There are three traditional categories of resulting trust: those arising from a voluntary transfer that appears to be a gift but was not intended to be one, where the claimant paid wholly or in part for the rights conferred, and where an express trust failed “due to uncertainty, or perpetuity, or form”. Lord Browne-Wilkinson in Westdeutsche developed a blanket explanation for resulting trusts, that unlike constructive trusts “a resulting trust is not imposed by law against the intentions of the trustee...but gives effect to his presumed intention”. This contested the decision in Vandervell where Megarry made a distinction between presumed and automatic resulting trusts – one giving effect to intention of the settlor, the other an automatic operation of law. Many argue that intention cannot explain the occurrence of all resulting trusts, particularly where they arise due to dispositive failure. However, it is also said that “the most widely held view is that all resulting trusts are based on the absence of any intention by the transferor to pass a beneficial interest to the transferee”, and one needs to clarify whether intention can be a sufficient explanation for resulting trusts, or whether other theories better explain their existence.

Lord Browne-Wilkinson’s first category in Westdeutsche is presumed resulting trusts, “where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B”. The resulting trust in this circumstance gives effect to the presumed intention that A did not intend to make a gift to B and therefore “the money or property is held on trust for A”. The emphasis on intention here is clear: resulting trusts will not give effect to intentions the settlor didn’t have – they can be rebutted by the presumption of advancement or by “direct evidence of A’s intention to make an outright transfer”. However, the presumption of advancement is rarely applied today since the modern age has rendered it outdated, and s199 Equality Act 2010 will abolish the doctrine when it comes into force, on such a day as the Lord Chancellor appoints unless the trust can be “rebutted by circumstances in evidence”. Although any rebuttal by

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2 Hodgson v Marks [1971] 1 Ch 892, 933 (Russell LJ).
4 Westdeutsche (n 3) 989-990.
5 Re Vandervell Trusts (No.2) [1974] 1 All ER 47.
6 Hanbury and Martin, Modern Equity (18th edn, Sweet and Maxwell 2008) 252.
7 Westdeutsche (n 3) 989.
8 ibid.
9 ibid.
11 Equality Act 2010, s216(2).
12 Dyer v Dyer (1788) 2 Cox 92, 93.
evidence is highly fact sensitive, a resulting trust will be presumed. However, where rebutting the presumption of advancement relies on an illegal purpose, a resulting trust will not occur. Robert Chambers criticises the view of a presumed intention that the settlor did not intend a gift and in fact intended a trust: “if the resulting trust was created by the presumed intention that it should exist, it could not properly be applied whenever that intention was impossible, improbable or unenforceable,” – suggesting that Browne-Wilkinson’s theory contradicts trust principles.

William Swadling’s first criterion, the voluntary conveyance resulting trust, is an example of a presumed resulting trust arising from a voluntary transfer. Chambers argues that the ‘apparent gift’ “creates a presumption of resulting trust” due to the “provider's lack of intention to benefit the recipient” and not a presumed intention to create a trust. Swadling strongly contests this view. He questions why equity is supposedly ‘suspicious’ of ‘apparent gifts’ and is not when gifts are post mortem or life estates. A trust is presumed if there is no contrary evidence, so Swadling argues that Chambers is incorrect in his thesis, particularly as the lack of intention to benefit the defendants “is once again a legal inference from facts proved by evidence, not the proof of an additional fact through the operation of a presumption”. Nick Piska criticises Swadling, arguing that “Swadling's analysis may be accurate” but when analysed closely his argument does not support instances “where there is clear evidence that there was no declaration of trust, i.e. there is no evidential gap” because although he may claim that resulting trusts were wrongly applied in these circumstances, “it is the case law on which the analysis must be based”. This alludes that Browne-Wilkinson’s analysis is consistent with authority because Piska suggests that Swadling is wrong in criticising him and Swadling’s analysis itself is inconsistent with authority. The question that needs to be asked is whether presumed resulting trusts occur due to intent of transfer of property or whether they are a trust obligation imposed by law? Chambers answers this by saying that “the resulting trust is really both, because it is dependent on the provider’s intention, but not the intention to create a trust”, which can be supported by s53(1) of the Law of Property Act 1925 which exempts resulting trusts of land from having to be in writing – they arise by operation of law.

