

## RESULTING TRUSTS IN SINGAPORE

In Singapore, the resulting trust is used as a default legal device in the context of non-commercial shared property. This article seeks to underscore that the conceptual underpinnings of the resulting trust in Singapore may not be completely satisfactory, show the weaknesses of such an approach, and register the adverse consequences it brings. It goes on to suggest the reasons why the common intention constructive trust may be considered as a better alternative.

**TEY Tsun Hang\***

*BCL (Oxford), LLB, AKC;*

*Advocate and Solicitor (Singapore), Advocate and Solicitor (Malaya),  
Barrister (Gray's Inn);*

*Associate Professor, Faculty of Law, National University of Singapore.*

### I. Introduction

1 In Singapore, the resulting trust persists as the default legal device in the context of non-commercial shared property. The cases of *Low Gim Siah v Low Geok Khim*<sup>1</sup> and *Lau Siew Kim v Yeo Guan Chye Terence*<sup>2</sup> represent an insistence on the use of the resulting trust as a default legal device in analysing such situations. This article seeks to show the weaknesses of such an approach, and the adverse consequences it brings. It is argued that the common intention constructive trust<sup>3</sup> should be adopted as the default legal device over the resulting trust.

### II. Conceptual foundation

2 Before discussing the conceptual underpinnings of the resulting trust in Singapore, it is useful to take a look at its uncertain conceptual character.

3 The classic formulation of the conceptual nature of the resulting trust can be found in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*<sup>4</sup> (“*Westdeutsche*”), where Lord Browne-Wilkinson held that “[a] resulting trust is not imposed by law against the intentions

---

\* The author gratefully acknowledges excellent assistance from J Z Chng.

1 [2007] 1 SLR(R) 795.

2 [2007] 2 SLR(R) 108.

3 *Stack v Dowden* [2007] 2 AC 432; *Abbott v Abbott* [2008] 1 FLR 1451.

4 [1996] AC 669 at 708.

of the trustee (as is a constructive trust) but gives effect to his presumed intention". This "intention" analysis can be contrasted with that in *Air Jamaica Ltd v Charlton*,<sup>5</sup> where Lord Millett held that a resulting trust "arises whether or not the transferor intended to retain a beneficial interest".

4 Other explanations for the nature of the resulting trust range from that arising from "non-beneficial transfers"<sup>6</sup> to a split between two types of resulting trusts, the "presumed" resulting trust and the "automatic" resulting trust. But till today, there is no consensus among the courts or academic commentators of a satisfactory and coherent basis for a unified theory of resulting trust.

5 This split between "presumed" and "automatic" resulting trust can be seen in *Westdeutsche*,<sup>7</sup> where Lord Browne-Wilkinson held a resulting trust arises in two situations: (a) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions; and (b) where A transfers property to B *on express trusts*, but the trusts declared do not exhaust the whole beneficial interest. Pearce, Stevens and Barr describe these as two manifestations of the resulting trust, divided into two categories, *viz*, that of the "presumed" resulting trust and the "automatic" resulting trust.<sup>8</sup> Both types of resulting trust are *traditionally* regarded as examples of trusts giving effect to the common intention of the parties.<sup>9</sup>

6 On this view, there may be a coherent basis for imposing a resulting trust. Lord Browne-Wilkinson talked about the resulting trust responding to the intention of the transferee.<sup>10</sup> However, this is not

---

5 [1999] 1 WLR 1399 at 1412.

6 Peter Birks, "Restitution and Resulting Trusts" in *Equity and Contemporary Legal Developments* (Stephen Goldstein ed) (Jerusalem: Hebrew University of Jerusalem (Sacher Institute), 1992) at pp 335–373; see also Robert Chambers, *Resulting Trusts* (London: Clarendon Press, 1997) and Robert Chambers, "Resulting Trusts in Canada" (2000) 38 Alberta LR 378; note that this was rejected by the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669.

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

8 Robert Pearce, John Stevens & Warren Barr, *The Law of Trusts and Equitable Obligations* (New York: Oxford University Press, 5th Ed, 2010) at p 268.

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

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

entirely satisfactory. Pearce, Stevens and Barr opine that there are situations where a resulting trust arises against the wishes of the parties. For instance, a resulting trust may arise in favour of A in situations even though B anticipated that he was the beneficiary of an absolute gift.<sup>11</sup> More significantly, a resulting trust may arise even where the transferee of property was unaware that the transfer had taken place.<sup>12</sup>

7 Similarly, Lord Millett opined that:<sup>13</sup>

Like a constructive trust, a resulting trust arises by operation of law, though unlike a constructive trust it gives effect to intention. But it arises whether or not the transferor intended to retain a beneficial interest – he almost always does not – since it responds to the absence of any intention on his part to pass a beneficial interest to the recipient. It may arise even where the transferor positively wished to part with the beneficial interest ...

8 Thus, the inquiry as to the theory behind the resulting trust is no less clarified. There seems to be no unified theory of resulting trust. There is no consensus as to whether the resulting trust responds to intentions, against intentions, or to prior intentions.

9 William Swadling<sup>14</sup> argues that while the “presumed” resulting trust is seen as premised on an accepted understanding that the presumption invoked is one where the “transferor declared a ... trust in his own favour”,<sup>15</sup> the “automatic” resulting trust, on the other hand, does not appear to have a satisfactory theoretical basis.<sup>16</sup> The notion put forth of a “presumed” resulting trust arising from the transferor’s intention to create a trust is known as the *positive intent analysis*. Swadling distinguishes *Air Jamaica Ltd v Charlton* by noting that it “provides nothing more than an unremarkable application of a decision of the House of Lords; it did not attempt to say anything new about resulting trusts. And in any case, since only a failed trust resulting trust was in issue, it says nothing of the content of the presumption operating in the other types of resulting trust”.<sup>17</sup> But Swadling could not adequately provide an explanation with regard to unifying the theory of resulting trusts. He admits as much that “though [there is a] convincing though anachronistic explanation for the ‘presumed’ resulting trust, the

---

11 Robert Pearce, John Stevens & Warren Barr, *The Law of Trusts and Equitable Obligations* (New York: Oxford University Press, 5th Ed, 2010) at p 268.

12 Robert Pearce, John Stevens & Warren Barr, *The Law of Trusts and Equitable Obligations* (New York: Oxford University Press, 5th Ed, 2010) at p 268.

13 *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 at 1412.

14 William Swadling, “Explaining Resulting Trusts” (2008) 124 LQR 72.

15 William Swadling, “Explaining Resulting Trusts” (2008) 124 LQR 72.

16 William Swadling, “Explaining Resulting Trusts” (2008) 124 LQR 72 at 99.

17 William Swadling, “Explaining Resulting Trusts” (2008) 124 LQR 72 at 84.

‘automatic’ resulting trust still defies legal analysis”.<sup>18</sup> Within the context of the “presumed” resulting trust, Swadling writes that he “does not seek to defend the continuation in the modern day of a presumption of declaration of trust where the common experience is that citizens do not generally create trusts for themselves. The point is only that no change in the content of the presumption has yet occurred in the view of the courts”.<sup>19</sup>

10 Chambers attempts to conceptualise the problem through the lenses of restitution, asserting that there is a unified theory of resulting trust. He opines that “all resulting trusts operate on precisely the same principle regardless of the situations in which they arise. They do not depend on an implied intention to create a trust, but neither do they arise completely independently of intention. All resulting trusts come into being because the provider of property did not intend to benefit the recipient”.<sup>20</sup> This is known as the *absence of intent* or *negative intent analysis*. This analysis appears consistent with reported cases, where it was not possible to establish or enforce a plaintiff’s intention for the property to be held on resulting trust but nevertheless one was found.<sup>21</sup> It would also not contradict cases where such intention for a property to be held on trust was clear since this necessarily meant that there was no intention for the defendant to receive the beneficial interest of the property which was transferred. But the conclusion from Chambers’ premise is that “resulting trusts reverse unjust enrichment”, and that this “merely restates [the] principle, using general terms taken from the language of restitution”.<sup>22</sup> However, it must be noted that the unjust enrichment analysis was rejected by Lord Browne-Wilkinson as a distortion of trust principles in *Westdeutsche*.<sup>23</sup> Firstly, it elides proprietary rights in the subject matter of a trust into rights in the value transferred.<sup>24</sup> Secondly, it renders a recipient of money a trustee automatically from the date of receipt, even though his conscience is unaffected because he is unaware of the factors which give rise to the supposed trust. Thirdly, adopting the unjust enrichment analysis would introduce an arbitrary and unprincipled modification to existing trust principles to ensure that the resulting trust does not arise when there has only been a failure to perform a contract, as opposed to total failure of consideration.

---

18 William Swadling, “Explaining Resulting Trusts” (2008) 124 LQR 72 at 102.

19 William Swadling, “Explaining Resulting Trusts” (2008) 124 LQR 72 at 84.

20 Robert Chambers, *Resulting Trusts* (Oxford: Oxford University Press, 1997) at p 32.

21 See, eg, *Vandervell v IRC* [1967] 2 AC 291; *Hodgson v Marks* [1971] Ch 892.

22 Robert Chambers, *Resulting Trusts* (Oxford: Oxford University Press, 1997) at p 104.

23 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 709.

24 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 709.

11 The survey of jurisprudence shows how confusing, and unsettled, the theory of resulting trust is. It is perhaps the case that one can do no better than the statement by Megarry VC that “[a] resulting trust is essentially a property concept: any property that a man does not effectively dispose of remains his own”.<sup>25</sup> Any attempt to further achieve coherence has failed, and there is not much basis to believe that a unifying theory can soon be found.

### III. Singapore’s approach

12 While the English cases appear to contradict in terms of the bases of their holdings, Singapore judges generally avoid enunciating the true basis of resulting trusts at all. For instance, Woo J in *Chan Gek Yong v Chan Gek Lan*<sup>26</sup> (“*Chan Gek Yong*”) held:

Even if [the plaintiff] had provided the funds to pay 65% of the purchase price, that would only raise a presumption of a resulting trust ... that the presumption would have been rebutted in that she had agreed to the defendant having a legal and beneficial half-share in the Hillside property irrespective of how much money she had provided, so long as that was the wish of the father. [emphasis added]

13 No authority on trust law was cited by Woo J for his holding. The principle underlying the raising of such a presumption was not further discussed. This is unfortunate, given that both the positive and negative intent theories of resulting trusts could have been used to support Woo J’s holding.

