs also the label constructive trust. This concept, as Fox LJ points out in *Ashburn Anstalt v. Arnold*, "has proved to be highly flexible in practice",⁸⁵ though it is perhaps not easy to define, because its parameters are not clearly set. Such a trust is one which, it may be obviously stated, is *construed* by the courts from the circumstances of the case, and to this extent, the common intention trust, being so construed, may properly, if pedantically, be called a constructive trust. However, in the main, the constructive trust is imposed in a more limited range of cases, where a fiduciary is in breach of a fiduciary relationship, or obtains some personal advantage from that relationship; or a stranger to the trust knowingly assists a breach of trust, or receives trust property. There is an element of equitable wrong doing, fraud, or "want of probity",⁸⁶ which is independent of intention. Equally, as illustrated by *Phipps v. Boardman*,⁸⁷ an intention to benefit the trust by a well meant excess of fiduciary obligation will not prevent a constructive trust being imposed. Generally, therefore, a constructive trust is independent of intention.⁸⁸ Perhaps, while a constructive trust can co-exist with some sort of intention, the need to establish any intention to constitute such a trust is irrelevant. Therefore, it would seem to follow that a trust wholly based on the establishment, expressly or by inference or implication of an intention, especially a common intention ought not properly to be labelled a constructive trust, if the categories of trust are to remain pure.

However, there is one class of case, usually recognised as a constructive trust, which may have some relevance to the new model, common intention trusts. It has therefore been held that a "constructive" trust arises where the legal owner of

84. *Ibid.*, at p.774 per Brightman J.

85. [1988] 2 W.L.R. 706, 725; and see *Page v. Clark* 592 P2d 729 (1979).

86. *Carl Zeiss Stiftung v. Herbert Smith and Co.* [1969] 2 Ch. 276, 300 per Edmund Davies J.

87. [1967] 2 A.C. 46.

88. *E.g.*, *Re Hope* (1985) 59 A.L.R. 609, 611 per Spender J; *Leonard v. Counts* 272 SE 2d 190 (1980); and Maitland, *Equity* (Ed. Brunyate, 1949), p.83.

property seeks to assert an exclusive interest in denial of a prior but *unenforceable* agreement or undertaking. Such a trust was found, of course, in *Bannister v. Bannister*,⁸⁹ where Scott LJ stated:

“It is, we think, clearly a mistake to suppose that the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest, which, according to the true bargain, was to belong to another, is confined to cases in which the conveyance itself was fraudulently obtained. The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest, and that is the fraud to cover which the Statute of Frauds or the corresponding provisions of the Law of Property Act, 1925, cannot be called in aid in cases in which no written evidence of the real bargain is available.”⁹⁰

Although the circumstances of this and other similar cases may be obviously distinguishable from the recent familial-dispute trusts of the common intention type, it may be possible to suggest an underlying likeness, in so far as both types of cases depend on establishing initial agreement or understanding between the parties at the time one of them acquired the property in dispute. So in *Gissing v. Gissing*, Viscount Dilhorne observed:

“Where there was a common intention at the time of the acquisition of the house that the beneficial interest in it should be shared, it would be a breach of faith by the spouse in whose name the legal estate was vested to fail to give effect to that intention and the other spouse will be held entitled to a share in the beneficial interest.”⁹¹

The common intention – almost contractual

In the case of the *Bannister* type the existence of some antecedent agreement may be clear, but in seeking for a common intention the courts are perhaps seeking a similar sort of pact between the parties, albeit perhaps at a lower degree. It is clear from the cases following *Pettitt* and *Gissing* that the courts will give effect to an express indication of intention and may imply an intention from the parties' conduct but will not impute an intention. Thus Lord Diplock in *Gissing* made the following observation:

“I did, however, differ from the majority of the members of your Lordships' House who were parties to the decision in *Pettitt v. Pettitt* in that I saw no reason in law why the fact that the spouses had not applied their minds at all

89. [1948] 2 All E.R. 133.