13 Fowkes v Pascoe [1875] LR 10 Ch App 343.
15 Robert Chambers, Resulting Trusts (Oxford University Press 1997) 34.
16 ibid 11.
17 ibid (n 15) 21.
18 Swadling (n 1) 87.
19 ibid 90.
21 ibid 449.
22 ibid.
23 Chambers (n 15) 33.
The most controversial area is Lord Browne-Wilkinson’s second category: “where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest”, referred to by Megarry as “automatic resulting trusts”. This is the critical point which Browne-Wilkinson and Megarry disagree on. Westdeutsche removing the distinctions made in Vandervell in favour of a single theory for all resulting trusts. In Vandervell, Megarry distinguished between the operation of presumed and dispositive failure resulting trusts, claiming that dispositive failure resulting trusts do “not depend on any intentions or presumptions, but is the automatic consequence of A’s failure to dispose of what is vested in him”. In contrast, Browne-Wilkinson did not distinguish between the two, submitting that they operated on the same basis of a presumed intention. This can be explained by the presumption when a trust fails being that the settlor would intend the rights to be held and not for the property to pass bona vacantia so a resulting trust occurs. Chambers favours this view: “where there is an express trust which fails to exhaust the trust property, the resulting trust is not the automatic consequence of that failure, but is dependent on the intention of the settlor”. However, Swadling argues against this because “an unexpressed intention is never enough to create a trust”. Supporting the statement above that Lord Browne-Wilkinson’s theory of intention goes against principle and authority, Justice Harman argued in Re Gillingham Bus Disaster Fund that in such cases, resulting trusts cannot “rest on any evidence of the state of mind of the settlor, for in the vast majority of cases no doubt he does not expect to see his money back: he has created a trust which so far as he can see will absorb the whole of it”. The fact that the settlor tried to create a trust does not support a theory that the settlor intended to recover the funds – he intended it to be on trust but not on trust for himself. Furthermore Lord Morris in Gissing v Gissing stated that “the court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had” – further evidence to support the view that Lord Browne-Wilkinson’s judgement goes against previous authority. Swadling strongly supports this view and agrees with Megarry’s judgement in Vandervell: when a resulting trust arises due to the failure of an express trust it has “nothing to do with proof by presumption of anything, least of all an intent by the settlor to create a trust for himself”. Lord Upjohn in Vandervell v IRC explains the trust as being ‘automatic’ because if A “fails to give it [the beneficial interest] away effectively to another or others or on charitable trusts it must remain in him”. Moreover, it can be

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24 Westdeutsche (n 3) 989.
25 Hanbury and Martin (n 6) 69.
26 ibid.
27 Chambers (n 15) 43.
28 Hanbury and Martin (n 6) 93.
29 Re Gillingham Bus Disaster Fund [1958] Ch 300.
30 ibid 310.
32 ibid 898.
33 Swadling (n 1) 99.
argued that Browne-Wilkinson was merely giving effect to previous authority; his theory may be inconsistent with Megarry’s in Vandervell, but as Chambers states, – “before Vandervell (No. 2), it was recognised that the resulting trust on the failure of an express trust was dependent on the intention of the settlor”. Therefore Browne-Wilkinson’s argument is not inconsistent with principle and authority if you look beyond Vandervell, Swadling arguing that Megarry’s “‘automatic’ resulting trust...defies legal analysis”.37

With regards to Quistclose38 trusts, it is arguable whether or not they are resulting trusts. Lord Wilberforce held there was a resulting trust in favour of Quistclose because the “intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear”,39 evidence that if Quistclose trusts are resulting then they are primarily based on intention. However, there are other views arguing that it is an express trust with two limbs, or that it is illusory40 and therefore this need not be explored further.

However, there is a further school of thought that “all resulting trusts effect restitution of what would otherwise be the unjust enrichment of the recipient”,41 explained by Chambers as being “equity’s active responses to non-voluntary transfer”.42 This does not have much support in the academic community. Swadling rejects this view, arguing that it is “unsustainable”43 for there to be a resulting trust in the majority of unjust enrichment cases, and Gary Watt also argues that “certainty of proprietary title will be undermined if current focus of law of trusts...is refocused on the reversal of unjust enrichment”.44 Therefore this is unlikely to have more support than Lord Browne-Wilkinson’s explanatory model of intention, especially as he himself rejected the unjust enrichment theory.

In conclusion, although Lord Browne-Wilkinson’s judgement in Westdeutsche is controversial, it is evident from the discussion that it is not completely inconsistent with principle and authority. Concerning his first category of resulting trusts, there is more agreement than disagreement – unless there is a special relationship or evidence to suggest otherwise, equity will give effect to the presumed intention of the settlor, that he did not intend a gift. The more controversial area is that of dispositive failure or automatic resulting trusts. It is not inconsistent with principle to presume that when a trust fails, the settlor intended someone to hold the rights, not for the assets to go bona vacantia to the Crown. In Westdeutsche the Lords did not apply a resulting trust on the facts because “it would be inconsistent with traditional principles of trust law.

35 ibid 313.
36 Chambers (n 15) 49.
37 Swadling (n 1) 102.
38 Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567.
39 ibid 582.
41 Chambers (n 15) 220.
42 ibid.
43 Swadling (n 1) 102.
44 Watt (n 40) 151.
to extend the availability of resulting trusts beyond the traditional cases to the circumstances arising in Westdeutsche” suggesting that Lord Browne-Wilkinson’s analysis is in line with authority. Although his views contradict that of Megarry in Vandervell, when concerning automatic resulting trusts before Vandervell the traditional theory of resulting trusts did rest on intention. Resulting trusts can be simply explained - “a resulting trust gives effect to a settlor’s...presumed intention in circumstances that were not anticipated by his expressed intentions”, which leads to the conclusion that Lord Browne-Wilkinson’s argument is not completely inconsistent with principle or authority, despite the criticism it received from many academics.

46 Chambers (n 15) 49.
47 Watt (n 40) 145.