14 Under the negative intent theory, the plaintiff’s agreement to the defendant having a legal and beneficial share can be said to have indicated an intention to make a gift, thus rebutting the presumption of resulting trust. On the other hand, the plaintiff’s agreement to the defendant’s legal and beneficial share also precluded any intention of creating a trust in the plaintiff’s favour, therefore rebutting the presumption of resulting trust under the positive intent theory. In other words, while Woo J probably arrived at the correct conclusion, the basis of the conclusion remains undefined.

15 Similarly, it was held in *Thomson Development Co Pte Ltd v Ng Kah Jin*<sup>27</sup> (“*Thomson Development*”) that:

A resulting trust can arise when A pays for property that is purchased in the name of B. In such a situation, there is a rebuttable presumption that B will hold the property in trust for A. ... There was no resulting

25 *Re Sick and Funeral Society of St John’s Sunday School, Golcar* [1973] Ch 51.

26 [2009] SGHC 20 at [34].

27 [2009] SGHC 8 at [42]–[50].

trust in favour of the plaintiff. The presumption for that was amply rebutted by the fact that on its best case, the plaintiff did not pay the whole purchase price for the properties, and that there was clear and *uncontroversial evidence that it was not intended to have any beneficial interest in the properties*. [emphasis added]

16 The language appears to suggest that the resulting trust theory is intent-based. Yet, as in *Chan Gek Yong*, it is unclear which intent-based theory was relied upon, as no authority was mentioned in *Thomson Development*.

17 Indeed, the practice of not spelling out the doctrinal basis of the resulting trust creates a façade of clarity in the law, while masking the fact that the principle on which resulting trusts rest remains confused. This is especially so when, as in *Chan Gek Yong* and *Thomson Development*, judges leave too much unsaid.

18 It also seems that when Singapore judges do define the basis of resulting trusts, they either cite no authorities or haphazardly endorse more than one doctrinal basis within a single decision. *Cheong Yoke Kuen v Cheong Kwok Kiong*<sup>28</sup> (“*Cheong Yoke Kuen*”) illustrates this. Here, a son of the deceased sought to establish the existence of a resulting trust in his favour arising from his providing the purchase money for a HDB apartment. Although *Air Jamaica Ltd v Charlton* was not cited, Thean JA held that resulting trusts respond to the absence of intention by the settlor to make a gift:<sup>29</sup>

Where a person has paid the purchase price of a property (‘the purchaser’) and the property is conveyed or transferred to him jointly with others, or to one or more persons other than the purchaser, a resulting trust arises in favour of the purchaser, and he is the beneficial owner of the property ... *Such a resulting trust is based on the presumed intention of the parties and such presumption is rebuttable by evidence of an intention on the part of the purchaser to make a gift or by the presumption of advancement* ... [emphasis added]

19 However, a few paragraphs later, Thean JA endorsed the positive intent theory as well:<sup>30</sup>

The nature of a constructive trust is such that it could not be said to be ‘created’ by the parties ... A resulting trust, however, is different. It arises from a certain transaction carried out intentionally by the parties concerned and *the court infers an intention to create a trust in favour of a party*. [emphasis added]

---

28 [1999] 1 SLR(R) 1126.

29 *Cheong Yoke Kuen v Cheong Kwok Kiong* [1999] 1 SLR(R) 1126 at [12].

30 *Cheong Yoke Kuen v Cheong Kwok Kiong* [1999] 1 SLR(R) 1126 at [17].

Although Thean JA cited no case law in support of his proposition, the proposition mirrored Lord Browne-Wilkinson's view in *Westdeutsche*.<sup>31</sup> This loose manner of grounding legal propositions perpetuates uncertainty as to the true position of the law.

20 While *Cheong Yoke Kuen* seems to signal that the automatic theory no longer represents consensus of opinion on the subject,<sup>32</sup> the citation of both competing intent-based theories did nothing to dispel ambiguities surrounding the basis of the resulting trust. Indeed, the use of loose and vague language betrays a confusion between, and conflation of, the two theories:<sup>33</sup>

[T]he circumstances in which the respondent transferred his entire interest in the flat to his mother *showed that by that transfer he intended that his mother would hold the flat in trust for him. He said that he did not intend to make a gift of the flat to his mother ...* Thus when he transferred his entire interest in the flat to the mother, *he intended to remain the beneficial owner of the flat. By such transfer he in effect 'created' a trust of the flat in his favour ...* This trust, in our opinion, fell within the prohibition of sub-s (4) and is void under sub-s (5) of s 51 of the Act. [emphasis added]

21 The ambiguities as to the true basis of the resulting trust is also seen in *Yeo Guan Chye Terence v Lau Siew Kim*,<sup>34</sup> where Lai J applied *Cheong Yoke Kuen* without discerning the problematic aspects of that case. One problem is the importation of Megarry J's automatic theory.<sup>35</sup> This flies in the face of the court's concurrent endorsement of *Cheong Yoke Kuen*, which is intent-based. Lai J also ignored *Westdeutsche*, a persuasive authority that discredits the automatic theory.

22 The Court of Appeal in *Lau Siew Kim v Yeo Guan Chye Terence*<sup>36</sup> ("*Lau Siew Kim*") may not seem to fare much better in terms of defining the doctrinal basis of the resulting trust. Although the attempt at highlighting the underlying policies in equity is done with laudable clarity,<sup>37</sup> the discourse on the doctrinal basis of the resulting trust seems to be haphazard and inconclusive. Rajah JA first endorsed the negative intent theory:<sup>38</sup>

A resulting trust is presumed to exist when the transferee has not given full consideration or is a fiduciary or is under an obligation to

31 Crown, "Trusts of HDB Flats" (1999) SJLS 635 at 636.

32 Crown, "Trusts of HDB Flats" (1999) SJLS 635 at 636.

33 *Cheong Yoke Kuen v Cheong Kwok Kiong* [1999] 1 SLR(R) 1126 at [21].

34 [2007] 2 SLR(R) 1.

35 *Yeo Guan Chye Terence v Lau Siew Kim* [2007] 2 SLR(R) 1 at [47].

36 [2008] 2 SLR(R) 108.

37 Tang Hang Wu, "Equity and Trusts" [2007] 8 SAL Ann Review 215 at 215–216, para 13.1.

38 *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [2] and [35]–[36].

return the property to the transferor. Such a presumption is justified by the finding of a *presumed intention of the transferor that he desires to retain ownership despite having parted with the legal title ...* Chambers has quite appropriately highlighted two essential points: first, that the lack of consideration required for the presumption is *not* a requirement for the resulting trust; and second, that the lack of intention to benefit the recipient required for the resulting trust is precisely the fact being inferred when the presumption is applied. It is thus apparent that a resulting trust may arise independently of the presumption *so long as it can be shown that the transfer was not intended to benefit the recipient*; and, in a similar vein, a resulting trust may not *necessarily* arise *even if* there was no consideration, if it can be shown that the transfer was *indeed* intended to benefit the recipient. [emphasis added]

23 However, in the course of discussing the negative intent theory, Rajah JA also cited *Westdeutsche* approvingly on the positive intent theory, and the problematic requirement of “common intention”,<sup>39</sup> before apparently adopting Megarry J’s automatic theory,<sup>40</sup> despite the acknowledgment that resulting trusts are intent-based.<sup>41</sup>

24 It may be said that by reintroducing some ambiguity as to whether the automatic theory still has a role to play, *Lau Siew Kim* brought the law back to square-one. Indeed, *Lau Siew Kim* demonstrates the lack of enthusiasm in enunciating the basis of the resulting trust. The result is that conceptual certainty in this area of law remains an ideal to be achieved.

25 These unresolved ambiguities create instability in Singapore law,<sup>42</sup> given the wider implications of the negative intent theory in relation to restitution. However, it may be argued that the endorsement of Chambers’ thesis in *Lau Siew Kim* leaves the possibility open for a wider application of the resulting trust in unjust enrichment claims.<sup>43</sup>

26 The common intention requirement alluded to by Rajah JA in *Lau Siew Kim* seems to have been rejected by Chan J in *Lim Chen Yeow Kelvin v Goh Chin Peng*<sup>44</sup> (“*Lim Chen Yeow Kelvin*”). Applying the Ontario Court of Appeal decision, *Saylor v Madsen Estate*,<sup>45</sup> Chan J

---

39 *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [34].

40 *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [34]. Although the phrase “fill the gap” was used.

41 *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [36].

42 Tang Hang Wu, “Equity and Trusts” [2007] 8 SAL Ann Review 215 at 216, para 13.3.

43 Tang Hang Wu, “Equity and Trusts” [2007] 8 SAL Ann Review 215 at 217, para 13.3.

44 [2008] 4 SLR(R) 783.

45 (2006) 261 DLR (4th) 597.

approved of the view that the overall focus is on the transferor's intention, rather than that of both parties:<sup>46</sup>

Reliance on the presumptions has diminished because the courts are now first examining all the evidence to determine the transferor's intent ... *the overall aim is to discern the intention of the transferor.* [emphasis added]

27 However, the Singapore Court of Appeal has yet to make a conclusive pronouncement on this matter. In any case, the position in *Lim Chen Yeow Kelvin* itself seems far from clear; shortly after emphasising that it is the transferor's intent which mattered,<sup>47</sup> Chan J cited *Lau Siew Kim* on the "common intention" requirement.<sup>48</sup>

28 *Yong Ching See v Lee Kah Choo Karen*<sup>49</sup> ("*Yong Ching See*") is perhaps the most problematic – it appears to endorse, and *equate*, both intent-based theories:<sup>50</sup>

As the authors of *Lewin on Trusts* (John Mowbray *et al* eds) (Sweet & Maxwell, 18th Ed, 2008) observe at para 7-02, *the resulting trust 'is created, not because it was intended by the settlor, but by operation of law because the settlor is presumed to have intended not to make a gift, this actual intention being consistent with that presumption'*. In [*Westdeutsche*], Lord Browne-Wilkinson reiterated this position (at 708) *that resulting trusts arise to fulfil the implied intentions of the parties.* [emphasis added]

29 Essentially, Lai J first held that resulting trusts respond to the lack of intention to make a gift (negative intent theory), before equating this approach with the "implied intentions" approach in *Westdeutsche*. Lai J appears to have assumed that the "implied intentions" in *Westdeutsche* were of the same nature as that intended by the authors in *Lewin on Trusts*.<sup>51</sup>

30 More uncertainty arises when Lai J appeared to endorse the restitutionary view of resulting trusts in *Yong Ching See*, without providing much analysis:<sup>52</sup>

The arms of equity step in to intervene to prevent unconscionable conduct on the part of the legal owner or as the court in *Lau Siew Kim* recognised, equity 'assumes bargains, and not gifts' ... With an absence of intent to transfer beneficial ownership, this operates to establish

---

46 *Lim Chen Yeow Kelvin v Goh Chin Peng* [2008] 4 SLR(R) 783 at [115].