90. *Ibid.*, at p.136.

91 [1976] A.C. 886, 900.

to the question of how the beneficial interest in a family asset should be held at the time when it was acquired should prevent the court from giving effect to a common intention on this matter which it was satisfied that they would have formed as reasonable persons if they had actually thought about it at that time. I must now accept the majority decision that, put in this form at any rate, this is not the law."⁹²

In *Pettitt*, Lord Morris of Borth-y-Gest had expressed the law in these terms:

"Sometimes an agreement, though not put into express words, would be clearly implied from what the parties did. But there must be evidence which establishes an agreement before it can be held the one spouse has acquired a beneficial interest in property which previously belonged to the other or has a monetary claim against the other."⁹³

Although these comments, and his later *dictum* that "there is no power in the court to make a contract for the parties which they themselves have not made. Nor is there power to decide what the court thinks that the parties would have agreed had they discussed the possible breakdown or ending of their relationship", were given in the context of s.17 of the Married Women's Property Act 1882, it has, it seems, been developed to apply in equity to claims outside any such legislation.⁹⁴

What this seems to suggest is that the courts are first seeking to ascertain the existence of an agreement, whether expressed in terms of common intention or otherwise. Hence, the courts look first for express agreement, and only if that is absent do they look to the contributions and conduct of the parties to establish first, the existence of the agreement and secondly, the nature or extent of that agreement. If an agreement is established by either means it would then be a fraud or breach of faith for the party with the legal title to deny that intent. In seeking, where necessary, to imply an agreement from circumstances and the contributions and the conduct of the parties, the courts may perhaps be said to be adopting a back-working process similar to that by which a contract is established from acts of part performance. "You must look first at the alleged acts of part performance and see whether they prove that there must have been a contract and it is only if they do so prove that you can bring in the oral contract."⁹⁵

The nub of the decision in *Steadman v. Steadman* is perhaps most clearly set out in the headnote.

92. *Ibid.*, p.904.

93. [1970] A.C. 777, 804, whether the agreement is reached at the time of acquisition or subsequently. The courts cannot impute an agreement or intention, but on the other hand Lord Pearson at p.902 uses the word "imputed." Lord Denning frequently used that word: e.g., *Cooke v. Head* [1972] 1 W.L.R. 518, 520. See also *Brown v. Stokes* (1980) 1 N.Z.C.P.R. 209, 213 *per* Cooke J.

94. "The Court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had": *per* Lord Morris of Borth-y-Gest in *Gissing v. Gissing* [1971] A.C. 886, 898.

95. *Steadman v. Steadman* [1974] 2 All E.R. 962, *per* Lord Reid.

“In order to establish facts amounting to part performance it was necessary for a plaintiff to show that he has acted to his detriment and that the acts in question were such as to indicate on a balance of probabilities that they had been performed in reliance on a contract with the defendant which was consistent with the contract alleged.”

While the doctrine of part performance is more curtailed than the parallel doctrine in relation to oral proof of a trust (and the speeches of the House of Lords in both *Pettitt* and *Gissing* clearly show that these cases are based on trust not contract),⁹⁶ it is submitted that what these cases really show, is that the courts are really enforcing a kind of informal and perhaps unvoiced contract *to create a trust* whereby a beneficial interest is, by joint agreement and intention, to be held for one or more *cestuis que trust*. It is, of course, not a contract to dispose of the legal title to land *per se*, though that itself might create a trust of the vendor-purchaser type. Hence, perhaps, the similarities being such, that in the seminal California decision in *Marvin v. Marvin*⁹⁷ the court sought to find an agreement between the parties, and settled the issue of beneficial interests on the basis of an implied contract, without rejecting the possible co-existence of other equitable or legal remedies. In giving the opinion of the Supreme Court in Banc, Tobriner J observed:

