A Shift in the Objective Deduction of Secondary Fact in Presumption

Abstract
The paper looks at the resulting-trust analysis adopted by the Supreme Court in the case of *Prest v Petrodel Resources* and argues that there is an inclination to an objectively deductive measure of inferred intention of the transferor. The presumed ownership for the transferor is based neither on intention inconsistent with a trust nor on intention to make a gift by the transferor; rather, the inferred intention is based on the objective deduction of the respondent-company not using property consistent with its beneficial ownership. The shift to the context-based application of objective inference is hidden in an unarticulated application of presumption in contextual-neutrality.

I. INTRODUCTION
Suppose that A company, controlled and owned by a sole, controlling shareholder, permits that shareholder’s family to live in its property. In such a case, judges in the Supreme Court of England and Wales are likely to infer that A company holds the property on a presumed resulting trust for the controlling shareholder.\(^1\) It appears that the presumed ownership is not based on the controlling shareholder being the financial contributor to the purchase of the property, in the name of the company, as the controlling shareholder did not intend to make a gift. Instead, the presumed ownership is based on the company’s inconsistent use of the beneficial ownership by having the controlling shareholder’s family living in its property. There is a clear shift in the use of presumption towards the conduction of the transferee-trustee. The shift is consistent with the established objective deduction in presumed resulting trust.

In a claim of ownership, a transferor generally enjoys the benefit of the presumed ownership in his favour if it is a gratuitous transfer without the need to adduce further evidence. The ownership is proven by legal presumption. The presumed resulting trust does not tell us why the transferor is the presumed owner. It is not because of the primary act of transfer made by the transferor; nor is there a lack-of-exchange element in the transaction as in a commercial sale. Judges have applied presumption, as part of the law of proof,\(^2\) in assisting their decision to allocate incidences of ownership that is not possible to be proven by evidence through a ‘comparable expressed and inferred intention’\(^3\) of the transferor.

Several scholars have offered ‘retention theory’\(^4\), ‘non beneficial transfer’\(^5\), or ‘declaration of trust’\(^6\) to explain the circumstances in which the law will find a resulting trust. These approaches share something in common: they draw the inferred intention exclusively from what the transferor-beneficiary intended. Discussions have put great efforts on the ‘presumption’ in association with the explicit or implicit intention of those express trusts, except where there is an ‘inferred intention’\(^7\) of the transferor. They align presumption with an inferred intention of the transferor to retain a beneficial interest, non-beneficial transfer or transferor-beneficiary’s acts being as a declaration

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1 *Prest v Petrodel Resources* [2013] UKSC 34, [2012] EWCA Civ 1395, [2013] 2 A.C. 415 [52] (Lord Sumption) ‘that in the case of the matrimonial home, the facts are quite likely to justify the inference that the property was held on trust for a spouse who owned and controlled the company’

2 W. Swadling, ‘Explaining resulting trust’ (2008) 124 (Jan) LQR 72-104, 74

3 *Stack v Dowden* [2007] 2 A.C 432, [125] (Lord Neuberger of Abbotsbury) ‘while an intention may be inferred as well as express, it may not, at least in my opinion, be imputed.


6 W. Swadling, ‘Explaining resulting trust’ (n 2).

7 *Petitt v Petitt* [1970] A.C. 777, at 822 (Lord Diplock) ‘it may be possible to infer from their conduct that they did in fact form an actual common intention…’; *Stack v Dowden* (n 3) [125] (Lord Neuberger of Abbotsbury).
of trust. The initial presumption is by no means conclusive as it can be rebutted by (1) counter-presumption of advancement; (2) direct evidence of intention to make an outright transfer; or (3) evidence of any intention inconsistent with such a trust. In *Prest v Petrodel Resources Ltd and Others (Prest)*, despite the effort of the controlling shareholder, on behalf of A company, in an attempt to provide evidences discharging the presumed ownership in his favour, and in the absence of clear evidence or disclosure, an adverse inference was adopted against the defendant company. The burden of proof generally inhibits the adverse inference in the absence of evidence. The adoption of adverse inference, as this paper argues, is an inclination to shift the focus of inferred intention from the transferor to the transferee. In *Prest*, the respondent, in addition to her husband, the company, in its best interest, was required to displace the burden of proof that having the controlling shareholder’s family to stay at its property was consistent with its beneficial ownership. The ‘shift’ is consistent with the established objective deduction of presumed resulting trust. Lord Neuberger, in his obiter dictum in *Stack v Dowden*, stated that ‘an inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements.’ The intention may be inferred or expressed, but cannot be imputed. Imputation is a technique to draw a conclusion on what the parties would have intended, whereas inference involves concluding what they did intend. In order to infer such subjective actual intention, the starting point is ‘to give effect to the common intention of the parties.’ Lord Diplock spoke of his discontent on imputing intention on the basis of presumptions of inferences of fact developed from the last generation but applied in the propertied classes of a different social era. The paper therefore argues that the shift in the contents of presumption is an objectively deductive method for the inferred intention, as law of proof is consistent with the old law as well as a contextual-neutrality with a context-based application of objective inference. This is evidenced in the subsequent case that follows the approach in *Prest*.

