Once a fraud, forever a fraud: the time-honoured doctrine of parol agreement trusts

ABSTRACT:

This paper, through doctrinal analysis of the relevant case law, examines the extent to which the prevention of fraud justifies equity's imposition of trusts which arise out of parol agreements. The authorities reveal that, although there are a variety of circumstances in which equity will operate in such a manner, the nature of the fraud which prompts equity's intervention is always the same. Furthermore, it is argued that, since very early times, these trusts have been regarded as what are now best described as constructive trusts, and that all such trusts are enforced pursuant to a coherent doctrine of equity.

INTRODUCTION:

The circumstances in which trusts are recognised in furtherance of parol agreements relating to both the *inter vivos* and *post mortem* disposal of property have long been a source of controversy. There is a wide range of situations in which equity will intervene in such a manner. [1] Furthermore, such trusts are often imposed when express trusts are apparently

[1]Such trusts include secret trusts and trusts of the type imposed in the well-known cases of *Bannister v Bannister* [1948] 2 All ER 133, *Pallant v Morgan* [1953] Ch 43 and *Rochefoucauld v Boustead* [1897] 1 Ch 196. Arguably, common intention constructive trusts are also trusts of this kind.

prohibited by statutory formality requirements.[2] Thus, some divergence of opinion might be expected. The level of academic discord is extraordinary, however. There is little consensus regarding why these trusts are enforced,[3] how they should be classified,[4] or whether they are enforced pursuant to common principles.[5] This state of affairs is perhaps exacerbated by the numerous examples of apparent judicial inconsistency in this area, and by the frequency with which trusts of this type arise in the courts.[6]

Before the twentieth century, as will be shown below, it was universally accepted that trusts arising out of parol agreements were recognised for the prevention of fraud and could be enforced by the courts even in apparent defiance of the statutory formality requirements on the ground that equity will not permit a statute intended to prevent fraud to be used as an instrument of fraud (hereafter referred to as the 'instrument of fraud principle'). Fraud is rarely mentioned in modern judgments concerning these trusts, however, although there appears to be little in the way of convincing explanation as to why it should no longer play a central role.

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[2]Primarily the Law of Property Act 1925, s53(1)(b) and the Wills Act 1837, s9.

[3]The various academic and judicial justifications are considered below, throughout this article.

[4]Although the most popular view is that all of the trusts to be considered here are constructive trusts, there are many dissenting voices. See, for example, W Swadling 'The Nature of the Trust in *Rochefoucauld v Boustead'* in Mitchell, ed, *Constructive and Resulting Trusts* (Oxford:Hart, 2009), p 68; LA Sheridan ''English and Irish Secret Trusts' (1951) LQR 314; D Wilde 'Secret and Semi-Secret Trusts: Justifying the Distinctions between the two' [1995] Conv 366; N Hopkins 'The *Pallant v. Morgan* "Equity"' [2002] Conv 35; *Ali v Khan* [2002] EWCA Civ 974 [at para 35] per Morritt VC.

[5]For arguments that they are governed by common principles (but not depending upon the prevention of fraud), see S Gardner 'Reliance-Based Constructive Trusts' in Mitchell, ed, *Constructive and Resulting Trusts* (Oxford:Hart, 2009, p 68; B McFarlane 'Constructive Trusts Arising on Receipt of Property *Sub Conditione'* (2004) 120 LQR 667, p 676.

[6]Some recent examples of cases of the type to be considered in this article are *Kearns Brothers Ltd v Hova Developments Ltd* [2012] EWHC 2968 (Ch); *De Bruyne v De Bruyne* [2010] EWCA Civ 519; *Samad v Thompson* [2008] EWHC 2809 (Ch); *Staden v Jones* [2008] EWCA Civ 936.

The purpose of this article is to analyse the relevant case law in order that the significance of equitable fraud to the enforcement of such trusts can be assessed, with the ultimate aim of considering whether this controversial area of equity is governed by a single unifying doctrine. In order to achieve this aim, the significance of the prevention of fraud to the various scenarios in which trusts are enforced in furtherance of parol agreements will be analysed. It is then proposed to consider, with reference to the historical development of the law, how these trusts should be classified and whether this classification should influence the underlying justification for their imposition. Finally, the question of the relationship between the prevention of fraud as a justification for the enforcement of these trusts and the instrument of fraud principle, and the relevance of this question to the modern law, will be examined.

It should be noted that, for the sake of expediency, the phrase 'parol agreement trusts' will be used to refer generically to the various types of trusts arising out of parol agreements.

1) THE ROLE OF FRAUD IN THE ENFORCEMENT OF PAROL AGREEMENT TRUSTS

In order to determine whether all parol agreement trusts are enforced for a common reason, it is necessary to consider the relevance of the prevention of fraud and also whether this fraud is of the same nature in each instance. In all of the scenarios under consideration, the grantor will be represented by 'A', and the grantee by 'B'. The beneficiary, in cases where s/he is other than A, will be represented by 'C'.

a) *Cases where A conveys to B subject to a parol agreement that B would hold on trust for A*

There are numerous examples of cases in which A surrendered his/her land to B subject to a parol agreement that B would hold the land for the benefit of A or at some point reconvey to A. These include cases where A wished to conceal temporarily his/her ownership of property,[7] or where B was granted title to land on an interim basis in order to obtain secured finance,[8] although there have been cases arising out of deliberate attempts by B to deceive A into surrendering title to his/her property.[9] According to the vast bulk of authorities from over 300 years, B is made trustee for A for the prevention of fraud, and the instrument of fraud principle explains why neither the Law of Property Act 1925 (the 1925 Act), s53(1)(b) nor its predecessor, the Statute of Frauds 1677 (the 1677 Act), s7 apply.[10] The recent cases of *Ali v Khan*[11] and *Kuppusami v Kuppusami*,[12] show that the prevention of fraud is still the underlying justification for the enforcement of such trusts today.[13] The authorities indicate that, for a parol trust to be imposed for the prevention of fraud, there must have been a parol *agreement* reached between A and B, pursuant to which the property was conveyed, rather than a mere oral declaration of trust by either party.[14] It is the bilateral nature of the

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[7] E.g *Davies v Otty (No 2)* (1865) 35 Beav 208; *Haigh v Kaye* (1872) LR 7 Ch 469.

[8] e.g. *Re Duke of Marlborough,* [1894] 2 Ch 133; *Ali v Khan,* above n 4; *Kuppusami v Kuppusami* [2002] EWHC 2578 (Ch).

[9] e.g. *Hodgson v Marks* [1971] Ch 892.

[10] See *Wilkinson v Brayfield* (1693) 2 Vern 307 [at n 1]; *Hutchins v Lee* (1737) 1 Atk 447 [at 285] per Lord Hardwicke; *Cripps v Jee* (1793) 4 Bro CC 472 [at 476] per Arden MR; *Haigh v Kaye*, above n 7 [at 474] per James LJ; *Booth v Turle* (1873) LR 16 Eq 182 [at 188] per Malins VC; *Re Duke of Marlborough*, above n. 8 [at 141] per Stirling J; *Bannister v Bannister*, above n 1 [at 136] per Scott LJ.

[11] Above n 4.

[12] Above n 8.

[13] In *Ali v Khan*, above n 4 [at para 22 and para 35], Morritt VC, giving the Court of Appeal's judgment, relied on *Marlborough*, describing it as a case of 'fraud', as well as *Haigh* and *Rochefoucauld*. For further discussion of *Ali*, see below, text to nn 119-127 and accompanying text. In *Kuppusami v Kuppusami* above n 8 [para 72] per Rimer J relied directly on *Ali.*

[14] It is notable that there several cases in which property was conveyed from A to B, for purposes other than to transfer the beneficial interest, but not subject to any parol agreement. None of these cases were enforced on the ground of fraud. Instead, they were enforced as resulting trusts. Examples include *Childers v Childers*

agreement, and A's subsequent reliance thereupon, which triggers equity's intervention on the ground of fraud.

It is also notable that some of these cases shed light on the nature of equitable fraud. Although some involved deliberate deceit or wilful dishonesty on the part of B, [15] several did not. There is no distinction in the reasoning of the courts between these classes of cases; the overwhelming consensus amongst the authorities is that the fraud lies in B reneging upon the parol agreement having taken the land on the premise that s/he would adhere to it. In *Re Duke of Marlborough,* for example, B died before he could reconvey the land in accordance with the parol agreement. Even though Stirling J was of the opinion that, prior to his death, B 'was willing and intended to reconvey', [16] the case was still held to be one of fraud. In *Cripps v Jee*, B unwittingly reneged upon the parol agreement when he was declared bankrupt. The parol trust was recognised on the ground that the case was one of 'a pious fraud'. [17] The approach of the courts to cases within this class is typified by Scott LJ's statement in *Bannister v Bannister* that it was 'fraudulent in [B] to insist on the absolute character of the conveyance for the purpose of defeating the beneficial interest which he had agreed [A] should retain', even if he 'may have been innocent of any fraudulent intent in taking the conveyance in absolute form'. [18]

b) Cases where A conveys to B subject to a parol agreement between A and B that B will take as trustee for C

(1857) De G & J 482; *Birch v Blagrave* (1755) Amb 264; *Platermore v Staple* (1815) G Coo 250.
[15] E.g. *Hodgson v Marks,* above n 9.
[16] Above n 8 [at 146] per Stirling J.
[17] *Cripps v Jee*, above n 10 [at 476] per Arden MR.
[18] *Bannister v Bannister*, above n 1 [at 136] per Scott LJ.