“In summary, we base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as other persons to contract respecting their earnings and property rights . . .⁹⁸ As we have explained, the courts now hold that express agreements will be enforced unless they rest on a meretricious consideration.⁹⁹ We add that in the absence of an express agreement, the courts may look to a variety of other remedies in order to protect the parties’ lawful expectations . . . The Courts may inquire into the conduct of the parties to determine whether the conduct demonstrates an implied contract or implied agreement of partnership or joint venture . . ., or some other tacit understanding between the parties. The courts may, when appropriate, employ the principles of constructive trust . . ., or resulting trust . . . Finally, a non-marital partner may recover in *quantum meruit* for the reasonable value of household services rendered . . .¹

96. *E.g.*, Lord Pearson in *Gissing* at p.902. Although in a very limited and general sense the terms contract, bargain, agreement or undertaking can be used with a degree of interchangeability, there is perhaps one important distinction between legal notions of contract, and equitable ideas of trust (or agreement to create a trust). While the latter may not exclude the former, the law tends towards an objective “reasonable person” test, equity towards a subjective “party-based” test. So in *Gissing* the House of Lords, specifically rejected the former as inappropriate for the new model, common intention trust.

97. 557 P 2d 1065 (1976).

98. *Ibid.*, p.116.

99. The consideration in *Marvin v. Marvin* was that Michelle Marvin had given up a lucrative career on the strength of the agreement; see also *Tanner v. Tanner* [1975] 3 All E.R. 776.

1. 557 P 2d 106 122-23.

But the contract must be seen perhaps as one to create beneficial interests in land. As previously pointed out the contract is not to dispose of land, but to establish beneficial interests which the law of trusts can enforce. Hence, the parties must, before the courts can enforce a trust against one, have been initially *ad idem* in their common intention, and there must be some consideration for the agreement, or at least something more than a merely gratuitous intention.²

Express trust or constructive trust

Put in this way, there may in the final analysis be seen to be little difference between a trust found to exist as a result of the common agreement or intention of the parties, and that in cases where in other circumstances the courts enforce an oral agreement for a trust despite the Statute of Frauds or its more recently enacted equivalent.³

It has been observed that the new model common intention trust does not need to be proved in writing,⁴ but it may not be clear whether this is because it is in the constructive trust exemption⁵ or because simply, as has been long held, it would be a fraud to deny the express trust. In *Bannister v. Bannister* and subsequently, the two notions may have merged, but perhaps one may question even now whether the trust in such case was really a constructive trust despite its being almost universally given that description.

In *Bannister* one of the cases to which Scott LJ referred, and which has been the basis of such constructive trust decisions as *Hodgson v. Marks*,⁶ was that of *Rochefoucauld v. Boustead*⁷ in which there was simply an oral agreement or common intention that one party would acquire land to be held on trust for another, which could, to prevent a fraud, be proved by parol evidence. The Court in *Rochefoucauld* held, on the basis of the classification laid down in *Soar v. Ashwell*,⁸ that the trust so established by parol was in fact an express trust.

“The trust is one which both plaintiff and defendant intended to create. This case is not one in which an equitable obligation arises although there may have been no intention to create a trust. The intention to create a trust existed from the first.”⁹

Might not the same be said of our new model common intention trust? Perhaps there may be a lesser degree of formality of agreement. Perhaps the intention is

2. *Austin v. Keele* (1987) 72 A.L.R. 579 (P.C.).

3. Law of Property Act 1925 (UK), s.53; Property Law Act 1952 (N.Z.), s.49A, as inserted by Property Law Amendment Act 1980, s.2.

4. E.g., *Gissing v. Gissing*, *supra* n.73, at p.905 *per* Lord Diplock; also *Hayward v. Giordani* [1983] N.Z.L.R. 140, 144 *per* Cooke J.

5. Law of Property Act 1925 (UK), s.53(2); Property Law Act 1952 (N.Z.), s.49A(2).

6. [1971] Ch. 892.

7. [1897] 1 Ch. 196.

8. [1893] Q.B. 390.

