# THE CONSTRUCTIVE TRUST AS A REMEDIAL DEVICE[1]

BY MARCIA A. NEAVE*

[*In England the courts traditionally treat the constructive trust as analogous to the express trust, usually to be imposed only where a fiduciary relationship exists. By contrast in America the constructive trust has been used as a remedial device to prevent unjust enrichment. Mrs Neave argues that in the light of recent English decisions, reconsideration of the traditional English constructive trust principle is necessary. In this article she firstly outlines the three situations in which the constructive trust has assumed new importance in England: where matrimonial property is in question, where there has been unconscionable behaviour amounting to 'fraud', and the* Hussey v. Palmer *situation. After a detailed consideration of the varying principles enunciated in these cases, Mrs Neave then turns to an examination of the recent decision,* Ogilvie v. Ryan *in which these doctrines were applied in Australia.*]

Both in England and America it is accepted that a constructive trust is imposed by law and arises independently of the intention of the parties.[2] Apart from this, the English and American views of the nature of a constructive trust differ fundamentally. Basically American commentators regard the constructive trust as a remedy designed to prevent or redress unjust enrichment. Waters summarizes the American approach in this way:

> It is a means whereby a person may recover or gain title to that which is unfairly withheld from him to the benefit of the withholder. Because of the unfair enrichment the deprived person is entitled to preference over the withholder's creditors and, if the withholder is insolvent to follow against the third party to whom transfer has been made and whose transferor is insolvent. The unfair enrichment enables the plaintiff to recover when no personal action lies.[3]

By contrast the English approach is to treat the constructive trust as a substantive trust institution analogous to the express trust.[4] This view makes it difficult to perceive any theme linking the diverse situations in which a constructive trust is said to arise. Discussions of the constructive trust in English law tend to rely upon the existence of a fiduciary relationship between the parties, regarding the constructive trust as emanating largely from the rule in *Keech v. Sandford*.[5] However this

* LL.B. (Hons.); Barrister and Solicitor of the Supreme Court of Victoria, Senior Lecturer in Law, University of Melbourne.

[1] This article does not discuss the constructive trust imposed when a fiduciary makes a profit, or constructive trusts arising under the *Barnes v. Addy* (1874) L.R. 9 Ch. App. 244 principle. These are dealt with by Heydon, 'Recent Developments in Constructive Trusts' (1977) 5, *Australian Law Journal* 635. The recent decision of Brooking J. in the Supreme Court of Victoria in *Kardynal v. Dodek* (12 October 1977) will be the subject of a later note in M.U.L.R.

[2] Keeton, G. W., *The Law of Trusts* (10th ed., 1974) 191.

[3] Waters, D. W. M., *The Constructive Trust* (1964) 12.

[4] Waters, D. W. M., *The Constructive Trust* (1964) 13.

[5] (1726) 2 Eq. Cas. Abr. 741.

provides no explanation for the miscellaneous situations where a constructive trust has been held to arise in the absence of a fiduciary relationship. Often these situations are simply listed without any attempt to advance any underlying theme.[6] Until recently the unjust enrichment concept so familiar in American writings, was used rarely by text writers, and even more rarely by the courts. In his book on *The Constructive Trust,* Waters argues that English law should cease to concentrate upon the relationship between the parties as the basis for imposing a constructive trust, and concentrate rather upon the acts or events which justify its imposition. Thus it should advance towards the concept of the constructive trust as a remedy, the basis of which is unjust enrichment.[7] The increasing use of the constructive trust by the English courts makes it now seriously arguable that the traditional English view is gradually being supplanted by the American approach. Indeed Lord Denning has gone so far as to say that a constructive trust:

> is a trust imposed by law whenever justice and good conscience require it . . . It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.[8]

Until recently Australian commentators could be excused for thinking that this approach to the constructive trust was largely attributable to the influence of Lord Denning, and for doubting the acceptability of his reasoning in Australian courts.[9] However the decision of Holland J. of the Supreme Court of New South Wales in *Ogilvie v. Ryan*[10] shows that this doubt may be ill-founded. Before *Ogilvie v. Ryan* is analysed it is necessary to examine three different situations in which the constructive trust has recently assumed importance in English decisions.

## 1. MATRIMONIAL PROPERTY[11]

Arguably the most influential context in which the constructive trust has recently been employed is in the area of matrimonial property and property acquired by parties living together in a *de facto* marriage. In this

[6] For a discussion of the attitude exhibited in three leading English texts see Waters, D. W. M., *The Constructive Trust* (1964) 28-30, 33-5. See also 339-43.

[7] Waters, D. W. M., *The Constructive Trust* (1964) 73.

[8] *Hussey v. Palmer* [1972] 3 All E.R. 744, 747. *Cf. Selangor United Rubber Estates Ltd v. Cradock* No. 3 [1968] 2 All E.R. 1073, 1082.

[9] For a discussion of the difference between the English and American approaches see Oakley, A. J., 'Has the Constructive Trust Become a General Equitable Remedy' (1973) 26 *Current Legal Problems* 17, 18-20.

[10] [1976] 2 N.S.W.L.R. 504.

[11] In Australia many of the matrimonial property problems similar to those discussed below would be dealt with under Family Law Act 1975-76 (Cth) s. 79(1) which provides

> In proceedings with respect to the property of the parties to a marriage or either of them, the court may make such order as it thinks fit altering the interests of the parties in the property . . .

However in all States save Victoria (where Marriage Act 1958 s. 161 confers upon the court a somewhat wider jurisdiction), the courts under their respective Married Women's Property Act legislation will be obliged to ascertain the rights of husband

area the Court of Appeal has developed the constructive trust to overcome the constraints placed upon it by the House of Lords' decisions in *Pettitt v. Pettitt*[12] and *Gissing v. Gissing*.[13]

To understand the role which the constructive trust has played in this area some historical background is necessary. Traditionally the principles relating to resulting trusts were relevant when a person contributed to the purchase price of property purchased in the name of another. Where legal title to property, for example the matrimonial home, was in the husband, but the wife had made direct financial contributions to its purchase, equity would presume a resulting trust in favour of the wife proportionate to the value of her contributions.[14] (In contrast, where legal title to the property was in the wife, and the husband made direct financial contributions to the acquisition of the property, it was presumed that the husband intended to benefit her.)[15] In cases where the wife had clearly made a direct contribution, but her precise contribution could not be quantified because the assets of the parties had been inextricably intermingled the court would apply the maxim 'equity is equality' and divide the assets equally.[16] These principles did not apply however to the wife who made no *direct* contribution to the acquisition of the assets. For example, the wife might have improved the property after it was acquired by contributing money or physical labour to renovations, or might have used her earnings to bear housekeeping expenses to enable her husband's income to be expended in paying off a mortgage.

Beginning in the early 1950s the Court of Appeal developed a doctrine of family assets covering property enjoyed in common by the parties to a marriage. The Court of Appeal took the view that s. 17 of the Married Women's Property Act empowered the court to vary existing proprietary rights between husband and wife where it was necessary to achieve justice

and wife according to existing legal principle. See *e.g.* Married Persons (Property and Torts) Act 1901-64 (N.S.W.) s. 22, Married Women's Property Act 1890-1952 (Qld) s. 21, Married Women's Property Act 1892-1962 (W.A.) s. 17, Law of Property Act 1936-75 (S.A.) s. 165, Married Women's Property Act 1935 (Tas.) s. 8.
The legislation cited above will not apply where the issue as to title to property does not arise between husband and wife, but between one party to the marriage and a third party, or between third party successors in title to the parties to the marriage. In such cases the issues raised in the Court of Appeal decisions will be relevant. For example the question might arise between the husband's creditors and the wife, or between claimants taking under the will of the husband and the wife. For a very recent discussion of Matrimonial Property in the Canadian Context see *Ratnwell v. Ratnwell* [1978] 2 W.W.R. 101.

[12] [1970] A.C. 777.
[13] [1971] A.C. 886.
[14] *Dyer v. Dyer* (1788) 2 Cox. Eq. Cas. 92; 30 E.R. 42.
[15] *Ibid. In Re Eykyn's Trusts* (1877) 6 Ch.D. 115, 118 *per* Malins V.C. *Wirth v. Wirth* (1956) 98 C.L.R. 228, *Pettitt v. Pettitt* [1970] A.C. 777, 811-6 *per* Lord Upjohn. See also *Carkeek v. Tate-Jones* [1971] V.R. 691.
[16] *Jones v. Maynard* [1951] Ch. 572. *Rimmer v. Rimmer* [1953] 1 Q.B. 63, 72 *per* Lord Evershed M.R.

between them.[17] In *Pettitt v. Pettitt*[18] the House of Lords rejected this view and held that s. 17 (which empowered the court in determining disputes relating to matrimonial property to make such order as it thought fit) was a procedural section only. Conflicts concerning title to matrimonial property were to be resolved by reference to general principles of property law applicable to disputes between strangers. The decision in *Pettitt v. Pettitt* also threw doubts on the correctness of earlier cases which had held that a spouse might acquire an equitable interest in property in the name of the other spouse simply by making improvements to the property after it was acquired.[19] The majority view was that in the absence of an agreement between the parties the 'improving spouse' would not acquire an interest in property in the name of the other spouse by effecting improvements to it.[20]

While *Pettitt v. Pettitt* made it clear that the court could not vary the existing proprietary rights of husband and wife simply for the purposes of achieving a fair distribution of property, the case left it somewhat unclear whether the court could imply an agreement from the conduct of the parties, or impute an agreement to them on the basis of what would have been intended by a reasonable husband and wife in all the circumstances of the case.[21] If such an agreement could be imputed or implied, this approach could be used by the court to achieve a distribution of the assets other than in accordance with the legal title.

