

# THE AMBIT OF THE MUTUAL WILLS DOCTRINE

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## I. INTRODUCTION

In a typical mutual wills arrangement, two individuals execute valid wills to the effect that the first to die (T1) will leave T1's property to the survivor (T2), and that T2 will leave whatever is left on T2's death to one or more ultimate beneficiaries, C(s). The parties also have an intention to create legally binding obligations,<sup>1</sup> as evidenced by the fact that T2 agrees not to revoke his or her will after T1's death. When T1 dies and property is left to T2, a constructive trust<sup>2</sup> binds T2 to carry out the agreement. Any subsequent volunteer recipient of T2's property, such as T2's personal representative, executor, heir,<sup>3</sup> or legatee<sup>4</sup> is likewise bound to fulfil the agreement. C's right takes priority over the other recipients by virtue of the maxim "where the equities are equal the first in time prevails."<sup>5</sup> The constructive trust arises notwithstanding the informality of the agreement, that is to say, despite the fact that the arrangement may not appear in T2's will as would normally be required by s. 9 of the Wills Act 1837,<sup>6</sup> and despite non-compliance with s. 53(1)(b) of the Law of Property Act 1925<sup>7</sup> where it affects interests in land. As Mummery L.J. observed in *Fry v Densham-Smith*,<sup>8</sup> "if and when [the doctrine] applies, absolute beneficial testamentary dispositions ... do not take effect in accordance with their terms."

An appreciation of the typical mutual wills arrangement often suffices for a judge who has to apply the mutual wills doctrine, as well as for commentators who write about particular aspects of the doctrine. As a result, there has been little impetus to pinpoint the *precise* factual ambit of the doctrine's operation, that is, to identify the specific real-world events which trigger the mutual wills doctrine. However, the need to do so has now come into sharp focus, given that the Law Commission is currently reviewing the law concerning wills,

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<sup>1</sup> *Birmingham v Renfrew* (1936) 57 C.L.R. 666 (H.C. Australia) at 675; *Re Cleaver (Deceased)* [1981] 1 W.L.R. 939 at 947; *Re Goodchild (Deceased)* [1997] 1 W.L.R. 1216 at 1225; *Osborne v Estate of Osborne* [2001] V.S.C.A. 228 (Melbourne C.A.) at [15]; *Birch v Curtis* [2002] EWHC 1158 (Ch); [2002] 2 F.L.R. 847 at [60].

<sup>2</sup> *Birmingham v Renfrew* (1936) 57 C.L.R. 666 (H.C. Australia) 680 at 683; *Re Cleaver (Deceased)* [1981] 1 W.L.R. 939 at 947; *Re Newey (Deceased)* [1994] 2 N.Z.L.R. 590 (H.C. Hamilton); *Re Dale (Deceased)* [1994] Ch. 31 at 46 – 47; *Manitoba University v Sanderman* (1998) 155 D.L.R. (4<sup>th</sup>) 40; *Healey v Brown* [2002] W.T.L.R. 849 at [8]; *Osenton v Osenton* [2004] EWHC 1055 (Ch) at [33]; *Olins v Walters* [2008] EWCA Civ 782; [2009] Ch. 212 at [39]; *Charles v Fraser* [2010] EWHC Civ 2154 (Ch); [2010] W.T.L.R. 1489 at [59]; *Shovelar v Lane* [2011] EWCA Civ 802; [2012] 1 W.L.R. 637 at [37].

<sup>3</sup> *Dufour v Pereira*, as reported in Hargrave, *Juridical Arguments and Collections Vol. 2* (1799) 304 at 309. Note, however, post the Land Transfer Act 1897, a deceased's property, real or personal, vests upon his death in his personal representative, and not his heir.

<sup>4</sup> See e.g. *Charles v Fraser* [2010] W.T.L.R. 1489; *Birmingham v Renfrew* (1936) 57 C.L.R. 666 (H.C. Australia).

<sup>5</sup> Charles Mitchell, *Hayton and Mitchell: Commentary and Cases on the Law of Trusts and Equitable Remedies*, 13<sup>th</sup> edn. (London: Sweet & Maxwell, 2010) at [3 – 170].

<sup>6</sup> Among its requirements, a will must be put in writing and witnessed by two others to be valid.

<sup>7</sup> "[A] declaration of trust respecting any land ... must be manifested and proved by some writing signed by some person who is able to declare such a trust".

<sup>8</sup> *Fry v Densham-Smith* [2010] EWCA Civ 1410; [2011] W.T.L.R. 387 at [31]. See also *Olins v Walters* [2009] Ch. 212 at [40].

including mutual wills.<sup>9</sup> Certainly, a successful review hinges on an accurate definition of what a “mutual wills arrangement” entails.

However, the typical arrangement provides little assistance to this end. Many factual variations have not prevented the mutual wills doctrine from operating, for instance, where T1 leaves property to T2 *inter vivos*, where T1 does not leave property to T2 at all, and where the parties want their agreement to be binding even before either of them have died. A further difficulty arises in relation to the terminology used. Despite the “mutual wills” label, a constructive trust is neither triggered merely by the mutuality of the terms of the testators’ wills nor the mutuality of the timing at which their wills are executed. Indeed, it appears not even to be necessary for the arrangement to involve the making of wills at all. The many possible factual variations must be accounted for in order to state precisely the ambit of the mutual wills doctrine.