These cases can arise in respect of agreements relating to both the *post mortem* and *inter vivos* disposal of property. The former, usually known as secret trusts, will be dealt with first. The dichotomy between fully and half secret trusts raises certain important theoretical considerations, because in the cases of fully secret trusts, B (the secret trustee) may gain personally from any failure to perform the secret trust, whilst in cases of half-secret trusts, B, having been identified by the will as a trustee, cannot take for himself/herself whether or not the secret trust is performed. It is therefore often suggested that half-secret trusts defy an explanation on the ground of fraud.[19] In fact, some modern academics reject the prevention of fraud as a ground for the enforcement of any secret trusts, citing a variety of reasons, including that B's fraudulent enrichment could be prevented by the imposition of a resulting trust in favour of A, so that the enforcement of the trust in favour of C must be for other reasons,[20] and that the difficulties in proving B's fraudulent intentions to a proper standard render the fraud theory impractical.[21]

Despite these objections, the authorities, including three House of Lords decisions,[22] overwhelmingly attribute the enforcement of all secret trusts to the prevention of fraud, which even the Wills Act 1837 (the 1837 Act), s9 may not interfere with. For a secret trust to be valid, there must be an intention on the part of A to subject B to an obligation in favour of C than can be enforced as a trust,[23] this must be communicated to B, and B must accept.[24] The effect of these requirements is that there must be an '"*agreement*," a "*bargain* [original

[19]See, for example, Sheridan, above n 4; P Matthews 'The True Basis of the Half-Secret Trust' [1979] Conv 360; P Critchley 'Instruments of Fraud, Testamentary Dispositions, and the Doctrine of Secret Trusts' (1999) 115 LQR 631.

[20]For an explanation of this point of view, see McFarlane, above n 5, p 676.

[21]This view was taken in *Re Snowden* [1979] Ch 528 per Megarry VC. See also R Pearce and J Stevens *The Law of Trusts and Equitable Obligations* (Oxford: OUP, 3rd edn, 2004) p223.

[22]*Blackwell v Blackwell*, [1929] AC 318; *Cullen v Attorney General of Ireland* (1866) LR 1 HL 190; *McCormick v Grogan* (1869) LR 4 HL 82.

[23]This appears to be so that the obligation that B accepts can be enforced as a trust. The three certainties need not be present. See below nn 96 and 97 and accompanying text.

[24]See *Blackwell v Blackwell,* above n 22 and *Ottaway v Norman* [1972] Ch 698. It is also established law that silence on the part of B will be construed as acceptance of the obligation (*Moss v Cooper* (1861) 1 J & H 352).

italics] between [A] and [B]"—a communication between the parties during the testator's life, which can be construed into a trust'.[25] If the three requirements are met, it is a fraud for B to renege on the parol agreement, upon which A must have relied when determining his testamentary disposition, and equity may prevent this fraud by imposing a trust to give effect to B's undertaking. Thus, any failure by B to perform his/her promise is a fraud, regardless of whether s/he gains personally from any such failure, and regardless of his/her state of mind at the time at which s/he agreed to the terms of the secret trust. As Lord Cairns explained, for 'the prevention of fraud, [the court] engrafts the trusts on the devise by admitting evidence which the statute would in terms exclude, in order to prevent [B] from applying property to a purpose foreign to that for which he undertook to hold it.'[26] This view was approved in *Blackwell v Blackwell* by Viscount Sumner,[27] and echoed in the same case by Lord Warrington, who stated that secret trusts are enforced because 'it would be a fraud on the part of the legatees to refuse to carry out the trust.'[28] Although there are academic opinions to the contrary, [29] so much authoritative case law has endorsed this view of fraud that the point appears settled.[30]

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[25] *Wallgrave v Tebbs* (1855) 2 Kay & J 313 at 322 [at 326] per Page Wood VC, partly quoting from *Muckleston v Brown* (1801) Ves Jun 53 [at 69] per Lord Eldon LC.

[26] *Jones v Badley* (1868) LR 3 Ch App 362 at 364 *per* Lord Cairns LC, citing *Wallgrave v Tebbs*, above n 25 [at 322 per] Page Wood VC.

[27] *Blackwell v Blackwell*, above n 22 [at 341] per Viscount Sumner.

[28] Ibid, [at 341] per Lord Warrington.

[29] Some doubts seem to be based on the view that *McCormick v Grogan*, above n 22 is an authority that fraud must involve personal gain. In fact, despite some of the unusual (for the time) language used by Lord Westbury to describe the fraud, it is almost certain that the House of Lords favoured the 'fraud on the testator' view (see above, text to n 33). For arguments to this effect, see S Wilson *Todd & Wilson's Textbook on Trusts* (Oxford: OUP, 10th edn, 2011) p225; G W Allan 'The Secret is Out There: Searching for the Legal Justification for the Doctrine of Secret Trusts through Analysis of the Case Law' (2011) 40 CLWR 311, pp316-320.

[30] See, for example, *Barrow v Greenough* (1796) 3 Ves Jun 152; *Re Boyes* (1884) 26 Ch D 531; *Briggs v Penny* (1849) 3 De G & S 525; *Chamberlain v Agar* (1813) 2 V & B 257; *Re Cooper* [1939] Ch. 811*; De Bruyne v De Bruyne*, above n 6; *Devenish v Baines* (1689) Prec Ch 3; *Drakeford v Wilks* (1747) 3 Atk 539; *Re Fleetwood* (1880) 15 Ch D 594; *Re Gardner (No 1)*[1920] 2 Ch 523; *Healey v Brown* [2002] WTLR 849; *Re Keen* [1937] Ch. 236; *Lomax v Ripley* (1855) 3 Sm & G 48; *Re Maddock* [1902] 2 Ch 220*; Moss v Cooper*, above n 24; *Muckleston v Brown*, above n 25; *Norris v Fraser* (1873) LR 15 Eq 318; *Oldham v Litchford* (1705) 2 Freem Chy 284; *Podmore v Gunning* (1836) 7 Sim 643; *Russell v Jackson* (1852) 10 Hare 204; *Stickland v Aldridge* (1804) 9 Ves Jun 517; *Reech v Kennigal* (1748) 1 Ves Sen 123; *Re Stead* [1900] 1 Ch

In respect of the *inter vivos* counterparts of secret trusts, in which the transfer to B as trustee for C takes effect during A's life, opinion is divided as to whether the court should enforce a trust in favour of C in order to effectuate the parol agreement, or impose a resulting trust in favour of A.[31] Until recently, the authorities were somewhat equivocal as to whether C's claim ought to be upheld.[32] In the frequently overlooked decision of *Staden v Jones,*[33] however, the Court of Appeal unequivocally upheld C's claim. A and B, who were co-owners of the matrimonial home, agreed that, upon their divorce, A would transfer her share in the land to B so long as B would ensure that the share eventually passed to C, their infant daughter. Some years after obtaining the transfer, B remarried, and later transferred the property into the joint names of himself and his new wife as equitable joint tenants. B died intestate, and C sought to claim a 50% beneficial interest in the property from B's wife. There was no evidence that B had obtained A's interest with the intention of retaining it for himself, or that B's wife had behaved dishonestly. Nevertheless, it was held that B's wife held a 50% beneficial interest on trust for C.[34] The basis of the judgment was the prevention of fraud, which was explained in exactly the same terms as in *Bannister*.[35]

A very similar result was reached in *De Bruyne v De Bruyne,* in which the trust of some shares was imposed in C's favour because 'refusal [by B] to carry out the agreement… which

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237; *Thynn v Thynn* (1684) 1 Vern 296*; Whitton v Russell* (1739) 1 Ves 124; *Re Young* [1951] Ch. 344.

[31] See TG Youdan 'Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v Boustead*' (1984) 43 CLR 306; JD Feltham 'Informal Trusts and Third Parties' [1987] Conv 246; TG Youdan 'Informal Trusts and Third Parties: a Response' [1988] Conv 267.

[32] *Rudkin v Dolman* (1876) 35 LT 791 seems to be an authority that the claim of C will be overlooked in favour of a resulting trust for the benefit of A. It is also arguable that *Rudkin* was correctly decided because there is no reference in the report to a parol agreement being entered into. There are authorities supportive of C's claim, but none are unequivocal (except for, perhaps, the oft-overlooked *Young v Peachy* (1741) Atk. 254). For reasons why *Lyus v Prowsa Ltd* [1982] 1 WLR 1044, *Neale v Willis* (1968) 19 P & CR 836 and *Binions v Evans* [1972] Ch. 359 may be construed otherwise than supporting C's claim, see Feltham, above n 36, pp 249-250.

[33] Above n 6.

[34] See below n 100 for further explanation of this case.

[35] See above, text to n 23. These words were directly quoted in *Staden*, above n 6 [at para 30] per Arden LJ in support of the judgment.

was the only basis upon which the property was transferred' amounted to 'fraud in equity'.[36] This is not a new concept. In *Young v Peachy,* another case in which C's claim was upheld, Lord Hardwicke noted the frequency of cases 'where a person has obtained an absolute conveyance from another, in order to answer one particular purpose, but has afterwards made use of it for another, that this court has relieved under the head of fraud'.[37] It therefore appears reasonable to conclude that secret trusts and their *inter vivos* equivalents, and indeed the cases considered in the previous section, are all enforced for the prevention of exactly the same species of fraud.

c) Cases where A conveys to B subject to a parol agreement between B and C that B will purchase all or part of the estate on behalf of C

In this class of cases, it may not be immediately obvious where any fraud lies. It cannot be said that the victim of the fraud is A, because in such cases s/he is not a party to the agreement, and cannot therefore be said to have been deceived into disposing of his/her property. On the other hand, C, who was a party, did not have an interest in the property at the time of the parol agreement so cannot easily be considered to have been deprived of it if the parol agreement is not honoured. Modern explanations tend to centre around the idea that the trust will only be enforced if C has demonstrably relied to his/her detriment on the parol agreement,[38] or because B has gained dishonestly as a result of his/her broken promise.[39]

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[36] *De Bruyne v De Bruyne*, above n 6 [at para 519] per Pattern LJ. *De Bruyne* is notable as an example of the doctrine applying to a transaction where no statutory formality requirements were applicable for the creation of a trust. For more on the significance of this, see below, text to n 158.

[37] *Young v Peachy*, above n 32 [at 558] per Lord Hardwicke.

[38] See K Gray and SF Gray *Elements of Land Law* (OUP:Oxford 5th edn 2008) p 882, it is stated that there must be a 'change of position or detrimental reliance… in order that a constructive trust should arise in English law'. See also Gardner, above n 5, p 68 (Gardner explains the detriment as a 'reliance loss'); Hopkins, above n

Fraud is rarely cited as the underlying reason for equity's intervention in these circumstances, especially in attempts to demonstrate that all cases within this class are united by common principles.[40] The case law, however, reveals that the prevention of fraud is central to the enforcement of these trusts.