9. [1897] 1 Ch. 196, 208 *per* Lindley LJ.

implied, but it cannot, as we are told, be imputed; and, though not creating a trust *per se*, but a beneficial interest (surely much the same thing), that intention, by agreement or *common* intention, existed from the first (or arose by new agreement at a later date), so as to create a like trust.

Possibly, however, there remains a distinction between what might be called true express trust, and intention trusts of the new model:

“While it is true that no particular form is necessary for the creation of an express trust, the intention of the settlor to create a trust must be *explicit*. In every case it is a question of fact for the court to determine whether an intention to create a trust is sufficiently evinced.¹⁰

So as in *Goodman v. Gallant*,¹¹ if the agreement employs the terminology of trust, there will be an express trust, leaving only the precise quantification of shares to be determined according to an expressed or implied common intention; whereas on the other hand, if there is no like agreement, or one has to be implied then, possibly, there is not an express trust but some other category. Thus, it may be that the concept of express trust is limited to cases where a trust is deliberately imposed upon property in reasonably explicit terms, all the three certainties being present – in fact where the settlor, as owner of the property, understands that a trust is being created. As Oakley puts it: “An express trust arises whenever a settlor either declares that he is holding property on trust for another or transfers property to another to hold in trust for a third party or for himself.”¹² Or as Spender J put it in *Re Hope*: “An expressed trust is one in which there is an expressed common intention by the parties *as to the existence of the trust*.”¹⁴

Possibly this may be a fine distinction that an *express* trust must in every case also be exclusively an *explicit* trust despite the fact that no specific formula is needed.¹⁵ However, the House of Lords, at least, in *Gissing v. Gissing* seems to have stressed that an express agreement is the best evidence of common intention,¹⁶ and only if that is lacking will the courts go through the process of sifting the evidence for any implication of an agreement, and performance of that implied agreement. Either way it seems that the end result is the same degree of agreement – the same common intention which is being proved.

Otherwise, there perhaps has to be faced, a distinction between three fundamentally similar trusts:

10. *Bloch v. Bloch* (1981) 37 A.L.R. 55, *per* Wilson J.

11. [1986] *Fam.* 106.

12. *Constructive Trusts* 2 Ed. (1987), p.17.

13. (1985) 59 A.L.R. 609.

14. *Ibid.*, at p.611 and see *Rochefoucauld v. Boustead*, *supra* n.7(2).

15. *Cf. Re Kayford Ltd. (in liquidation)* [1975] 1 W.L.R. 279, where a deliberate intention was conceived in relation to personalty. On the other hand the trust of the bank in *Lyus v. Prowsa Developments Ltd.* [1982] 1 W.L.R. 1044, though called a constructive trust, might justly be also interpreted as an express trust – being tantamount to a clear declaration of trust.

16. *E.g.*, *per* Lord Diplock at p.905.

- a) explicit trusts, where there is a conscious and deliberate intention to create a trust;
- b) express and/or explicit agreements (or contracts) to confer some beneficial interest, but without a knowing thought of *trust*; and
- c) trusts arising from a common intention not *imputed*, but based on evidence which shows that the parties *actually* had an intention to share the beneficial interests in appropriate proportions.

The first two classes might be termed express trusts, the third constructive only, though essentially it is based on the same actuality, merely proved in a different way. Furthermore, it would seem from *Gissing v. Gissing* that the second and third classes are to be treated as basically alike.

Therefore a distinction based on formalities seems somewhat artificial, and may not hold. Indeed in *Delahunt v. Carmody*¹⁷ the High Court of Australia seems to have held that an oral agreement to share the property but not in terms to create a trust could constitute an express trust. In this case, it was found that the parties had contributed equally to the purchase of property, on the basis of an express oral agreement that they would own the property in equal shares and that it would in due course be put in the names of both. However, Gibbs CJ commented cautiously:

“It does not matter whether the trust in the present case be regarded as an express trust (not created by an instrument) or a resulting trust, for, as will be seen, the result will be the same in either case.”¹⁸

Consideration – the role of proprietary estoppel

In *Gissing v. Gissing* Lord Diplock mentioned that some evidence of common intention might be found in the fact that the non-owning spouse acted to his or her detriment in reliance upon the alleged common intention.¹⁹ Recently, as has previously been noted, much has been made of the apparent parallel between this idea, and the doctrine of proprietary estoppel,²⁰ and indeed that doctrine has been the backstop, in some cases, where no common intention to create a trust was found.²¹ However, proprietary estoppel, does not seem to require an intention. It is established by simple proof of the expenditure of money upon the land of another in a mistaken belief in some right, which mistake is known to the owner of

17. (1986) 69 A.L.R. 253.