This question was further discussed in *Gissing v. Gissing*.[22]

[17] See *e.g. Fribance v. Fribance* (No. 2) [1957] 1 All E.R. 357. *Hine v. Hine* [1962] 3 All E.R. 345. *Ulrich v. Ulrich and Felton* [1968] 1 All E.R. 67. *Chapman v. Chapman* [1969] 3 All E.R. 476. *Nixon v. Nixon* [1969] 3 All E.R. 1133. *Muetzel v. Muetzel* [1970] 1 All E.R. 443.
The latter three cases were decided after the House of Lords' decision in *Pettitt v. Pettitt* [1970] A.C. 777, but prior to the decision in *Gissing v. Gissing* [1971] A.C. 886. Married Women's Property Act 1882 (U.K.) s. 17 provides as follows:

> In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge . . . and the judge . . . may make such order with respect to the property in dispute . . . as he thinks fit. . . .

[18] [1970] A.C. 777.

[19] *Appleton v. Appleton* [1965] 1 W.L.R. 25. *Jansen v. Jansen* [1965] P. 478.

[20] [1970] A.C. 777, 804 *per* Lord Morris of Borth-y-gest; 807, 811 *per* Lord Hodson, 818-9 *per* Lord Upjohn. While Lord Reid and Lord Diplock agreed in the result they expressed qualifications to this wider general principle. [1970] A.C. 777, 796 *per* Lord Reid (an improving spouse would not acquire an interest in the property where the work was of an ephemeral nature), [1970] A.C. 777, 826 *per* Lord Diplock (an improving spouse would not acquire an interest where the work was of the kind that a spouse would normally carry out).

[21] Lords Reid and Diplock were sympathetic to the approach of imputing an intention to the parties. See [1970] A.C. 777, 795 *per* Lord Reid who said 'we can ask what the spouses, or reasonable people in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who has contributed to the acquisition on improvement of property owned by the other spouse', and see Lord Diplock, 823-5. *Cf.* the approaches of Lord Morris of Borth-y-gest, 804-5, Lord Hodson, 810, and of Lord Upjohn, 817, which was opposed to imputing an intention to the parties, as opposed to implying one from their conduct.

[22] [1971] A.C. 886.

In *Gissing v. Gissing* the House of Lords rejected the approach of imputing a contract to vary legal interests, and asserted that the solution to the problem was to be achieved by applying the principles of trusts law.[23] The following propositions emerge from *Gissing v. Gissing:*

(i) The question whether a wife obtains a beneficial interest in property in the name of the husband (or *vice versa*) depends upon the law of trusts and not upon the law of contract. In other words, it is necessary to show an intention to transfer or create interests, rather than simply an intention to enter into a contract, in order for a person to acquire an interest in property in the name of another.[24]

(ii) A person who makes contributions which may indirectly assist in the acquisition of an asset does not *prima facie* acquire an interest in that asset as a result of such indirect contributions.

(iii) In the absence of an express contract, or an express declaration of trust, (which in the case of land must be in writing) a beneficial interest in the property may only be claimed if the conduct of the parties at the time of acquisition of the asset shows an agreement or common intention that the person not acquiring legal title should acquire a beneficial interest in the property. It appears that such an agreement cannot be imputed to the parties.[25]

(iv) If such an intention exists the non-owner may acquire a beneficial interest by means of an implied, resulting or constructive trust.[26]

(v) Under the trust the parties will be equitable tenants in common. Generally the shares in which they hold will be related either to the direct contributions made, or to the terms of the agreement between them.[27]

Unfortunately *Gissing v. Gissing* did not clearly indicate when a court would be entitled to deduce an agreement or common intention from the parties' conduct. However, one proposition is clearly inherent in both *Pettitt v. Pettitt* and *Gissing v. Gissing*. In the absence of an agreement or common intention affecting beneficial interests (which need not be express but must be discoverable from the parties' conduct) the court cannot alter the beneficial interests in order to achieve fairness. The

[23] *Cf.* the comments of Lord Diplock in *Pettitt v. Pettitt* [1970] A.C. 777, 822.

[24] [1971] A.C. 886, 896 *per* Lord Reid, 899-900 *per* Viscount Dilhorne, 904-5 *per* Lord Diplock.

[25] [1971] A.C. 886, 898 *per* Lord Morris of Borth-y-gest, 900 *per* Viscount Dilhorne, 902-3 *per* Lord Pearson, 904-5 *per* Lord Diplock. Note Lord Diplock's comments relating to the time at which the intention must be manifested, 906-7. By contrast Lord Reid stood firm to the approach he had taken in *Pettitt v. Pettitt* [1970] A.C. 777, that an agreement could be imputed to the parties. See *Gissing v. Gissing* [1971] A.C. 886, 896. Oddly enough Lord Pearson talks of imputing an agreement, but seems to use it in the sense of implying an agreement from the parties' conduct.

[26] [1971] A.C. 886, 901 *per* Viscount Dilhorne, 902 *per* Lord Pearson, 904-5 *per* Lord Diplock.

[27] In *Gissing v. Gissing* [1971] A.C. 886 some cautions were uttered against the application of the 'equity is equality' principle *per* Lord Reid, 897, *per* Lord Pearson, 903. See also the comments of Lord Diplock, 906-10 as to the quantification of the interests of the parties.

constructive trust, if it arises at all, arises out of the intention of the parties and cannot be imposed simply to prevent one party from being unjustly enriched at the expense of the other. The majority of the House of Lords was clearly opposed to the approach of imputing an agreement to the parties on the basis of what reasonable persons in their position would have intended. To use the constructive trust to achieve fairness would be to resurrect the heretical approach of the Court of Appeal prior to the decision in *Pettitt v. Pettitt,*[28] albeit in a different guise. Thus the whole tenor of the decision in *Gissing v. Gissing*[29] is opposed to the use of the constructive trust as a device to prevent unjust enrichment, at least in the context of matrimonial property.

This however leads us to a further question. The House of Lords did not consider it necessary to differentiate between 'an implied, resulting or constructive trust'.[30] On what basis is the imposition of a constructive trust justified in these circumstances, if it is not the prevention of unjust enrichment? Two possible explanations spring to mind. First, if an indirect contribution of money or services is made by one person in reliance upon an agreement or common intention of both parties that such contribution will lead to the acquisition of an interest in the property, the court will impose a constructive trust to prevent the other party from deriving benefit from the contribution while failing to fulfil his side of the agreement. On this view the constructive trust does not arise from the unjust enrichment of the benefited party but from his unconscionable behaviour in attempting to retain the benefit while reneging on the agreement. While the existence of an agreement would be vital, presumably the constructive trust would not arise until the indirect contributions were actually made.

This view is supported by the analysis of Lord Reid which was that the acceptance by the husband of the wife's contribution might 'impose on him an implied, constructive, or resulting trust'.[31] It is difficult to know how much weight to attach to Lord Reid's comments, as in other respects his approach differs from that of the rest of the House of Lords. However the same view is supported by the analysis of Lord Diplock, who refers to the trust arising out of the trustee's unconscionable conduct in inducing the *cestui que trust* to act to his detriment in the belief that by so doing he was acquiring a beneficial interest. It is worth quoting Lord Diplock's comments in full, for Lord Denning M.R. has used them in later cases as a justification for a more liberal approach than Lord Diplock himself appears to adopt.

[28] [1970] A.C. 777.

[29] [1971] A.C. 886.

[30] [1971] A.C. 886, 896 *per* Lord Reid, 901 *per* Viscount Dilhorne, 905 *per* Lord Diplock. Waters, D. W. M., in *Law of Trusts in Canada* (1st ed., 1974) 314 comments 'Though their Lordships speak of "resulting, implied or constructive trust", they are assuming in so doing that the trust arises out of, or implements, intent'.

[31] [1971] A.C. 886, 896.