The leading case (although one often erroneously assumed to fall within one of the classes explained above[41]) is *Rochefoucauld v Boustead*.[42] C was the registered owner[43] of some estates which had been mortgaged to A, who, owing to C's inability to repay the loan, obtained legal title to the estates and announced an intention to sell them pursuant to a power of sale.[44] C therefore, entered into a parol arrangement with B whereby he would purchase the property on her behalf from A, subject to a lien in respect of the purchase money and his expenses, and thereafter manage them on her behalf. B then purchased the land from A at auction. The fact that the sale was at auction shows that A would have been prepared to sell to the highest bidder, whether or not that was B,[45] and that therefore A did not sell in reliance on the parol agreement.[46] The Court of Appeal upheld the trust in C's favour on the basis that the

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4 (in respect of cases other than the 'joint purchase cases'.

[39]See McFarlane, above n 5; Hopkins, above n 4 (in respect of the 'joint purchase' cases).

[40]For example, McFarlane, above n 5, p676; Gardner, above n 5, p68.

[41]*Rochefoucauld* is described as, in essence, a case concerning a conveyance from A to B subject to a parol agreement that B will hold on trust for A by P Pettit *Equity & The law of Trusts* (Oxford: OUP, 10th edn, 2006) p 96 and also by Feltham, above n 36, p 247. It is also described as a case concerning a conveyance from A to B subject to a parol agreement between A and B that B will hold on trust for C by Gardner, above n 5, p 68 and McFarlane, above n 5, p674-675.

[42] Above n 1.

[43]The estates were situated in Ceylon, which had in place a system of registration of title deeds (see generally EJ Taylor 'Registration of Title Deeds Under Roman-Dutch Law' (1886) 2 LQR 347).

[44]The precise circumstances of the sale are difficult to ascertain fully from the ICLR report (above, n 2). Records in the Baring Archive (HC6.3.7, 1864; HC6.3.22.13, 1872) reveal that, as part of the security, the agents of the original mortgagee had been granted an irrevokable power of attorney by which they could convey the estates to C 'for further or better securing the repayment of the [debt]'. When it became clear that C was unable to repay the debt, the power of attorney was invoked and A obtained title to the estates and then announced the intention to sell. Reference to what was called a 'power of sale' is made in *Rochefoucauld v Boustead* (1896) 74 LT 783 [at 383].

[45]It was, in fact, specifically agreed between A and B that A would only sell to B at the auction 'if no higher bidder intervened' (*Rochefoucauld v Boustead*, above n 22 [at197]).

[46]It should also be noted that A was in liquidation and the sale was orchestrated by A's liquidator (see *Rochefoucauld v Boustead* (1896) 65 LJ Ch 794 [at 794]). It is most unlikely that the liquidator would have

case was 'one of fraud'.[47] Several cases relied upon by the court concerned grants from A to B subject to a parol agreement in A's favour.[48] Evidently, the fraud in *Rochefoucauld* was considered to have been of the same nature as the fraud in those cases.

Similarly, in *Lincoln v Wright*[49], a case with facts essentially analogous to those of *Rochefoucauld*,[50] Turner LJ justified the enforcement of the parol agreement on the ground of fraud.[51] *Lincoln* was relied upon in several of the cases considered above in which A was the beneficiary.[52] This further reinforces the view that all cases considered thus far are governed by the same principle. It should also be noted that in neither *Rochefoucauld* nor *Lincoln* was the question of detrimental reliance raised, nor was the question of whether the plaintiffs could have obtained the land via other means had the parol agreement not been entered into even mentioned. A recent example of a case within this class is *Samad v Thompson.* Although B was held to be trustee for C, Sales J downplayed the role of fraud as explained in *Rochefoucauld,* holding instead that the 'foundation' of C's claim was his 'significant acts of detrimental reliance'.[53] It is arguable, however, that, Sales J ought to have been bound by higher authorities to recognise the centrality of fraud to his reasoning.[54]

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had any regard for the parol agreement.

[47] *Rochefoucauld v Boustead,* above n 1 [at 206] per Lindley LJ (delivering the Court of Appeal's judgment).

[48] *Booth v Turle*, above n 10, *Davies v Otty (No 2)*, above n 7, *Haigh v Kaye*, above n 7 and *Re Duke of Marlborough*, above n 8 were all cited in *Rochefoucauld v Boustead,* above n 1 [at 206] per Lindley LJ.

[49] (1859) De G & J 16.

[50] The main difference is that, in *Lincoln*, the parol agreement between B and C was held to amount to an equitable mortgage agreement whereby B was to purchase from A (the original mortgagee) as mortgagee under a new equitable mortgage, rather than trustee with the benefit of an equitable lien. Thus, the statutory provision that was relied upon by the defendant was s4 of the Statute of Frauds rather than s7.

[51] *Lincoln v Wright,* above n 49 [at 22] per Turner LJ. It is therefore certain that Turner LJ enforced the trust pursuant to the principles under discussion here. Note that Knight Bruce LJ held in favour of the plaintiff by applying the doctrine of part performance, but he also held [at 21] that, were it not for the part performance, the Statute still would not have applied.

[52] E.g. *Booth v Turle*, above n 10 [at 188] per Malins VC; *Haigh v Kaye*, above n 7 [at 474] per James LJ; *Re Duke of Marlborough*, above n 8[at 141] per Stirling LJ.

[53] *Samad v Thompson*, above n 6 [at para. 128] [per Sales J.

[54] The same applies to *Cox v Jones* [2004] EWHC 1486 (Ch), in which it was held that B had purchased a flat on behalf of C.

Also falling within this section are the 'joint-purchase cases', where B and C, both being interested in obtaining different parts of a single estate, agree that B will purchase the land from A and then forfeit part of it in C's favour. In *Chattock v Muller,* Malins VC held that:

> '[B] had lulled [C] into not making an offer for the estate... [B] was all the time leading [C] to believe that if he bought the property [C] should have the part he wanted. Otherwise he ought to have told [C] not to rely upon him, and that if he wanted any part of the estate he must bid in competition with him… [B] was… no longer at liberty to change his mind'.[55]

He went on to state that B's denial of the agreement amounted to '[a] flagrant breach of duty, which in this Court has always been considered as a fraud'[56] Furthermore, in *Bannister*, it was held by the Court of Appeal that *Chattock* was decided on the same principles as *Booth, Marlborough* and *Rochefoucauld*. [57]

The next case is *Pallant v Morgan,*[58] in which the purchase was at an auction, to which both

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[55] *Chattock v Muller* (1878) LR 8 Ch D 177 [at 180] per Malins VC.

[56] Ibid, [at 181] per Malins VC. For further discussion of detrimental reliance, see below n 64-83 and accompanying text.

[57] *Bannister v Bannister,* above n 1 [at 136] per Scott LJ.

[58] Above n 1. It should be recognised that these 'joint-purchase cases' are sometimes asserted to be conceptually distinct from cases such as *Rochefocuauld* on the ground that, in *Chattock* [at 181], Malins VC stated that B had 'unquestionably purchased [part of the estate] as the agent of [C]' (see Hopkins, above n 4, for example). In the nineteenth century, the boundaries between agreements giving rise to agency and agreements giving rise to trusts were apparently not well-defined. For example, in *Adaicappa Chetty v Asaicappa Chetty* (1921) 2 22 N.L.R 417 [at 420] *per* Viscount Haldane, *Rochefoucauld* was described as a case in which 'it was clearly proved that the person who purchased the property was acting as the agent of the other party.' In *Chattock*, Malins VC cited *Booth v Turle* as an authority, even though that case was decided purely on trust principles by Malins VC *himself* with no mention of any agency agreement. See also *Lees v Nuttall* (1829) 1 Russ. & My. 53 for an example of an agency agreement being enforced by a decree that the defendant took as trustee. That two different principles seem to have been confused with one another can be explained when it is considered that nineteenth century equity judges considered a breach of an agency agreement to be a fraud. Thus, if A conveyed title to land to B in circumstances where B had agreed to take as agent for C, and then B sought to keep the land for himself in defiance of the agency agreement, this was a fraud, and a trust would be enforced in favour of C. It was not open to B to argue that the lack of written evidence prevented the finding of a trust; to do so would be to use s7 as an instrument of fraud. (See the explanation offered by Jessel LJ in *Cave v Makenzie* (1877) 46 LJ Ch 564 [at 567]). It can therefore be seen why judges in former times used the terms 'agent' and 'trustee' interchangeably in respect of those persons taking land subject to a parol agreement: the consequences of breach of the two types of agreement were the same. For a recent argument that the 'joint purchase' cases 'ought to be explained in wholly conventional terms by the existence and breach of fiduciary duty', see *Crossco No. 4 Unlimited v Jolan Ltd* [2012] EWCA Civ 1619 [at para. 88] per Etherton LJ.

B and C dispatched agents. Although discussions between B and C had already taken place, it was only at the auction that it was finally agreed that C's agent would refrain from bidding so long as B would subsequently sell part of the land to C.[59] Harman J, following *Chattock,*[60] held B to be trustee for the prevention of fraud.[61] The fraud lay in B reneging on the parol agreement upon which C had relied. It is notable that B's agent had authority to bid up to £3,000 and C's only to £2,000. It is therefore arguable that C did not suffer any detriment as he would have been outbid had he not entered into the arrangement. This, however, was not deemed relevant by the court.