## II. AGREEMENT

It is uncontroversial that the mutual wills doctrine is agreement-based: the constructive trust gives effect to a prior agreement between the parties. As Lewison J. observed in *Thomas and Agnes Carvel Foundation v Carvel*,<sup>10</sup> “the [constructive] trust does not arise under the will ... [or] ... any previous will of [T2]. It arises out of the *agreement* between the two testators”. Similarly in *Re Dale*,<sup>11</sup> Morritt J. described the doctrine as “[t]he principles on which the court acts in imposing the trust to give effect to the *agreement* to make and not revoke mutual wills”. The agreement-based nature of the doctrine implies that the testators have considerable latitude to define the scope and content of their legal engagements. However, their agreement must meet certain minimum requirements for it to fall within the ambit of the doctrine in the first place.

### II.1. The Minimum Requirements

It is often assumed, drawing from the typical arrangement, that it is necessary for both parties to make testamentary dispositions, either by way of a joint will<sup>12</sup> or separate wills.<sup>13</sup> Upon closer inspection, however, this represents an overstatement. In the first place, the parties’ testamentary dispositions need not be made by way of wills. Thus, in New Zealand, the doctrine has been held to operate where the agreement was that T1 would not sever the parties’ joint tenancy in order to allow T2 to take the full interest by way of survivorship, with T2 promising to make a testamentary disposition in favour of C.<sup>14</sup> So too in Canada, the doctrine was applied where the parties agreed that if T1 altered part of his existing will by way of a codicil T2 would make a corresponding change, but only T1 (and not T2) ultimately

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<sup>9</sup> <<http://www.lawcom.gov.uk/project/wills/>> (accessed ...). The other key areas that are being reviewed are: testamentary capacity, formalities for a valid will, and the rectification of wills.

<sup>10</sup> *Thomas and Agnes Carvel Foundation v Carvel* [2007] EWHC 1314 (Ch); [2008] Ch. 395 at [27] (emphasis added).

<sup>11</sup> *Re Dale (Deceased)* [1994] Ch. 31 at 38 (emphasis added).

<sup>12</sup> *Re Hagger* [1930] 2 Ch. 190.

<sup>13</sup> *Re Green (Deceased)* [1951] Ch. 148.

<sup>14</sup> *Re Newey (Deceased)* [1994] 2 N.Z.L.R. 590 (H.C. Hamilton) 601. A portion of the reasoning of Hammond J. which led to the decision was approved by Rimer J. in *Birch v Curtis* [2002] 2 F.L.R. 847 at [71] – [72].

made the alteration.<sup>15</sup> In fact, it is unnecessary for the arrangement to involve a *testamentary* disposition by T1 at all. In *Lewis v Cotton*,<sup>16</sup> it was observed that the doctrine could operate where an arrangement entailed an *inter vivos* transfer of property from T1 to T2, with T2 promising to make a particular testamentary disposition. From these cases, the first minimum requirement can be deduced: the agreement must relate to a *testamentary disposition by T2*.

Two points need to be observed in relation to the first minimum requirement. First, very little turns on the nature of T1's agreed course of action, so long as that course of action was contemplated as part of the agreement between the parties. As is well known, the case of *Re Dale*<sup>17</sup> establishes the proposition that it is unnecessary for T1's property to be transferred to T2. In that case, T1 and T2 made respective wills benefitting C directly and a constructive trust arose to bind T2 to the agreement at T1's death. It would, however, be a mistake to think that T1 must make a disposition *to T2 or to C*, or even that *a disposition* must be made at all. In *Re Dale*, Morritt J. justified his decision on the basis that the agreement "is what the parties bargained for",<sup>18</sup> and that "it has been performed by [T1] on the faith of the promise of [T2] and in each case [T2] would have deceived [T1] to the detriment of [T1] if [T2] were permitted to go back on his agreement."<sup>19</sup> It follows that it would make no difference if T1 agrees to dispose of property to D, rather than to T2 or to C.<sup>20</sup> Likewise, the doctrine would apply if T1 agrees to carry out an act which does not involve making a disposition, for example, making investments in T2's name on the faith of a promise by T2 to make a testamentary disposition to C.<sup>21</sup> Whatever the nature of T1's agreed course of action, he or she would equally have acted on the faith of T2's promise; hence a constructive trust would prevent T2 from going back on his or her promise and thereby "deceiving" T1.

The second point to be observed in relation to the first minimum requirement is that the need for T2 to agree to make a *testamentary* (as opposed to an *inter vivos*) disposition distinguishes the mutual wills doctrine from the doctrine in *Rochefoucauld v Boustead*.<sup>22</sup> The doctrine in *Rochefoucauld v Boustead* relates to an agreement whereby B informally promises to hold A's land on trust for A if the legal title of the land in question is transferred to B. If A so transfers the land to B, a constructive trust<sup>23</sup> binds B to carry out his or her promise.

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<sup>15</sup> *Re Fox* [1951] O.R. 378 (Ont. S.C.).

<sup>16</sup> *Lewis v Cotton* [2001] 2 N.Z.L.R. 21 (N.Z.C.A.) at [45] – [46].

<sup>17</sup> *Re Dale (Deceased)* [1994] Ch. 31.

<sup>18</sup> *Re Dale (Deceased)* [1994] Ch. 31 at 48.

<sup>19</sup> *Re Dale (Deceased)* [1994] Ch. 31 at 48 – 49.

<sup>20</sup> As the Court of Appeal observed in *Olins v Walters* [2009] Ch. 212 at [38].

<sup>21</sup> *Bigg v Queensland Trustees Ltd* [1990] 2 Qd. R. 11 (S.C. Brisbane) seems to support this proposition, although in that case it was T1 who secretly revoked her will, leaving T2 to continue making investments in T1's name. It was held that T1 and those who benefitted from her new will were bound to carry out the mutual wills agreement.