**II PREST**

The adoption of a resulting trust, by the Supreme Court in *Prest v Petrodel Resources Ltd and Others (Prest)*, represents the change in instrumental law to regulate social phenomenon that married couple utilize a company to hold a matrimonial home and ‘family assets’. *Prest* involved a high-profile divorce between an oil tycoon, Mr

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11 *Prest* (n 1) [36] (Lord Sumption).
12 *Prest* (n 1) [47] (Lord Sumption).
13 *Prest* (n 1) [45] (Lord Sumption).
14 *Prest* (n 1) [52] (Lord Sumption).
15 *Royal Bank of Scotland plc v Etridge* (No 2) [2002] 2 A.C. 733, para 16(Lord Nicholls of Birkenhead) ‘use of the term presumption is descriptive of a shift in the evidential onus on a question of fact’, and that the ‘use of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position.
16 [2007] 2 A.C 432
17 *Stack v Dowden* (n 3) [126] (Lord Neuberger of Abbotsbury).
18 *Stack v Dowden* (n 3) [125] (Lord Neuberger of Abbotsbury).
19 *Stack v Dowden* (n 3) [126] (Lord Neuberger of Abbotsbury).
20 Westdeutsche Landesbank Girozentrale (n 8) at 708 (Lord Browne-Wilkinson); *Pettitt v Pettitt* (n 7) at 822 (Lord Diplock).
21 Pettitt v Pettitt (n 7) at 824 (Lord Diplock) ‘It would, in my view, be an abuse of the legal technique for ascertaining or imputing intention to apply to transactions between the post-war generation of married couples ‘presumptions’ which are based upon inferences of fact which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era.’
22 *M v M* [2015] 1 FCR 12, [251] (King J).
24 Pettitt v Pettitt (n 7) at 819-825(Lord Diplock).
25 *Prest* (n 1); *Nicholas v Nicholas* (Nicholas) [1984] FLR 285, [1984] Fam Law 118.
Prest, and his wife. The question in the case was whether the court could make an order transferring UK properties to the wife, even though legally they belonged not to the husband but to his companies. Two companies, PRL and V, were set up to hold properties including the matrimonial home. To do so, the court would depart from the fundamental principle of a corporate body being a separate entity from its controlling shareholder. Nonetheless, the Supreme Court held that the properties, including the matrimonial home, were held by the companies on a resulting trust for the controlling shareholder husband. These properties therefore came under section 24 of the Matrimonial Causes Act (MCA) 1973. The court was empowered to make property right adjustments in relation to the matrimonial relationship by ordering the controlling shareholder husband to transfer to the wife such ‘property to which the first-mentioned party is entitled, either in possession or reversion’.

For Lord Sumption, in order to exercise statutory power to adjust or vary the property right, the court has extensive procedural powers to compel disclosure in order to identify the ownership. In such inquisitorial proceeding, His Lordship adopted an adverse inference, in the absence of clear evidence, against the companies. Strong evidence was given about the defiance of the husband, such as persistent obstruction throughout the proceeding. The specific circumstances explain the judgment in favour of a procedural inference. It is inferred that the fact that the occupation of the company’s property as the matrimonial home was not justified to be in the company’s interest, it was gratuitous. The judges in the family jurisdiction were entitled to be sceptical about whether the terms of occupation were really what they were said to be or were simply a sham to conceal the reality of the husband’s beneficial ownership, and the fact that the husband was uncommunicative in the proceeding should be taken into account. Normally, the courts could have ordered the transfer of the company share, but in such a case where both the company and the controller shareholder were resident abroad this will not offer much help. His Lordship admitted that the relevant section 24 does not deal with the problem of international mobile spouses and assets in the age of internationalization, and that neither does section 37. Despite his view that the MCA is not in line with the trend of internationalization of commercial arrangements, Lord Sumption inclined towards an objective deductive method as the solution to this fact-specific case. While the objective deductive method offers flexibility, it is underlined by commercial pragmatism of simplifying legal standards for commercial actors. Accordingly, the statutory entitlement was to be understood to include both legal and equitable interest across every division of the courts.

Lady Hale placed much emphasis on the policy that is largely enshrined in the ‘promulgation of a set of rules, as into statute, to be applied by a public agent devoted

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26 Prest (n 1) [3] (Lord Sumption).
27 ibid.
28 Prest (n 1) [4] (Lord Sumption).
29 Prest (n 1) [52] (Lord Sumption).
30 Luo Xing Juan v Estate of Hui Shui See [2008] HKEC 996; Rebecca Lee & Lusina Ho, ‘Disputes over family homes owned through companies: constructive trust or promissory estoppel?’ (2009) 125 (Jan) LQR 25-31
31 Prest (n 1) [40] (Lord Sumption).
34 Prest (n 1) [40] (Lord Sumption).
35 Prest (n 1) [43] (Lord Sumption).
36 Prest (n 1) [37] (Lord Sumption).
to this purpose’. The policy objective is to influence or alter behaviour or relationship. To achieve that end, rules could be formulated in various forms such as deployment of resources, franchises, or other methods. Lady Hale preferred the public interest ground that ensures spouses make proper provision for one another, both during and after marriage. That argument is premised on having regard to the non-exhaustive list of factors in section 25(2) to be taken into account by the court when deciding how to exercise financial property adjustment orders. Lady Hale articulated the policy in the MCA 1973 by drawing attention to its evolution from the Matrimonial Proceedings and Property Act 1970 (MPPA 1970). She pointed out that neither the MPPA 1970 nor the Family Law Report on Financial Provision in Matrimonial Proceedings (HC 448, Law Com No 25) suggested that statutory words should include property over which the first-mentioned party has such control that he could cause himself to become entitled, either in possession or reversion. Rather, she preferred that those properties were understood as a party’s resources for the purpose of section 25(2) of the MCA 1973. She cautioned that, despite the wife’s success in the appeal to have those properties transferred to her, in the light of the mortgages which apparently encumbered the properties, she was unlikely to gain any benefit.