47 *Lim Chen Yeow Kelvin v Goh Chin Peng* [2008] 4 SLR(R) 783 at [115].

48 *Lim Chen Yeow Kelvin v Goh Chin Peng* [2008] 4 SLR(R) 783 at [125].

49 [2008] 3 SLR(R) 957.

50 *Yong Ching See v Lee Kah Choo Karen* [2008] 3 SLR(R) 957 at [36].

51 John Mowbray *et al*, *Lewin on Trusts* (London: Sweet & Maxwell, 18th Ed, 2008).

52 *Yong Ching See v Lee Kah Choo Karen* [2008] 3 SLR(R) 957 at [41].

defective consent by the transferor ... as the authors of *Lewin on Trusts* note at para 7-07, this wide theory of 'resulting trusts' operates within the sphere of autonomous unjust enrichment, and so responds to the injustice of the receipt carrying beneficial ownership. [emphasis added]

31 A number of problems arise from this aspect of Lai J's holding. Firstly, the authors of *Lewin on Trusts* expressly state that this "wide theory" of resulting trusts was "severely criticised, and unanimously rejected" by the House of Lords in *Westdeutsche*.<sup>53</sup> It thus seemed strange that *Lewin* is cited as the authority for the correctness of the restitutionary view. Secondly, Lai J's endorsement of the restitutionary view contradicts her earlier endorsement of *Westdeutsche*, which propounded the positive intent theory. This inconsistency is perhaps attributable to the failure to recognise differences between the intent-based theories. Furthermore, although there are indeed merits to a limited restitutionary approach, the purported introduction of this contentious notion into Singapore law should deserve some serious analysis, as the House of Lords in *Westdeutsche* did.

32 In more recent cases, the distinction between the different conceptual bases has yet to be made. In *Koh Cheong Heng v Ho Yee Fong*,<sup>54</sup> Prakash J continued to equate both intent-based theories by stating that "[r]esulting trusts are imposed to give effect to the implied intentions of the owner of the property", after which she cited Pearce, Stevens and Barr<sup>55</sup> to elaborate that "[w]here a transfer of property has occurred and the legal title has been transferred, but the transferor has failed to show an intention to divest himself fully of all his interest in that property, the transferee will not be permitted to receive the property absolutely for his own benefit; instead, he will hold it on trust for the transferor"<sup>56</sup> [emphasis added].

33 Cases dealing with the subject of *Quistclose* trusts also serve to highlight the failure of the Singapore courts in appreciating the differences between the various resulting trust theories. Ang J attempted to categorise the *Quistclose* trust as a type of resulting trust in *Pacific Rim Palm Oil Ltd v PT Asiatic Persada*.<sup>57</sup> However, Ang J was unclear as to which resulting trust theory was being utilised.

---

53 John Mowbray *et al*, *Lewin on Trusts* (London: Sweet & Maxwell, 18th Ed, 2008) at p 234.

54 [2011] 3 SLR 125.

55 Robert Pearce, John Stevens & Warren Barr, *The Law of Trusts and Equitable Obligations* (New York: Oxford University Press, 5th Ed, 2010) at p 267.

56 *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125 at [36].

57 [2003] 4 SLR(R) 731.

### A. *Presumption of advancement*

34 It is the interplay between the twin presumptions of resulting trust and advancement that undergirds Singapore's default legal device in the non-commercial shared property context.

35 The first question that needs to be answered is the basis for the trigger of the presumption of advancement. Currently, the law recognises certain categories where the presumption of advancement is applicable, namely, in relationships between husband and wife,<sup>58</sup> father and child,<sup>59</sup> and that of a person standing in *loco parentis* to a child.<sup>60</sup> In this context, it must be noted that the use of presumptions is a process of standardised inference based on common experience.<sup>61</sup>

36 In this regard, the Singapore cases have offered different rationales for triggering the presumption. *Low Gim Siah v Low Geok Khim*<sup>62</sup> (“*Low Gim Siah*”) and *Lau Siew Kim* are instructive. The Singapore Court of Appeal in *Low Gim Siah* held that the presumption is premised on “a moral or equitable obligation on the part of one to care for the other”.<sup>63</sup> These moral obligations do not change even if social conditions change.<sup>64</sup>

37 This position reflects early judicial statements on the presumption of advancement. In *Bennet v Bennet*,<sup>65</sup> Jessel MR held that “the presumption of gift arises from the moral obligation to give ... [in the context of the father-child relationship,] ... [i]t is clear that in that case the presumption can only arise from the obligation, and therefore in that case the doctrine can only have reference to the obligation of a father to provide for his child, and nothing else”. Therefore, the presumption of advancement can only be displaced if one proves that the core obligation has changed such that it is no longer applicable.

38 However, in a later case, the Singapore Court of Appeal also affirmed the use of the presumption of advancement based on certain recognised categories of relationships. It was held in *Lau Siew Kim* that:<sup>66</sup>

---

58 *Lee Kuan Yew v Tang Liang Hong* [1999] 1 SLR(R) 533; *Teo Siew Har v Lee Kuan Yew* [1999] 3 SLR(R) 410; *Low Gim Siah v Low Geok Khim* [2007] 1 SLR(R) 795.

59 *Lai Min Tet v Lai Min Kin* [2004] 1 SLR(R) 499; *Low Geok Khim v Low Geok Bian* [2006] 2 SLR(R) 444; *Low Gim Siah v Low Geok Khim* [2007] 1 SLR(R) 795.

60 *Damayanti Kantilal Doshi v Shobhana J Doshi* [1997] 3 SLR(R) 340.

61 *Calverley v Green* (1984) 155 CLR 242 at 264.

62 [2007] 1 SLR(R) 795.

63 *Low Gim Siah v Low Geok Khim* [2007] 1 SLR(R) 795 at [44].

64 *Low Gim Siah v Low Geok Khim* [2007] 1 SLR(R) 795 at [44].

65 *Bennet v Bennet* (1879) 10 Ch D 474 at 476.

66 *Lau Siew Kim v Yeo Guan Chye Terence* [2007] 2 SLR(R) 108 at [77].

The presumption of advancement is still very relevant today in the established (both traditional and extended) categories of relationships; it is the strength of the presumption that should vary with the circumstances in accordance with modern social conditions.

39 The court seemed to treat the dependency relationship and “a moral or equitable obligation on the part of one to care for the other” as interchangeable.<sup>67</sup> Strictly speaking, the rationales are not interchangeable: “[T]he contradiction comes in the strength of the presumption. If the presumption rests on established relationships, it is conceivable that the presumption applies in equal force for a transfer from father to child, regardless of the child’s age. However, if the presumption rests on the moral or equitable obligation to provide, the strength of the presumption is affected by the strength of the obligation to provide. Presumably this is much weaker in cases where the child is an adult as compared to cases where the child is still a minor.”<sup>68</sup>

40 The potential confusion this uncertainty may cause can be seen in the contradiction of local case law as regards the need for financial dependence to trigger the presumption of advancement. Prakash J in *Ang Toon Teck v Ang Poon Sin*<sup>69</sup> and *Shih Shin Wang-Liu v Tsai Pei Lun Betty*<sup>70</sup> held that the presumption would not arise for an adult child who was no longer financially dependent on his father. Kan J, on the other hand, held in *Low Geok Khim v Low Geok Bian*<sup>71</sup> that there was no such requirement, but that the presumption would arise so long as the relationship of the parties fell within the established categories. But in this regard, the Court of Appeal in *Low Gim Siah*<sup>72</sup> and *Lau Siew Kim* appear to have clarified that the factor of financial dependence in itself would not be decisive as “the presumption arises no less from affection than dependency”.<sup>73</sup>

41 It is pertinent to note that the House of Lords had de-emphasised the importance of the presumption of advancement. It was held in *Stack v Dowden*<sup>74</sup> that the House in *Pettitt v Pettitt*<sup>75</sup> “was almost unanimous in ... the view that (at least as between husband and wife) the presumption of

---

67 Tsun Hang Tey, “Singapore’s Muddled Presumption of Advancement” [2007] Sing JLS 240 at 245.

68 Tsun Hang Tey, “Singapore’s Muddled Presumption of Advancement” [2007] Sing JLS 240 at 245.

69 [1998] SGHC 67.

70 [2006] SGHC 196.

71 [2006] 2 SLR(R) 444.

72 [2007] 1 SLR(R) 795 at [24]–[33].

73 *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 at [58].

74 [2007] 2 AC 432 at [16], [2007] UKHL 17, [2007] 2 WLR 831.

75 [1970] AC 777, [1969] 2 WLR 966.

advancement was no longer appropriate for determining property disputes". This, as Lord Neuberger pointed out, was due to the fact that:<sup>76</sup>

[T]hese principles [on the presumption of advancement] are not static and develop as the needs and values of society change. Thus, the presumption of advancement, as between man and wife, which was so important in the 18th and 19th centuries, has now become much weakened, although not quite to the point of disappearance.

42 This represents a contrast with the position in Singapore, where the timelessness of the presumption has been emphasised several times.<sup>77</sup>

### ***B. The twin presumptions of resulting trust and advancement***

43 The picture that one gets at the end of the inquiry is that there is no fixed coherent basis for applying the presumption of resulting trust and the presumption of advancement. While doctrinal difficulties dissuade from their application, it is also the case that its practical result detracts from its efficacy.