18. *Ibid.*, at p.225. Perhaps it could be argued that where pursuant to a common intention or agreement, one party acquires the land, the other might alternatively claim an express trust on the principle expressed by Lord Birkenhead LC in *Les Affreteurs Réunis Société Anonyme v. Leopold Walford (London) Ltd.* [1919] A.C. 801, 806.

19. *Supra* n.73, at p.905.

20. *Grant v. Edwards* [1986] 1 Ch. 638, per Browne-Wilkinson VC at p.656.

21. *E.g., Beech v. Beech* (1982) 1 N.Z.C.P.R. 454 and *J. N. Elliott and Co. v. Murgatroyd* (1982) 3 N.Z.F.L.R. 119.

the land.²² It results in the mistaken spender receiving an appropriate interest in the land, whether an estate interest,²³ an easement²⁴ or a licence.²⁵ Therefore, it seems to differ in principle from trust, though it is clearly very similar in practice. Certainly, in some cases the result may be reached on proprietary estoppel by a process using the same evidential data, and similar implications, but it would seem to be a separate, and possibly a floating, doctrine, which may achieve an appropriate result where a trust fails or where perhaps the bargain cannot be sufficiently clearly proved or implied. However, this is not to deny that estoppel or something very like it does not form part of the process of establishing a trust based on common intention.

If, as has been suggested, that trust is founded on principles analagous to an oral agreement or contract to create a trust, then for the trust to be enforceable it must be completely constituted by an appropriate transfer, as perhaps in *Goodman v. Gallant*,²⁶ or the relevant alleged *cestuis que trust* must have provided appropriate consideration; hence the need to ascertain the financial contributions made by that person, or whether any other form of detriment has been suffered, as perhaps Janet Eves' exertions in *Eves v. Eves*,²⁷ or the giving up of some valuable right as in *Marvin v. Marvin*²⁸ or *Tanner v. Tanner*.²⁹

In this way it may be that the consideration is provided by a similar detriment to that required for an estoppel, so that the trust agreement becomes enforceable and the claimant under the common intention ceases to be a mere volunteer. As pointed out by the Privy Council in *Austin v. Keele*,³⁰ a merely gratuitous intention is insufficient to found a trust, of at least the common intention type. Possibly the role of estoppel in the formation of such a trust, is simply to provide the necessary consideration. The point may perhaps be illustrated by the decision of Gresson J in the New Zealand Supreme Court in *Thomas v. Thomas*:³¹

"It is trite law that there is no equity to perfect an imperfect gift: and what the husband did may seem, viewed superficially, to be an incomplete gift. He did

22. The five probanda established in *Willmott v. Barber* (1880) 15 Ch. D. 96, that: a) the claimant made a mistake of legal rights; b) had spent money, or otherwise acted detrimentally on the faith of that mistake; c) that the legal owner of the land knew his own rights as being inconsistent with the claimant's; d) legal owner must know of the claimant's belief; e) legal owner must have encouraged the claimant in his expenditure: have, in the course of time been relaxed so that only three, mistaken belief, expenditure and knowing encouragement, need be shown: *Andrews v. Colonial Mutual Life Assurance Society Ltd.* [1982] 2 N.Z.L.R. 556.

23. *Dillwyn v. Llewellyn* (1862) 4 DeG. F & J 517; *Beech v. Beech* (1982) 1 N.Z.C.P.R. 454.

24. *Crabb v. Arun District Council* (1975) 32 P.C.R. 70.