In recent years, 'joint purchase' trusts have been enforced in cases where the agreement did not relate to land, most notably *Banner Homes v Luff Developments*, [62] in which the parol agreement related to C's acquisition of some shares in a wholly owned subsidiary of B. The subsidiary purchased the land in question. Chadwick LJ, giving Court of Appeal's judgment, did not mention fraud, and held that a constructive trust over the shares arose out of the '*Pallant v Morgan* equity', which applies to joint purchase cases when C's reliance on the parol agreement causes 'advantage to [B], or detriment to [C]'.[63] It is submitted, however, that the principles governing such cases had long been settled and that there is no logical justification for separating the joint purchase cases from cases such as *Rochefoucauld* on the ground that the former, unlike the latter, involve a parol agreement relating to part rather of,

[59]In respect of the parol agreement, s40 of the 1925Act was mentioned by the defence but not actually relied upon. This section, since repealed and replaced by s2 of the Law of Property (Miscellaneous Provisions) Act 1989, required that contracts for the sale of land were required to be in writing signed by the relevant parties. On the facts, it was held that there was no agreement sufficiently certain to be specifically enforced, so the section would not have been relevant even had it been pleaded.

[60]This makes it odd that *Chattock* is often ignored when the joint purchase cases are discussed. See, for example *Cobbe v Yeoman's Row* [2008] UKHL 55.

[61]*Pallant v Morgan*, above n 1 [at 48] per Harman J.

[62] [2000] Ch 372.

[63]Ibid, [at 398] per Chadwick LJ.

rather than the whole, beneficial interest in the property.[64]

d) A Common Justification based on reliance alone

If the conclusions reached thus far are correct, in all of the scenarios considered above, equity's intervention is justified on the ground that B took the property with B's conscience affected so that for B to deal with the property otherwise than in accordance with the parol agreement would amount to a fraud. Whether B's conscience was so affected may be determined by ascertaining whether s/he knowingly took the property in circumstances where the parol agreement was relied upon by the party with whom it was made (either A or C, depending on the scenario). If B has knowingly taken subject to such reliance, then any breach of the parol agreement constitutes a fraud. This is so regardless of whether or not B would gain, or A or C (as the case may be) would suffer any loss or detriment, as a result of such a breach. Equity's intervention in these cases takes the form of the imposition of a trust which prevents the fraud by restraining B from dealing with the property in any manner inconsistent with the parol agreement.

It seems that the courts have developed fixed requirements for each type of scenario to ensure that parol agreement trusts are only enforced when the courts are satisfied that the parol agreement has been relied upon and B must have known this to be the case. In the words of Lord Hardwicke, 'every breach of promise is not to be called a fraud'.[65] In instances where A is a party to the parol agreement, such as secret trusts and cases such as *Bannister* and *Staden*, the fact that A entered into the parol agreement and subsequently executed the conveyance or will in B's favour is sufficient to show reliance; it is thus unnecessary for it to be

[64]For an example of the 'joint purchase' case being separated on principle, see Hopkins, above n 4. Of course, quantifying the extent of the beneficial interest to be taken by C may raise concerns that would not arise in *Rochefoucauld*-type cases, but that is a separate issue, dealt with below at n 171-182 and accompanying text.
[65]*Whitton v Russell,* above n 30 [at 449] per Lord Hardwicke LC.

demonstrable that any tangible level of detriment or loss would have been suffered in the event of the parol agreement not being carried out,[66] or that B would thereby gain personally.[67] In cases such as *Pallant* and *Rochefoucauld* it is always[68] demonstrable that C wished to acquire the property, or at least a share therein, for himself, but that, upon the parol agreement being entered into with B, s/he refrained from engaging in alternative attempts to secure this acquisition. Again, once this can be proven, the court may safely conclude that C relied on the parol agreement and that B was aware of this. It is not necessary to consider whether C would have actually been able to acquire the property by different means had B indicated that s/he was not intending to honour the parol agreement.

e) Why is reliance upon the parol agreement sufficient justification for its enforcement?

The answer to the difficult question of why mere reliance on a parol agreement by A or C is sufficient to justify the imposition of a trust may be found by reassessing the reasons for equity's intervention in cases of fraud. Arguments that loss, detriment or gain are necessary ingredients of the types of trusts discussed here may respectfully be categorised as being founded on the assumption that B's culpability is dependent upon the consequences of any failure of his/hers to honour the agreement. What much of the case law seems to indicate, however, is that the aim of equity in deeming breaches of the parol agreement fraudulent was, historically, to regulate conduct. The courts apparently took the view that to breach a parol agreement that had been relied upon in the manner explored above was so intolerably unjust

[66]For example, it could be argued that, if A is dead by the time B reneges upon the parol agreement, he suffers no tangible loss, regardless of what subsequently happens to the property.

[67]Of course, in some of these cases, the grantor will have lost his land if the parol agreement is not adhered to.

[68]The other cases within this line are *Banner Homes v Luff Develpments Ltd*, above n 62; *Chattock v Muller*, above n 55; *Cox v Jones*, above n 54; *Holiday Inns v Broadhead* (1974) 232 EG 951; *Island Holdings Ltd v Birchington Engineering Ltd* (unreported), 7 July 1981; *Lincoln v Wright* , above n 49; *Samad v Thompson*, above n 6; *Time Products Ltd v Combined English Stores Group Ltd* (unreported,) 2 December 1974; *Kearns Brothers Ltd v Hova Developments Ltd,* above n 6.

as to amount to fraud, even in cases in which the breach was unintentional.[69] The root of equity's disdain for such conduct seems to be that the parties had informally reached what the promisee believed to be an honest agreement and that the apparently genuine nature of this agreement had precluded the possibility of the arrangement from being drawn up in a more formal fashion, or of alternative arrangements being made.

Support for this view can be gleaned from *Lincoln v Wright*, in which Turner LJ explained that '[i]f the real agreement' was that the conveyance was not to be absolute, 'it is…a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud.'[70] Similarly, Knight Bruce LJ stated that there was 'an absence of plain dealing… that an unjustifiable attempt to defeat or evade a fair agreement ha[d] been unsuccessfully made'.[71] *Lincoln* has been followed several times,[72] and numerous other cases involving *inter vivos* dispositions seem to have been decided for the same reasons.[73] The same considerations seem to apply to secret trusts cases. In *Barrow v Greenough*, for example, it was stated that, when a court is deciding whether to enforce a secret trust, '[t]he question is, whether the confidence, that the Defendant would perform the trust he undertook, did not prevent the testator from making a new will.'[74] This view was endorsed in *McCormick v Grogan*, in which Lord Hatherley referred to the 'fraud thus committed by the heir in inducing the testator to die intestate, upon the faith of the heir's representations that he would carry all

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[69]E.g. *Re Duke of Marlborough,* above n 8; *Drakeford v Wilks,* above n 30; *Norris v Frazer*, above n 30; *Cripps v Jee*, above n 10.

[70]*Lincoln v Wright,* above n 49 [at 22] per Turner LJ.

[71]*Lincoln v Wright,* above n 49 [at 21] per Knight Bruce LJ. It is notable that *Lincoln* is a case in which the land was sold by a mortgagee under a power of sale to the defendant's father. The land could have been purchased by the father with or without the parol agreement, and it was made clear that the plaintiff, being impecunious, could not have purchased the land for himself. Therefore, it is arguable that, in breaching the parol agreement, the defendant would have gained nothing that could not have been gained without the parol agreement, and also that any breach of the parol agreement would have deprived the plaintiff of nothing.

[72]Most notably in *Rochefoucauld v Boustead*, above n 1.

[73]For example, in *Davies v Otty*, above n 7, the trust was enforced, *inter alia*, because it was 'not honest for [B] to keep the land'

[74]*Barrow v Greenough,* above n 30 [at 154] per Arden MR. See also *Newburgh v Newburgh* (1820) 5 Madd 364 [at 366] per Leach VC.

such wishes… into effect.'[75]

Although these authorities go some way towards explaining what equity finds objectionable about reneging on a parol agreement that has been relied upon, it could reasonably be argued that they do not fully explain exactly why such conduct has been deemed to amount to a fraud. In fact, there is surprisingly little exploration of this issue, even in the early cases. It seems to have long been accepted that the proposition that such conduct is fraudulent was beyond question, probably because both *inter vivos* and *post mortem* parol agreement trusts have been enforced since well before the 1677 Act.[76]

What little discussion exists in the early case law supports this hypothesis. In *Young v Peachy,* Lord Hardwicke described the fraud of B in failing to carry out the parol agreement as '*dolus malus*'.[77] Famously, in *Earl of Chesterfield v Janssen*,[78] the same judge sought to categorise equitable fraud into five types. Whilst four of these species required a detailed justification, Lord Hardwicke merely said of the first that 'fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition; which is the plainest case'.[79] It appears that his Lordship thought cases involving *dolus malus* to be such obvious cases of fraud that no further explanation was required. Interestingly, *dolus malus* is an expression that was used in Roman law. Ill intent was originally a necessary ingredient of *dolus malus*,[80] but, by the

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[75]*McCormick v Grogan*, above n 22 [at 88] per Lord Hatherley. See also *Drakeford v Wilks*, above n 30 [at 541] per Lord Hardwicke.

[76]In *Young v Peachy*, above n 32. Lord Hardwicke said [at 257] that there had been 'a great many cases, even since the statute of frauds, where a person has obtained an absolute conveyance from another, in order to answer one particular purpose, but has afterwards made use of it for another, that this court has relieved under the head of fraud'. Also, in *Chamberlaine v Chamberlaine* (1678) 2 Freem 34 [at 35], Lord Nottingham said that it had been 'the constant course of this court' to enforce secret trusts.

[77]Above n 32 at 257.

[78](1751) Ves Sen 125

[79]Ibid, [at 155] per Lord Hardwicke.

[80]'Labeo defined "dolus malus" as any pretence, deceit, or means employed for the purpose of circumventing, deceiving or ensnaring another' at Dig. 4, 3, 1, 2 cited in W L Burdick *The Principles of Roman Law and their Relation to Modern Law* (New Jersey; Clark, reprint, 2004) p498. See also E Descheemaeker *The Division of Wrongs, A Historical Comparative Study* (Oxford: OUP, 2009) pp 71-72.

time of Lord Hardwicke, merely taking legal title with notice of a previously existing equitable interest was considered to be *dolus malus.*[81] In *Young* itself, B's failure to perform the parol agreement was sufficient to count as *dolus malus*, without the need for the court to enquire into his state of mind. Interestingly, Lupoi has recently argued that much English trust law derived from continental civil legal systems, including cases concerning 'a successor who pleads the lack of formalities in order not to perform an informal confidence', such as secret trusts.[82] Furthermore, according to Lupoi, such a defence was regarded as '"*propter dolum et mendacium"* of the party who sheltered behind the lack of legal formalities'.[83]

Overall, then, it is arguable that according to 18th century equity, any failure by B to perform an agreement that, to B's knowledge, had been relied upon by A or C, was a fraud because it was *dolus malus*. Furthermore, it seems reasonable to suggest that this reasoning may have been borrowed by the early Chancellors from the civil law so that that by the 18th century, when parol agreement trusts were first considered at length in the law reports, equity's classification of such conduct as fraudulent was thoroughly entrenched.