44 It is clear from *Stack v Dowden* that the resulting trust analysis is now considered inappropriate in the non-commercial shared property context. The House of Lords approved of Chadwick LJ's speech in *Oxley v Hiscock*<sup>78</sup> ("*Oxley*"), where his Lordship followed *Drake v Whipp*<sup>79</sup> in holding that "it would be artificial in the extreme to proceed to decide ... on the false footing that the parties' shares are to be determined in accordance with the law on resulting trusts". Baroness Hale alluded to this "false footing" by holding that the presumption of resulting trust is inappropriate in the domestic context.<sup>80</sup> Her Ladyship held that "these days, the importance to be attached to who paid for what in a domestic context may be very different from its importance in other contexts or long ago", and that "the law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it".<sup>81</sup>

45 This "false footing" is an assumption by courts that parties order their living arrangements in accordance with how they intend to hold their individual interests. The repercussions of this are twofold:

---

76 *Stack v Dowden* [2007] 2 AC 432 at [101].

77 Tsun Hang Tey, "Reforming the Presumption of Advancement" (2008) 82 ALJ 40.

78 [2004] 3 WLR 715 at [64].

79 [1996] 1 FLR 826.

80 *Stack v Dowden* [2007] 2 AC 432 at [59].

81 *Stack v Dowden* [2007] 2 AC 432 at [59].

that parties in this type of shared home arrangement gave thought to how they would want to hold their legal interests, and that they have determined the extent of their legal interests.<sup>82</sup> Both assumptions are erroneous.

46 It is erroneous to assume that all cohabitating couples can be treated alike. The mechanics of cohabitation vary across a wide spectrum, from conscious deliberation and decision, gradual evolution of a relationship, to “spur of the moment” decisions.<sup>83</sup> It stands to reason that parties in certain situations do not give any thought to the legal implications of their living arrangements. Furthermore, it is unclear whether parties who enter into a cohabite arrangement after much conscious deliberation would have taken the additional step of deliberating over their legal arrangements.<sup>84</sup>

47 Even if one assumes the answers to the preceding two questions, it is not entirely certain that parties would have quantified their legal interests from the outset. The implication of such an approach would mean that subsequent acts within the cohabitation sphere would not be relevant to the issue of quantification.<sup>85</sup> This has led to the view that the presumption of resulting trust would only be applicable in

---

82 See *Midland Bank v Cooke* [1995] 4 All ER 562 at 575 per Waite LJ:

When people, especially young people, agree to share their lives in joint homes they do so on a basis of mutual trust and in the expectation that their relationship will endure. Despite the efforts that have been made by many responsible bodies to counsel prospective cohabitants as to the risks of taking shared interests in property without legal advice, it is unrealistic to expect that advice to be followed on a universal scale. For a couple embarking on a serious relationship, discussion of the terms to apply at parting is almost a contradiction of the shared hopes that have brought them together. There will inevitably be numerous couples, married or unmarried, who have no discussion about ownership and who, perhaps advisedly, make no agreement about it. It would be anomalous, against that background, to create a range of homebuyers who were beyond the pale of equity's assistance in formulating a fair presumed basis for the sharing of beneficial title, simply because they had been honest enough to admit that they never gave ownership a thought or reached any agreement about it.

83 UK, Department for Constitutional Affairs, *Separation from cohabitation: making arrangements for finances and parenting* (DCA Research Series 7/06) (Rosalind Tennant, Jean Taylor & Jane Lewis) at para 2.2.

84 UK, Department for Constitutional Affairs, *Separation from cohabitation: making arrangements for finances and parenting* (DCA Research Series 7/06) (Rosalind Tennant, Jean Taylor & Jane Lewis) at para 2.4: “It is, of course, difficult for people to explain why they did not think about something though, in general, they said the thought simply did not occur to them – people did not see cohabitation as being a legal act, or they thought they would not separate.”

85 UK, The Law Commission, *Sharing Homes: A Discussion Paper* (Law Com No 278) at para 2.61, where it was stated that “[t]raditionally, the only contributions which would give rise to the presumption were those at the date of acquisition of the property”.

“uncommon” situations, where “there is no evidence of the parties’ actual intentions, but contributions of cash have been channelled directly towards the initial purchase of realty”.<sup>86</sup>

48 Arguments have been made about the continuing relevance of the presumption of resulting trust in this area as a “default” rule, by resort to the concept of an “extended purchase moneys resulting trust”, where mortgage payments subsequent to purchase of the house can be taken into account. This found no difficulty with Lord Neuberger in *Stack v Dowden*, as His Lordship held that a resulting trust solution is also capable of taking into account post-acquisition payments.<sup>87</sup> While this may overcome the objection to the inapplicability of post-acquisition payments, it does not answer the criticism that it takes too narrow a view of financial contributions. Simply put, it still does not answer criticisms that it is not sensitive to the relevant context. De-emphasising non-financial contributions has the effect of not distinguishing between commercial and non-commercial situations. It is reasonable, and even salutary, to expect parties in a commercial context to order their agreements in such a way that it would be readily identifiable; non-financial contributions would ordinarily not be taken into account because parties are at arm’s length and should ordinarily be presumed to have proceeded prudently.<sup>88</sup>

49 The social context in which cohabite arrangements take place is markedly different. This should necessitate a wider understanding of contributions when the court looks towards a finding of common

---

86 UK, The Law Commission, *Sharing Homes: A Discussion Paper* (Law Com No 278) at para 2.61, where it was stated that “[t]raditionally, the only contributions which would give rise to the presumption were those at the date of acquisition of the property”.

87 *Stack v Dowden* [2007] 2 AC 432 at [138], where his Lordship held that the suggestion by Lord Hoffmann that the trust which arises at the date of acquisition is of an “ambulatory nature” does not “justify a departure from the application of established legal principles any more than such a departure is justified at the time of acquisition”, and later that “subject of course to other relevant facts justifying a different conclusion, the fact that one party carries out significant improvements to the home will justify an adjustment of the apportionment of the beneficial interest in his favour. In such a case, the cost could be seen as capital expenditure which differs from regular outgoings relating to the use of the home, and is not dissimilar in financial effect, from the cost of acquiring the home in the first place”.

88 Another approach taken by the Singapore courts has been to use evidence of the parties’ common intention as a means to displace the presumptions of resulting trust or advancement. In *Siak Lye Ping v Chia Tien Leong Benjamin* [2005] SGDC 183 at [66], the court held that “the evidence of actual intention was only to displace the resulting trust. He did not need to raise a constructive trust that the husband and the wife were holding a beneficial interest on trust for him”. One could argue that such an approach would allow the courts to take into account non-financial contributions as evidence of actual common intention. However, this does not overcome the problem where there is no evidence of actual common intention.

intention. It is certainly undesirable to return to the “bad old days of *Burns v Burns*”.<sup>89</sup>

50 Nick Piska brings the argument one step further, by arguing that the resulting trust analysis should be rejected because it “entrenches the differential treatment of women and may not truly reflect the parties’ beliefs and expectations on the acquisition of the family home”.<sup>90</sup> This is on the premise that the resulting trust analysis, “with its emphasis on financial contributions and the ‘solid tug of money’, is said to have worked to the detriment of women seeking to claim a beneficial interest in the family home”.<sup>91</sup> This, it is submitted, further lends credence to Baroness Hale’s assertion that “the law has indeed moved on in response to changing social and economic conditions”.<sup>92</sup>

51 Therefore, on this analysis, it is certain that the resulting trust approach has been – and rightly – discredited in England and Wales, in the area of cohabite arrangements. Stretching the resulting trust to its doctrinal limits, in terms of the “extended purchase moneys resulting trust”, would still fail to capture the essential fairness of the situation, which is to “ascertain parties’ shared intentions ... with respect to the property in the light of their whole course of conduct in relation to it”.<sup>93</sup>

52 Its failure to be both contextually sensitive and relevant to prevailing social conditions in this area makes it unsuitable as a legal device to apportion shared property in the event of a cessation of cohabite arrangements.

53 While Singapore courts have considered the common intention constructive trust before, such cases were mostly analysed in the pre-*Oxley* era<sup>94</sup> in reliance on the authority of *Lloyds Bank plc v Rosset*.<sup>95</sup> The common intention constructive trust was used in *Tan Thiam Loke v Woon Swee Kheng Christina*,<sup>96</sup> but there has not been much development

---

89 S Greer, “Back to the Bad Old Days?” 158 NLJ 174, cited in Nick Piska, “A common intention or a rare bird? Proprietary interests, personal claims and services rendered by lovers post-acquisition: *James v Thomas; Morris v Morris*” (2009) 21 CFLQ 104 at 109.

90 Nick Piska, “Intention, Fairness and the Presumption of Resulting Trust after *Stack v Dowden*” (2008) 71 MLR 120 at 124.

91 Nick Piska, “Intention, Fairness and the Presumption of Resulting Trust after *Stack v Dowden*” (2008) 71 MLR 120 at 124.

92 *Stack v Dowden* [2007] 2 AC 432 at [59].

93 *Stack v Dowden* [2007] 2 AC 432 at [59].

94 This time frame is essential because the English Court of Appeal in *Oxley v Hiscock* [2004] 3 WLR 715 provided a clearer explanation of Lord Bridge’s speech in *Lloyds Bank plc v Rosset* [1991] 1 AC 107 as espousing the threshold question of a two-stage test; see *Stack v Dowden* [2007] 2 AC 432 at [48].

95 [1991] 1 AC 107.

96 [1991] 2 SLR(R) 59.

after that.<sup>97</sup> It is indeed curious, to say in the least, that *Tan Thaim Loke* was not cited in *Lau Siew Kim*. Nor was *Stack v Dowden* cited in *Lau Siew Kim*, despite it being decided after the case.<sup>98</sup> More interestingly, there was no mention of a common intention constructive trust solution, given that this doctrine has been widely compared to the twin presumptions of resulting trust and advancement in English jurisprudence. This appears to be a deliberate attempt to focus the analysis on the resulting trust. The cases of *Low Gim Siah* and *Lau Siew Kim* can thus be seen as a preference by the Singapore Court of Appeal to move in the resulting trust direction.