Lord Diplock said[32]

> Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based upon the proposition that the person in whom the legal estate is vested holds it as trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of 'resulting, implied or constructive trusts'. Where the trust is expressly declared in the instrument by which the legal estate is transferred to the trustee or by a written declaration of trust by the trustee, the court must give effect to it. But to constitute a valid declaration of trust by way of gift of a beneficial interest in land to a cestui que trust the declaration is required by section 53(1) of the Law of Property Act 1925, to be in writing. If it is not in writing it can only take effect as a resulting, implied or constructive trust to which that section has no application.
>
> 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.
>
> This is why it has been repeatedly said in the context of disputes between spouses as to their respective beneficial interests in the matrimonial home, that if at the time of its acquisition and transfer of the legal estate into the name of one or other of them an express agreement has been made between them as to the way in which the beneficial interest shall be held, the court will give effect to it — notwithstanding the absence of any written declaration of trust. Strictly speaking this states the principle too widely, for if the agreement did not provide for anything to be done by the spouse in whom the legal estate was not to be vested, it would be a merely voluntary declaration of trust and unenforceable for want of writing. But in the express oral agreements contemplated by these dicta it has been assumed sub silentio that they provide for the spouse in whom the legal estate in the matrimonial home is not vested to do something to facilitate its acquisition, by contributing to the purchase price or to the deposit or the mortgage instalments when it is purchased upon mortgage or to make some other material sacrifice by way of contribution to or economy in the general family expenditure. What the court gives effect to is the trust resulting or implied from the common intention expressed in the oral agreement between the spouses that if each acts in the manner provided for in the agreement the beneficial interests in the matrimonial home shall be held as they have agreed.

Clearly Lord Diplock's justification for the imposition of the constructive trust is narrower than any simplistic notion of 'fairness'. As the quotation above illustrates, his analysis requires both the existence of an agreement or common intention *and* the performance of acts by one of the parties in reliance upon the agreement. In the case of an agreement relating to an interest in land any formal requirements are avoided, for it would be fraudulent for a spouse to take the benefit of the agreement and then to plead the Statute of Frauds.[33] The use of the constructive trust elegantly serves two ends. It explains the source of the spouse's beneficial interest, and obviates any need to satisfy the Statute of Frauds.[34]

[32] [1971] A.C. 886, 904-5.

[33] The equivalent modern provisions are found in: Conveyancing Act 1919-76 (N.S.W.) s. 23C. Property Law Act 1958 (Vic.) s. 53. Property Law Act 1974-75 (Qld) s. 11. Law of Property Act 1936-75 (S.A.) s. 29. Property Law Act 1969-75 (W.A.) s. 34. Conveyancing and Law of Property Act 1884 (Tas.) s. 60.

[34] Resulting, implied and constructive trusts are exempt from the requirement that they be manifested or proved in writing. See provisions *supra*.

As an alternative to Lord Diplock's approach it could be argued that the constructive trust is imposed simply because the parties intended that the non-contributing party should gain an interest. Arguably it would be unconscionable for the party with the legal interest to deny the existence of the agreement in order to defeat the interest of the other party. On this view it would be strictly unnecessary to show that any contributions, even indirect ones, had been made. This view regards the constructive trust as arising simply out of the parties' *intention*, a view contrary to the traditional notion of the constructive trust. It gains little support from the decision in *Gissing v. Gissing* although Viscount Dilhorne did say

> 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.[35]

This seems to go even further than the Court of Appeal would be prepared to go. Even in the judgments discussed below the party claiming the beneficial interest had made a contribution of some kind, however indirect, to the acquisition of property. Therefore it appears that the basis for the imposition of the constructive trust is the unconscionable behaviour of the party who seeks to resile from the agreement after receiving benefits from the other party, rather than the simple existence of the agreement itself.[36] This view is supported by the analysis of Holland J. in *Ogilvie v. Ryan*[37] discussed below.

While the imposition of a constructive trust can be explained as above, it is difficult to see how the House of Lords in *Gissing v. Gissing* could regard the resulting trust as a means of giving effect to the parties' intention. According to traditional principles a resulting trust arises where one person makes a direct contribution to the purchase price of an asset transferred to another. The majority view of the House of Lords was that this presumption *did not* extend to indirect contributions. Any resulting trust which arose derived from the actual intention of the parties rather than from a presumed intention. It would seem that a trust which arose out of the actual intention of the parties would be express, rather than resulting. If H takes a transfer of the legal title to property from V in circumstances where there is no presumption of resulting trust in favour of W, H's wife, the only trust which could arise in favour of W would be express. H's intention that W should have a beneficial interest would be effective to pass such an interest to W, except where the property was land. In the case of land the declaration of trust would be required to be

[35] [1971] A.C. 886, 900.

[36] See the analysis by Lesser, H., 'The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot' (1973) 23 *University of Toronto Law Journal* 148, 189-91.

[37] [1976] 2 N.S.W.L.R. 504. *Cf.* Webb, F., 'Trusts of Matrimonial Property' (1976) 92 *Law Quarterly Review* 489.

manifested and proved in writing. In *Cowcher v. Cowcher*,[38] Bagnall J. attempted to explain the House of Lords reference to the resulting trust in this way:

> If my analysis has been correct, there are thus two types of agreements or common intention which may affect A's and B's respective equitable interests: (1) an agreement that, irrespective of the actual payments to the vendor and the legal obligations to an outside mortgagee, as between themselves A and B shall be treated as providing the money (including being liable for mortgage repayments) in, say, equal shares; (2) an agreement that irrespective of the shares in which, as between themselves, the money has been provided, the property shall be held on an express trust for A and B in, say, equal shares. The first type of agreement or common interest, could, in my judgment, be inferred from conduct antecedent, contemporaneous or subsequent, for it would be part of the arrangement which gave rise to the resulting trust and consistent with it. On the other hand, in my opinion, it would be extremely difficult to infer the second type of agreement from any conduct, because it would involve relying on conduct to substitute for the resulting trust that would otherwise have been implied also from conduct, a contractual express trust inconsistent with that resulting trust.

In other words, Bagnall J. would regard the source of any resulting trust as being an agreement between the parties to treat contributions, admittedly indirect, as direct for the purposes of the presumption of resulting trust.[39] Because the parties agreed that indirect contributions should be regarded as direct, the normal presumption of resulting trust, applicable in the case of direct contributions, could also be applicable in the case of the indirect contributions. An agreement to this effect, however, would be essential. Bagnall J. did not pursue the possibility that an agreement, when acted upon to the detriment of one party, could give rise to a constructive trust. His sophisticated and complex analysis seems to have been largely ignored, since subsequent decisions of the Court of Appeal simply refer to the constructive and resulting trust as if they were interchangeable devices.

What has become of the analysis of Lord Diplock? The Court of Appeal has effectively ignored the restrictions inherent in the decision in *Gissing v. Gissing*.[40] In a number of decisions the Court of Appeal has used the constructive trust, and sometimes the resulting trust, in order to confer beneficial interests in property upon persons who have made indirect contributions to the acquisition of an asset, so long as these contributions were not trivial. This approach has been used even when the contribution was not referable to the acquisition of the asset, and in some cases where the contribution was largely one of physical labour. Although in some cases the Court of Appeal has purported to give effect to the common intention of the parties, the attempt is often a transparent legal fiction.

[38] [1972] 1 W.L.R. 425, 432-9. Note that Bagnall J. implies in his judgment that all express trusts must be manifested or proved in writing. This requirement, of course, relates only to express trusts of land. See n. 33, *supra*.

[39] This analysis seems to accord with that of Waters, D. W. M., *Law of Trusts in Canada* (1st ed., 1974) 311. *Cf.* the comments of Goff J. in *Re Densham* [1975] 3 All E.R. 726, 732. See also Webb, F., 'Trusts of Matrimonial Property' (1976) 92 *Law Quarterly Review* 489.

[40] [1971] A.C. 886.

In many of these cases Lord Denning quite clearly imputes an agreement to the parties and then treats the imputed agreement as giving rise to a constructive trust. The cases discussed below are representative of this approach.[41]

In *Hazell v. Hazell*[42] a husband purchased a house, the purchase price being provided by a loan from the husband's parents and a loan from a building society. Following the purchase of the house the parties discussed how to meet the increased expenditure. It was agreed that the wife should go out to work and the husband reduced her housekeeping money. There was no express agreement that the wife should gain a beneficial interest in the house. The wife went to work and used her salary in paying for a household help and in meeting housekeeping and clothing expenses. It was held that the wife's contribution to family expenses entitled her to a fifth share in the house. This result was reached despite the lack of any express or implied agreement that her contribution would entitle her to a beneficial interest. Lord Denning M.R. said

> She may get a share by reason of her contributions, even though there is no agreement, express or implied.[43]

It was not necessary to show that her contributions were referable to the purchase as long as they relieved the husband from expenditure he would otherwise have to bear. Despite the absence of an express or implied agreement 'it would be inequitable for the husband to take the whole when she has helped him so much to acquire it'.[44] Megaw L.J., by contrast, appeared to attach some significance to the fact that she went out to work to contribute towards expenses which were going to be incurred because of the acquisition of the matrimonial home. It was sufficient if a reasonable husband would realize that this was the reason his wife went out to work.[45] Lord Denning's view, at least, appears to be inconsistent with the approach in *Gissing v. Gissing*[46] which required some kind of intention or understanding linking the making of indirect payments with the acquisition of an interest in the house. Clearly the constructive trust was not imposed

[41] These cases are simply selected as representative of the liberal approach taken by the Court of Appeal but see also *Smith v. Baker* [1970] 2 All E.R. 826; *Falconer v. Falconer* [1970] 3 All E.R. 449. See particularly the comments of Lord Denning M.R., 452 where he interpreted *Gissing v. Gissing* [1971] A.C. 886 as permitting the imposition of a trust. He said 'It is done, not so much by virtue of an agreement, express or implied, but rather by virtue of a trust which is *imposed* by law.' *Cracknell v. Cracknell* [1971] P. 356; *Davis v. Vale* [1971] 2 All E.R. 1021. See particularly the comments of Lord Denning M.R., 1026; *Hargrave v. Newton* [1971] 3 All E.R. 866, 869 *per* Lord Denning M.R.; *Re Cummins, decd* [1972] 1 Ch. 62, 68 *per* Lord Denning M.R. *Cf.* the decision of Goff J. in the Chancery Division in *Re Densham* [1975] 3 All E.R. 726; and see also *Richards v. Dove* [1974] 1 All E.R. 888. See the discussion in Bisset-Johnson, A., 'Ownership of Family Assets' (1972) 46 *Australian Law Journal* 436. Compare also the equally liberal approach in *Tanner v. Tanner* [1975] 3 All E.R. 776 distinguished in *Horrocks v. Forray* [1976] 1 All E.R. 737. *Tanner v. Tanner* was followed in *Pearce v. Pearce* [1977] 1 N.S.W.L.R. 170.