<sup>22</sup> *Rochefoucauld v Boustead* [1897] 1 Ch. 196.

<sup>23</sup> Despite the occasional suggestion that the doctrine in *Rochefoucauld* enforces the informal arrangement as an *express* trust (see e.g. William Swadling, "The Nature of the Trust in *Rochefoucauld v Boustead*" in Charles Mitchell (ed.), *Constructive and Resulting Trusts* (Oxford: Hart Publishing, 2010)), the overwhelming judicial view is that the trusts are constructive in nature (see e.g. *Taylor v Davies* [1920] A.C. 636 at 650 – 651; *Bannister v Bannister* [1948] 2 All E.R. 133; *Chattey v Farndale Holdings Inc* (1998) 75 P. & C.R. 298 at 316; *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All E.R. 400 at 409; *Banner Homes Holdings Ltd (formerly Banner Homes Group Plc) v Luff Developments Ltd* [2000] Ch. 372 at 383 – 384; *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467; [2002] B.C.C. 729 at [36]; *Samad v Thompson* [2008] EWHC 2809 (Ch); [2008] N.P.C. 125 at [128]; *De Bruyne v De Bruyne* [2010] EWCA Civ 519; [2010] 2 F.L.R. 1240 at [51]). There are compelling reasons for this classification: see, e.g. Peter Birks, *An Introduction to the Law of Restitution*, revised edn. (Oxford: Oxford University Press 1989) at p. 65; Robert Chambers, "Constructive Trusts in Canada" (1999) 37 Alberta L. Rev. 173 at p. 183; Robert Chambers, *Resulting Trusts* (Oxford: Oxford University Press, 1997) at pp. 220ff; Ben McFarlane, "Constructive Trusts

Although both doctrines are similar in that they bind the promisor to his or her promise by way of a constructive trust, it is significant that B's promise in the context of the doctrine in *Rochevoucauld* is to hold the land on trust *inter vivos*, while T2 in the mutual wills context promises to make a *testamentary* disposition. Hence it is a unique feature of the mutual wills doctrine that the *imposition* of a constructive trust (typically at T1's death<sup>24</sup>) and the "*crystallisation*" of that constructive trust (typically at T2's death, when his or her testamentary dispositions take effect<sup>25</sup>) are not simultaneous.

The second minimum requirement relates to the subject matter of the agreement. It must include property belonging to T2; it cannot relate exclusively to T1's property. This requirement distinguishes mutual wills arrangements from secret trusts. In *Ottaway v Norman*,<sup>26</sup> T1 executed a will leaving a house absolutely to his wife (T2), with T2 agreeing that she would execute a will leaving the house to C. After T1 died, T2 made a new will redirecting the house to other named beneficiaries. Brightman J. held that the arrangement between the testators was governed by the secret trusts doctrine, by which T2 was bound to carry out the agreement. Although the arrangement in *Ottaway* was similar to a mutual wills arrangement in that it involved T2 promising to make a testamentary disposition, it was decided on the basis of the secret trusts doctrine because it did not include T2's property. As Leggatt L.J. observed in *Re Goodchild*,<sup>27</sup> "mutual wills ... [binds] the property of the second testator ... whereas a secret trust concerns only the property of a person in the position of the first testator."

A third minimum requirement is that the agreement must indicate an express or implied intention to create legally binding obligations.<sup>28</sup> Because most agreements are made contemporaneously with or after the parties' execution of their wills, this requirement is usually expressed as the need for the parties to agree not to revoke their wills,<sup>29</sup> or to be bound to a "future course of inaction".<sup>30</sup> It is also to the same effect to say that the parties must intend to be legally bound to a future course of action, in cases where the parties' agreement precedes the making of their wills.<sup>31</sup> More specifically, because it is only T2 who is required to make a testamentary disposition for the doctrine to apply, the parties must intend for T2 to be legally bound to make the agreed testamentary disposition. Because the typical case involves wills, this requirement is normally rationalised in contradistinction to the fact

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Arising on a Receipt of Property Sub Conditione" (2004) 120 L.Q.R. 667 at p. 675; Simon Gardner, *An Introduction to the Law of Trusts*, Clarendon Law Series, 3rd edn. (Oxford: Oxford University Press, 2011) at p. 97; Ying Khai Liew, "Rochevoucauld v Boustead (1897)" in Charles Mitchell and Paul Mitchell (eds.), *Landmark Cases in Equity* (Oxford: Hart Publishing, 2012).

<sup>24</sup> *Thomas and Agnes Carvel Foundation v Carvel* [2008] Ch. 395 at [27].

<sup>25</sup> *Birmingham v Renfrew* (1936) 57 C.L.R. 666 (H.C. Australia) at 689. See too *Re Goodchild (Deceased)* [1997] 1 W.L.R. 1216 at 1225; *Re Cleaver (Deceased)* [1981] 1 W.L.R. 939 at 947; *Healey v Brown* [2002] W.T.L.R. 849; *Birch v Curtis* [2002] 2 F.L.R. 847.

<sup>26</sup> *Ottaway v Norman* [1972] Ch. 698.

<sup>27</sup> *Re Goodchild (Deceased)* [1997] 1 W.L.R. 1216 at 1224.

<sup>28</sup> See e.g. *Birmingham v Renfrew* (1936) 57 C.L.R. 666 (H.C. Australia) at 675; *Re Cleaver (Deceased)* [1981] 1 W.L.R. 939 at 947; *Re Goodchild (Deceased)* [1997] 1 W.L.R. 1216 at 1225; *Osborne v Estate of Osborne* [2001] V.S.C.A. 228 (Melbourne C.A.) at [15]; *Birch v Curtis* [2002] 2 F.L.R. 847 at [60].