54 But recent High Court judgments do recognise the existence and relevance of the common intention constructive trust. In *Koh Cheong Heng v Ho Yee Fong*,<sup>99</sup> the court recognised that there are two types of implied trusts which may arise. The first was the resulting trust, while the second was an institutional constructive trust and “one species of such an institutional constructive trust is English law’s *common intention constructive trust* (‘CICT’)”<sup>100</sup> [emphasis in original]. Prakash J added that “the CICT was judicially developed in England in the context of shared homes (see generally *Pearce, Stevens & Barr* at pp 337, 360–391). In this regard, the CICT may be seen to be appropriate in the present case because the Property is a shared home”. Prakash J then went on to state that she was reluctant to hold that a CICT properly describes all *donatio mortis causa* situations (which the case before the court revolved around), because not all *donatio mortis causa* situations revolved around shared homes. This implies a recognition and acceptance of the common intention constructive trust in situations which do revolve around a shared home. It must be noted that although Prakash J goes on to recognise the criticisms<sup>101</sup> of the common intention

---

97 Notably, *Tan Thiam Loke v Woon Swee Kheng Christina* [1991] 2 SLR(R) 59 was cited by the Court of Appeal only once, in *Shi Fang v Koh Pee Huat* [1996] 1 SLR(R) 906; the Court of Appeal only cited it as indicative of the law of constructive trust; however, there was on the facts no common intention to be found.

98 The House of Lords rendered the decision in *Stack v Dowden* [2007] 2 AC 432 on 25 April 2007, while *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108 was argued before the Singapore Court of Appeal on 10 July 2007; one would thus imagine that there would be good reasons for not citing *Stack v Dowden* despite citing the line of cases from *Gissing v Gissing*; *Stack v Dowden* was also relevant to the central discussion of the presumption of advancement; cf Baroness Hale’s speech at [17] and Lord Neuberger’s speech at [101].

99 [2011] 3 SLR 125.

100 *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125 at [37].

101 The common intention constructive trust has been criticised for its artificial search for common intention (see generally Robert Pearce, John Stevens & Warren Barr, *The Law of Trusts and Equitable Obligations* (New York: Oxford University Press, 5th Ed, 2010) at pp 337, 360–391) and it has been suggested that courts should acknowledge that a constructive trust was being imposed without consent,

(cont’d on the next page)

constructive trust, these were not used as grounds to reject the common intention constructive trust, but only as a reason for caution in using the common intention constructive trust to describe all situations. Although the common intention constructive trust was formally recognised by the court, Prakash J did not cite the seminal case of *Stack v Dowden*, and so it remains to be seen whether the common intention constructive trust, as enunciated and laid out by *Stack v Dowden*, plays a certain role in the shared homes context in Singapore.

55 It is perhaps relevant to note that many principles in the judgement of *Stack v Dowden* have been cited and applied by recent Court of Appeal<sup>102</sup> and High Court cases.<sup>103</sup> Such principles include the burden of proof which is “on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way”,<sup>104</sup> that upon death of a joint tenant, the property passes to the survivor<sup>105</sup> and the effect of a severance of a joint tenancy.<sup>106</sup>

56 While one can view these cases as being irrelevant to the cohabite arrangement cases, as the case of *Lau Siew Kim* affirmed the approach of *Low Gim Siah* without citing *Stack v Dowden*, the better view is that Singapore courts did not rule out the applicability of the common intention constructive trust in the shared homes context and that it might still be part of Singapore law, as seen in *Koh Cheong Heng v Ho Yee Fong*. But the Court of Appeal may have made a conscious decision to abide by the principles and policy objectives behind the resulting trust analysis. These principles and objectives are examined below.

### C. *Resulting trust in the context of a two-stage process*

57 The resulting trust was given its emphasis in *Low Gim Siah* via the use of the presumption of advancement. As stated, the presumption of advancement was held to be equally applicable today, even if social conditions change, because it is premised on “the basis of a *moral or equitable obligation* on the part of one to care for the other. Such moral

---

expressed, implied or imputed, of the trustee (*Lankow v Rose* [1995] 1 NZLR 277 at 293).

102 *Shafeeg bin Salim Talib v Fatimah bte Abud bin Talib* [2010] 2 SLR 1123.

103 *Lee Kim Kiat v Lee Biow Neo* [2008] 2 SLR(R) 174; *Lee Hwee Khim Rosalind v Lee Sai Khim* [2011] SGHC 64.

104 *Lee Kim Kiat v Lee Biow Neo* [2008] 2 SLR(R) 174 at [35].

105 *Shafeeg bin Salim Talib v Fatimah bte Abud bin Talib* [2010] 2 SLR 1123 at [36].

106 *Lee Hwee Khim Rosalind v Lee Sai Khim* [2011] SGHC 64 at [25].

obligations do not change even if social conditions change”<sup>107</sup> [emphasis in original].

58 Further, *Lau Siew Kim* affirmed that the presumption of advancement was the second stage of a two-stage process; there must be facts supporting the imposition of a presumption of resulting trust, and this presumption would only be displaced by the presumption of advancement.<sup>108</sup> The English position, as explained above, is that the presumption of resulting trust and presumption of advancement are legal devices that are no longer relevant in light of “changing social and economic conditions”. They are also not contextually sensitive and serve only to obfuscate the analysis, which should be premised on the common intention as between the parties.

59 *Low Gim Siah* and *Lau Siew Kim* implicitly rejected this approach by emphasising the timelessness of the presumption of advancement, and presumably, the applicability of the presumption of resulting trust. Furthermore, it is implicit too that the Singapore Court of Appeal was more concerned with the obligations imposed by law from one party to another, instead of undertaking an inquiry as to the state of affairs as between the parties.

60 While the differing formulations of the presumption of advancement in these two cases might be contradictory, the point remains that the Singapore Court of Appeal emphasised the “deemed” consequences flowing from the nature of the relationship as between the parties. Thus, it may well be the case that *Stack v Dowden* was not cited because the Singapore Court of Appeal did not approve of the overarching philosophy behind that decision.

61 Therefore, it can be said that *Stack v Dowden*, insofar as it deems the resulting trust analysis as no longer relevant, does not represent Singapore’s approach in this area.<sup>109</sup> The learned authors in *Principles of Singapore Land Law* approved of this stance, stating that the pivotal issue of:<sup>110</sup>

... whether the courts should be more or less interventionist in this context depends very much on whether one is comfortable with the idea that the courts should engage explicitly in distributive justice in the context of property disputes, usually following fallouts of relationships. There is no doubt a case to be made for a less than

---

107 *Low Gim Siah v Low Geok Khim* [2007] 1 SLR(R) 795 at [44].

108 *Lau Siew Kim v Yeo Guan Chye Terence* [2007] 2 SLR(R) 108 at [57].

109 Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee’s Principles of Singapore Land Law* (Singapore: LexisNexis, 3rd Ed, 2009) at paras 7.57 and 7.61.

110 Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee’s Principles of Singapore Land Law* (Singapore: LexisNexis, 3rd Ed, 2009) at para 7.64.

legalistic approach to property disputes in joint domestic enterprises, whether involving marriage or otherwise. It is distasteful to expect close family members or lovers to engage in the sort of contractual negotiations to the minutiae that the law typically expects of commercial parties. However, the extent to which the courts are free to intervene on the basis of fairness is open to dispute.

62 This, coupled with the learned authors' characterisation of the process in *Stack v Dowden* as one of "imputing intention",<sup>111</sup> frames the argument as rejecting the common intention constructive trust for lack of certainty, and being unprincipled in its objectives of achieving fairness. This criticism mirrors the academic debate in England and Wales<sup>112</sup> and is cited also in *Koh Cheong Heng v Ho Yee Fong*.

63 This article goes on to show that the continued relevance of the presumption of advancement should be doubted, and that the problem of contextual sensitivity is one that cannot be overcome by invoking the twin presumptions. Thus, there is no logical basis for the resulting trust to remain as the default rule in these circumstances in Singapore.

#### ***D. The continuing relevance of the presumption of advancement***

64 As mentioned, the continuing relevance of the resulting trust analysis depends largely on the relevance of the presumption of advancement in this area. It is the effect of the presumption of advancement upon a presumption of resulting trust that allows one to

111 Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Land Law* (Singapore: LexisNexis, 3rd Ed, 2009) at para 7.62.

112 See William Swadling, "The Common Intention Constructive Trust in the House of Lords: an Opportunity Missed" (2007) 123 LQR 511 at 517: "In truth, the passage from Lord Diplock's speech in *Gissing* ([1971] AC 889 at 905) on which Lord Denning so often relied was spoken in the context of a discussion of a declaration of trust which could not be proved for want of admissible evidence in the form required by s 53(1)(b) of the Law of Property Act 1925. Only by ignoring the context was Lord Denning able essentially to carry on as before, though now claiming the imprimatur of the House of Lords. It is therefore unfortunate that this same passage was also cited out of context by Lord Walker (at para 19), and used to justify the imputation of intent"; and at p 518: "It is certainly a pity that the issue of resulting trusts was not more fully ventilated. Baroness Hale's act of abolition was made with the benefit of almost no reasoning, and even a mistaken view of their nature, for she said that the 'presumed resulting trust' reflected equity's presumption 'against gifts' without explaining why equity took such a stance. Moreover, she failed to notice that this was the very argument of Professor Birks ('Restitution and Resulting Trusts' in S Goldstein (ed), *Equity and Contemporary Legal Developments* (1992), pp 335–373) which the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 unanimously rejected." See also Robert Pearce, John Stevens & Warren Barr, *The Law of Trusts and Equitable Obligations* (New York: Oxford University Press, 5th Ed, 2010) at pp 337, 360–391 and *Lankow v Rose* [1995] 1 NZLR 277 at 293, as cited in *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125 at [37].

accept their efficacy as an alternative solution to the English common intention constructive trust approach.<sup>113</sup> However, this is rather unsatisfactory. There is no coherent explanation for the basis of the presumption, which affects the rationale in applying it in certain factual situations. (Furthermore, even if there was a coherent basis for applying the presumption, the application must be “in line with today’s social conditions.”<sup>114</sup>)

65 It is at least clear that there is no coherent basis for applying the presumption.<sup>115</sup> There are differences in the formulation of the presumption in *Low Gim Siah* and *Lau Siew Kim*. The Court of Appeal in *Low Gim Siah* emphasised that the basis of the presumption rested on an “equitable or moral obligation” to provide, while the Court of Appeal in *Lau Siew Kim*, while approving of the formulation in *Low Gim Siah*, went on to emphasise the importance of “established categories of relationships”.<sup>116</sup> The court seemed to treat the dependency relationship and “a moral or equitable obligation on the part of one to care for the other” as interchangeable.<sup>117</sup> It may well be that the “presumption contains a number of underlying rationales – a reflection of the common intention of the relationship, the greater *prima facie* possibility of beneficial interests being intended in the situations, moral or equitable duty to provide, a dependency relationship, and affection that flows from the inherent nature of the relationship”.<sup>118</sup> However, the Singapore Court of Appeal’s formulation did not take these into account, and that runs the risk of applying the presumption in an ill-reasoned manner.