2) HOW SHOULD PAROL AGREEMENT TRUSTS BE CLASSIFIED?

The next question to address is how the types of trusts considered here should be classified.

[81]See *Le Neve v Le Neve* (1747) 3 Atk 646 [at 654-655] per Lord Hardwicke.
[82]M Lupoi 'Trust and Confidence' (2009) 125 LQR 253 p 271
[83]Ibid, p 273. Lupoi equates the meaning of this phrase with 'fraud'. It should be noted that '*dolus malus*' was frequently abbreviated to simply '*dolus*'. See Descheemaeker, above n 81, p 71.

With several notable exceptions,[84] modern commentators tend to classify all parol agreement trusts as constructive trusts, although the notion that these constructive trusts arise for the prevention of fraud is not widely accepted. This lack of recognition of the place of fraud in the modern law in this area is readily appreciable if the authorities are taken at face value. The trend in the case law is simple. Before the mid-twentieth century, the enforcement of parol agreement trusts was invariably attributed to the prevention of fraud, but the trusts were never described as constructive trusts. Since the mid-twentieth century, parol agreement trusts have generally been classified as constructive trusts, but reference is rarely made to the underlying reason for their enforcement being the prevention of fraud. [85] This may explain why it is often stated that whilst the instrument of fraud principle provides a historical justification for the enforcement of parol agreement trusts as express trusts, the more acceptable modern justification is that the trusts are constructive trusts which arise independently of any fraud.[86] It is therefore necessary to explore the reasons behind this peculiar trend.

a) The traditional meaning of 'constructive trust'

The first point to note is that, until relatively recently, the phrase 'constructive trust' did not have the same meaning as it has today. During the eighteenth and nineteenth centuries, the statutory limitation period[87] ran against constructive trustees, but not against express trustees.[88] Application of this rule required the courts to explain the difference between

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[84]See above, n 5 for examples.

[85]Two notable exceptions are *De Bruyne v De Bruyne*, above n 6 [at para 51] per Patten LJ and *Healey v Brown*, above n 30 [at 28] per Donaldson QC Sitting as a Deputy High Court Judge.

[86]See, for example, Gardner, above n 5; J Martin *Hanbury & Martin Modern Equity* (Sweet & Maxwell: London, 19th edn, 2012) p 160; *Samad v Thompson*, above n 6 [at 128] per Sales J; *Re Snowden*, above n 21 [at 535] per Megarry VC.

[87]The limitation period was six years. The source of this rule was the Limitation Act 1623, s3. Although s3 did not directly apply to trusts, the Court of Chancery developed a rule by analogy with the 1623 Act that the six year limitation period should apply. This was later confirmed by the Trustee Act 1888, s8(1).

[88]This rule, again developed by the Court of Chancery, was confirmed by the Judicature Act 1873, s25(2). The

express and constructive trustees. In *Soar v Ashwell,* the leading case, Bowen LJ defined a constructive trust as 'one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour.'[89] This definition is typical for the era.[90] As will be explained below, parol agreement trusts do not fall within this definition. In the nineteenth century and earlier, [91] these trusts were not regarded as constructive trusts and were not described as such in the authorities.

b) The express trust fallacy

Notwithstanding the fact that parol agreement trusts were never, in the pre-20th century authorities, described as constructive trusts, it is submitted that they have always been described in terms which would nowadays warrant their classification as constructive trusts and that they have never been regarded as express or resulting trusts. For example, in *Blackwell*, Viscount Sumner described secret trusts as being very similar to (although distinct from) resulting trusts[92] because both arise from the 'the exercise of a general equitable

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position was more complex after the passage of the Trustee Act 1888, as s8 clearly provided that the limitation period should run in relation to all claims for breach of trust, but contained an exemption in respect of claims against trustees for the recovery of 'trust property, or proceeds thereof'. Section 8, therefore did to apply to such claims, and the old law, with the dichotomy of treatment between express and constructive trustees, persisted in such cases.

[89] *Soar v Ashwell* [1893] 2 QB 390 at 396 *per* Bowen LJ. See also Kay LJ's explanation [at 400] that 'a person who is not the appointed trustee and whom it is sought to affect with a trust by reason of his conduct is not a trustee at all, although he may be liable as if he were; which is commonly expressed by saying that he is not an express but a constructive trustee.' In this case, a trustee *de son tort* was held to be an express trustee for the purposes of the limitation period. *Soar* was accepted as the leading case in *Rochefoucauld v Boustead*, above n 1.

[90] In addition to the authorities cited in *Soar*, see, for example, J Smith *A Manual of Equity Jurisprudence* (Stevens and Norton: London, 5th edn, 1856) Chapter VI, p151; J Story *Commentaries on Equity Jurisprudence as Administered in England and America*, *Vol 2* (Little, Brown and Company: Boston, 13th edn, 1886) Chapter XXXIII, p528.

[91] Examples of constructive trusts by this definition include those in Lord Millett's second class in *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 [at 409] per Millett LJ.

[92] The comparison with resulting trusts is expressly made in *Blackwell*, above n 22 [at 338] per Lord Sumner, and his Lordship was clearly referring to both resulting and constructive trusts throughout the paragraph which straddles 338 and 339.

jurisdiction'.[93] In *Re Spencer's Will,* Cotton LJ explained that, in secret trust cases, the court 'implies an obligation of performing the wishes of the testator which the testator had relied upon their performing as a ground for giving the legacy'.[94] Similarly, in *Hutchins v Lee,* an *inter vivos* case, Lord Hardwicke stated that the parol evidence of the defendant's 'acknowledgement of… the trust' was admissible, 'but though there can be no parol declaration of a trust, since the statute [of Frauds], yet this evidence is proper in avoidance of fraud.'[95]

Also of relevance is the almost total absence of references in the case law regarding parol agreement trusts to the normal requirements for express trusts, such as the three certainties. In *Russell v Jackson*, Turner LJ stated that rather than being cases where all three certainties had to be proven (as alleged by the defendant),[96]secret trusts fell within 'that class of cases which says that, if there be fraud, it lies on the party who has been guilty of the fraud to sever the disposition which is affected by the fraud from that which is not affected by the fraud.'[97] Parol agreement trusts have also been enforced in other circumstances when no oral declaration of express trust has been made, most obviously in cases when A conveyed to B subject to an agreement that B would reconvey. It is established law that a mere promise to convey land does not amount to a self-declaration of trust.[98] This lack of regard for the requirements of express trusts is unsurprising when it is appreciated that parol agreement

[93]*Blackwell v Blackwell* , above n 22 [at 339] per Lord Sumner.
[94]*Re Spencer's Will* (1887) 57 LT 519 [at 522] per Cotton LJ. See also *Stickland v Aldridge*, above n 30 [at 519] per Lord Eldon LC; *Lomax v Ripley*, above n 34 [at 69] per Stuart VC.
[95] *Hutchins v Lee*, above n 10 [448] per Lord Hardwicke LC.
[96]The reason being that, according to counsel for the defendant, it was unclear what proportion of the residue was to form the subject matter of the secret trust.
[97]*Russell v Jackson*, above n 30 [at 213] per Turner LJ. This statement ought, perhaps, to be borne in mind in cases where the quantification of the beneficial interests proves difficult. Note that in both *Blackwell* and *McCormick v Grogan*, above n 22, the House of Lords laid down the requirements for secret trusts with no reference to the three certainties. This suggests that, in this respect, the recent judgment in *Kasperbauer v Griffith* [2000] WTLR 333 is incorrect.
[98]*Richards v Delbridge* (1874) LR 18 Eq 11; *Jones v Lock* (1865) 1 Ch App 25.

trusts invariably arise out of an executory promise made by B[99] at a time when B did not yet have title to the land, and therefore had no capacity to declare an express trust.[100]

c) How were parol agreement trusts classified before the twentieth century?

Until quite recently, it appears to have been accepted that because the prevention of fraud was sufficient reason for a trust to be raised in furtherance of a parol agreement, no further classification was necessary. As stated by Lord Eldon in the case of a secret trust, 'though within the intention [of the legislature] it cannot be said a trust is declared under these circumstances, it is clear, a trust would be created, upon the principle, on which this Court acts, as to fraud'.[101] Similarly, in an *inter vivos* case, Lord Hardwicke stated that 'the plaintiffs could not be relieved under the notion of a [a resulting] trust [which is what the claim was based upon]; however, [they had] a proper ground to be relieved upon under the head of fraud.'[102] It should be noted that, in *Soar v Ashwell,*[103] it was held that there were certain types of trust which, whilst not technically express trusts, were not constructive or resulting trusts either, but that some trusts of this nature were to be treated as express trusts for the purposes of the statutory limitation period.[104] The fact that in *Rochefocuauld,* the only case

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[99]Aside from all of the authorities that the trusts arise out of the agreement, in *Rochefoucauld v Boustead*, above n 1 [at 206], it was made clear by Lindley LJ that , for s7 to have been satisfied, written evidence of the declaration of trust 'signed by *the defendant'* would have had to have been in existence. Of course, the defendant (represented by 'B',see above nn 44-46 and accompanying text) had no capacity to declare any trust at the time when the parol agreement was entered into between himself and the plaintiff.

[100]A good illustration of this principle is provided by *Staden v Jones*, above n 6, in which even though B's promise that he would, upon receipt of A's share, hold it on trust for C, had been reduced to writing, the trust was enforced as a constructive trust and not an express trust.