[42] [1972] 1 All E.R. 923.

[43] [1972] 1 All E.R. 923, 925.

[44] [1972] 1 All E.R. 923, 927. *Cf. Hargrave v. Newton* [1971] 3 All E.R. 866.

[45] [1972] 1 All E.R. 923, 928.

[46] See Eekelaar, J. M., 'The Matrimonial Home in the Court of Appeal', Note (1972) 88 *Law Quarterly Review* 333.

simply to prevent the husband resiling from an agreement after having had the benefit of his wife's activities. While Lord Denning did not specifically refer to unjust enrichment as a basis for the imposition of the trust, this appears to be implicit in his judgment.

In *Cooke v. Head*[47] the plaintiff was the defendant's mistress. The defendant purchased a house which was put in his name and he paid the deposit and arranged the mortgage. The plaintiff made a small financial contribution to the mortgage repayments and helped physically in the task of building the bungalow. The trial judge awarded the plaintiff a one-twelfth interest in the proceeds of the sale on the basis of her actual financial contribution. There was some evidence that the parties intended the plaintiff to take a one-half share. The Court of Appeal managed to impose a constructive trust in order to entitle her to one-third of the proceeds. Lord Denning said that

> it [was] not right to approach this case by looking at the money contributions of each and dividing up the beneficial interest according to the contributions.

The matter should be approached more broadly, for

> 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.[48]

Lord Denning placed little emphasis upon finding a common intention in the parties relating to such a division of the assets. In fact, such evidence of an agreement as did exist pointed towards an equal division. His use of the constructive trust was clearly designed to reach the result he considered fair. Karminski J. delivered a separate judgment agreeing with Lord Denning.

In *Eves v. Eves*[49] an unmarried couple decided to purchase a house. The defendant bought the house in his own name and supplied the purchase money, telling the plaintiff that he would have put it in their joint names if she had not been under age. At the trial he said that he had used her age as an excuse for not putting it in their joint names. The plaintiff did a great deal of work in cleaning and renovating the house and garden. Lord Denning referred to his own comments in *Cooke v. Head*.[50] Since the house was acquired or maintained by both parties with the intention that it should be used for their joint benefit the law would impose a constructive trust upon the defendant entitling the plaintiff to a beneficial interest in one-quarter of the house. In contrast, on the view of Brightman L.J., it would be insufficient to simply show that the plaintiff had been led to believe that she was to have some undefined interest in the property. In his words: 'This, of course, is not enough by itself to create a beneficial interest in her favour'; that would at best be a mere

[47] [1972] 2 All E.R. 38.
[48] [1972] 2 All E.R. 38, 42.
[49] [1975] 3 All E.R. 768. For further criticisms of this case see Jacobs, K. S., *Law of Trusts in Australia* (4th ed., 1977) by Meagher, R. P. and Gummow, W. M. G., 256-7.
[50] [1972] 2 All E.R. 38.

'voluntary declaration of trust' which would be 'unenforceable for want of writing'.[51] However he was prepared to infer a bargain between the parties that in return for the plaintiff contributing her labour she was to have a beneficial interest in the property. The views of Brightman L.J. are more readily reconcilable with those of the House of Lords in *Gissing v. Gissing*.[52]

An even more dramatic illustration of the liberal approach is provided by *Heseltine v. Heseltine*.[53] The case was concerned *inter alia*[54] with three sums of £20,000 each transferred by a wife to her husband. Normally a presumption of resulting trust would arise in these circumstances. However the first two payments were made at the husband's request in order to equalize the husband and wife's liability to estate duty, and the third payment was made to provide the husband with sufficient assets to qualify as a Lloyd's underwriter. Clearly the wife's intention was to transfer the beneficial interest as well as the legal one, for only by so doing could these aims be satisfied. Nevertheless, the Court of Appeal held that the husband held as trustee for his wife. Purporting to rely upon Lord Diplock's judgment in *Gissing v. Gissing* Lord Denning said

> If the conduct of the husband is such that it would be inequitable for him to claim the property beneficially as his own, then although it is transferred into his name, the court will impose upon him a trust to hold it for them both jointly, or for her alone, as the circumstances of the case may require.[55]

Clearly, the imposition of a trust in these circumstances is designed to prevent unjust enrichment and has no relationship to any agreement or common intention of the parties.

The above cases illustrate that in the area of matrimonial property the Court of Appeal is largely by-passing the restrictions inherent in *Pettitt v. Pettitt*[56] and *Gissing v. Gissing*.[57] The Court of Appeal has simply paid lip-service to the principle that any implied, resulting or constructive trust must arise from the express or implied intention of the parties, and has used the constructive trust as a remedial device designed to prevent unjust enrichment.[58]

[51] [1975] 3 All E.R. 768, 774.
[52] [1971] A.C. 886.
[53] [1971] 1 All E.R. 952.
[54] The case also concerned division of the matrimonial home. Oakley argues that the court's result on this issue was also reached by use of the constructive trust. Oakley, A. J., 'Has the Constructive Trust Become a General Equitable Remedy' (1973) 26 *Current Legal Problems* 17. See also Jacobs, K. S., *Law of Trusts in Australia* (4th ed., 1977) by Meagher, R. P. and Gummow, W. M. G., 254. Note that in *Heseltine v. Heseltine* Lord Denning purported to rely upon a paragraph from Lord Diplock's judgment in *Gissing v. Gissing* [1971] A.C. 886, 905 quoted *supra*, whilst omitting a crucial sentence from the quote.
[55] [1971] 1 All E.R. 952, 955.
[56] [1970] A.C. 777.
[57] [1971] A.C. 886.
[58] For an extremely detailed and sophisticated analysis of the whole matrimonial property area see Lesser, H., 'The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot' (1973) 23 *University of Toronto Law Journal* 148.

It is interesting to note that in the New South Wales case of *Doohan v. Nelson,*[59] Mahoney J. appears also to have taken the view that the reasoning in *Gissing v. Gissing*[60] permitted the court to impute an intention to the parties even where there was no evidence that such an intention existed in the subjective sense. With respect, Mahoney J. appears to confuse certain statements made by their Lordships in *Gissing v. Gissing* which relate to *inferring* an agreement from the conduct of the parties, with the notion of *imputing* an intention to the parties. In part, he relies on the judgment of Lord Reid, whose comments were inconsistent with those of the other law lords. Accordingly Mahoney J. held that a wife held the matrimonial home, which was in her name, absolutely in trust for her husband. This result was reached because almost the entire cost of purchasing the house had been paid by the husband. Mahoney J.'s interpretation of *Gissing v. Gissing* is somewhat idiosyncratic and the decision is more consistent with the reasoning of the Court of Appeal than with that of the House of Lords in *Gissing v. Gissing.*[61] While the results in the Court of Appeal decisions are usually attractive, the reasoning, or rather lack of it, gives rise to difficulty. It is argued that the clear recognition of the constructive trust as a remedial device is a healthy development. However it is difficult to spell out from the Court of Appeal decisions when this remedy will be available and how far it will extend. Vague references to 'fairness' do not provide an answer. Lord Diplock's judgment is not inconsistent with the use of a constructive trust as a remedy, and at least provides some guide-lines as to when the remedy might be expected to be available.