---

113 The presumption of resulting trust approach has after all been discredited in part because the presumption of advancement did not apply; thus, there exists no basis from which the “weaker” party can claim more than what she contributed financially to the purchase of the shared property.

114 Tsun Hang Tey, “Singapore’s Muddled Presumption of Advancement” [2007] Sing JLS 240 at 263.

115 Tsun Hang Tey, “Singapore’s Muddled Presumption of Advancement” [2007] Sing JLS 240 at 243: “There has been no judicial consensus in Singapore on the underlying rationales of the presumption.”

116 *Lau Siew Kim v Yeo Guan Chye Terence* [2007] 2 SLR(R) 108 at [77].

117 Tsun Hang Tey, “Singapore’s Muddled Presumption of Advancement” [2007] Sing JLS 240 at 245:

[T]he contradiction comes in the strength of the presumption. If the presumption rests on established relationships, it is conceivable that the presumption applies in equal force for a transfer from father to child, regardless of the child’s age. However, if the presumption rests on the moral or equitable obligation to provide, the strength of the presumption is affected by the strength of the obligation to provide. Presumably this is much weaker in cases where the child is an adult as compared to cases where the child is still a minor.

118 Tsun Hang Tey, “Singapore’s Muddled Presumption of Advancement” [2007] Sing JLS 240 at 263.

66 If one accepts either formulation as given by the Singapore Court of Appeal, one would then be hard-pressed to meet objections on the basis of it being a dogmatic approach. It is clear that the presumption in its current guise is one that has public policy content.<sup>119</sup>

67 On this basis, it is doubtful whether wider concerns about public policy were taken into account, including inherent gender bias.<sup>120</sup> If this were so, the use of the presumption should be rejected for not adequately reflecting policy concerns and reality. This is *a fortiori* the case when the Singapore Court of Appeal has emphasised the timelessness of the presumption, which means that the possibility of varying the use of the presumption is implicitly rejected.<sup>121</sup> Elsewhere, a single threshold test has been suggested, “which is flexible enough to apply to a range of diverse factual circumstances. The presumption of advancement has to accurately reflect the probability that a state of affairs exists”.<sup>122</sup> The presumption of advancement in this form would potentially be more acceptable. However, as the law stands, a presumption of advancement based on an equitable or moral obligation or a categories approach is unsatisfactory, and does not reflect today’s social conditions.

### E. *Contextual sensitivity*

68 The use of the presumptions of resulting trust and advancement has a major drawback, in that they do not respond to the context in which the trust arises. The context in which the trust arises can be sufficiently given effect to, via an inquiry into the circumstances

---

119 Tsun Hang Tey, “Singapore’s Muddled Presumption of Advancement” [2007] Sing JLS 240 at 263: “[t]he factors to be considered include policy considerations”; see too *Lau Siew Kim v Yeo Guan Chye Terence* [2007] 2 SLR(R) 108 at [74]: “[G]iven that legislative recognition and public consensus about the status of *de facto* relationships have yet to emerge locally, any development along the lines envisaged by Gibbs CJ may be, in our view, presently unwarranted.”

120 In this context, it must be noted that the UK Law Commission has expressed concerns about gender bias; see UK, The Law Commission, *Sharing Homes: A Discussion Paper*, (Law Com No 278) at para 2.60: “The presumption of advancement is now viewed as being somewhat anachronistic ... The gender bias of advancement is widely thought to contravene Article 5 of the Seventh Protocol to the European Convention on Human Rights in its assertion of the equality of spousal rights and responsibilities.”

121 *Low Gim Siah v Low Geok Khim* [2007] 1 SLR(R) 795; while the Court of Appeal held that “it is the strength of the presumption that varies” (at [77]), this is still rather unsatisfactory, because the presumption operates upon the existence of an obligation or a recognised category of relationship, and one would not find it easy to displace the presumption.

122 Tsun Hang Tey, “Singapore’s Muddled Presumption of Advancement” [2007] Sing JLS 240 at 263.

in which it arises. The resulting trust and presumption of advancement arguably do not perform this function.

69 It has already been shown that the twin presumptions do not respond to a situation in a sensitive way. It erroneously assumes that parties discuss their legal arrangements when they are cohabiting. It fails to distinguish between commercial situations and non-commercial situations by relying on express evidence – a method which is arguably more suitable to the commercial context. It takes too narrow a view of financial contributions. Also, in Piska's words, it "entrenches the differential treatment of women and may not truly reflect the parties' beliefs and expectations on the acquisition of the family home".<sup>123</sup>

70 The fatal blow, arguably, is that it fails to recognise sufficiently analogous situations and react in a coherent and consistent manner. It is clear that the law responds differently to different situations, which on the surface may generate the same result. In the sphere of shared ownership between couples, the separation of title upon the end of a shared arrangement may differ according to whether the separation was by divorce, death or dissolution of a cohabite relationship. These situations would *prima facie* be similar; they involve a separation of title upon the end of a relationship. However, in the case of divorce, the "deferred community of property" approach applies,<sup>124</sup> whereas a resulting trust approach would apply to a marital situation where the end of the relationship was actuated by the death of either party.<sup>125</sup>

#### ***F. Deferred community of property***

71 The current position in Singapore with regard to dissolution of a cohabite agreement would, under the principles of *Lau Siew Kim*, also be governed by the presumption of resulting trust. What the court failed to consider was that this "deferred community of property" approach is, *inter alia*, an embodiment of an imputed intention. The court imputes an intention upon the parties in a marriage to treat their union as "an equal co-operative partnership of different efforts", and thus that "property acquired during marriage is jointly owned and both spouses

---

123 Nick Piska, "Intention, Fairness and the Presumption of Resulting Trust after *Stack v Dowden*" (2008) 71 MLR 120 at 124.

124 As embodied in the Women's Charter (Cap 353 2009 Rev Ed) s 112; see Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2nd Ed, 2007) at p 530.

125 As was the case in *Lau Siew Kim v Yeo Guan Chye Terence* [2007] 2 SLR(R) 108 at [81]: "When the marriage subsists, property law, including the law of resulting trusts, applies, without modification, to determine the respective proprietary rights of spouses."

have equal entitlement to ownership and use of it”<sup>126</sup>. An assertion that “[w]hen the marriage subsists, property law, including the law of resulting trusts, applies, without modification”<sup>127</sup> would have the effect of merely stating the law without considering the intentions of the parties. Although the use of “imputed” intentions in the case of shared property in a cohabite situation is not suggested or recommended here, it must be noted that inferring intentions as between the parties would closely approximate the purpose of the “deferred community of property” approach, in a situation which is similar, but not analogous, to marriage. This does not run afoul of public policy, simply because a distinction is drawn in that it is permissible to use “imputed” intentions in a marital situation, but not in a cohabite situation. In the latter scenario, the court’s focus on the nature of the relationship is merely a means of inquiring into the arrangement as between both parties.

72 This places sufficient emphasis on the private, non-business nature of the arrangement between the parties, and also gives due regard to the unique nature of the relationship. The law should be sensitive to the context in which the arrangement arises, and should not attempt to treat all private arrangements as being similar in nature.

### G. *Over-litigation*

73 It has been suggested that one advantage of the twin presumptions approach is that it might avoid uncertainty and, by extension, over-litigation. The learned authors of *Principles of Singapore Land Law* wrote:<sup>128</sup>

[I]n pioneering the use of imputed intentions to divine the parties’ intentions as to shares in the property, [Baroness Hale] is *encouraging* rather than *discouraging* litigation. First, it provides a further basis for the courts’ intervention beyond actual and inferred intentions. Second, and perhaps more significantly, it has been remarked that ‘[i]n the absence of a clear basis for intervention *Stack* is unlikely to lead to consistency of decisions’. The greater the inconsistency between cases, the greater will be the room for dispute between the parties, leading to more rather than less litigation. [emphasis in original]

---

126 Leong Wai Kum, *Elements of Family Law in Singapore* (Singapore: LexisNexis, 2nd Ed, 2007) at p 529.

127 *Lau Siew Kim v Yeo Guan Chye Terence* [2007] 2 SLR(R) 108 at [81]: “When the marriage subsists, property law, including the law of resulting trusts, applies, without modification, to determine the respective proprietary rights of spouses.”

128 Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee’s Principles of Singapore Land Law* (Singapore: LexisNexis, 3rd Ed, 2009) at para 7.63.

74 This assertion, however, is in contrast with Baroness Hale's speech:<sup>129</sup>

[t]he burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way. This is not a task to be lightly embarked upon ... A full examination of the facts is likely to involve disproportionate costs. In joint names cases it is also unlikely to lead to a different result unless the facts are very unusual.

75 It is suggested that the threat of litigation runs both ways. The risk factor with the common intention constructive trust apparently lies in the open list of factors to be taken into consideration,<sup>130</sup> while with the twin presumptions, the presumption of resulting trust would be triggered if joint tenants contributed unequally. However, three points can be noted here. The risk of litigation with the common intention constructive trust is lesser, if one takes a more nuanced approach to the doctrine. The uncertainty as regards the open list in *Stack v Dowden* is more of a second-stage question. Any plaintiff who wishes to assert a common intention to share must first prove the existence of a common intention. It is in this area where one must again recall the effect of *Lloyds Bank plc v Rosset*. This, coupled with *Stack v Dowden*, would tend to show that the burden is indeed not easy to overcome.