II.A True Presumption vs Presumption of Facts and as Rules of Statutory Construction

The ‘purchase-money resulting trust’ arises in the circumstances that where ‘A makes a voluntary payment to B or pays wholly or in part for the purchase of property which is vested in B alone, 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)’. This is only a presumption which is rebuttable by three other methods. The presumption allocates the burden of proof among parties in the litigation. Therefore the primary fact that there was a voluntary payment or purchase gives that party to the litigation the benefit of a secondary presumed intention not to make gift. When one fact exists, another fact follows. The secondary fact is presumed on the basis of first having been proven. Such a process is termed standardized inference. When we say that a resulting trust is presumed, what we mean is that the presumed intention not to make a gift has been proved by presumption, as opposed to evidence. The transferor therefore does not need to adduce evidence to prove the presumed intention. If the other party alleges otherwise to be the case, he or she has the burden to prove the contrary.

II.A.i Presumption of Facts

To put the presumption test in the context of Prest, the presumption is used as a construction of secondary fact in the absence of sufficient evidence to the contrary. This is evidenced in Lord Sumption’s statement that ‘the occupation of the company’s property as the matrimonial home of its controller will not be easily justified in the company’s interest, especially if it is gratuitous.’ Here, the company’s interest is the
secondary proven fact which follows from the primary fact of actual occupation. But it is possible that in some circumstances, in particular an international company, the director and the controlling shareholder’s remuneration to include a housing subsidy or gratuitous accommodation is not unusual. Therefore this part of the judgment is by no means a true presumption. It is more accurate to say, as Professor Swalding puts it, that it is a ‘presumption of fact’. This approach has nothing to do with the allocation of the burden of proof. That presumption is no more than a rational inference and factual probability.

II.A.ii Presumption as rules of construction

His Lordship also adopted presumptions as rules of construction on statutory wording. That is manifested in his construction over the statutory wording ‘entitlement either in possession or reversion’ being a proprietary right, legal or equitable. The entitlement is well clarified as rights that are proprietary in nature, as opposed to personal right. Yet the construction to include legal and equitable is to assist his Lordship in framing the presumption as ‘not consistent with the company’s beneficial ownership.’ Beneficial ownership does not denote equitable interest or beneficial interest. Rather, it is used as an adverb to describe how a right is held. To say that the company’s ownership is beneficial is only to say that the company does not hold it on trust or as security. Therefore the secondary fact, in the absence of evidence, on the basis of primary fact (beneficial ownership of the company) suggests that the company was a scheme to conceal the reality of the husband’s beneficial ownership. The presumption is used as a rule of construction that the company does not have the whole beneficial ownership. This is because sole legal ownership is reflected in a presumption of sole beneficial ownership.

The Law of Property Act (LPA) 1925 draws a distinction between legal estate (as to the title) and equitable interest (as to an interest in the property other than legal estate or charge). The case of Shell UK Ltd v Total UK Ltd reflects the internal arrangement of English law on property rights. Despite the fact that damage is caused to the trust properties, the beneficiary needs to join the trustee in order to bring the action. The claimant, under English tort law, must have either a legal or possessory title to the thing that is negligently damaged in order to recover economic loss in relation thereto. The beneficiary that has neither a legal nor a possessory title cannot be party to the claim. Shell had no legal title at the time the damage occurred, and all the judges who heard Shell’s claim held that Shell had no possessory title either. In The Aliakmon case, Lord Brandon stated that if a claimant were a mere ‘equitable owner’, he would have to join the legal owner as a party to the action. The legal or possessory