## 2. CONSTRUCTIVE TRUST ARISING OUT OF 'FRAUD'

The second situation in which the constructive trust has recently been employed is illustrated by the Court of Appeal decision in *Binions v. Evans.*[62] Equity will impose a constructive trust in order to prevent a person from enjoying the fruits of his fraud.[63] Where a person has had title to land transferred to him on the oral understanding that he will hold the land on trust for the transferor or for some third party he will not be permitted to rely on the Statute of Frauds, s. 7[64] in order to avoid the trust, for equity regards this as fraudulent.[65]

[59] [1973] 2 N.S.W.L.R. 320.
[60] [1971] A.C. 886.
[61] *Robinson v. Robinson* [1961] W.A.R. 56. See also *Fraser v. Gough* [1975] 1 N.Z.L.R. 138. *McRae v. Whalley* (unreported decision of Jones J. of the Supreme Court of Western Australia 15th August 1975) and *Valent v. Salamon* (unreported decision of Holland J. of the Supreme Court of New South Wales 8th December 1976).
[62] [1972] Ch. 359.
[63] For further illustrations of this principle see Oakley, A. J., 'Has the Constructive Trust Become a General Equitable Remedy' (1973) 26 *Current Legal Problem* 17.
[64] For the equivalent modern provisions see n. 33, *supra.*
[65] *Rochefoucauld v. Boustead* [1897] 1 Ch. 196.

In a situation of this kind there are two possible explanations for the ability of the intended beneficiary to enforce the trust. First, it can be argued that the court simply enforces the express trust between the parties by preventing the trustee from pleading the statute.[66] The trustee cannot rely upon the statute because it would be fraudulent to do so. The majority of cases appear to favour this approach. Clearly this view presupposes the existence of an intention to create a sufficiently defined beneficial interest coming into existence at the moment of conveyance. Secondly, it can be argued that the terms of the Statute of Frauds prohibits the enforcement of the express trust. However in order to prevent the statute being used as an instrument of fraud, equity imposes a constructive trust upon the trustee to prevent him benefiting from the fraud. The Statute of Frauds is not breached because constructive trusts are expressly exempted from its provisions. Even on this view the fraud which attracts the imposition of a constructive trust will not exist unless there was a clear intention to confer a beneficial interest on the intended beneficiary.[67]

Generally speaking, the first explanation has been relied upon by the courts. In other words, the express trust, rather than a constructive trust covering the same ground, is enforced.[68]

However in *Bannister v. Bannister*[69] the court appears to have relied on the second line of reasoning to justify the imposition of a constructive trust. In that case the defendant conveyed two cottages to the plaintiff on the basis of the plaintiff's oral undertaking that the defendant would be allowed to live in one of the cottages rent free for as long as she desired. The conveyance contained no mention of the plaintiff's undertaking but, because it was intended that the defendant retain a beneficial interest, the plaintiff paid a reduced price. Subsequently the plaintiff sought to evict the defendant from the portion of the cottage occupied by her, arguing that the defendant was a mere tenant at will whose interest had been determined. It was argued that the defendant could not rely upon the oral undertaking in view of the absence of writing and the provisions of the Law of Property Act, ss. 53 and 54.[70] It was held that the plaintiff held a life interest on constructive trust for the defendant. It was not necessary to show that at the time the conveyance was made the plaintiff had a fraudulent intention, for according to Scott L.J. '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'.[71] The parties' bargain need not have expressly referred to a trust provided they had an intention to create a sufficiently defined beneficial interest.

[66] This is the explanation accepted in Jacobs, K. S., *Law of Trusts in Australia* (4th ed., 1977) by Meagher, R. P. and Gummow, W. M. G., 253.
[67] Waters, D. W. M., *Law of Trusts in Canada* (1st ed., 1974) 197-200.
[68] *Ibid.*
[69] [1948] 2 All E.R. 133.
[70] For the equivalent provisions in Australia see n. 33, *supra.*
[71] [1948] 2 All E.R. 133, 136.

The principle enunciated in *Bannister v. Bannister* was applied in the New South Wales case of *Last v. Rosenfeld.*[72]

*Bannister v. Bannister* was applied and extended in *Binions v. Evans.*[73] In *Binions v. Evans* the owners of a cottage agreed to permit the widow of a deceased former servant to remain in the cottage rent free for her life in return for her keeping the property in good order. Under the written agreement she was to reside in the cottage 'as tenant at will free of rent for the remainder of her life or until determined as hereinafter provided'. Provision was made for the widow to determine the tenancy and the agreement concluded '. . . the tenancy hereby created shall unless previously determined forthwith determine on the death of the defendant'. Later the owners of the cottage sold it to Binions. The sale was expressly subject to Mrs Evans' tenancy and as a result the price of the cottage was reduced. Subsequently the plaintiffs purported to determine Mrs Evans' tenancy at will and to evict her. The Court of Appeal held that she could not be evicted. Lord Denning reached this result by means of two alternative approaches. The first solution was that the plaintiff had a contractual licence, protected in equity but not amounting to an equitable life tenancy. Following *Errington v. Errington*[74] this interest was enforceable against the plaintiffs because they had notice of it. The contractual licence reasoning is inconsistent with the decision of the High Court in *Cowell v. Rosehill Racecourse Ltd*[75] and is unlikely to be followed in Australia.[76] However, even if this reasoning were wrong Lord Denning had a second solution. If Mrs Evans did not have an interest enforceable against third parties before the sale, she obtained one when the owners of the cottage sold it to the defendants expressly subject to her 'tenancy'. Lord Denning said

> In these circumstances this court will impose on the plaintiffs a constructive trust for her benefit; for the simple reason that it would be utterly inequitable for the purchaser to turn the widow out contrary to the stipulation subject to which he took the premises.[77]

Quoting from the judgment of Lord Diplock in *Gissing v. Gissing*[78] a constructive trust was created 'whenever the trustee has so conducted himself that it would be inequitable to allow him to deny a *cestui que trust* a beneficial interest in the land acquired'. In quoting from Lord Diplock's judgment Lord Denning did what he also did in *Heseltine v.*

[72] [1972] 2 N.S.W.L.R. 923.

[73] [1972] Ch. 359. For a detailed discussion of the case see Smith, R. J., 'Licences and Constructive Trusts — The Law is What it Ought to Be' [1973] *Cambridge Law Journal* 123.

[74] [1952] 1 K.B. 290.

[75] (1937) 56 C.L.R. 605.

[76] For a detailed criticism of this part of the judgment of Lord Denning M.R. see Smith, R. J., 'Licences and Constructive Trusts — The Law is What it Ought to Be' [1973] *Cambridge Law Journal* 123, 135-6.

[77] [1972] Ch. 359, 368.

[78] [1971] A.C. 886, 905.

*Heseltine*.[79] He omitted the next sentence from the judgment which added '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'. This statement as qualified by Lord Diplock is not relevant to the situation arising in *Binions v. Evans,* for in that case there was no evidence that Binions' acts had induced Mrs Evans to act to her detriment. Lord Denning also relied upon an American decision, *Beatty v. Guggenheim Exploration Co.,* ignoring the fact that the American view of the constructive trust differs from the English one.[80] Megaw and Stephenson L.JJ. relied upon *Bannister v. Bannister*[81] to determine that the agreement between Mrs Evans and the owner of the cottage created a trust under which the landlord held the property for Mrs Evans for life. Since the plaintiffs took with express notice of the trust they could not turn her out of the cottage.

The analysis of Lord Denning differs dramatically from that of the other members of the court. According to Stephenson and Megaw L.JJ., Mrs Evans had an equitable life interest in the land prior to the sale to the plaintiffs.[82] While the nature of this interest was somewhat contentious,[83] if it is accepted that such an interest existed it clearly bound the purchaser with notice. But on the view of Lord Denning even if Mrs Evans had no interest in the land before the conveyance to Binions, the conveyance subject to so-called tenancy was sufficient to give rise to an equitable interest by way of a constructive trust. The constructive trust arose because it would be inequitable for Binions to deny Mrs Evans' interest, having undertaken to take subject to it.

This represents a dramatic inroad on traditional principles of property law.[84] Despite Lord Denning's protestations it is clearly inconsistent with the House of Lords' decision in *King v. David Allen & Sons, Billposting Ltd*[85] in which it was held that a contractual licence, which did not amount to an interest in land, could not bind a purchaser of the land from the licensor, despite the fact that the purchaser took with actual notice of the contract. Lord Denning distinguished *King v. David Allen & Sons, Billposting Ltd*[86] and another similar case, *Clore v. Theatrical Properties Ltd and Westby & Co. Ltd,*[87] on the basis that in these cases 'there was no trace of a stipulation, express or implied, that the purchaser should take the property subject to the right of the contractual licensee'. While

[79] [1971] 1 All E.R. 952.
[80] (1919) 225 N.Y. 380, 386.
[81] [1948] 2 All E.R. 133.
[82] [1972] Ch. 359, 370 *per* Megaw L.J., 372 *per* Stephenson L.J.
[83] On this point see Smith, R. J., 'Licences and Constructive Trusts — The Law is What it Ought to Be' [1973] *Cambridge Law Journal* 123.
[84] See the criticisms in Oakley, A. J., 'Has the Constructive Trust Become a General Equitable Remedy' (1973) 26 *Current Legal Problems* 17.
[85] [1916] 2 A.C. 54.
[86] *Ibid.*
[87] [1936] 3 All E.R. 483.

this is literally true it is also clear that in *King's* case the House of Lords considered that even the existence of an express stipulation would not subject the purchaser to the interest of the contractual licensee unless the interest amounted to an interest in land. Moreover despite the lack of an express stipulation that he took subject to the contractual licensee's interest the purchaser in *King's* case was well aware of the existence of the prior contract, and apparently aware of the fact that it was intended to take subject to it. It was as inequitable in *King's* case for the purchaser to repudiate the arrangement as it was in *Binions v. Evans,*[88] and according to Lord Denning's analysis of the genesis of the constructive trust, the absence of an express stipulation in the contract between the vendor and the purchaser should have made no difference.