76 Secondly, the uncertainty surrounding the quantification stage is no more than a fair reflection of the state of affairs as between the parties. It has been shown elsewhere that parties who were found to have formed a common intention can nevertheless form it with a vague notion that they intend to share, with exact questions as to apportionment left aside. One cannot readily expect the law to trigger a presumption for the sake of certainty and convenience if the facts were such that the whole situation had an air of relative uncertainty around it. In this regard, fairness must definitely trump certainty.

77 Lastly, one cannot downplay the risk of litigation even with a resulting trust approach. This has two related points. The first is that a general implied trust approach seems to have a risk of litigation, and it is suggested that this is unavoidable. After all, an implied trust has its roots in equity, which is founded on conscientious dealings. An implied trust operates on the notion that there must be a split between the legal and beneficial interest of the property, due to some unconscionable conduct or inequity involved. This undermines certainty in that it reaches a result different from what a title register or document evinces. It is therefore suggested that the risk of litigation would always be present if one is inclined to follow the implied trust approach.

---

129 *Stack v Dowden* [2007] 2 AC 432 at [68].

130 *Stack v Dowden* [2007] 2 AC 432 at [69].

78 Specifically, with the resulting trust, it must be noted that the presumption is triggered once there is an inequality between the moneys paid and the proportion of title held. This threshold to litigation is remarkably lower than the common intention constructive trust, and reflects Baroness Hale's words that:<sup>131</sup>

It cannot be the case that all the hundreds of thousands, if not millions, of transfers into joint names using the old forms are vulnerable to challenge in the courts simply because it is likely that the owners contributed unequally to their purchase.

79 Thus, it is suggested that the perceived fear of litigation under the common intention constructive trust cannot be used to downplay its role; it is a risk that is inherent in trust law. Any purported lack of risk for the resulting trust approach must be proven and carefully examined, for it is certain that the resulting trust is likely to lead to as much – if not more – litigation, compared to the common intention constructive trust.

#### **H. Resulting trust in commercial context**

80 The foregoing analysis is not intended to be a recommendation for the abolition of the resulting trust. Indeed, the use of a resulting trust analysis can still be relevant in the commercial context, where parties are presumed to be at arm's length. This is where the presumption of resulting trust is the strongest, as the court is considering the context as between the parties when it only inquires into the extent of financial contributions as between the parties. The resulting trust analysis is also relevant in cases of business arrangements between parties with a private relationship, as can be seen from the suggestion by Lord Walker.<sup>132</sup>

---

131 *Stack v Dowden* [2007] 2 AC 432 at [68].

132 *Stack v Dowden* [2007] 2 AC 432 at [32]: “The doctrine of a resulting trust (as understood by some scholars) may still have a useful function in cases where two people have lived and worked together in what has amounted to both an emotional and a commercial partnership. The well-known Australian case of *Muschinski v Dodds* (1985) 160 CLR 583 is an example. The High Court of Australia differed in their reasoning, but I find the approach of Deane J, at p 623, persuasive: ‘That property was acquired, in pursuance of the consensual arrangement between the parties, to be held and developed in accordance with that arrangement. The contributions which each party is entitled to have repaid to her or him were made for, or in connection with, its purchase or development. The collapse of the commercial venture and the failure of the personal relationship jointly combined to lead to a situation in which each party is entitled to insist upon realisation of the asset, repayment of her or his contribution and distribution of any surplus.’

However, Deane J described this as a constructive trust, and he had earlier, at p 612, treated a resulting trust as excluded by evidence of the parties' common purpose (building and running an arts and crafts centre), even though that purpose had failed. Professor Birks would have treated this as a resulting trust: see

*(cont'd on the next page)*

81 Having a dichotomy of using the common intention constructive trust in private non-commercial relationships, and using the resulting trust in commercial situations, does not result in an inconsistent application of the law of trusts. Both approaches are consistent within the context of searching for a common intention. In commercial arrangements, it must be noted that parties are taken to be dealing at arm's length, and hence both parties are expected to tailor their arrangements according to the desired legal effect.<sup>133</sup>

82 This must be contrasted with the observation that parties in a private non-commercial relationship often do not order their arrangements in a way that would satisfy legal obligations and expectations.<sup>134</sup> Parties who are not in such relationships cannot expect equity to come to their assistance by looking beyond what has been formally bargained for.

83 As for private non-business arrangements, the use of the common intention constructive trust as the default rule is preferred. The presumption of resulting trust should only be used in cases where the court cannot infer a common intention to share.

---

*Restitution and Equity* (ed Birks & Rose), vol 1 (2000), pp 275–279. Other scholars disagree. *Drake v Whipp* [1996] 1 FLR 826 might have been analysed in this way so as to produce the same result, but only if the whole of each party's contribution had been taken into account in applying the resulting trust."

133 In the context of the law of mistake in contract, V K Rajah JC in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [105], held: "The very foundations of predictability, certainty and efficacy, underpinning contractual dealings, will be undermined if the law and/or equity expands the scope of the mistake exception with alacrity or uncertainty. The rigour in limiting this scope is also critical to protect innocent third party rights that may have been acquired directly or indirectly. Certainty in commercial transactions should not be trifled with, as this will inevitably affect how commercial and business exchanges are respected and effected. The quintessential approach of the law is to *preserve* rather than to *undermine* contracts. Palm tree justice will only serve to inject uncertainty into the law." [emphasis in original]

134 See *Midland Bank v Cooke* [1995] 4 All ER 562 at 575 *per* Waite LJ: "When people, especially young people, agree to share their lives in joint homes they do so on a basis of mutual trust and in the expectation that their relationship will endure. Despite the efforts that have been made by many responsible bodies to counsel prospective cohabitants as to the risks of taking shared interests in property without legal advice, it is unrealistic to expect that advice to be followed on a universal scale. For a couple embarking on a serious relationship, discussion of the terms to apply at parting is almost a contradiction of the shared hopes that have brought them together. There will inevitably be numerous couples, married or unmarried, who have no discussion about ownership and who, perhaps advisedly, make no agreement about it. It would be anomalous, against that background, to create a range of homebuyers who were beyond the pale of equity's assistance in formulating a fair presumed basis for the sharing of beneficial title, simply because they had been honest enough to admit that they never gave ownership a thought or reached any agreement about it."

84 On a final note, how then does one treat *Lau Siew Kim*? The factual scenario in *Lau Siew Kim* was one of a private non-commercial relationship. The issue thus was whether there existed a common intention as between the deceased and the appellant, who was his third wife. This finding of common intention – or the lack thereof – would relate to whether there was a common intention as between the deceased and the appellant for either to take the whole of the property under survivorship of joint tenancy upon the death of the other. The presumption of resulting trust would step in only if such an intention cannot be inferred.<sup>135</sup> This is thus consistent with the approach advocated here that the presumption of advancement continues to play a part in this situation, though it must be emphasised that the use of the presumptions of resulting trust and advancement would only be defensible after the search for a common intention has failed.

#### IV. Social goals

85 An analysis of the use of resulting trust and presumption of advancement must include an analysis of the social goals that the twin presumptions hope to achieve. Just as this article earlier rejected the use of both the presumptions on the basis that they do not reflect reality and hence ignore wider policy considerations, so too must this article consider the specific social goals that both presumptions seek to achieve.

86 It is implicit in the conception of the presumption of advancement that there is a divide between socially recognised relationships and relationships that are at the periphery of social acceptability. The Court of Appeal in *Lau Siew Kim* declined to extend the use of the presumption to “*de facto*” relationships, because “legislative recognition and public consensus about the status of *de facto* relationships have yet to emerge locally”.<sup>136</sup> Similarly, the proposed threshold test for the presumption of advancement allows the courts not to apply the presumption in “cohabite and man-mistress relationships and other relationships where public policy poses a real obstacle” because the presumption “has a subsidiary role in enforcing social policies”.<sup>137</sup>

87 These are considerations that cannot be easily ignored. It is admittedly true that public policy considerations in Singapore would set it on a different path from that taken in England and Wales, especially in

---

135 This, as the Court of Appeal points out, is also subject to the overall succession regime framework where applicable. See *Lau Siew Kim v Yeo Guan Chye Terence* [2007] 2 SLR(R) 108 at [82].

136 *Lau Siew Kim v Yeo Guan Chye Terence* [2007] 2 SLR(R) 108 at [74].

137 Tsun Hang Tey, “Singapore’s Muddled Presumption of Advancement” [2007] Sing JLS 240 at 263.

the area of cohabitation arrangements.<sup>138</sup> The policy argument would be that allowing the imposition of a court-sanctioned division of assets by way of trust would amount to state sanction of such arrangements, when it is not in Singapore's social policy interests to advance such goals. Indeed, John Mee has argued that there is "the problem of legitimacy", where "[i]t is arguable that courts should not be too ready to facilitate the legislature in its desire to avoid confronting controversial social problems".<sup>139</sup>

88 There are two facets to this problem. Firstly, there is the issue of whether the common intention constructive trust *per se* has some "in-built" characteristic signifying judicial or state approval, as is the case with the presumption of advancement displacing the result reached under the presumption of resulting trust. Secondly, even if assuming that the common intention constructive trust does not have some implicit message of judicial or state approval, one must still consider whether it would nevertheless be objectionable to undertake this analysis if the end result reached, by allowing non-marital couples to rely on some previously formed common intention, would have the appearance of judicial or state approval.

89 As to the former issue, it is argued that such worries are unwarranted. The use of a common intention constructive trust would not legitimise such relationships as compared to the presumption of advancement in the case of expanding categories. The idea of state acknowledgement implicit in the presumption of advancement is attributable to its *raison d'être* of either a moral obligation or a recognised category of relationship. Such concerns are not present in the common intention constructive trust. Its rationale is the division of title based upon the common intention of the parties; there is no notion of a moral judgment or state approval of certain kinds of relationships. The fact of the existence of a cohabitee relationship is only relevant in deciding whether certain acts are relevant in inferring a common intention. Indeed, it is instructive that in local jurisprudence, the Court of Appeal in *Tan Thiam Loke v Woon Swee Kheng Christina*<sup>140</sup> applied the common intention constructive trust analysis. A common intention was found to exist as between the parties regarding the sharing of property, though the plaintiff was found not to have detrimentally relied upon the common intention. What is particularly instructive was the fact that

---

138 Note that in England and Wales, the Law Commission recommended a statutory framework for cohabitees, which includes a threshold test for cohabitation relationships that would enjoy the proposed protection under the statutory framework. See generally UK, The Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307).