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49 W Swadling, ‘Explaining resulting trust’ (n 2) 76.
50 ibid.
51 Prest (n 1) [37] (Sumptions) ‘This section is invoking concepts with an established legal meaning and recognized legal incidents under the general law.’
52 Prest (n 1) [37] (Sumptions).
53 Prest (n 1) [52] (Sumptions).
54 Re Vandervel’s Trusts (no 2) [1974] Ch 269, 290 (Megarry J).
55 W Swadling, ‘Explaining resulting trust’ (n 2) 76.
56 Stack v Dowden (n 3) [114] (Lord Neuberger of Abbotsbury).
57 Law of Property Act 1925, s1.
58 [2009] EWHC 540 (Shell UK Case)
61 Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd [1986] AC 785, 809.
62 ibid 812.
title is very different from an equitable or beneficial interest. Equitable interest operates differently from the common-law property law. The 'basis of understanding the nature of a trust lies in recognizing that the nature of the beneficiary’s property right is a fundamentally different character in equity from the common law'. The nature of equitable interest has been supported in the works of others. An example where an equitable right is able to attach onto a subsequent mixed fund is equitable tracing, as compared to the common law of tracing. The continuity in equitable tracing reflects the substitution theory in the equitable interest as a property right being capable of alternative substitute to the original trust assets. Trust money is convertible into investment properties. This is reflected in equitable tracing where trust money in a bank account is deemed readily convertible, or capable of being substituted. The ‘money’ in a will has a wide meaning such as the whole of the personal estate, and a reference to ‘all my money’ in some cases extends to the testator’s entire real and personal estate. Another example of the substitutive theory is where there is a misapplication of trust assets, the beneficiary can choose to be equitably compensated in the case of falsification and surcharging of accounts. The choice offered to the beneficiary reflects the substitution theory in the sense that the beneficiary can treat the misapplied assets as still being in the trust fund for a substitutive performance of the trustee’s obligation. Last but not least, ‘in possession’ can also suggest an interest or proprietary right that is referred to as an ‘equitable interest’. This means that the proprietary right entitles the holder to claim any immediate interest subject to it.

Ownership, therefore, has no legal meaning in English law other than rules applicable in certain circumstances whereby the law recognizes a party as having exclusive control to property. A property right generally commences with a person having a physical possession that is considered an incident of ownership. However, the law recognizes the reality that land cannot be physically embraced. There have to be rules establishing one’s possessory title. Possession has various meanings in English law and there has never been a completed logical and exhaustive definition of possession. Writing about possession in the context of tortious conversion, Professor Harris identified nine factors, based on the reading of cases, to enable judges to conclude that a man is entitled to the benefit that law recognizes in terms of possession. The common-law possessory remedies will be adequate only if judges

64 Edelman, ‘Two fundamental questions for the Law of Trusts’ (n 59).
66 Re Diplock [1948] Ch 465, 521 The meaning of money is specifically discussed. The decision was affirmed by the House of Lords in Ministry of Health v Simpson [1951] AC 251.
68 Perrin v Morgan [1943] AC 399; Re Taylor [1923] Ch 920. Thus money in this context include credit balance with banks and building societies and may extend to holdings of government bonds: Re Collings [1933] 1 WLR 587.
70 ibid.
71 Gartside v IRC [1968] A.C. 553, at 607(Lord Reid) ‘To have an interest in possession does not merely mean that you possess the interest. You also possess an interest in expectancy, for you may be able to assign it and you can rely on it to prevent the trustees from dissipating the trust fund. “In possession” must mean that your interest enables you to claim now whatever may be the subject of the interest.’
74 U.S.A v Dollfus Mieg [1952] AC 582, 605 (Earl Jowitt) see D R. Harris, ‘The Concept of Possession in English Law’ (n 73) 69.
75 D R. Harris, ‘The Concept of Possession in English Law’ (n 73) 74-80.
are prepared to develop a flexible approach to the idea of possession and if there are special rules awarding possession in certain circumstances. In the context of property law, the concept of possession is fairly uncomplicated. Possession represents a control perception. In the context of estate or land it is one of the essential elements for ownership determination: possession or security. Honore identified two distinctive elements of possession: first, where the possessor is given a right in rem because the law recognizes the owner’s consent for disposal of the property; and second, where the owner is entitled to recover from persons generally what he or she has lost or had taken from him or her. In the Court of Appeal, the Prest case seemed to have been decided based on the second category. As pointed out by Lord Sumption, Moylan J considered that the fact that he was ‘able to procure their disposal as he may direct, based again on his being the controller of the companies and the only beneficial owner’ was enough to justify ownership. Lord Sumption seems to welcome the second category of the owner being entitled to recover from persons generally what he or she has lost or had taken from him or her. But he also extends the first category of possession, in which the company has right in rem as it if there is consent from the transferor for disposal.

The construction of the statutory wording ‘entitlement in possession or reversion to include both legal and equitable’ is by no means wrong, but it is submitted that his Lordship used presumption as a rule of construction in preference to a specific statute. This is not a true presumption because this is not a question of proof of facts in issue, namely inferred intention of the transferor. In contrast, this paper critiques the reliance of presumption on a wrong footing why ‘in marginal cases, the judge has a discretion to decide the issue of possession one way or the other, according to his own appraisal or the relative merits of the parties’ cases and the social purpose of the rule in question.’ On the other hand, it is possible to view the use of company assets inconsistent with the company’s beneficial ownership as conduct which infers the intention of the transferor not to make a gift transfer.