[101]*Stickland v Aldridge*, above n 30 [at 519] per Lord Eldon LC.

[102]*Young v Peachy*, above n 32 [at 257] per Lord Hardwicke LC.

[103]Above n 89.

[104]*Soar v Ashwell*, above n 89 [at 393] per Esher LJ, [at 396] per Bowen LJ, and [at 405] per Kay LJ.

concerning a parol agreement trust in which the limitation period was raised as a defence,[105] Lindley LJ described the trust as 'an express trust *within the meaning of that expression as expressed in Soar v Ashwell* [italics added]'[106] rather than simply as an express trust, supports the argument that such trusts were considered to be neither express, resulting nor constructive trusts.

d) The turning of the tide

The next question is how and why these trusts came to be regarded as constructive trusts. The point at which the definition of constructive trusts was expanded to include parol agreement trusts can be traced to the case of Privy Council case of *Taylor v Davies,*[107] in which, in response to a question concerning the application of the limitation period, it was recognised for the first time,[108] that there are two categories of constructive trust, one of which includes parol agreement trusts.[109]

e) The statutory exception in the 1925 Act

The re-classification of parol agreement trusts as constructive trusts acquires particular significance when it is recalled that within a few years of *Taylor*, the 1925 Act was enacted. It is currently accepted that *inter vivos* parol agreement trusts are classified as constructive trusts for the purposes of s53(2) of the 1925 Act, which expressly exempts 'constructive trusts' from the effect of s53(1)(b).[110] The predecessor of s53(2) was s8 of the 1677 Act. At

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[105]For various reasons, there had a been a considerable delay in C commencing her action.
[106]*Rochefoucauld v Boustead* , above n 1 [at 208] per Lindley LJ. The defence thus failed.
[107][1920] AC 636
[108]*Taylor v Davies* has been cited as the source of the rule that there are two types of constructive trusts on several occasions in the higher courts. See, for example, *Clarkson v Davies* [1923] AC 100; *Paragon Finance plc v DB Thakerar & Co*, above n 103; *Williams v Central Bank of Nigeria* [2012] EWCA Civ 415.
[109]In *Taylor v Davies*, above n 107 [at 651] per Viscount Cave, *Rochefoucauld* was expressly identified as a case concerning a constructive trust. It was held that constructive trusts such as that in *Rochefoucauld* were to be treated, like express trusts, as trusts within the statutory exemption to the limitation period.
[110]See generally *Bannister v Bannister,* above n 1. Also, *Samad v Thompson*, above n 6 [at para 118] per Sales J.

first glance, s8 seems to have been identical in effect to s53(2). Section 8 exempted trusts that 'shall or may arise or result by the Implication or Construction of Law' from the effect of s7. The judicial consensus, however, was that s8 only exempted only what would now be considered as resulting trusts, and did not exempt constructive trusts of any type.[111] The repeal of s8 and its replacement with s53(2) seems to have been a watershed. Probably as a result of Parliament having been influenced by uncertainty expressed by jurists regarding the proper meaning of s8,[112] this new provision expressly included 'constructive trusts', as distinct from resulting trusts, within its ambit, and it therefore had a meaning distinct from that of its predecessor. Consequently, the courts began to hold that *inter vivos* parol agreement trusts, which had recently been reclassified as constructive trusts, were exempt from the effect of s53(1)(b) by virtue of s53(2). The contrast between pre- and post-1926 cases is stark. Of the former, there is no single unequivocal example of such a trust being enforced by virtue of s8.[113] In the latter cases, the enforcement of *inter vivos* parol agreement trusts pursuant to s53(2) is commonplace.[114]

Whilst the enactment of s53(2) provided the courts with an obvious reason to hold that *inter vivos* parol agreement trusts are constructive trusts, there was no such catalyst in relation to secret trusts. The 1837 Act contains no exception to s9 which is comparable to s53(2), so

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[111]See *Lloyd v Spillit* (1740) Barn Ch 335 [at 338] per Lord Hardwicke LC. See also *Willis v Willis* (1740) 2 Atk 71; *Young v Peachy*, above n 32; *Bellasis v Compton* (1693) 2 Vern. 294; *Kirk v Webb* (1698) Prec Ch 84. Note also that the title of s8 was 'Proviso for Trusts arising, transferred or extinguished by Implication of Law'. This point was rarely discussed in later cases, but was assumed to represent the law in the arguments of counsel in *Haigh v Kaye*, above n 7 [at 472]; *Davies v Otty*, above n 7 [at 211 and 212]; *Re Duke of Marlborough*, above n 8[at 173]. See also P Matthews 'The Words Which Are Not There: A Partial History of the Constructive Trust' in Mitchell, ed, *Constructive and Resulting Trusts* (Oxford:Hart, 2009) pp 11-13, in which the same point about the application of s8 is very clearly explained.

[112]Although the judiciary seem to have been in agreement as to the meaning of s8, there was some dispute and discussion amongst jurists. See FA Lewin *A Practical Treatise on The Law of Trusts by (the late) Thomas Lewin, Esq Vol 1*(Philadelphia: Blackstone, 8th Eng edn, 1888) pp 297-300.

[113]See below n 189-191 and accompanying text for a discussion of two cases that are sometimes presumed to have been enforced pursuant to s8. The most equivocal case is *Davies v Otty*, above n 7, in which the trust was enforced by virtue of s8, but apparently as a resulting trust based on a lack of consideration accompanying the offending conceyance.

[114]See above, n 124.

even after *Taylor*, there was rarely any pressing reason for the courts to actually hold secret trusts to be constructive trusts. Thus, the indistinct classification of secret trusts as trusts imposed for the prevention of fraud persisted for far longer; the first judgment in which a secret trust was upheld explicitly as a constructive trust was in 2002,[115] over fifty years after an *inter vivos* parol trust was first held to be a constructive trust.[116]

f) An unintended effect of s53(2)

Although there are no direct authorities which suggest that the alteration in the classification of parol agreement trusts has effected any change in the underlying reason for their enforcement, an unfortunate consequence of the enactment of s53(2) has been that, at least in respect of *inter vivos* transactions, the courts began to impose constructive trusts in furtherance of parol agreements without mention of the word 'fraud'. This seems to have been based on the unconsciously adopted view that s53(2) gives the courts *carte blanche* to enforce constructive trusts of land in order to give effect to parol agreements without reference to any underlying justification. This trend may provide an explanation for the decline in appreciation of the nature and significance of equitable fraud that occurred throughout the twentieth century.[117] This decline, which spread to secret trusts,[118] is arguably the ultimate source of much of the current discord in respect of trusts arising out of parol agreements.

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[115] *Healey v Brown*, above n 30. Secret trusts had occasionally previously been referred to as constructive trusts. See *Kasperbauer v Griffith* [2000], above n 97; *Re Cleaver* [1981] 1 WLR 939.

[116] *Bannister v Bannister*, above n 2 seems to have been the first example after the 1925 Act of a case involving an *inter vivos* parol agreement relation to land.

[117] For example, in *Bannister,* above n 2, the prevention of fraud is clearly cited as the reason for the imposition of the constructive trust. By the time of *Gissing*, above n 4, the word 'fraud' seems to have fallen out of use. For example it was not used in any of the House of Lords cases of *Pettitt*, above n 72, *Gissing*, or *Lloyd's Bank v Rosset* [1991] AC 107. For discussion of the common intention constructive trusts, see below n 147- 178 and accompanying text.

[118] For example, the prevention of fraud was clearly held to be the reason for the enforcement of secret trusts in *Blackwell v Blackwell*, above n 22, but by the time of *Re Snowden*, above n 21, doubt was cast on the relevant of fraud. In *Kasperbauer v Griffith*, above n 97, the word 'fraud' was not used.

g) Parol agreement resulting trusts?

A final issue to note is that in some recent cases concerning transfers from A to B subject to a parol agreement in A's favour, the trusts imposed have been described as resulting trusts. In *Ali v Khan*,[119] for example, Morritt VC[120] followed *Haigh* and *Marlborough*, expressly categorising them both as cases of trusts enforced for the prevention of fraud, [121] but further describing them as resulting trust cases.[122] In *Marlborough*, Stirling LJ observed that counsel for the plaintiff had raised the 1677 Act, s8, but stated that that the proper answer to the defence's plea of s7 was that 'to exclude the evidence would be to permit the Statute of Frauds to be used to cover a fraud'.[123] Similarly, in *Haigh,* James LJ mentioned s8, probably again in deference to counsel's arguments, but based his judgment on the prevention of fraud.[124] Thus, both *Haigh* and *Marlborough* may be seen as cases concerning what are now regarded as constructive trusts.

Furthermore in *Hodgson v Marks*,[125] an analogous trust was also described as a resulting trust. Russell LJ, although accepting that the prevention of fraud would have raised a trust against B, was uncertain as to whether it could apply against the defendant, to whom B had sold the land.[126] According to the analysis presented here, the constructive trust arises for the prevention of fraud upon receipt by B of legal title, and is therefore capable of affecting B's successors in title. Therefore, *Hodgson* is arguably incorrect in respect of the reasoning.

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[119]Above n 4. *Ali* was directly followed in *Kuppusami v Kuppusami*, above n 8.
[120]With whom Rix LJ and Sir Swinton Thomas agreed.
[121]*Ali v Khan*, above n 4 [at paras 21 and 22] per Morritt VC.
[122]Ibid, [at para 35] per Morritt VC.
[123]*Re Duke of Marlborough*, above n 8 [at 140-141 per Stirling J.
[124]*Haigh v Kaye*, above n 7 [at 474] per James LJ.
[125] Above n 9.
[126] *Hodgson v Marks*, above n 9 [at 933].

Furthermore, as it is an established rule that any finding of an actual agreement in respect of the apportionment of the beneficial interests in the property displaces any presumption that could give rise to a resulting trust,[127] it is submitted that the trusts in cases such as *Ali* and *Hodgson* are best seen as constructive trusts and that the reasoning in *Bannister* and numerous other authorities is preferable.