25. *J. N. Elliott & Co. v. Murgatroyd* (1982) 2 N.Z.F.L.R. 119; and perhaps the estoppel will extend the effect of a licence into something almost approximating an interest in land: *Plimmer v. Mayor etc. of Wellington* (1884) 9 App. Cas. 699 (P.C.).

26. [1986] Fam. 106.

27. [1975] 3 All E.R. 768.

28. 557 P 2d 106 (1976).

29. [1975] 3 All E.R. 776.

30. (1987) 72 A.L.R. 579.

31. [1956] N.Z.L.R. 785.

not purport to constitute himself a trustee for her but to make over the property to her; and he did not adopt the method appropriate for transferring realty. Though equity will not assist volunteers, nevertheless there can be circumstances in which an uncompleted gift of land can be binding.”

In this case a husband and wife purchased land, in 1948, as joint tenants, with the intention of building a matrimonial home, which was evidently completed. The building costs were paid in cash provided mostly by the wife with most of the balance being raised on a mortgage. In 1952, however, the husband left the premises never to return, and as the judge found, orally abandoned his interest in the property to his wife. Subsequently, she paid all mortgage instalments and other financial outgoings, and sought the vesting of the property in her name alone. It was held that the circumstances revealed a clear equity in Mrs Thomas’ favour. So presumably, the husband held his legal title as a trustee for her, but not perhaps an explicit trust, but from the circumstances of the gift one which was intended as an express gift, and so express trust.

Clearly, in *Thomas* the consideration which served to raise the wife’s status from that of a mere volunteer was financial, but there is perhaps no reason to suppose that the principle does not apply to any other detriment suffered.

Conclusion

The object of this article has been to consider within the pantheon of trusts the appropriate place of what has been called “the constructive trust of a new model” or a common intention trust. Glass JA posed the question: “Is it a new kind of constructive trust, an express trust or a resulting trust?”³² He might have added: or a completely novel species of trust? In the course of the examination, this article has perhaps fallen into two broad parts. In the first it was sought to establish, in brief, the salient features of this modern form of trust, noting its development especially by Lord Denning towards what seemed to some an unacceptably wide doctrine; and seeking the analagous treatment in the different common law jurisdictions of New Zealand and the U.S.A.. Possibly what was illustrated in this first part was that there was a tension in the law; there are, on the one hand, those judges who seem to want to avoid the precise niceties of form – that whether it is called one name or another, as Gibbs CJ suggested, for example, in *Delahunt v. Carmody*,³³ the result might be the same. Ranged against this view, is the alternative, that, as Bagnall J expressed it, the progeny must be legitimate,³⁴ that the Courts of Equity must develop along established lines.

There is, however, as suggested, potential hazard in this confusion or lack of exactitude. The peril arises where a statute, say a statute of frauds or of

32. (1977) 2 N.S.W.L.R. 685, 689.

33. (1986) 68 A.L.R. 253.

34. *Cowcher v. Cowcher* [1972] 1 W.L.R. 425, 430.

limitations³⁵ applies differently to one form of trust than to another or where some other statutory consequence has to be avoided. For example, might not the distinction between one kind of estoppel and another have become blurred or even eliminated as a result of *Maharaj v. Chand*?³⁶ Might not the distinctions between the classes of trusts be similarly indistinct?

Therefore, in the second part of the article, the essential features of traditional forms of trust were noted briefly. Does the new trust relate to all or any? The suggested answer is that it does or can be made to. But, equally, it does not do so exactly. It is, of course, a contributing trust and the beneficial interest will relate to the contribution made. However, the resulting trust has been established on limited grounds of capital contributions *ab initio*. So unless the nature of the contribution is to change, as the courts seem to have been unwilling to allow, the common intention trust goes beyond the resulting trust. It is, as suggested earlier, but a form of rebutting such a trust, although with some independent existence. Unless, as apparent in America, the dynamic of intention supplants the notion of presumption,³⁷ there is no resulting trust category to hold completely the common intention trust. It might further be suggested that where some cash contribution to capital has been made, if the common intention fails there may remain a resulting trust from the contribution alone.³⁸