III. TRUE PRESUMPTION AND SHIFT IN THE OBJECTIVE DEDUCTION

Much argument has been made by other scholars that a resulting trust operates on an inferred intention akin to an express intention in the express trust. This is why it is like a declaration of trust. The intention can be either inferred or expressed has been an established rule. Resulting trusts are ‘grounded in the settlor’s intent as are express

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76 D.R. Harris, ‘The Concept of Possession in English Law’ (n 73) 98.
78 B Rudden, ‘Things as thing and things as wealth’ (n 63) 83.
79 ibid 85.
80 ibid 82.
81 A.M Honore, ‘Ownership’ (n 72) 114-115.
82 Prest (n 1) [39] (Lord Sumption).
83 Prest (n 1) [39] (Lord Sumption).
84 Prest (n 1) [40] (Lord Sumption).
85 Prest (n 1) [40] (Lord Sumption) ‘The judge was entitled to take account of the husband’s ownership and control of the companies and his unrestricted access to the companies’ assets in assessing what his resources were for the purpose of s25(2)(a).’
86 Prest (n 1) [37] (Lord Sumption) The words ‘in possession or reversion’ show that the right in question is a proprietary right, legal or equitable. This section is invoking concepts with an established legal meaning and recognised legal incidents under the general law.’
87 W. Swadling ‘Explaining resulting trusts’ (n 2) 74.
88 D.R. Harris, ‘The Concept of Possession in English Law’ (n 73) 72.
89 W Swadling, ‘Explaining resulting trust’ (n 2).
90 Pettitt v Pettitt (n 7) at 803 (Lord Morris of Borth-y-Gest); Stack v Dowden (n 3) [125] (Lord Neuberger of Abbotsbury).
trust, but with this difference – that intent is inferred, or is presumed as a matter of law form circumstances of the case. 91 In the quest for the settlor’s intent, the cases concerning express trust have developed principles that look for specific language that imposes legal obligation. The courts in England and Wales have adopted a semantic approach in looking for a word 92 that imposes legal obligation in order to respect and implement the wishes of the trust settlor. 93 This has been so even if the legal obligation was an imperfect one 94 which no actual human being could have enforced on behalf of the object against the trustee. I shall not go further than the ‘linguistic or semantic’ 95 movement that is associated with obligation theory. But the point is that by searching the ‘intention’, the focus was placed on the trustee as to whether a legal obligation can be identified. In other words, there is a correlative relationship between obligations or duties and the inferred intention of the settlor. This supports the shift of focus in the objective deduction of inferred intention inclining to the trustee in the case of a resulting trust. While the above critique on the use of presumption differ, I argue that the following passage is the true presumption. I argue that there is a shift in the focus on the defendant for a deductive inferred intention of the transferor. Lord Sumption’s judgment that ‘the intention will normally be that the spouse in control of the company intends to retain a degree of control over the matrimonial home which is not consistent with the company’s beneficial ownership’ 96 in particular should be construed as a shift in the objective deduction 97 of inferred intention.

III. A Objective Deduction

In Westdeutsche Landesbank Girozentrale v Islington London Borough Council 98, Lord Browne-Wilkinson explicitly rejected the retention idea, that is, that one can retain equitable interest when transferring all legal rights with the property. 99 For him there seems to be a voluntary conveyance or purchase-money resulting trust in one camp and the failed-trust resulting trust in the other camp. 100 The key concept of the resulting trust is reflected in his judgment that ‘[b]oth types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention’ 101. This requires explanatory expansion. While common intention is the starting point, the constructive trust is an intention imposed by law in circumstances that the conscience of the legal owner is affected. 102 Imputed intention has been distinguished from inferred intention in Stack v Dowden 103. The imputation is said to draw conclusion on what parties would

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91 Rathwell v Rathwell (1978) 83 DLR 289 at 303(Dickson J)
92 Knight v Knight (n 37) 148 ‘where property is given absolutely to one, who is by the donor recommended, in treated, or wished, to dispose of it in favour of another, the words create a trust, if they are such as ought to be construed imperative’; G Moffat, G Bean and R Probert, Trusts Law (5th edn, CUP 2009) 210.
93 In Diggles, Re, Gregory v Edmondson (1888) 39 Ch D 253, 59 LT 88, it was held that ‘no trust or obligation to pay the annuity was imposed upon the daughter, but these was only a request to the daughter, not binding her in law, to make that provision for AG.’
94 G Moffat, G Bean and R Probert, Trusts Law (5th edn, CUP 2009) 258; Dean, Re, Cooper-Dean v Stevens (n 31); Re Astor’s (n 31).
95 Re Gulbenkian’s Settlement, Hacobian v Maun [1970] AC 508, 524-525 (Lord Upjohn); McPhail v Doulton [1971] A.C. 424, 457 (Lord Wilberforce); Re Tuck’s Settlement Trusts Public Trustee and Another v Tuck and Another [1978] Ch. 49.
96 Prest (n 1) [52] (Sumptions).
97 In re Curteis’ Trusts (Bacon V-C) (1872) L.R. 14 Eq 217 see Vandervell v IRC [1967] 2 A.C. 291, 313 (Lord Upjohn)
99 Westdeutsche Landesbank Girozentrale (n 8) at 706(Lord Browne-Wilkinson).
100 ibid.
101 W Swadling, ‘Explaining resulting trust’ (n 2) 76.
102 Stack v Dowden (n 3) [128] (Lord Neuberger of Abbotsbury).
103 (2007) 2 A.C 432
have intended. This seems to suggest that the court, against its duty, decides on what
parties may have intended their arrangement to be.\(^{104}\) The inference involves drawing
conclusion on what they did intend.\(^{105}\) What also distinguishes the inferred intention
from the imputed intention is the detriment element in which a resulting trust would
become rebutted or supplemented by a constructive trust.\(^{106}\) In *Prest*, when his
Lordship suggested that the use of a legal trustee’s property is inconsistent with its
beneficial ownership it was another way of saying no detriment had occurred in either
way. In a real commercial world, the company stood no gain in having its controller’s
family staying over, though the controller shareholder could use his vote to amend the
articles of association or cause the company and himself to enter into a separate
agreement.\(^{107}\) The question was also structured against the respondent company for the
sake of disposing of the self-falsification of evidence by the husband who was the
controller of the companies.\(^{108}\) The group of companies were effectively said to be the
controlling shareholder’s money box which he used at will.\(^{109}\)