3) THE DOCTRINE OF PAROL AGREEMENT TRUSTS

At this stage, a significant conclusion can be drawn, that is that a doctrine of equity, which may conveniently be referred to as the 'doctrine of parol agreement trusts', has been uncovered. The trusts in all of the scenarios considered above are recognised pursuant to this doctrine. By virtue of the doctrine, in appropriate circumstances, a constructive trust will be raised in order to prevent a party from perpetrating a fraud by refusing to give effect to an agreement. Usually, but not necessarily, the agreement has not been reached in a form which meets with statutory formality requirements. Three conditions must be satisfied in order for the doctrine to take effect:

1) an agreement[128] must be reached between two parties whereby one of the parties promises that, upon receiving title to certain specified property, s/he will use it for a certain purpose;

[127] This rule most obviously manifests itself in cases where property is conveyed from A to B and a trust is imposed in A's favour. The cases where there was a parol agreement are almost invariably enforced for the prevention of fraud, and the cases where there was no parol agreement are invariably enforced as resulting trusts. See above n 15 and 19. Also, in the inferred common intention cases, where there has been a contribution by C to the purchase price sufficient for a common intention to be inferred, a constructive rather than a resulting trust is imposed. This approach was confirmed in *Stack v Dowden*, above n 4.

[128] This is the most obvious difference between this doctrine and that of proprietary estoppel, which does not depend upon the finding of an agreement (although there may be an agreement), rather upon 'a representation or assurance made to the claimant' (*Thorner v Major* [2009] UKHL 18 [at 29] per Lord

2) the promise cannot amount to a valid declaration of express trust (in such a case, the doctrine would be redundant), but it must be possible for the promise to be given effect by the imposition of a trust;[129]
3) the promisee must demonstrably have relied on the agreement, and the promisor must know that s/he has, so that it will be a fraud for the promisor to renege thereupon. There are several sets of fixed rules which have been formulated in order to determine whether, in any given scenario, reliance is present.[131]

a) *The relationship between the doctrine of parol agreement trusts and the instrument of fraud principle*

Even if it is accepted that parol agreement trusts are enforced for the prevention of fraud, the relevance of the instrument of fraud principle to the modern law may be questioned, particularly in respect of *inter vivos* parol agreement trusts, to which s53(2) applies. Furthermore, the constitutionality of the instrument of fraud principle has repeatedly been called into question by some modern commentators.[132] Thus, the relationship between fraud as a justification for the enforcement of parol agreement trusts and the instrument of fraud principle will be explored.

Walker).

[129]This is explained particularly clearly in *Bannister v Bannister,* above n 2 [at 136] per Scott LJ. Thus, for example, if A transfers land to B subject to an agreement that B will use it for a non-charitable purpose, then the doctrine here could not apply. This also explains decisions such as *Re Snowden*, above n 21 and *Cobbe v Yeomans Row*, above n 60, in which the agreement was essentially insufficiently certain for the imposition of a trust.

[131]See above n 87-95 and accompanying text.

[132]See in particular K F K Low 'Nonfeasance in Equity' (2012) 128 LQR 63p 78 and n 122. Also, see E Challinor 'Debunking the Myth of Secret Trusts?' [2005] Conv 492 at 297; Critchley, above n 19, pp 653-654; Gardner, above n 5, pp 64 and 68.

There are a number of authorities which show that both *inter vivos* and *post mortem* parol agreement trusts have been enforced since before the enactment of the 1677 Act.[133] The response of the courts to the introduction of the statutory formality requirements was that Parliament did not intend that the 1677 Act or its successor provisions, enacted to prevent fraud, should be used to facilitate fraud, and that therefore Parliament must not have intended to interfere with equity's jurisdiction to impose trusts for the prevention of fraud. Equity judges from previous centuries were, it seems, well aware of their duty to follow the will of Parliament. As explained by Malins VC, 'it is clear that the [1677 Act] was never intended to prevent the Court of Equity from giving relief in a case of a plain, clear, and deliberate fraud.'[134] Similarly, Lord Cairns stated that 'the Court does not violate the spirit of the [1837 Act]; but for the same end, namely prevention of fraud, it engrafts the trusts on the devise'.[135] The sophistication of the instrument of fraud principle was explored by Viscount Sumner in *Blackwell*. He said, in relation to secret trusts, that suggestions that 'equity has "given the go-by" to the Wills Act…[do] less than justice… to equity and those great masters of it.'[137] Rather, secret trusts are imposed 'for the prevention of fraud'[138], and 'the legislation did not purport to interfere with this general equitable jurisdiction'.[139] Notably, in the context of *inter vivos* agreements, Lord Thurlow spoke of 'the general authority of a court of equity, to relieve in cases of fraud'.[140]

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[133]See above, n 80.
[134]*Haigh v Kaye*, above n 7 [at 474] per Malins VC. See also *Lincoln v Wright*, above n 48 [at 22] per Turner LJ; [at 206] per Lindley LJ.
[135]*Jones v Badley*, above n 26 [at 364] per Lord Cairns LC, citing *Wallgrave v Tebbs*, above n 25 [at 322] per Page Wood VC. Note that Page Wood VC also became Lord Chancellor under the name, Lord Hatherley, and sat in *McCormick v Grogan*, above n 22.
[137]*Blackwell v Blackwell*, above n 22 [at 337] per Viscount Sumner. See also *McCormick v Grogan*, above n 22 [at 97] per Lord Westbury.
[138]Ibid, [at 335] per Viscount Sumner.
[139]Ibid, [at 339] per Viscount Sumner.
[140]*Irnham v Child* (1781) 1 Bro CC 92 [at 93] pre Lord Thurlow.

It is therefore proposed that the juxtaposition between the instrument of fraud principle and fraud as a justification for the doctrine of parol agreement trusts may be summarised as follows:

1) B acquires legal title to the property in circumstances where there has been no express trust created in accordance with the relevant formality requirements;
2) Nevertheless, A or C (as the case may be) claims that B has taken as trustee for him/her;
3) Prior to acquisition of legal title to the property, B had agreed with A or C to use the property in a certain way, and A or C had, with B's knowledge, relied on this agreement;
4) It has, since prior to the 1677 Act, been regarded by equity as a fraud for B to renege on such a parol agreement;
5) Equity has a general jurisdiction to impose a trust (now recognised as a species of constructive trust) for the prevention of fraud;
6) It was not within Parliament's intention that the statutory formality requirements should be used as an engine of fraud;
7) Consequently, Parliament did not seek to interfere with equity's general jurisdiction to impose a trust for the prevention of fraud;
8) Therefore, even though no trust has been declared or evidenced as required by the statutes, equity may nevertheless hold that B took as a trustee for A or C. [141]

[141] In *Re Spencer's Will*, above n 94 [at 521] per Cotton LJ, it was emphasised, in fact, that a court of equity, in such circumstances, is 'bound' to give effect to the trust.

If the conclusions reached so far are accepted, what is now called a constructive trust, in the context of parol agreement trusts, may be thought of as a manifestation of equity's ancient jurisdiction to prevent fraud. The instrument of fraud principle is not a separate doctrine; it merely explains why no statutory provisions regulate the exercise of this jurisdiction. Accordingly, parol agreement trusts can be enforced for the prevention of fraud regardless of whether or not the disposition in question is one which, prima facie, seems to be regulated by formality requirements.[142] Although, in the case of *inter vivos* parol agreement trusts of land, equity's ability to intervene to prevent fraud has been formalised by s53(2) of the 1925 Act, perhaps this should not be seen as a reason to dismiss the instrument of fraud principle. Rather, it is proposed that the enactment of s53(2) ought to be seen as vindication of equity's approach as explained here. As for secret trusts, the reasoning of Viscount Sumner still has direct application today.

b) Can the doctrine of parol agreement trusts apply to post-acquistion agreements?

It may seem curious that parol agreement trusts only seem to arise in respect of pre-acquisition parol agreements. Certainly, the fraud is arguably the same if B reneges upon a post-acquisition parol agreement that has been relied upon. Nevertheless, the courts do seem to have been reluctant to recognise constructive trusts involving parol agreements of the latter kind.[143] It has been held in the House of Lords that constructive trusts of the kind discussed here could not arise when '[B] owned the property before [C] came upon the scene'[144] There

[142]This view explains why parol agreement trusts may be enforced for the prevention of fraud in instances where statutory formality requirements do not apply. See, for example, *Banner Homes v Luff Developments Ltd*, above n 62; *De Bruyne v De Bruyne*, above n 6.

[143]A rare example of a trust similar to a parol agreement constructive trust being raised by a post-acquisition agreement is the first instance decision of *Singh v Anand* [2007] EWHC 3346 (Ch).

[144]*Cobbe v Yeoman's Row*, above n 60 [at para 37] per Lord Scott. See *Re Goodchild* [1997] 1 WLR 1216 [at 1229-1230] per Leggatt LJ for an authority that this is the reason why the doctrine of mutual wills is distinct

seems to be no obvious reason why this is so. It is, however, notable that there are numerous authorities in which proprietary estoppel was successfully pleaded in circumstances where the circumstances giving rise to the estoppel transpired after the party whose fraud gave rise to the estoppel had acquired the land in question.[147] This odd dichotomy may be of relevance to discussions regarding the differences between proprietary estoppel and parol agreement constructive trusts.[148] On the other hand, expansion of the doctrine of parol agreement trusts into instances involving post-acquisition parol agreements would not impugn upon any of the underlying justifications for the doctrine that are proposed here.

c) The Relationship between Parol Agreement Trusts and Common Intention Constructive Trusts

A species of constructive trust which seems to bear some resemblance to those within the doctrine of parol agreement trusts is the common intention constructive trust. Although the cases concerning common intention constructive trusts are numerous, there is surprisingly little in the way of judicial discussions as to the jurisprudential origins of these trusts.[150] Nevertheless, it has been held, albeit at first instance, that the principles developed in *Gissing v Gissing*[151] were founded on those which were 'established long ago in *Rochefoucauld*

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from the types of constructive trust considered here. It is also notable that for mutual wills to be enforceable, the agreement must have taken the form of a valid contract. *Healey v Brown*, above n 30 [at 849] is an interesting authority on the relationship between the doctrine of mutual wills and trusts of the type governed by the doctrine under consideration here.