Thus Lord Denning's analysis in *Binions v. Evans* represents a considerable extension of the principles relating to constructive trusts. The mere existence of a provision in a contract between vendor and purchaser relating to the rights of a third party is sufficient to give rise to a constructive trust in favour of the third party. The proprietary interest arises despite the fact that prior to the transfer from the vendor to the purchaser, the third party had no proprietary interest in the land. The interest arises from a stipulation in the contract which is inserted for the purpose of protecting the vendor from an action for breach of contract, not for the purpose of protecting the third person, who is not a party to the contract. Lord Denning used the constructive trust approach in order to overcome the failure of the owners of the cottage to give Mrs Evans a proprietary interest enforceable against Mr Binions. This approach enabled Lord Denning to take into account the fact that the price of the cottage had been reduced by the vendors because of Mrs Evans' interest. It should be noted that the fact that a reduced price had been paid by Binions was not regarded as a requirement for the granting of the remedy, although it clearly provided evidentiary support for the argument that fraud had occurred. In these circumstances only the imposition of a constructive trust would prevent Binions from reaping an unfair advantage. Could the payment of a reduced price be regarded as a requirement before a constructive trust be held to arise in future cases akin to *Binions v. Evans*?[89] This would be a means of preventing unjust enrichment whilst providing the court with clearer guide-lines upon which to operate.

It is difficult to regard *Binions v. Evans*[90] as falling within the spirit of the decision in *Gissing v. Gissing.*[91] Either the circumstances allowing the imposition of a constructive trust are narrower in the area of matrimonial property than in other areas, or there is an underlying conflict between the decision in *Binions v. Evans* and *Gissing v. Gissing.*

[88] [1972] Ch. 359.
[89] [1972] Ch. 359.
[90] *Ibid.*
[91] [1917] A.C. 886.

### 3. *HUSSEY v. PALMER*[92]

The third situation in which the Court of Appeal has recently invoked the constructive trust is illustrated by the case of *Hussey v. Palmer*. In *Hussey v. Palmer* the plaintiff, a widow, was invited to live with her daughter and son-in-law, the defendant. She paid £607 to a builder for the cost of building an extension to the house which would serve as her bedroom. After fifteen months family disputes led to her departure. Later she sued her son-in-law in the County Court for £607 as money lent, but elected to be non-suited when the registrar intimated that he would regard the transaction as a family arrangement rather than a loan. She then began a fresh action, claiming the £607 on a resulting trust. In this action she gave evidence that she had 'lent the money to the son' who said he would build a bedroom. In cross-examination she said, 'They would give me a home for life, if I wanted it'. Traditionally a loan and a resulting trust are regarded as mutually exclusive. If A lends B £10,000 to enable B to purchase property A has no interest in the property and the relationship is simply a debtor-creditor one. By contrast, if A contributes directly to the purchase price, with B taking transfer of the legal title, a presumption of resulting trust arises in favour of A. Mrs Hussey's evidence that the money was lent would appear to preclude the existence of a resulting trust. The judge held that there was no case for a resulting trust on the evidence of Mrs Hussey and she appealed to the Court of Appeal. Lord Denning took the view that there was no loan, as there was no arrangement that the money should be repaid. However, after referring to a number of cases in which a constructive trust had arisen in favour of a person contributing to the purchase of a property, and also to the equity of acquiescence,[93] he held that there was either a resulting or constructive trust in favour of the plaintiff proportionate to the amount which she had put into the property. He said

> 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. 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 legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or the benefit of it or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.[94]

He relied in part on his decisions in the matrimonial property cases saying

> Instances are numerous where a wife has contributed money to the initial purchase of a house or property; or later on to the payment of mortgage instalments; or has

[92] [1972] 3 All E.R. 744.

[93] The equity of acquiescence, like the constructive trust, frequently has been used as a remedial device by Lord Denning. For a detailed discussion of the equity of acquiescence see Neave, M. A. and Weinberg, M. S., 'The Function of the Equity' 1978 *Tasmanian Law Review*.

[94] [1972] 3 All E.R. 744, 746-7.

> helped in a business: see *Falconer v. Falconer* [1970] 1 W.L.R. 1333; *Heseltine v. Heseltine* [1971] 1 W.L.R. 343. *In Re Cummins, decd.* [1972] Ch. 62. Similarly, when a mistress has contributed money, or money's worth, to the building of a house: *Cooke v. Head* [1972] 1 W.L.R. 518. Very recently we held that a purchaser had bought a cottage subject to the rights of an occupier, held it on trust for her benefit: *Binions v. Evans* [1972] Ch. 359. In all those cases it would have been quite inequitable for the legal owner to take the property for himself and exclude the other from it. So the law imputed a trust for his or her benefit.[95]

Since it would be against conscience for the son-in-law to retain the land and not allow Mrs Hussey any interest in it or charge on it he would impose or impute a trust under which Palmer held the property on trust for her, proportionate to her share.

Clearly in this judgment, Lord Denning is using the constructive trust as a remedial device designed to prevent unjust enrichment. No attempt was made to find any intention in Palmer to confer a beneficial interest on his mother-in-law, and the case stands in contrast with the more restrictive approach in *Gissing v. Gissing*.[96]

Lord Phillimore held that a resulting trust arose in favour of Mrs Hussey. This was not inconsistent with the concurrent existence of a debtor-creditor relationship. Cairns L.J., in his dissenting judgment, took the more traditional view that the relationship of debtor-creditor and trustee-beneficiary under a resulting trust were mutually exclusive. Since Mrs Hussey had admitted that she had lent the money to her son-in-law she could not rely on a resulting trust.

This discussion of three areas in which the constructive trust has recently grown in importance brings us to a discussion of *Ogilvie v. Ryan*.[97]

## 4. *OGILVIE v. RYAN*

The facts of *Ogilvie v. Ryan* were as follows. Ogilvie Senior was the managing director of a company which owned a theatre and two cottages behind the theatre. In 1935, when his wife died, Ogilvie went to live with the defendant Ryan in one of the cottages which she had rented for some sixteen years previously. Ogilvie lived there until 1969, paying Ryan board. In 1969 the company contracted to sell the theatre and the cottages. When Ogilvie told the defendant she would have to leave the cottage she said she would try to find another home. However Ogilvie proposed that he buy a house and that she live in it with him and look after him for the rest of his life. In return for her services he said that the house would be hers as long as she lived. Ryan gave evidence that she and Ogilvie agreed on these terms. Ogilvie purchased a house and he and Ryan went to live in it in 1970. On Ogilvie's death in 1972 his will did not mention Ryan and his executor Ogilvie Junior commenced proceedings to recover possession of the house.

[95] [1972] 3 All E.R. 744, 747.
[96] [1971] A.C. 886.
[97] [1976] 2 N.S.W.L.R. 504.

Holland J. accepted the evidence of Ryan as to the agreement between herself and Ogilvie. He took the view that Ryan had carried out her part of the bargain in full and that she had received no recompense for her services. On this view of the facts he could have held that the parties had no intention to enter into legal relations and that the case was simply one of an imperfect gift or ineffective testamentary arrangement. Alternatively he could have held that even if the parties had intended to enter into legal relations the contract was a contract relating to an interest in land. In the absence of a memorandum in writing sufficient to satisfy the Statute of Frauds, or sufficient acts of part performance the agreement would be unenforceable. Holland J. discussed whether the acts of the defendant amounted to part performance, and this aspect of the case is considered below.

However counsel for Mrs Ryan argued that the facts were sufficient to give rise to a constructive trust. It was submitted that a constructive trust arose because '(1) The evidence proved expressly a common intention, before the property was acquired, that the defendant was to have a beneficial interest in it, and that the property was acquired by the deceased for the purpose of giving effect to their common intention. (2) The defendant was induced to alter her position and undertake a course of conduct greatly beneficial to the deceased upon the faith of his assurance that it would be carried out . . . (3) It would be a fraud on the defendant for the deceased or his executor now to assert his legal title in order to defeat the promised beneficial interest with a view to which the legal title was acquired, after having had the full benefit of her performance of the obligations which she undertook so that she might earn and maintain her right to that interest.'[98]

Holland J. referred to *Bannister v. Bannister*,[99] *Binions v. Evans*,[1] *Last v. Rosenfeld*,[2] *Hussey v. Palmer*,[3] and a number of the matrimonial property cases, including *Eves v. Eves*[4] and *Cooke v. Head*.[5] He also quoted the statement made by Lord Diplock in *Gissing v. Gissing*[6] referred to above and relied upon by Lord Denning in *Binions v. Evans*.[7] It has been seen that in *Binions v. Evans* and *Heseltine v. Heseltine*[8] Lord Denning omitted the last sentence of the paragraph quoted above. Holland J. referred to it in full. Holland J. pointed out that none of the above cases were on all fours with *Ogilvie v. Ryan*.[9] He proceeded to divide the cases

[98] *Ibid.* 513-4.
[99] [1948] 2 All E.R. 133.
[1] [1972] Ch. 359.
[2] [1972] 2 N.S.W.L.R. 923.
[3] [1972] 3 All E.R. 744.
[4] [1975] 3 All E.R. 768.
[5] [1972] 2 All E.R. 38.
[6] [1971] A.C. 886.
[7] [1972] Ch. 359.
[8] [1971] 1 All E.R. 952.
[9] [1976] 2 N.S.W.L.R. 504.

into two categories. *Bannister v. Bannister*[10] and *Last v. Rosenfeld*[11] were cases where the constructive trustee obtained his legal title from the *cestui que trust* only because he agreed that the *cestui que trust* would have a beneficial interest in the property. *Binions v. Evans*[12] represented an extension of this category. Here the basis of the constructive trust was the constructive trustee's fraud in asserting his legal interest.