The question is whose conduct should be weighed against this inferred intention?
In the absence of evidence, can the conduct of the defendant-transferee be a deductive
method for an intention? The question organises on the transferor not intending a gift
upon transfer is just another way of saying that the transferee holds the property in a
manner not consistent with his or her beneficial ownership. This is evidenced in the
judgment of Lord Neuberger of Abbotsbury: ‘Such an intention may be express
(although not complying with the requisite formalities) or inferred, and must normally
be supported by some detriment, to justify intervention by equity. It would be in this
way that the resulting trust would become rebutted and replaced, or (conceivably)
supplemented, by a constructive trust.’\(^{110}\) For his Lordship, ‘An inferred intention is
one which is objectively deduced to be the subjective actual intention of the parties,
in the light of their actions and statements. An imputed intention is one which is attributed
to the parties, even though no such actual intention can be deduced from their actions
and statements, and even though they had no such intention.’\(^{111}\)

### III.B Company’s Intention?
The objective shift to view the conduct of the defendant company as consistent with
the beneficial ownership manifests itself as treating the company as a legal person
separate from its controlling shareholder. Therefore the doctrine of attribution\(^{112}\) will
not be applicable to treat the controlling shareholder’s mind as attributable to the
intention of the company. Such a case only tells us that there is in effect one singular
intention and cut across the corporate legal personality but we trade this convenience
for a recognized defence that the controlling shareholder can use on behalf of the
companies. This explains why *Prest* did not give rise to a common intention
constructive trust, but did in the similar case of *M v M and others*,\(^{113}\) where the

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\(^{104}\) *Petitt v Petitt* (n 7) at 798 (Lord Morris of Borth-y-Gest); ‘In a question as to the title to property the question for the court
was - “Whose is this” and not - “To whom shall this be given.”’

\(^{105}\) *Stack v Dowden* (n 3) [126] (Lord Neuberger of Abbotsbury).

\(^{106}\) *Stack v Dowden* (n 3) [124] (Lord Neuberger of Abbotsbury).

\(^{107}\) *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189; *Salomon v A Salomon & Co Ltd* [1897] AC 22, 66 LJ Ch, 4 Mans 89, 45 WR
193, 41 Sol Jo 63, 75 LT 426, 13 TLR 46 HL. Author has *Foss v Harbottle* cited before *Salomon* for a chronological reason that
the SLP had to be recognized by court in 1843 which otherwise would not have to go around with minority derivative action.

\(^{108}\) *Prest* (n 1) [36] (Sumptions).

\(^{109}\) *Prest* (n 1) [15] (Sumptions).

\(^{110}\) *Stack v Dowden* (n 3) [124] (Lord Neuberger of Abbotsbury).

\(^{111}\) *Stack v Dowden* (n 3) [126] (Lord Neuberger of Abbotsbury).

\(^{112}\) *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

\(^{113}\) [2015] 1 FCR 12, [251] (Eleanor King J) ‘In my judgment on the facts of this case the court can properly infer such a common
intention; the husband is a shadow director and his will and intention is the will and intention of the company. The court has found
judgment took for granted that the common intention constructive trust was applicable. The judge ordered the transfer of property because the companies were found to be resulting/constructive trustees for the controller spouse. The case of M v M relied on Munby J’s formulation that ‘constructive trust is founded on a wider range of circumstances of conduct of the parties from which it is submitted that one can properly infer a common intention.’ For King J in M v M, there could be a common intention given that a controller spouse’s knowledge is the intention of the company because he was a shadow director. The common intention, however, was not debated further. This construction has two problems. First, the communication was made between the shareholder husband and his wife; the company was never a party to the communication. The common law doctrine of attribution might offer some assistance, but to hold the company liable for something that the company did not communicate is a rule adopted for policy reasons. Second, whose common intention was it? Despite evidence of communication between the couple, in the case of Prest it was not pursued further.

In Luo Xing Juan v Estate of Hui Shui See (‘Luo’), where a company was interposed between the spouses to hold the matrimonial home on behalf of the deceased shareholder, Ribeiro J rejected the CICT, but instead applied promissory estoppel to order the company to transfer company shares to the living spouse equivalent to the value of the matrimonial home held by it. In spite the fact that company did not itself present such assurance, the court held that promissory estoppel ‘operates to prevent the promisor from enforcing his strict legal rights against the promisee’. Given that the shareholder spouse had the power to cause the company to exercise its rights against the wife, including evicting her from the property, this was a sufficient purpose of a promissory estoppel. In Prest, Lord Sumption pointed out that the transfer of the company shares to the claimant wife would not help in the situation where the companies and the controller shareholder are all resided overseas.