139 John Mee, *The Property Rights of Cohabitees: An Analysis of Equity's Response in Five Common Law Jurisdictions* (Oxford: Hart Publishing, 1999) at p 313.

140 [1991] 2 SLR(R) 59.

both the plaintiff and the defendant were at one point in time cohabiting despite the lack of marital status. This shows that the common intention constructive trust does not lend itself to moral judgment or state approval of certain categories of relationships. Its role is simply to give effect to the common intention thus found.

90 The latter issue of whether the end result as a whole can be taken as a backdoor to implied judicial approval is admittedly harder. If the aim of the presumption of advancement in closing its door to “*de facto*” relationships is to discourage such relationships by refusing to provide legal protection to such category of persons, hence reflecting a policy preference for marriage, it is possible that the imposition of a common intention constructive trust would undermine this. However, such an approach would be too harsh. It ignores the issue of substantive fairness as between the parties. It entrenches the position of the holder of the legal interest, ignoring the common intention to share that existed between the parties.<sup>141</sup> This “losses lie where they fall” outcome is on par with the consequences of illegality, with which cohabitation surely cannot be equated.<sup>142</sup> The relative harshness and injustice as

---

141 See generally Simone Wong, “The Iniquity of Equity: A Home-Sharer’s Tale” [2008] Sing JLS 326, especially at 329: “With increased female participation in the labour market, the traditional family structure of the male wage-earner/female homemaker is undoubtedly on the decline. The evidence nevertheless reveals that not only does the gender pay gap still exist, but also that the age and the number of dependent children have a substantial impact on women’s employment. The data further indicate that the gender pay gap varies by married or cohabiting status, but the legal marital status of women is not a relevant factor in determining the degree of their financial dependency on their partners. The disparities in working hours and the pay gap between men and women lead to gendered financial inequality in the relationship, with women becoming more financially dependent on their male partners. The financial inequality can be one of three forms: inequality in earnings, inequality in asset and debts, and inequality in earning capacity. The latter two are in part a result of inequality in earnings. With less financial resources available to them, women become unequal contributors to household income. They are more likely to be dependent on men for their access to money and other household resources, and to have less control over how money is spent. This means that a female partner’s financial contributions may not necessarily be applied in the manner that the law requires in order for a common intention trust to be established. Crucially, the substantial and important non-financial contributions, such as homemaker and childcare contributions, which a woman may make, are completely ignored in assessing whether an implied intention can be found ... Furthermore, a claimant bears the burden of adducing evidence that relevant contributions have been made ... [c]oupled with the tendency for women’s earnings to be used on expenses that are classified by the law as indirect rather than direct contributions, the evidential burden is heavier for women. Consequently, the law as it currently stands in England and Wales represents a source of injustice for many female claimants and fails to respond adequately to disputes over the shared home on cohabitation breakdown.”

142 See *Chettiar v Chettiar* [1962] AC 294, where the Privy Council held that a father who transferred his land to his son for an illegal purpose (that is, to evade certain restrictions on the holding of land for the production of rubber) cannot rebut the  
(cont’d on the next page)

between the parties should act as a sufficient counterbalance to the other policy goal of discouraging “*de facto*” relationships. Thus, it is argued that it is not enough to assert that the use of the common intention constructive trust would in effect encourage “*de facto*” relationships. One must also consider the potential iniquity from the perspective of the party seeking to enforce the common intention.

91 At the end of the day, the choice between both the twin presumptions of resulting trust and advancement and the common intention constructive trust falls to be governed by policy considerations. As mentioned, the learned authors of *Principles of Singapore Land Law* prefer to look at this issue as tending towards the extent to which Singapore courts are prepared to intervene on the basis of fairness.<sup>143</sup> However, this policy consideration – that of potential interference with accrued property rights – is downplayed, because this is simply not present if the court merely declares an institutional constructive trust. It is preferable to conceptualise the question as a choice between party justice and fairness on one side, and family policy objectives on the other. Thus stated, the use of the presumption of advancement shows a divide between recognised and unrecognised relationships.

92 The above analysis only looks at whether the common intention constructive trust would undermine such policy objectives. However, one must consider further the case where the common intention constructive trust is plainly inconsistent with family policy objectives. On this basis, while the common intention constructive trust might detract from the “sanctity of the traditional notion of marriage” in that it might unnecessarily be forced into a model of “partnership paradigm” and be equated with “an emotional and economic partnership”,<sup>144</sup> it cannot be said to be contrary to public policy, unless the public policy is to actively discourage cohabitation arrangements. In this regard, this

---

presumption of advancement, because he would need to rely on his illegal purpose to show that he did not intend the transfer as a gift for his son; this effectively let the father’s losses lie where they fell; *contra Nelson v Nelson* (1995) 184 CLR 538, where the High Court of Australia doubted the reasoning in *Tinsley v Milligan* [1994] 1 AC 340, and held that there is no general proposition that equity will let the loss lie where it falls even if one has to rely on the illegality to prove his claim. While this might be an oversimplification of the law of illegality in contract, it can be observed that the relative harshness of ignoring party fairness is only invoked in cases of illegality, and there are even cases which doubted the application of this harsh doctrine even when illegality can be found. See generally Tsun Hang Tey, “Reforming Illegality in Private Law [2009] 10 SAL Ann Review 218.

143 Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee’s Principles of Singapore Land Law* (Singapore: LexisNexis, 3rd Ed, 2009) at para 7.64.

144 Tsun Hang Tey, “Singapore’s Muddled Presumption of Advancement” [2007] Sing JLS 240 at 255; see also John Mee, *The Property Rights of Cohabitees: An Analysis of Equity’s Response in Five Common Law Jurisdictions* (Oxford: Hart Publishing, 1999) at p 315.

particular alleged public policy is not satisfactorily proven. It is instructive that the court's rejection of the use of the presumption of advancement for cohabite arrangements in *Lau Siew Kim* was described as "unwarranted" based on a lack of "legislative recognition and public consensus",<sup>145</sup> and not in terms of being contrary to public policy. Thus, any assertion that cohabite arrangements are contrary to public policy and hence should not be given effect by the courts is a bare assertion at best.

93 Perhaps the most important reason for favouring the party intention conception of conscience lies in the fact that this is ultimately a private law remedy. Party considerations should be given priority when the courts consider such cases. To seek to do otherwise might reduce the efficacy of private law remedies, and result in an unprincipled restriction on private law rights. Such restrictions can only be placed by a demonstration of a principled basis for invoking equity's notions of conscience, morality and public policy. In this regard, one must bear in mind the reminder in *Cowcher v Cowcher*<sup>146</sup> that "[t]his does not mean that equity is past childbearing; simply that its progeny must be legitimate – by precedent out of principle". To do so otherwise would be to cast doubts on its legitimacy.<sup>147</sup>

## V. Moving forward

94 Moving forward, two issues should be dealt with. Firstly, the presumption of resulting trust and presumption of advancement are no longer appropriate as a device for legal analysis in the context of non-commercial shared property. It has been shown that these presumptions do not have a coherent basis for their application. It has further been shown that it is preferable and more desirable that the common intention constructive trust be used.

95 Singapore's preference for the resulting trust approach appears increasingly indefensible. The result reached under the Singapore approach fails to balance party justice and policy objectives. It fails to sufficiently consider how the common intention constructive trust is more neutral in its application to the facts and circumstances, as compared to the twin presumptions. The use of the common intention constructive trust is unobjectionable, unless one can prove the specific

---

145 *Lau Siew Kim v Yeo Guan Chye Terence* [2007] 2 SLR(R) 108 at [74].

146 [1972] 1 WLR 425 at 430.

147 "[The legitimacy of the new model was] ... at least suspect; at best it is a mutant from which further breeding should be discouraged" (*Allen v Snyder* [1977] 2 NSWLR 685 at 701 *per* Samuels JA, albeit in a different context; his Honour's opinion was in response to Lord Denning's conception of a "new model constructive trust").

public policy to which the application of the common intention constructive trust is contrary.

96 Ultimately, one must keep in mind whether the use of such presumptions are in accordance with prevailing social conditions, for it must be stressed once again that “[a] presumption is a useful aid to decision making only when it accurately reflects the probability that a fact or state of affairs existed or has occurred ... If the presumptions do not reflect common experience today, they may defeat the expectations of those who are unaware of them”<sup>148</sup>.

97 Secondly, the need for a coherent pronouncement on the juridical basis of resulting trusts is a matter of some urgency in Singapore. It is unfortunate that the Singapore judgments appear to be plagued by a lack of understanding of the different resulting trust theories. *Yong Ching See*, where the different theories were not only confused, but conflated, is a classic example.

98 The way forward for the Singapore courts is, perhaps, to adopt a robust attitude in articulating the basis of adopting one theory over another. This, of course, is premised on the need for the courts to spell out with clarity the theory which is being applied. Such a practice could serve to expose logical loopholes and slips in reasoning, such that bad case law is not further perpetuated,<sup>149</sup> and may be corrected by<sup>150</sup> future judicial pronouncements.<sup>151</sup>

---

148 *Nelson v Nelson* (1995) 184 CLR 538 at 602 *per* McHugh J.

149 Adoption of *Cheong Yoke Kuen v Cheong Kwok Kiong* [1999] 1 SLR(R) 1126 in *Yeo Guan Chye Terence v Lau Siew Kim* [2007] 2 SLR(R) 1.

150 David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* (London: LexisNexis, 18th Ed, 2010) at para 22.13.

151 *El Ajou v Dollar Land* [1993] 3 All ER 717, where the transferor had no such intention because it was unaware of the fact that the property had been taken from it in the first place; *Vandervell v IRC* [1967] 2 AC 291; *Re Vinogradoff* [1935] WN 68.