<sup>29</sup> See e.g. *Birmingham v Renfrew* (1936) 57 C.L.R. 666 (H.C. Australia); *Re Dale (Deceased)* [1994] Ch. 31; *Dufour v Pereira*, as reported in Hargrave, *Juridical Arguments and Collections Vol. 2* (1799) 304 at 309; *Olins v Walters* [2009] Ch. 212; *Birch v Curtis* [2002] 2 F.L.R. 847; *Fry v Densham-Smith* [2011] W.T.L.R. 387.

<sup>30</sup> *Lewis v Cotton* [2001] 2 N.Z.L.R. 21 (N.Z.C.A.) at [48].

<sup>31</sup> *Re Fox* [1951] O.R. 378 (Ont. S.C.); *Fry v Densham-Smith* [2011] W.T.L.R. 387 at [3]; *Edell v Sitzer* (2001) 55 O.R. (3d) 198 (Ontario S.C.J.) at [64].

that wills are revocable.<sup>32</sup> The parties must intend that the agreement will hold good in spite of the possibility of T2 revoking and making a new will. Another factor which affects the rationale of this requirement is the gap in time between the constructive trust's arising and its crystallisation upon T2's death. This gap implies that T2's circumstances might change in a way in which the parties could not have foreseen beforehand. Therefore, the parties will not be bound unless they have an intention to be bound come what may.

## II.2. Latitude

Subject to meeting the three minimum requirements, the parties have considerable latitude to define the terms of their agreement, and can expect the fullest possible legal effect to be given to it.<sup>33</sup> Latitude to customise their agreement is commonly exercised in relation to “the nature and extent of the property to which the trust attaches”, and/or “the rights of the survivor to consume or dispose of it after the other's death”.<sup>34</sup> So, instead of the typical case whereby T2 promises to make a testamentary disposition of his or her entire estate to C, the agreement might provide for T2's obligation to extend only to a proportion of T2's residuary estate.<sup>35</sup> The parties might also expressly stipulate the extent of T2's interest, for example by limiting this to a life interest only,<sup>36</sup> or in rarer cases by providing for a complete prohibition against gratuitous transfers after T1's death.<sup>37</sup> A lack of express stipulation as to T2's rights after T1's death, however, would not prevent the doctrine from operating,<sup>38</sup> since the implication here would be that the parties intend for T2 to have unrestricted use of his or her estate during T2's lifetime, as reflected in the typical case.

Contrary to what the label “mutual wills” suggests, it is not a requirement for the parties' arrangement to contain mutual terms. Hence, as discussed above, the parties have latitude to provide that T1 will perform an *inter vivos* act, with T2 promising to make a testamentary disposition. It is also possible for “one-directional” arrangements to be made. In *Birch v Curtis*<sup>39</sup> and *Birmingham v Renfrew*,<sup>40</sup> for example, the doctrine operated where T1 made a will which benefitted T2 only, with T2 making a will leaving his residuary estate to certain named beneficiaries. It should be noted, however, that such arrangements run the risk of failing to engage the mutual wills doctrine in the event that the sequence of deaths is not as expected. That is to say, if the testator whom the parties presume will be the survivor of the two in fact dies first, then the mutual wills agreement is of no effect, since a testamentary gift by the actual survivor to the deceased would lapse.<sup>41</sup>

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<sup>32</sup> *Vynior's Case* (1610) 8 Co. Rep. 81b; 77 E.R. 597. It is one's final will which is always admitted to probate: *Dufour v Pereira* (1769) Dick. 419; 21 E.R. 332; *Dufour v Pereira*, as reported in Hargrave, *Juridical Arguments and Collections Vol. 2* (1799) 304 at 309; *Re Heys (Deceased)* [1914] P. 192; *Fry v Densham-Smith* [2011] W.T.L.R. 387 at [30].

<sup>33</sup> *Olins v Walters* [2009] Ch. 212 at [43].

<sup>34</sup> *Edell v Sitzger* (2001) 55 O.R. (3d) 198 (Ontario S.C.J.) at [64].

<sup>35</sup> *Re Green (Deceased)* [1951] Ch. 148; *Charles v Fraser* [2010] W.T.L.R. 1489 at [59].

<sup>36</sup> *Re Hagger* [1930] 2 Ch. 190.

<sup>37</sup> *Thomas and Agnes Carvel Foundation v Carvel* [2008] Ch. 395 at [4].

<sup>38</sup> *Olins v Walters* [2009] Ch. 212 at [35].

<sup>39</sup> *Birch v Curtis* [2002] 2 F.L.R. 847.

<sup>40</sup> *Birmingham v Renfrew* (1936) 57 C.L.R. 666 (H.C. Australia).

<sup>41</sup> It would, however, be otherwise if the actual survivor's will contained a substitutionary gift to other beneficiaries, and if the parties also contemplated as part of the mutual wills agreement that the term providing for the substitutionary gift would be irrevocable.

