*The Honourable Justice Gummow AC**

RESULTING TRUSTS

By Robert Chambers

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The law as to resulting trusts ought by now largely to be settled. But some issues continue to excite differences of opinion. The presumptions of advancement still give rise to debate. If a mother takes title in the name of her child, is a resulting trust rather than a gift to be presumed?[1] Does any presumption of advancement by a parent, mother or father, in favour of a child continue to represent common experience?[2]

Again, doubts are still expressed[3] as to whether a resulting trust arises on a voluntary conveyance of land.[4] However, the history of the matter is described in *Scott on Trusts* and the conclusion reached:

> It seems to be clear law today that where the owner of property transfers it without declaring any trust, the transferee does not hold the property upon a resulting trust for the transferor merely because the transfer is gratuitous.[5]

The author of the work under review deals with the first of the above issues by concluding that "equal treatment" of both parents will "become the order of the day", but that it should be considered whether the presumption of advancement ought to apply to such suspicious dealings as substantial gifts from elderly parents to children upon whom they depend.[6] He deals with the second issue somewhat inconclusively.[7] In chapter 3 there is also the

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1 See *Brown v Brown* (1993) 31 NSWLR 582 at 591.

2 *Nelson v Nelson* (1995) 184 CLR 538 at 600-603.

3 See *Newcastle City Council v Kern Land Pty Ltd* (Unreported, NSW Supreme Court, Windeyer J, 11 June 1997).

4 The Torrens System may give rise to special considerations: *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 460.

5 Scott & Fratcher, *The Law of Trusts* Vol V (Little, Brown & Co, Boston, 4th ed 1989) p15.

6 Chambers, *Resulting Trusts* (Clarendon Press, Oxford 1997) p29.

7 At pp14-19.

suggestion that the *Quistclose* trust is a resulting trust or "at least need not be an express trust".[8]

The author takes to task Lord Browne-Wilkinson for his analysis in *Westdeutsche Bank v Islington LBC*[9] that all species of resulting trust (including those where an express trust does not exhaust the whole of the beneficial interest) give effect to the presumed intentions of the settlor. His Lordship did not accept Megarry J's view expressed in *In re Vandervell's Trusts (No 2)* that in cases where the whole of the beneficial interest has not been exhausted "the resulting trust takes effect by operation of law, and so appears to be automatic".[10]

Perhaps most of what can be said of those cases where an express trust makes no provision as to what is to happen to the property bound by the trust if the trust fails completely or there is a surplus is found in the following passage in *Scott on Trusts*:

> The inference is that the trustee is not to keep the property, and since no other disposition is made of it the property or the surplus should be returned to the settlor. The inference is, not that the settlor actually intended that the property or surplus should be returned to him, for there is no evidence that he contemplated the possible failure of the express trust or the possible existence of a surplus, but that he did not intend in any event that the trustee should have a beneficial interest. Since the trustee was not intended to keep the property or the surplus, and since no other disposition has been made in the event that has happened, the court will compel the trustee to return the property or the surplus to the person who created the trust. It cannot be said that the settlor actually intended this result, since there is nothing to indicate that he had any intention with respect to the matter. At most it can be said that it is what he probably would have intended if the question had occurred to his mind.[11]

In *Perpetual Trustee Co Ltd v Commissioner of Stamp Duties (NSW)*,[12] Starke J said of a beneficial interest not fully disposed of by a settlement of property that the interest which would result to the settlor, in the event of failure of the limitations made in the settlement, had not been comprised in the gift and was not reserved under the gift itself to the settlor.[13]

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8 At p83.

9 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 708.

10 [1974] Ch 269 at 289.

11 Scott & Fratcher, *The Law of Trusts* p7. Emphasis added.

12 (1941) 64 CLR 492; affirmed by *Commissioner for Stamp Duties (NSW) v Perpetual Trustee Co Ltd* [1943] AC 425.

13 (1941) 64 CLR 492 at 507. See also at 503 per Rich ACJ, at 511 per Dixon J, at 513 per McTiernan J.

The decision of the House of Lords in *Westdeutsche*[14] was given two weeks after the author had delivered his manuscript to the publisher. The text was then revised for publication. His interest in the subject, and a significant theme of the book, had been stimulated by the paper by Professor Birks, "Restitution and Resulting Trusts".[15] The thesis is that a resulting trust should arise wherever money has been paid under a mistake, which vitiates the actual intention of the payer, or when money is paid upon a condition which is not subsequently satisfied. The present author urges the recognition of unjust enrichment as "the generic event" to which what once was called the implied contract and the resulting trust each respond.[16]

One difficulty is that the thesis, as it effects resulting trusts, has been rejected by the House of Lords in *Westdeutsche*.[17] Whether the same result would follow in Australia is an inappropriate speculation here. However, the following points may be made.

No doubt it may be said that, in circumstances discussed above, it would be unconscientious for the trustee to assert a beneficial as well as legal title. In a sense, then, a consequence of the resulting trust is the prevention of the enrichment of the trustee to the prejudice of the settlor. However, that does not necessarily mean that it is the prevention of unjust enrichment which founds the institution of the resulting trust. Again, it may be said that an account of profits serves to prevent the enrichment of the defendant, but the liability of a fiduciary to account is not determined by any concept of unjust enrichment at the expense of the person to whom the fiduciary duty is owed. In *Warman International Ltd v Dwyer*,[18] the High Court recently affirmed this position.

The number of short works on various aspects of equity is on the increase, and the trend is to be welcomed. This addition to the field is a stimulating illustration of what Lord Goff of Chieveley has identified as the matter of great difficulty in fixing the role of equitable proprietary claims in a coherent law of restitution,[19] or, as others might prefer it, in fixing a place for normative principles of restitution in the well-developed scheme of equitable institutions, doctrines and remedies.

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14 [1996] AC 669.

15 Birks, "Restitution and Resulting Trusts" in Goldstein (ed), *Equity and Contemporary Legal Developments* (Sacher Institute for Legislative Research and Comparative Law, Hebrew University of Jerusalem, Jerusalem 1992) p335.

16 Chambers, *Resulting Trusts* p223.

17 [1996] AC 669 at 689-690 per Lord Goff of Chieveley, at 708-709 per Lord Browne-Wilkinson.

18 (1995) 182 CLR 544 at 557-558.

19 *Westdeutsche* [1996] AC 669 at 685.