The novelty in this paper is to view the presumption as a set of standardized inferences, at the inquisitorial proceeding, without being a de novo standard. In practical terms, the analysis explains the shift in the presumptive rules made by the judiciary in exercising judicial administration. Equally the rules have a role in explaining the relationship between law and social control, but presumption offers an efficient and fairly objective way of inferring the intention of parties in circumstances where property is passed to a company which is interposed between a couple. While accepting that there is a coherency in social regulation where a company is interposed, the rule ought to be treated with caution as this paper has pointed out the issue in the case of M v M. In the words of Lord Nottingham: ‘The law never implies, the Court never presumes a trust, but in case of absolute necessity. The reason of this rule is sacred;
for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is open to the Lord Chancellor to construe or presume any man in England out of his estate.'

III.C Economic Analysis of the Conducts and Obligations

The rules of passing property have traditionally been used to make a claim to an ownership of a property, or to fix a problem that is law’s own creation. Law has prescribed how property can be passed in accordance with the ‘nature of the property’ itself. A gift of chattels requires a deed of gift or intention to give with a delivery of possession. A gift of a legal interest in land requires a transfer by deed in the case of unregistered land or by registration in the case of registered land. A gift of a subsisting equitable interest must be in writing. Another example is the statutory formality that is required on the part of the settlor or transferor when he or she intends to create an express trust over real property. Prior to the registration of a legal title, the law in some circumstances recognizes the vacuum of title holder in the transactional process by allocating the transferee with an equitable interest. In such circumstances, equity treats the transfer as being effected despite the error in formalities. ‘A man does not cease to own a property with a simple statement “I do not want it”.’ The question for the law is whether he has succeeded in doing so or not in accordance with recognised methods of disposal or abandonment. In Re Rose, his Lordship, having regard to the form and the operation of the transfers, stated that pending registration of the share, ‘the deceased (donor) was in the position of a trustee of the legal title in the shares for the transferee’. Evershed MR has hypothetically asked a question relating to a normative expectation in social value: ‘[H]ad Mrs Rose claimed to have a dividend handed to her prior to registration of her legal title to the shares, what would have been the deceased’s answer?’ His Lordship phrased the answer as, ‘But what else could he say? How could he, in the face of his own statement, deny the proposition that he had.’ Although it is framed in a specific social character, the secondary fact that the legal trustee would have handed over the dividend upon on demand was a presumed fact. The secondary fact relates to the consequential benefit as to who is the ultimate owner in economic terms of the use value and exchange value (profit) of a specific property.

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121 See Edelman ‘Two fundamental questions for the Law of Trusts’ (n 59), 85 citing Lord Nottingham in the *fons et origo* of the constructive and resulting trusts, see *Cook v Fountain* (1696) 3 Swans 585 at 592 ‘the law never implies, the Court never presumes a trust, but in case of absolute necessity. The reason of this rule is sacred ; for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is open to the Lord Chancellor to construe or presume any man in England out of his estate.’

122 *Milroy v Lord* [1861-73] 4 De GF & J 264; 31 LJ Ch 798; 7 LT 178; 8 Jur NS 806; All ER Rep 783 at 789 (Turner LJ).


124 LPA 1925, s52(1).

125 Land Registration Act 2002.

126 LPA 1925, s53(1) (c).

127 LPA 1925, s53(2) (b).

128 In *Re Rose, Rose v Inland Revenue Commissioners* [1952] Ch 499, 518 (Jenkins LJ) ‘...pending registration, the deceased was in the position of a trustee of the legal title in the shares for the transferees.’ S Smith ‘A Duty to Make Restitution’ (2013) 26 Can Journal of Legal Jurisprudence 157, 178.

129 *Re Rose* (n 128); *Pennington and another v Waine and others* [2002] EWCA Civ 227

130 *Vandervell v IRC* [1966] Ch 261, 275 (Plowman J)

131 *Re Rose* (n 128).

132 ibid 518 (Jenkins LJ).

133 *Re Rose* (n 128) at 512 (Evershed MR) ‘...if the deceased had received a dividend between execution and registration and Mrs. Rose had claimed to have that dividend handed to her, what would have been the deceased’s answer?’

134 ibid.
Nonetheless, the judicial preference is to infer that the property was held on trust in the case of the matrimonial home. This context-neutral approach to the fact-specific issue is cloaked in the general principle of resulting trust. My understanding on this is that the application of resulting trust, though appearing to be context-neutral in treating the matrimonial home as having no different a function to other properties, as being held for use value. The use value of a home or dwelling is to raise the family and provide shelter, while the home can be turned into an investment value upon retirement. The home has dual functions but the nature of it being a real property is unchanged. The economic theory offers great flexibility in the choice of inference in the allocation of the burden of proof in order to produce an outcome-specific result. By viewing properties as being held for functional purposes, the economic theory objectively explains why the ultimate benefit and power of exclusion draws an inferred intention on the part of the transferor who did not intend not to make a gift.