The ability to customise the agreement also extends to the timing at which the parties incur legally binding obligations. Typically, the parties stipulate that T2 is bound once T1 dies, the agreement being revocable with notice prior to that time; and this also represents the default position absent an express agreement as to the issue of timing.<sup>42</sup> By extension of logic, if the agreement is for T1 to make an *inter vivos* disposition<sup>43</sup> or to perform other acts such as investing in T2's name, the default position is that T2 is bound when T1 makes the disposition or performs the agreed act. The parties may nevertheless choose expressly to be bound *prior* to T1's death,<sup>44</sup> or by extension of logic, prior to T1's agreed course of *inter vivos* action. However, it would appear to be impermissible for the parties expressly to provide that T2 will only be bound at some point in time *after* T1's death or T1's performance of the agreed course of action. As will be seen below, courts have attached much significance to T1's reliance on the agreement, since a constructive trust arises to bind T2 when T1's reliance occurs. The ability to postpone the binding effect of the agreement to a point in time post-reliance would contradict the legal significance of T1's reliance.

### II.3. Establishing the Agreement

The need to establish that the parties to a mutual wills arrangement had an intention to create legal obligations has the potential to cause practical difficulties. There may well be a large gap in time between the alleged agreement being reached and the time at which it falls to be proved. It also often happens that the party whose onus it is in court to establish a mutual wills agreement was not party to the agreement at all, since many disputes arise after the death of both T1 and T2. It is, therefore, practically sensible for the parties to make explicit their intention to create legal obligations. This may be done in writing, for instance, as a recital in a joint will,<sup>45</sup> as a term of the testators' individual wills,<sup>46</sup> by way of deed,<sup>47</sup> or in a cover letter.<sup>48</sup> It may also be made orally, as demonstrated through evidence of family conversations.<sup>49</sup>

The gap between the time when the agreement is reached and the time it falls to be proved may, however, render it difficult for evidence of an express agreement to be produced. Therefore, the relevant agreement can also be implied or inferred<sup>50</sup> through "the process of drawing reasonable and probable inferences from other facts, such as primary facts specifically found, undisputed events and uncontroversial circumstances surrounding them."<sup>51</sup> Given the centrality of the relevant agreement to the mutual wills doctrine as well as the extensive legal consequences which flow from the imposition of a constructive trust, courts have been rightly circumspect in inferring agreements. While the simultaneity in the

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<sup>42</sup> *Dufour v Pereira* (1769) Dick. 419; 21 E.R. 332; also reported in Hargrave, *Juridical Arguments and Collections Vol. 2* (1799) 304; *Birmingham v Renfrew* (1936) 57 C.L.R. 666 (H.C. Australia); *Manuel v Wells* [2001] All E.R. (D) 326 (May); *Lewis v Cotton* [2001] 2 N.Z.L.R. 21 (N.Z.C.A.); *Re Goodchild (Deceased)* [1997] 1 W.L.R. 1216 (CA).

<sup>43</sup> *Lewis v Cotton* [2001] 2 N.Z.L.R. 21 (N.Z.C.A.) at [45] – [46].

<sup>44</sup> *Lewis v Cotton* [2001] 2 N.Z.L.R. 21 (N.Z.C.A.) at [45]; *Manuel v Wells* [2001] All E.R. (D) 326 (May).

<sup>45</sup> *Re Hagger* [1930] 2 Ch. 190.

<sup>46</sup> *Re Green (Deceased)* [1951] Ch. 148.

<sup>47</sup> *Re Newey (Deceased)* [1994] 2 N.Z.L.R. 590 (H.C. Hamilton).

<sup>48</sup> *Olins v Walters* [2009] Ch. 212.

<sup>49</sup> *Re Heys (Deceased)* [1914] P. 192 at 194; *Re Cleaver (Deceased)* [1981] 1 W.L.R. 939; *Re Newey (Deceased)* [1994] 2 N.Z.L.R. 590 (H.C. Hamilton).

<sup>50</sup> See e.g. *Birmingham v Renfrew* (1936) 57 C.L.R. 666 (H.C. Australia) at 683; *Bigg v Queensland Trustees Ltd* [1990] 2 Qd. R. 11 (S.C. Brisbane) at 14.

<sup>51</sup> *Fry v Densham-Smith* [2011] W.T.L.R. 387 at [33].

execution of wills and the similarity of their terms are matters which a court will take into account, these factors are not themselves evidence of an intention to create legal obligations.<sup>52</sup> Moreover, courts are wary of placing undue weight on witness statements, since it is all too easy “for the recollections of the witnesses to be subtly improved [by solicitors] in the direction the party calling them wishes to go.”<sup>53</sup> Thus, the starting point generally taken is that the parties do not wish to give up their freedom to make testamentary dispositions in the light of later events,<sup>54</sup> and the intention to be legally bound will be inferred only where it is backed by clear and satisfactory evidence on the balance of probabilities.<sup>55</sup>

A number of useful guidelines in relation to the inferring of intention have been formulated by the courts. In *Re Oldham*,<sup>56</sup> Astbury J. took the view that the relevant agreement must be the “sole inference” to be drawn from the circumstances of the case. In *Re Goodchild*,<sup>57</sup> Leggatt L.J. suggested that the test was to ask whether, if after T1’s death and during T2’s lifetime the intended beneficiary did something unpardonable, T2 could change his testamentary arrangements. And in *Walpole v Orford*,<sup>58</sup> the “inequality” and “unfairness” in the parties’ arrangement was taken to be decisive factors: given that the subject matter of the arrangement was “worth nothing” to one testator and “infinitely more valuable” to the other, Loughborough L.C. refused imply a mutual wills agreement.<sup>59</sup> These guidelines are consistent *inter se*: a court can only be certain that the parties intend to create binding legal obligations if this were the only inference that can be drawn from the facts; this entails T2 being bound regardless of C’s later actions; and such intention to be legally bound is unlikely to have arisen if there was an initial inequality in the parties’ “bargaining position”.