*Hussey v. Palmer*,[13] and the matrimonial property cases fell into the second category. Here the constructive trustee had had the value of his property increased by 'means of direct or indirect financial contributions or work and labour' provided by the *cestui que trust* on an understanding that the *cestui que trust* would have a beneficial interest in the property. Here again the basis of the trust was 'the prevention of the fraud of using the legal title to retain benefits gained only because of the common understanding, yet defeat the beneficial interest for which the benefits were given'.[14]

The present case did not fit clearly within either of these categories. Ogilvie had not acquired the property from Mrs Ryan, and although it was the parties' common intention that she would have a beneficial interest, the acts performed by her were unrelated to the acquisition of the property and the improvement of its value. However, if the condition of her acquiring an interest had been the provision of finance and labour in improving the property, or a contribution to the purchase price, a constructive trust would have arisen in her favour. The fact that she agreed simply to look after Ogilvie should not prevent her from obtaining an interest, for the fraud in the latter case was just as great as in the former. To sum up, in the words of Holland J.:

> If the condition had been that she would contribute financially towards the purchase price or would provide finance or labour to improve the property itself, there would, I think, have been no doubt that the case fell into the second category, and a constructive trust would have arisen. Why should it not arise if, by their arrangement and common intention, the benefits to be taken by the deceased were of a different character? The fraud on the defendant of using the legal title to defeat her interest, after the benefits have been taken and she has earned her interest in the property in accordance with the arrangement, is just as great as it is in the case where the benefits were directed towards the acquisition or enhancement of the value of property.[15]

After determining that a constructive trust had arisen Holland J. considered the alternative argument that the agreement between the parties conferred upon Ryan a specifically enforceable contractual licence which afforded her an equitable defence to the plaintiff's claim. Lacking an agreement in writing, Ryan relied upon her acts as amounting to part performance. This aspect of the case is not considered in depth in this

[10] [1948] 2 All E.R. 133.
[11] [1972] 2 N.S.W.L.R. 923.
[12] [1972] Ch. 359.
[13] [1972] 3 All E.R. 744.
[14] [1976] 2 N.S.W.L.R. 504, 517.
[15] [1976] 2 N.S.W.L.R. 504, 518.

article. As to acts amounting to part performance an apparent conflict exists between the 1974 House of Lords' decision in *Steadman v. Steadman*[16] and certain earlier Australian decisions.[17] Holland J. analysed in detail the existing state of the law and concluded that as it stood he was bound to take the view that Ryan's acts did not amount to part performance of the contract. If, however, *Steadman v. Steadman*[18] were the law in Australia Ryan's acts would have been sufficient.

To what extent does the decision in *Ogilvie v. Ryan*[19] represent a change in Anglo-Australian attitudes to the nature of the constructive trust? It was unnecessary for Holland J. to participate in the academic debate concerning whether a constructive trust is a remedy or an institution. However clearly the decision is remedial in its effect and prevents the estate of Ogilvie Senior from being unjustly enriched.

Of course even if the American approach to the constructive trust were whole-heartedly accepted by English courts the major task of determining which enrichments were unjust would still remain.[20] In this respect the Court of Appeal decisions, in their vague reliance upon 'fairness', provide few clear guide-lines. The major virtue of the judgment of Holland J. is that this is precisely what he attempts to do. In his formulation of the situations in which the court will impose a constructive trust he spells out criteria which will provide assistance in future cases. Unlike the statements of Lord Denning in cases such as *Binions v. Evans*[21] and *Hussey v. Palmer*[22] Holland J.'s reasoning, and the result in the case, are consistent with the approach of Lord Diplock in *Gissing v. Gissing*.[23] In *Gissing v. Gissing* it was recognized that the common intention of the parties could give rise to a resulting or constructive trust, at least where that intention was acted upon by the parties. In *Ogilvie v. Ryan,*[24] unlike the situation in many of the matrimonial property cases, it was not necessary for the court to spell out an intention from the conduct of the parties, for the court believed the evidence of Mrs Ryan that such an intention existed. Thus, it was unnecessary for Holland J. to rely upon any wider unjust enrichment concept. The constructive trust arose not simply because Ogilvie Senior unfairly derived benefits from Ryan's conduct but because it would be unconscionable for him to take the benefits of her performance based upon the common intention of the parties, and then to plead the Statute. This is consistent with the explanation for the imposition of the

[16] [1974] 2 All E.R. 977.
[17] *McBride v. Sandland* (1918) 25 C.L.R. 69. *Cooney v. Burns* (1922) 30 C.L.R. 216. See also *Millet v. Regent* [1975] 1 N.S.W.L.R. 62. (N.S.W. Court of Appeal) (1976) 50 A.L.J.R. 799 (High Court of Australia).
[18] [1974] 2 All E.R. 977.
[19] [1976] 2 N.S.W.L.R. 504.
[20] See the comments on this point in Waters, D. W. M., *The Constructive Trust* (1964) 24-6.
[21] [1972] Ch. 359.
[22] [1972] 3 All E.R. 744.
[23] [1971] A.C. 886.
[24] [1976] 2 N.S.W.L.R. 504.

constructive trust in *Gissing v. Gissing*,[25] which the writer attempts to spell out above. The only sense in which the case represents an extension of *Gissing v. Gissing* is that in that case the House of Lords was largely concerned with acts which indirectly contributed to the acquisition of the property.

However in following the Court of Appeal decisions in *Binions v. Evans*,[26] *Hussey v. Palmer*[27] and the matrimonial property cases, Holland J. gave the unfairness concept indirect support. In his judgment he did not allude to the many criticisms which academic commentators have made of these decisions. Thus a court wishing to escape the restrictions inherent in *Gissing v. Gissing* could derive some support from Holland J.'s decision. Moreover, as Holland J. himself recognized, the decision in *Ogilvie v. Ryan*[28] can be regarded as an extension of the principles underlying these cases. In the matrimonial property cases the acts performed by the party claiming the beneficial interest generally could be related to the acquisition of the property or the improvement of its value. In *Ogilvie v. Ryan* the acts performed were quite unrelated to the property even in the wider sense adopted in *Hazell v. Hazell*.[29] However Holland J. did himself avoid the use of the wider concept of unjust enrichment when he said

> It may be suggested as, perhaps, Lord Denning may have had in mind in his statement of the principle in *Hussey v. Palmer* that the basis of the constructive trust found in the second category of cases is the prevention of unjust enrichment; but I would respectfully prefer the view of Lord Reid in *Pettitt v. Pettitt* that the doctrine of unjust enrichment, whilst applicable to many claims, is not necessarily appropriate where the claim is to a beneficial interest in the subject property.[30]

Even accepting that Holland J.'s decision provides clear guide-lines as to when a constructive trust will arise, the extension of the constructive trust to the situation where the acts of the *cestui que trust* are not directly or indirectly related to the acquisition of the property and the enhancement of its value, is not without difficulties. In the case where a person relies upon his acts of part performance, in order to take the contract outside the operation of the Instruments Act, s. 126 (derived from the Statute of Frauds, s. 4) it is not sufficient to show simply that he relied upon the contract to his detriment. It is necessary to go further and show that his acts are sufficient to amount to part performance of the contract. But according to the view expressed in *Ogilvie v. Ryan*,[31] in order for the court to raise a constructive trust it is necessary only to show that Mrs Ryan acted to her detriment upon the faith of a promise of a specified beneficial interest. If this is the case it is unconscionable for Ogilvie to rely upon his legal title to deny the trust and the Statute of Frauds[32] does not

[25] [1971] A.C. 886.
[26] [1972] Ch. 359.
[27] [1972] 3 All E.R. 744.
[28] [1976] 2 N.S.W.L.R. 504.
[29] [1972] 1 All E.R. 923.
[30] [1976] 2 N.S.W.L.R. 504, 518.
[31] [1976] 2 N.S.W.L.R. 504.
[32] See n. 33, *supra*.

apply. This will be the case even if Mrs Ryan's acts do not amount to part performance of the contract. It is clear that the courts have adopted a different attitude to Section 4[33] and Section 7 of the Statute of Frauds. This difference of approach is described in Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* in these words:

> As has been seen the treatment of s. 4 of the Statute [of Frauds] in *Maddison v. Alderson*[34] required not merely an element of 'fraud' but acts of part performance, denied that the Statute was waived and based the jurisdiction upon the administration of independent equities. On the other hand the cases in s. 7 directly counter its to provisions and appear authority for the proposition that the Statute may not be pleaded by the party holding the land against a claim that he only acquired the land upon trust for the claimant.[35]

This divergence creates difficulties where, as in *Ogilvie v. Ryan*,[36] the facts may give rise to both a contract and a constructive trust. In *Last v. Rosenfeld*[37] Hope J., dealing with an oral contract to resell land, attempted to grapple with such a situation. He differentiated between two cases. V agrees to sell land to P, with P orally agreeing that on the occurrence of certain conditions he would resell to V. After taking a transfer of the land from V, P refuses to resell to V. If there are no acts of part performance of the oral contract to resell could V argue that it would be fraudulent for P, having taken the transfer, to plead the Statute of Frauds, so that P held on constructive trust for V? Hope J. says that this argument would not succeed as the case would simply be one of a vendor failing to perform an oral contract. In the absence of acts of part performance equity would not perform such a contract.