A property transaction involves the element of exchange. The exchange occurs when the price for the property is paid. Precisely, the legal terms for a commercial transaction refers to this as consideration. In this context, the exchange represents the additional value other than the implicit use value of the goods or assets. When goods are exchanged for goods, they are an exchange of use values that is known as barter. This reflects the economic theory to treat things held for implicit use value. In a commercial transaction, things are traded for an exchange value that has been processed with additional labour cost. Marx claimed that the exchange value in the labour cost is the depreciation of the use value. Let alone the in depth debate on Marx’s claim that exchange value derives from use value, the use value and exchange value persist in property transactions, except gratuitous gift. Law differentiates an act of transfer from a legal power to create an interest in the property or a legal power to sell. In the former case, the law recognizes that an individual could create a new interest in the third party by voluntarily conveying or transferring the property to the third party, or trustee, with a correlative liability which simultaneously extinguishes the transferor’s interest. This is a Hohfedian Power-Relation theory. In a commercial transaction, there is an exchange element between property in the goods or assets for a value called consideration. In this context, the exchange represents the additional value (price) other than the implicit use value of the goods or assets. The use value of goods is best explained by the ideology of barter. If goods are exchanged for goods or services, then it is a barter. This is why a sale contract must involve an exchange element called price or money consideration. By applying the use value and exchange value to the context of property being held, the economic reasoning that underpins the use of presumption is an objective one. This objective element is also illustrated in the traditional relationship between presumed resulting trust and presumption of advancement. The latter is applied only in defined parent/child or husband/wife relationships.

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135 Prest (n 1)[45]&[52] (Lord Sumption) ‘Whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue’
137 W N Hohfeld, ‘Fundamental legal conceptions as applied in Judicial Reasoning’ (1917) 26 Yale Law Journal 710, 714. See Law of Property Act 1925 (1) differentiates the legal estates and equitable interests that a person can convey and create.
138 Sale of Goods Act 1979, s2(1) A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price
139 ibid.
140 Bennet v Bennet (1879) 10 Ch D 474, 477 (Jessel MR) ‘Now what is the meaning of the expression “a person in loco parentis” of Equalities Act 2010, s199
presumption is that this context only ‘allocates the burden of proof’. It shifts the burden of proof as well as the subsequent fact without the need to adduce further evidence. Their relationship is referred to as the mirror image of the rebuttable intention.

This procedural inference for adjudication, in the absence of evidence, is similar to the adverse inference that Lord Sumption adopted in Prest. The initial presumed conclusion is because the actual evidence turned out to support that initial conclusion, not because of the presumption. The presumptions might be described as ‘long stops’ when other facts are unavailable. But equally there will circumstances where evidence is tainted by non-compliance or falsification, or where the witnesses are all plainly self-serving and hence unreliable, or where the relevant parties to the transaction are all dead.

IV CONCLUSION

While jurisprudence is important to the vindication of property right, the presumption as part of the law of evidence will be consistently explained by the procedural rules of inference, if some form of principles were to be developed. This paper explains that there is a shift in the objective deduction in the use of presumption. The shift is consistent with the established principles in case law. The presumed ownership should be based on the objective conducts of the parties and which draws the conclusion that there was an inferred intention not to make a gift. In order to adduce the benefit of secondary fact (presumed ownership) without the need for further evidence, such conducts cannot simply be drawn from the transferor’s perspective. Moreover, presumption is neither a vested right; nor is it an established principle. While his Lordship acknowledges that no ordinary principles and presumptions of equity can be elaborated in this fact-specific case, the judicial preference to infer that the property was held on trust in the case of a matrimonial home is based on a shift in the objective deduction of presumption. Not only it is supported by judges, but it has inherent consistency when an economic theory is applied to analyse the benefit of ownership that it entails. Thus this paper concludes that the fact-specific issue is cloaked in the shift within the general principle of resulting trust. My understanding on this is that the application of resulting trust, though seeming to be contextual-neutral in treating the home as having no different a function to other properties, and held for use value, offers great flexibility in the choice of inference in the allocation of the burden of proof in order to produce an outcome-specific result. The rationale to reinforce the objective deduction is the subtle discontent that English law, particularly the MCA, is unable to address the issue in the age of the internationalization of commercial arrangements.

142 ibid.
143 Karsten v Markham [2009] EWHC 3658 (Ch) at [122].
145 Hepworth v Hepworth (1870) LR11 Eq 10 ; In re a policy no 6402 of the Scottish Equitable Life Assurance Society [1902] 1 Ch 282
146 Ebrand v Dancer (1680) 2 Chan Cas 80; 22 ER 829; Dyer v Dyer (1788)2 Cox Eq 92; Re Gooch (1890) 62 LT 384. Not mother to child: Bennet v Bennet (1879) 10 Ch D 474; Sekhon v Alissa [1989] 2 FLR 94, although see Laskar v Laskar [2008] EWCA Civ 347, [2008] 1 WLR 2695 at [20]-[21].
147 J Glister,’Section 199 of the Equality Act 2010: How Not to Abolish the Presumption of Advancement’(n 141) 808.
148 Prest (n 1) [43] (Lord Sumption).