A second possibility is that this really is a form of constructive trust, based on the kind of fraud in *Bannister v. Bannister*.³⁹ However, if in common with such constructive trust, the new model is based on breach of faith in asserting title contrary to an earlier agreement, and like those constructive trusts, the basis of the present is an agreement, a common intention, a contract to create a trust or beneficial intent, there appears a conflict with the earlier forbear: *Rochefoucauld v. Boustead*.⁴⁰ The trust should perhaps be seen as a species of express trust. The basis for this for both the express trust of *Rochefoucauld*, and the new model trust is that expressly or by implication an intention *ad idem* between the parties is not found to exist. Thus in *Baumgartner v. Baumgartner*⁴¹ a couple lived in a *de facto* relationship and some time later the man (appellant) purchased land and built a house as their home. This land was bought in his name partly from the sale of the property previously owned by him, prior to the start of the relationship, and partly

35. Perhaps it was the Limitations statute which, after all, influenced the result in *Rochefoucauld v. Boustead* [1897] 1 Ch. 196.

36. [1986] 1 A.C. 898. In this case it seems that the Privy Council employed the notion of promissory estoppel, instead of proprietary estoppel, to evade the consequences of a Fijian statute.

37. Phraseology suggested by Megarry J in *Re Vandervell's Trusts (No.2)* [1974] 1 Ch. 269, 289-90 and see *Calverley v. Green* (1984) 56 A.L.R. 483, and especially *per* Murphy J at p.498.

38. *Edward v. Woods* 385 A.2d 780 (1978); and see *Bloch v. Bloch* (1981) 37 A.L.R. 55, where in the absence of finding a common intention, there was nonetheless a resulting trust corresponding to the capital contributions of the parties. From the case it may be suggested that the essence of an express trust is the degree of certainty of the intention, whether common or otherwise.

39. [1948] 2 All E.R. 133.

40. [1897] 1 Ch. 196.

41. (1987) 76 A.L.R. 75.

by a mortgage in his own name. The purchase of the land was apparently discussed by both parties together, although it seems to have been undertaken at his initiative. It further seems that the woman had aspirations that the relationship might result in marriage and it appears they may have discussed putting the home in their joint names. There was also some evidence that throughout the relationship they pooled their earnings in a common fund, though their contributions were unequal and from this pool the mortgage instalments were paid. However, the Court found that the evidence of subjective common intention was doubtful, although admitting that the case was "borderline", the main difficulty being the time the discussion took place. However, if a trust based upon common intention failed the court, nonetheless, considered that such was the nature of the relationship that a constructive trust might be imposed:

"In this situation the appellant's assertion, after the relationship had failed, that the Leumeah property, which was financed in part through the pooled funds, is his sole property, is his property beneficially to the exclusion of any interest at all on the part of the respondent, amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of the respondent."⁴²

In conclusion it has been sought to be shown in this article that the common intention trust, the so-called "Implied Resulting or Constructive trust" or the New Model trust does not fit neatly, even by development, into the established categories of resulting or constructive trust. Rather, it almost inevitably points to a kind of express trust. If the focus is placed on those features in the new model which are similar to those found in resulting or constructive trusts, for example the contribution or the fraud, the essential nature of the trust becomes distorted, just as to focus on the contractual nature of the agreement (though this analogy may to a certain degree be helpful) is to risk the application of an objective rather than a subjective approach to common intention. Clearly the theme of *Gissing v. Gissing* is to stress the latter exclusively. What may have been revealed as the various classes of trust, and the judicial approaches to parallel situations, have been catalogued in the foregoing pages, is that not only may the common intention trust not fit sufficiently an existing category of non-express trust, but that there is a confusion and uncertainty of nomenclature and hence of the rules to be applied. The confusion may, however, clear if it is emphasised that the essential bedrock of the new trust is agreement or common intention, express or understood, whatever other features may co-exist. The trust lies in agreement, not in the process by which the agreement is proved, not in the consideration given or performed whereby the *cestui que trust* ceases to be a volunteer. Neither does it lie in the remedy by which the underlying trust is enforced.