## II.4. “Contract at Law”?

A question arises as to whether there must be a “contract at law” for the mutual wills doctrine to operate. Although a mutual wills agreement was described as a “contract” from as long ago as the first reported mutual wills case of *Dufour v Pereira*,<sup>60</sup> the use of the phrase “contract at law” is relatively more modern, finding its first mention in *Re Dale*.<sup>61</sup> The difference between the two phrases is potentially significant. A description of the agreement as a “contract” does not imply anything beyond the fact that the testators have “bound [themselves] to an obligation ... in such terms as to render it enforceable in equity”.<sup>62</sup> Where they have done so, “[w]hether one calls it a ‘contract’, ‘an agreement’, ‘an undertaking’ or ‘legally enforceable promise’ is merely a matter of nomenclature.”<sup>63</sup> Requiring a “contract at

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<sup>52</sup> *Lewis v Cotton* [2001] 2 N.Z.L.R. 21 (N.Z.C.A.) at [55]; *Gray v Perpetual Trustee Co Ltd* [1928] A.C. 391; *Smith v Clayton* [2010] EWCA Civ 236; *Birmingham v Renfrew* (1936) 57 C.L.R. 666 (H.C. Australia) at 675.

<sup>53</sup> *Charles v Fraser* [2010] W.T.L.R. 1489 at [65].

<sup>54</sup> *Charles v Fraser* [2010] W.T.L.R. 1489 at [60].

<sup>55</sup> *Charles v Fraser* [2010] W.T.L.R. 1489 at [59]; *Re Cleaver (Deceased)* [1981] 1 W.L.R. 939 at 947; *Olins v Walters* [2009] Ch. 212 at [36].

<sup>56</sup> *Re Oldham* [1925] Ch. 75 at 89.

<sup>57</sup> *Re Goodchild (Deceased)* [1997] 1 W.L.R. 1216 at 1225.

<sup>58</sup> *Lord Walpole v Lord Orford* (1797) 3 Ves. Jun. 402; 30 E.R. 1076.

<sup>59</sup> *Lord Walpole v Lord Orford* (1797) 3 Ves. Jun. 402 at 419 – 420; 30 E.R. 1076 at 1084 – 1085.

<sup>60</sup> *Dufour v Pereira* (1769) Dick. 419; 21 E.R. 332; also reported in Hargrave, *Juridical Arguments and Collections Vol. 2* (1799) 304.

<sup>61</sup> *Re Dale (Deceased)* [1994] Ch. 31.

<sup>62</sup> *Osborne v Estate of Osborne* [2001] V.S.C.A. 228 (Melbourne C.A.) at 816.

<sup>63</sup> *Osborne v Estate of Osborne* [2001] V.S.C.A. 228 (Melbourne C.A.) at 815.

law”, on the other hand, suggests something more specific. It might lead one to assume that the enforceability of the agreement *at common law* is a prerequisite for the operation of the doctrine — that the fulfilment of the requirements such as the sufficiency of consideration is a precondition.<sup>64</sup> It also implies that a mutual wills agreement, if it involves a “disposition of an interest in land”, is invalid unless it complies with the formality requirements of s. 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989.<sup>65</sup>

It is submitted that, despite the judicial use of the phrase “contract at law”, it is unnecessary for an agreement to amount to a contract enforceable at common law for the mutual wills doctrine to operate. This view is consistent with numerous judicial statements.<sup>66</sup> It has been said that the doctrine does not involve making a claim for contractual relief such as specific performance because C “is not even a party to the contract”;<sup>67</sup> that its principles are not precisely the same as those which apply to contractual disputes;<sup>68</sup> and that it arises from the parties’ course of conduct and not the contract itself and therefore “[a] contract made without formality is enough”.<sup>69</sup> Indeed, in *Olins v Walters*,<sup>70</sup> the Court of Appeal applied the doctrine where the relevant agreement was held not to be certain enough to amount to a contract enforceable at common law. Moreover, since a mutual wills agreement can be made orally<sup>71</sup> or be inferred from the circumstances of a case,<sup>72</sup> then surely it is contemplated that the formality requirement of the 1989 Act has no relevance to the mutual wills doctrine. In this regard, the judgment of David Donaldson QC, sitting as a Deputy High Court judge in *Healey v Brown*,<sup>73</sup> which held that compliance with s. 2(1) of the 1989 Act is a prerequisite for the doctrine to apply, cannot be sustained as a matter of principle and consistency.<sup>74</sup> After all, it is indisputable that the mutual wills doctrine gives rise to constructive trusts, not merely contractual damages; and s. 2(5) of the Act provides that “nothing in this section affects the creation or operation of ... constructive trusts.”<sup>75</sup>

Since the fulfilment of common law contractual principles is not a prerequisite for the mutual wills doctrine to operate, the phrase “contract at law” is best understood simply to

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<sup>64</sup> *Re Dale (Deceased)* [1994] Ch. 31 at 37. See also *Dufour v Pereira*, as reported in Hargrave, *Judicial Arguments and Collections Vol. 2* (1799) 304 at 310; *Lord Walpole v Lord Orford* (1797) 3 Ves. Jun. 402 at 417; 30 E.R. 1076 at 1083.

<sup>65</sup> *Healey v Brown* [2002] W.T.L.R. 849 (Ch) at [19] – [20]. This subsection provides that “[a] contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.”

<sup>66</sup> Cf the views of some commentators, e.g. Christine Davis, “Mutual Wills; Formalities; Constructive Trusts” [2003] Conv. 238 at 239; Ben McFarlane, “Constructive Trusts Arising on a Receipt of Property *Sub Conditione*” (2004) 120 L.Q.R. 667 at 688; Alexandra Braun, “Revocability of Mutual Wills” in Kenneth G.C. Reid, Marius J. de Waal, and Reinhard Zimmermann (eds.), *Exploring the Law of Succession: Studies National, Historical and Comparative* (Edinburgh Studies in Law Vol. 5) (Edinburgh: Edinburgh University Press, 2007) at p. 221.