However where, as was found to be the case in *Last v. Rosenfeld,* the whole contract was held to be one transaction so that the original sale would not have taken place were it not for the contract to re-convey, equity would prevent the Statute from being used as an instrument of fraud even in the absence of part performance. In such a situation P would hold on constructive trust for the original vendor. Hope J. took the view that the mere fact that the original vendor was relying upon an oral contract which had not been partly performed did not prevent the constructive trust from arising. The situation described by Hope J. in *Last v. Rosenfeld*[38] was not directly relevant to *Ogilvie v. Ryan*[39] where the problem did not arise out of a contract of resale. However, the facts of *Ogilvie v. Ryan* could be regarded as simply giving rise to an oral contract, with Mrs Ryan's services providing consideration, and, if the

[33] The section which requires contracts for the sale of an interest in land to be in writing. Instruments Act 1958 (Vic.) s. 126. Conveyancing Act 1919-76 (N.S.W.) s. 54A. Property Law Act 1974-75 (Qld) s. 11; Law of Property Act 1936-75 (S.A.) 526; Conveyancing and Law of Property Act 1884 (Tas.) s. 36.

[34] (1883) 8 App. Cas. 467.

[35] Meagher, R. P., Gummow, W. M. G. and Lehane, J. R. F., *Equity Doctrines and Remedies* (1975) 307.

[36] [1976] 2 N.S.W.L.R. 504.

[37] [1972] 2 N.S.W.L.R. 923. See also *George v. De Georgio* (1968) 89 W.N. Pt. 1 (N.S.W.) 1, 5.

[38] [1972] 2 N.S.W.L.R. 923.

[39] [1976] 2 N.S.W.L.R. 504.

analysis of Hope J. were adopted, equity would not enforce a contract of sale in the absence of acts of part performance.

However if *Ogilvie v. Ryan* is correct it means that in any contractual situation where there is an insufficient memorandum or acts of part performance but one party has acted on the promise to his detriment he may rely on the alternative constructive trust argument in order to subvert the Statute of Frauds. This point was raised by counsel for Ogilvie in *Ogilvie v. Ryan*. Counsel argued that where there was a contract for the sale of an interest in land which failed to comply with the Statute of Frauds, it was not open for a party to the contract to rely 'on the very same contract as giving rise to a constructive trust of an interest in the land because, to do so would be to invite the Court to do what, in effect, the Statute prohibits, namely, enforce the contract'.[40]

Holland J. rejected this argument. He said

> In my opinion, the authorities referred to do not establish the plaintiff's contention. In my view, the true position is that, if the facts proved are such that, in Equity, a constructive trust would arise, a court of Equity will enforce that trust, notwithstanding that amongst the facts relied upon to establish it there is an agreement proved of which specific performance could not have been ordered because of the Statute of Frauds. A constructive trust may arise in circumstances where there is nothing that the law would call a contract, and a contract for the sale or other disposition of land may occur in circumstances which would not give rise to a constructive trust; but, in my opinion, the enforceability of a constructive trust of a beneficial interest in land is not inhibited by the presence of an oral contract otherwise unenforceable, because that would make the statute an instrument of the fraud which the constructive trust is designed to prevent. In *Bannister v. Bannister*,[41] the plaintiff relied upon an oral agreement. She claimed the declaration of a constructive trust, or alternatively, specific performance of the oral agreement. A constructive trust was declared. In *Maddison v. Alderson*[42] and *Wakeham v. Mackenzie*[43] the only remedy sought was specific performance. The decision in *Last v. Rosenfeld*[44] is directly contrary to the plaintiff's submission, as a declaration of trust was sought and granted in respect of an agreement to which s. 54A of the Conveyancing Act directly applied, and was pleaded, and which would not have been enforceable, but for the fact that the other circumstances of the case gave rise to a constructive trust.
>
> In *Gissing v. Gissing*[45] Lord Reid, in dealing with a contributing spouse's claim to a beneficial share in the matrimonial home, said that the establishment of such a claim depended upon the law of trust rather than the law of contract, but did not suggest that the intention to become a trustee could not be derived from an oral agreement between the spouses, Lord Diplock[46] (116) expressly said that what the Court gave effect to was, 'the trust resulting or implied from the common intention expressed in the oral agreement between the spouses'; and Lord Pearson,[47] after saying that it was 'better to approach the question through the doctrine of resulting trusts rather than through contract law', said that, 'if an agreement can be proved it is the best evidence of intention'.

Holland J. referred to a number of cases[48] which had assumed that in the absence of a specifically enforceable contract a purchaser could not

[40] [1976] 2 N.S.W.L.R. 504, 525.
[41] [1948] 2 All E.R. 133.
[42] (1883) 8 App. Cas. 467.
[43] [1968] 2 All E.R. 783.
[44] [1972] 2 N.S.W.L.R. 923.
[45] [1971] A.C. 886, 896.
[46] [1971] A.C. 886, 905.
[47] [1971] A.C. 886, 902.
[48] *Perpetual Executors and Trustees Association of Australia Ltd v. Russell* (1931) 45 C.L.R. 146. *Howard v. Miller* [1915] A.C. 318. *Central Trust & Safe Deposit Co. v. Snider* [1916] 1 A.C. 266.

acquire an equitable interest in the land he contracted to buy. He distinguished these cases on the basis that the question of a constructive trust arising independently of sufficient acts of part performance had not been argued. This distinction does not confront the policy issues inherent in solving the conflict between the Court's attitude to sections 4 and 7 of the Statute of Frauds. In his judgment in *Last v. Rosenfeld*[49] Hope J. attempted to differentiate between the cases in which these two sections applied. The judgment of Holland J. drew no such distinctions and leaves open the possibility that many contracts which would previously have been unenforceable may now give rise to constructive trusts.

## 5. CONCLUSIONS

In both England and Australia courts are increasingly using the constructive trust as a means of providing a remedy in novel situations. While there is still a tendency to rationalize the device as a means of fraud prevention or punishment of unconscionable behaviour, the notion that the constructive trust is a remedial device designed to prevent unjust enrichment is gradually gaining favour. Water's argument that the time has come for a reconsideration of the principles underlying the constructive trust is particularly relevant today.

Even if English law wholeheartedly accepts the American concept of the constructive trust however, it will still be left with the task of categorizing which enrichments are 'unjust'. The judgment of Holland J.[50] which builds upon the comments of Lord Diplock in *Gissing v. Gissing*[51] attempts to grapple with this task.

However it may be questioned whether the constructive trust is sometimes rather too blunt an instrument to provide the best solutions to problems such as those presented in the matrimonial property cases, and cases such as *Ogilvie v. Ryan*.[52] In the case of property of parties to a marriage or to a stable domestic relationship, the solution may lie in legislative intervention. In a case such as *Ogilvie v. Ryan*[53] it might have been better for the Court to compensate Mrs Ryan generously for services rendered.[54] Alternatively legislation in the form of the New Zealand Law Reform (Testamentary Promises) Act 1949[55] might provide a person in a position like Mrs Ryan with a remedy.

[49] [1972] 2 N.S.W.L.R. 923.
[50] [1976] 2 N.S.W.L.R. 504.
[51] [1971] A.C. 886.
[52] [1976] 2 N.S.W.L.R. 504.
[53] [1976] 2 N.S.W.L.R. 504.
[54] *Deglman v. Guaranty Trust Co. of Canada and Constantineau* [1954] 3 D.L.R. 785 (*Quantum Meruit*). *Stinchcombe v. Thomas* [1957] V.R. 509. Note that an action on the basis of *quantum meruit* would only lie in respect of services rendered over the previous six years.
[55] Hardingham, J. J., Neave, M. A. and Ford, H. A. J., *The Law of Wills* (1977) 252-6.