The error of the court in *Allen v. Snyder*, as suggested by the decision in

42. *Ibid.*, at p.84: the joint judgment of Mason CJ, Wilson and Deane JJ.

Baumgartner, was perhaps to fail to observe that the common intention trust was essentially different from a constructive trust (or it might be added the resulting trust or proprietary estoppel): that the latter could be considered if the former failed. However, if this in itself is not sufficient to point to the common intention trust being an express trust, it may also be suggested that hitherto there may have been some confusion of the underlying trust with its remedy.

It is submitted that no essential difference exists between the trust by agreement or undertaking or common intention, and the trusts in either *Rochefoucauld v. Boustead* or *Bannister v. Bannister*. All depend on an initial agreement. However, in *Rochefoucauld*, the trust was called express; in *Bannister*, constructive. While it may be that *Bannister* appears as an anomalous constructive trust, the two cases may be reconciled. The former may be said to focus on the original underlying trust, whereas the latter looks to the remedy for its breach. Thus, it may be that the confusion and the problem of name can be solved by asserting that where there is some agreement or common intention this creates an express but not explicit trust, which is enforceable by someone who is not a volunteer despite the absence of writing, for to do otherwise would be to perpetrate a fraud. The fraud, however, suggests not the trust or its nature, but its remedy. If the trustee breaks the trust or denies its existence that fact may raise a constructive trust in a remedial sense. The underlying trust nonetheless remains an express trust arising from agreement. Clearly this is how, often, a constructive trust arises where a trustee commits a breach of trust or excess of duty, or where a stranger knows of an antecedent breach of trust. An express trust may first exist, the constructive trust follows as a remedy.

In summary it may be suggested that the proper arrangement of degrees of trust are:

- a) a trust based on common intention or, if that fails to be proved,
- b) either a resulting or constructive trust according to the circumstances, and,
- c) if the common intention trustee (or co-trustee) breaks that trust or seeks to deny it, that as with any other express trustee in like circumstances, the remedy may be the imposition of a constructive trust.⁴³

The final conclusion is therefore, that the new model is not a resulting or constructive trust as those terms have been generally understood, but perhaps is a species of express trust. If, however, because of the process of implication involved so often in this new model trust, the term 'express trust' feels inappropriate, and given that the term 'implied trust' is frequently used as synonymous with resulting trust,⁴⁴ there is the alternative that there has developed a new species of trust

43. Possibly illustrated by *Protheroe v. Protheroe* [1968] 1 W.L.R. 519. If this case can be viewed as a common intention trust (with a resulting trust in the background arising specifically from contribution) then the application of *Keech v. Sandford* (1726) Sel. Cas. Ch. 61 would seem appropriate to such an express trustee; and consistent with *Phipps v. Boardman* [1967] 2 A.C. 46.

44. See Maxton, *Nevill's Law of Trusts, Wills and Administration in New Zealand* (1985), p.52. Cf. Pettit, *Equity and the Law of Trusts* 6 Ed. (1989), 54.

distinct from, but drawing its parameters from, features of each of the earlier forms, and perhaps in the process of replacing them. Acknowledging that the new model trust may be a kind of express trust does not perhaps inhibit further development of a wider constructive trust to apply legislative philosophy as found in the Matrimonial Property Act 1975 (NZ) to the law of trusts. The ultimate alternative is to suggest, with the Colorado Court of Appeals,⁴⁵ that if and when the label becomes important, that will depend on the whim of the particular court: a situation which must be open to the same criticism Mahon J vented upon the view of Lord Denning.⁴⁶ This, it is submitted, would only exacerbate the already existing confusion.

45. 572 P 2d 1214 (1977), *supra* n.55.

46. *Supra* n.16.