<sup>67</sup> *Olins v Walters* [2009] Ch. 212 at [36]. See also *Re Dale (Deceased)* [1994] Ch. 31 at 38.

<sup>68</sup> *Re Hobley (Deceased)* unreported (The Times, 16 June 1997).

<sup>69</sup> *Lewis v Cotton* [2001] 2 N.Z.L.R. 21 (N.Z.C.A.) at [44], [55].

<sup>70</sup> *Olins v Walters* [2009] Ch. 212. See especially counsel’s submission at [24] which the Court of Appeal rejected at [35].

<sup>71</sup> *Charles v Fraser* [2010] W.T.L.R. 1489 at [59].

<sup>72</sup> *Fry v Densham-Smith* [2011] W.T.L.R. 387 at [33].

<sup>73</sup> *Healey v Brown* [2002] W.T.L.R. 849 (Ch) at [19] – [20].

<sup>74</sup> Note also that in *Birmingham v Renfrew* (1936) 57 C.L.R. 666 (HC Australia) at 680, Latham C.J. held that the constructive trust imposed by way of the mutual wills doctrine is excepted from any otherwise relevant formality requirements. Although his Honour referred specifically to the constructive trust exception in s. 53 of the Law of Property Act 1925, the same exception would likewise apply to the Law of Property (Miscellaneous Provisions) Act 1989 by virtue of s. 2(5).

<sup>75</sup> See also Peter Luxton, “*Walters v Olin [sic]: Uncertainty of Subject Matter — An Insoluble Problem in Mutual Wills?*” (2009) 6 Conv. 498 at 402; Mark Pawlowski and James Brown, “Problems with Mutual Wills — A Study of Probate Practice” (2012) 6 Conv. 467 at 472 – 73.

mean that the parties must have made an agreement *amounting to* a binding legal contract: they must intend to create legally binding obligations. This is consistent with the nature of equity, which looks to the substance of the agreement rather than the form in which it appears. As Lord Camden observed of the mutual wills doctrine, “[t]he actions of men here are stripped of their legal cloathing [*sic*], and appear in their first naked simplicity.”<sup>76</sup>

The reference to common law contracts which the phrase evokes is, however, not all sterile. In the domestic arena where the mutual wills doctrine operates, incidences of parties entering into agreements are very common; yet, the parties involved seldom intend to subject themselves to the sanction of a court of justice<sup>77</sup> and thus to be legally bound. With a fair amount of diligence, it is of course possible to spell out the precise threshold of the certainty of intention required for the mutual wills doctrine to operate. But such a technical and potentially arbitrary effort is unnecessary given that the *substance* of a legally binding contract already provides practical guidelines. Thus, there are different presumptions which operate in domestic and commercial contexts for establishing an “intention to create legal relations” for the purposes of legal contracts,<sup>78</sup> and the same presumptions are helpful in the mutual wills context to preclude the doctrine from operating where the arrangement merely reflects an honorary engagement,<sup>79</sup> mutual expectations or desires,<sup>80</sup> coincidences,<sup>81</sup> and where any other evidence negates the inference of the relevant agreement.<sup>82</sup> The method by which courts scrutinise and interpret the terms of legal contracts is also useful for determining whether “the terms of the mutual engagement ... are sufficiently certain that the court can see its way to enforce them”<sup>83</sup> in the mutual wills context. It is therefore helpful to draw assistance from contractual principles, but at the same time crucial not to lose sight of the basal concern, which is to establish “the existence of a legal obligation of a nature which *equity* would enforce.”<sup>84</sup>

### III. RELIANCE

In drawing the analogy with contracts enforceable at common law, courts are also often found referring to the need for “consideration”. This is often said to be supplied when T1 dies and a testamentary disposition is made in the agreed manner.<sup>85</sup> However, this does not

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<sup>76</sup> *Dufour v Pereira*, as reported in Hargrave, *Juridical Arguments and Collections Vol. 2* (1799) 304 at 310.

<sup>77</sup> On the dichotomy of intending the sanction to be “the authority of a Court of Justice” and “the conscience of the devisee”, see *M’Cormick v Grogan* (1867) 1 I.R. Eq. 313 at 328; *Re Snowden (Deceased)* [1979] Ch. 528 at 537.

<sup>78</sup> See e.g. *Edwards v Skyways Ltd* [1964] 1 W.L.R. 349.

<sup>79</sup> *Dufour v Pereira*, as reported in Hargrave, *Juridical Arguments and Collections Vol. 2* (1799) 304 at 276; *Lord Walpole v Lord Orford* (1797) 3 Ves. Jun. 402 at 420; 30 E.R. 1076 at 1085.

<sup>80</sup> *Re Goodchild (Deceased)* [1997] 1 W.L.R. 1216 at 1225; *Charles v Fraser* [2010] W.T.L.R. 1489 at [59]; *Osenton v Oseinton* [2004] EWHC 1055 (Ch) at [33].

<sup>81</sup> *Healey v Brown* [2002] W.T.L.R. 849 at [9].

<sup>82</sup> *Re Oldham* [1925] Ch. 75.

<sup>83</sup> *Lewis v Cotton* [2001] 2 N.Z.L.R. 21 (N.Z.C.A.) at [55], paraphrasing *Re Oldham* [1925] Ch. 75 at 86.