[147]See, for example, *Dillwyn v Llewelyn* (1862) 4 De G F & J 517; *Gillett v Holt* [2001] Ch 210; *Greasley v Cooke* [1980] 1 WLR 1306; *Henry v Henry* [2010] UKPC 3; *Inwards v Baker* [1965] 2 QB 29; *Jennings v Rice* [2002] EWCA 159; *Pascoe v Turner* [1979] 1 WLR 431; *Plimmer v Wellington Corp.* (1884) 9 App Cas 699; *Ottey v Grundy* [2003] EWCA Civ 1176; *Willmott v Barber* (1880) 15 Ch D 96.

[148]See, for example, *Thorner v Major*, above n 128 for a discussion of the relationship. See also T Etherton 'Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle [2009] 2 Conv 104.

[150]See, for example, the leading cases of *Lloyds Bank v Rosset* [1991] AC 107; *Stack v Dowden* [2007] UKHL 17; *Jones v Kernott* [2011] UKSC 53.

[151] [1971] AC 886

v Boustead'.[154] Furthermore, common intention constructive trusts have recently been held as being enforced for the same reasons as some of the trusts categorised here as parol agreement trusts.[155] It is also arguable that common intention constructive trusts are subject to some of the same requirements as parol agreement trusts. Despite the use of the phrase 'common intention', it has repeatedly been held that these trusts turn upon the finding of a parol agreement, albeit usually one that has been inferred from the conduct of the parties.[160] It is also generally accepted that the parol agreement must have been relied upon.[170] The courts have even shown the same curious reluctance to recognise common intention trusts arising out of post-acquisition parol agreements as has been shown in the cases concerning parol agreement trusts.[180]

Despite these similarities, there are several objections to the classification of common intention constructive trusts alongside parol agreement trusts. Firstly, it is arguable that, in many cases involving common intention constructive trusts, there is no real agreement at all;[185] certainly, the courts have been prepared to go far further to infer an agreement in order to recognise these trusts than has been the case with parol agreement trusts.[186] Secondly, if

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[154] *Re Densham* [1975] 1 WLR 1519 [at 732] per Goff J. See also *Healey v Brown*, above n 30, in which it was presumed that common intention constructive trusts are enforced for the same reasons as secret trusts.

[155] See, for example, *Crossco No 4 Unlimited v Jolan Ltd*, above n 58 [at para 122] per McFarlane LJ and [at para 129] per Arden LJ.

[160] *Lloyd's Bank v Rosset*, above n 145. See also *Grant v Edwards* [1986] [at 649] per Nourse LJ. For a recent mention of the requirement for an agreement, see *Gallarotti v Sebastianelli* [2012] EWCA Civ 865 [at para 5] per Arden LJ.

[170] Ibid.

[180] In *Lloyd's Bank v Rosset*, above n 145 [at 132] per Lord Bridge, it was held that a common intention arising post-acquisition can only 'exceptionally' give rise to a common intention constructive trust. See also *Bernard v Josephs* [1982] Ch 391 [at 404] per Griffiths LJ; *Morris v Morris*, above n 6 [at para 19] per Peter Gibson LJ; *Mirza v Mirza* [2009] EWHC 3 (Ch) [at para 122] per Stephen Smith QC sitting as Deputy Judge of the Chancery Division.

[185] See *Crossco No 4 Unlimited v Jolan Ltd*, above n 58 [at para 85] per Etherton LJ for a summary of the view that such trusts do not always depend on the establishment of any actual agreement. See also S Gardner 'Rethinking Family Property' (1993) 109 LQR 263; N Piska 'Constructive Trusts and Constructing Intention' in M Dixon (ed) *Modern Studies in Property Law Vol 5* (Hart Publishing: Oxford, 2009) p203 ; S Gardner 'Family Property Today' (2008) 124 LQR 422.

[186] In cases concerning secret trusts, silence on the part of B when asked to be a secret trustee will be taken as

the arguments in this article regarding the requirements for parol agreement trusts are to be accepted, the long-standing requirement that common intention constructive trusts require detrimental reliance[187] distances them from parol agreement trusts.

The recent developments in the House of Lords and the Supreme Court relating to common intention constructive trusts further undermine any potential for classifying common intention constructive trusts as parol agreement trusts. In neither *Stack v Dowden*[188] nor *Jones v Kernott*[189] was any mention made of any of the cases concerning the types of parol agreement trusts considered in this article, nor was the word 'fraud' even used in the discussions concerning the nature of the constructive trusts. Furthermore, the recognition that, for the purposes of quantification of beneficial interests, a common intention may be imputed where no parol agreement may be inferred,[190] is incongruous with the theoretical basis of parol agreement trusts as argued in this article. Also of relevance is the fact that, in the analyses of the principles relating to common intention constructive trusts in *Stack* and *Jones*, no mention at all was made of any need to prove detrimental reliance. This suggests that the law may have developed to the extent that neither reliance nor detriment need be proven in order for a common intention constructive trust to be recognised.[191] As reliance on the parol agreement is a key ingredient of the doctrine of parol agreement trusts as proposed in this article, this further suggests that common intention constructive trusts may be jurisprudentially distinct.

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acceptance of the secret trust obligation (*Moss v Cooper*, above n 24). See also the comments of Lord Hatherley in *McCormick v Grogan*, above n 22 [at 89]. There are no examples of secret trusts or any other parol agreement trusts arising wholly from the conduct of the parties, however.

[187] This requirement was emphasised in *Gissing v Gissing,* above n 146 and *Lloyd's Bank v Rosset*, above n 145.

[188] Above n 145.

[189] Ibid.

[190] See especially *Jones v Kernott,* Ibid [at para 31] per Baroness Hale.

[191] Although, in relation to common intention constructive trust cases involving a single legal owner, the requirement for detrimental reliance seems to have survived. See *Gallarotti v Sebastianelli*, above n 149 [at para 5] per Arden LJ. Detrimental reliance was not, however, mentioned in the discussion of common intention constructive trusts in *Geary v Rankine* [2012]EWCA Civ 555.

In summary, although it is at least arguable that common intention constructive trusts and parol agreement trusts share a common origin, it does seem that a different direction has been taken by the highest courts in relation to the former. Therefore, it is submitted that, at most, the two types of trusts may be regarded as 'close cousins',[192] albeit ones which seemingly have grown apart in recent years.

4) CONCLUSION

The analysis presented here reveals the centrality of the prevention of fraud, a motive that even a statute may not obscure, to the doctrine whereby parol agreements may be given effect through the imposition of constructive trusts. The fraud arises when a grantee takes legal title to property in circumstances where his/her conscience is affected by a parol agreement connected with his/her acquisition of the property, and then reneges upon that agreement. His/her conscience will be affected if the other party, as determined by the set of rules applicable to the scenario in question, relied on the parol agreement and s/he knew this. To prevent such fraud, the grantee takes the property as constructive trustee, and can thus be compelled to give effect to his/her promise. Despite some recent errant judgments, the doctrine uncovered here has very strong foundations in numerous authorities, and has been endorsed by the highest courts on numerous occasions.

The current lack of recognition of this doctrine of parol agreement trusts, and the high level

[192] Recently, in *Kearns Brothers Ltd v Hova Developments Ltd*, above n. 7 [at para. 115], described common intention constructive trusts and joint purchase constructive trusts as 'close cousins', albeit with different reasoning as to the differences between these two types of constructive trust.

of debate which currently surrounds various of its aspects, seems to be the result of a dearth of appreciation of the nature of the fraud which prompts equity's intervention. This lack of regard for the role of fraud in equity seems to have arisen as a result of the repeal of the 1677 Act, s8 and its replacement with the 1925 Act, s53(1)(b). Nevertheless, as has been demonstrated, despite some changes in the terminology used to refer to the trusts under consideration here, the doctrine has never been overturned in any English courts.

By way of epilogue, a final point to raise is just how effective the doctrine discussed here has proven in terms of preventing fraudulent conduct. The doctrine has, in the twenty-first century alone, aided the young lover who is persuaded to spend money improving land that is not at law hers,[193] the first-generation immigrant who is deceived into transferring his hard-earned land to a better-educated and avaricious son or daughter,[194] the informal business partner who is denied his rightful remuneration by a conspiracy of lies,[195] the victim of a miscarriage of justice who relies on an agreement with an insincere friend in order to try to obtain a home,[196] and the daughter whose inheritance is jeopardised by the informality of her parents' dealings with the matrimonial home upon their divorce.[197] Application of the same doctrine has, in far older cases, provided the very same assistance to the woman whose faith is betrayed by the man who purported to purchase her land for her benefit,[198] the daughter who forfeited her inheritance in reliance on a parol agreement with her father,[199] the wife who transferred her land to her husband to enable him to attempt to settle his debts,[200] the man falsely accused of bigamy who entrusted his land to his friend,[201] and the man who, upon his

[193] *Cox v Jones*, above n 54.
[194] *Ali v Khan*, above n 4; *Kuppusami v Kuppusami*, above n 8.
[195] *Singh v Anand*, above n 141.
[196] *Samad v Thompson*, above n 6.
[197] *Staden v Jones*, above n 6.
[198] *Rochefoucauld v Boustead*, above n 1.
[199] *Young v Peachy*, above n 32.
[200] *Re Duke of Marlborough*, above n 7.
[201] *Davies v Otty (No 2)*, above n 7.

retirement, was persuaded to surrender his home when he sold his business premises.[202] Hence, it can be seen that this single doctrine has displayed an astonishing ability to protect the weak from the crafty or the careless, even when the precise social circumstances giving rise to the said weaknesses could not have been envisaged by the architects of the doctrine. The doctrine has undeniably stood the test of time, and has, for centuries, provided a guiding hand for judges walking the tightrope of balancing the need to adhere to formality requirements without allowing those formality requirements to be used in furtherance of the very evils which they were intended to prevent. For such a doctrine to be lost and replaced by new laws or ideas could well prove detrimental to the ability of the law in this area to protect the vulnerable of the future.

[202] *Booth v Turle*, above n 10.