<sup>84</sup> *Osborne v Estate of Osborne* [2001] V.S.C.A. 228 (Melbourne C.A.) at [18] (emphasis added).

<sup>85</sup> *Dufour v Pereira*, as reported in Hargrave, *Juridical Arguments and Collections Vol. 2* (1799) 304 at 310; *Healey v Brown* [2002] W.T.L.R. 849 at [8]; *Birmingham v Renfrew* (1936) 57 C.L.R. 666 (H.C. Australia) at 688. In *Re Dale (Deceased)* [1994] Ch. 31 at 38 it was said that consideration is provided when T1 executes her will. However, T2 is not bound simply when T1 executes her will. It remains necessary for T1 to die with that being her last will, since if T1 makes a new will contrary to the agreement this may in some circumstances release T2 from any obligations, for instance where T2 has notice of this upon T1’s death (*Stone v Hoskins* [1905] P. 194 at 137).

mean that consideration *in the contractual sense* is required, since courts are not concerned with a common law contractual action. After all, executory consideration would bind parties to a contract at present, whereas the typical mutual wills arrangement binds T2 only at T1's death. By speaking of "consideration", judges can instead be understood as referring to the need for one party to have *relied* on the agreement for the mutual wills doctrine to operate. As Buchanan J.A. observed in *Osborne v Estate of Osborne*,<sup>86</sup> "[t]he fraud in equity lies in the departure by the survivor from the agreement or understanding that caused the first testator to act in reliance upon the survivor abiding by the agreement or understanding."

The need for reliance is essential because constructive trusts are never imposed *simply* to enforce an informal agreement; more is always required. In the most common mutual wills cases, it is T1's reliance which matters; in a rarer class of case, the law is concerned with T2's reliance.

### III.1. Reliance by T1

In the typical case, legally binding obligations will arise only upon T1's death, since that is when T1's testamentary disposition takes effect. By extension of logic, where the agreement provides that T1 will perform an *inter vivos* act, T2 is bound from the moment T1's performance is complete. The element of reliance is brought out in the description of T1 as having acted "on the faith of T2's promise".<sup>87</sup> The importance of T1's reliance can also be seen in the rules concerning the revocation of a mutual wills arrangement. Courts have held that legally binding obligations do not arise if T1 revokes and duly notifies T2,<sup>88</sup> or if T1 secretly departs from the agreement during his or her lifetime but T2 has notice of this departure upon T1's death.<sup>89</sup> The reason that the arrangement is not binding is that neither party can later claim to have relied on the agreement in order to render it enforceable against the other party: neither party has acted in reliance of the other's promise not to revoke the agreement.

As with the rules concerning the establishment of a mutual wills agreement, reliance refers to the substance as opposed to the mere form of T1's actions. Thus in *Re Hobley*,<sup>90</sup> before T1 died he made a minor but not obviously insignificant alteration to his testamentary disposition contrary to a mutual wills agreement with his wife (T2). Charles Aldous Q.C., sitting in the High Court, held that T2 was not bound by the agreement. The result is explicable on the basis that, although it was minor, the alteration nevertheless indicated that T1 did not dispose of property in reliance on T2's promise to perform her part of the agreement. Presumably the conclusion would be the same if T1 dies leaving a will where its terms appear to comply with the mutual wills agreement, but the agreement is made conditional on a certain event occurring (or, in the alternative, not occurring) during T1's

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<sup>86</sup> *Osborne v Estate of Osborne* [2001] V.S.C.A. 228 (Melbourne C.A.) at [24].

<sup>87</sup> See e.g. *Birmingham v Renfrew* (1936) 57 C.L.R. 666 (H.C. Australia) at 683; *Re Cleaver (Deceased)* [1981] 1 W.L.R. 939 at 947; *Re Dale (Deceased)* [1994] Ch. 31 at 48; *Olins v Walters* [2009] Ch. 212 at [38].

<sup>88</sup> *Dufour v Pereira* (1769) Dick. 419 at 421; 21 E.R. 332 at 333; *Lewis v Cotton* [2001] 2 N.Z.L.R. 21 (N.Z.C.A.) at [45].

<sup>89</sup> *Stone v Hoskins* [1905] P. 194 at 137.

<sup>90</sup> *Re Hobley (Deceased)* unreported (The Times, 16 June 1997).

lifetime, which does not (or, in the alternative, does) in fact occur.<sup>91</sup> Conversely, the agreement would hold good if, during T1's lifetime, T1 makes an alteration to his or her will which does not affect the substance of the agreed scheme.<sup>92</sup> This is because despite the alteration in form, the substance of T1's final will would indicate a disposition in reliance on T2's promise to perform the latter's part of the agreement.

### III.2. Reliance by T2

In two rarer cases, it is T2's reliance instead with which equity is concerned. The first relates to cases where T1 secretly departs from the agreement, but at T1's death T2 does not receive the requisite notice of T1's revocation.<sup>93</sup> This would arise where T2 no longer has the opportunity to reconsider his or her testamentary dispositions, for instance, where T2 loses testamentary capacity before,<sup>94</sup> or dies so soon after, the time of T1's death. In the second case, T2 would be prejudiced even if T1 provides notice of revocation during T1's lifetime or by virtue of T1's death. For instance, T2 may have made investments in T1's name<sup>95</sup> in reliance on an arrangement by which T1 promises to make a testamentary disposition in T2's favour, with T2 promising in turn to make a testamentary disposition in favour of C. Because it is not only T2 but also T1 who promises to make a testamentary disposition in an agreed manner, T1 is capable of being bound if T2 acts in reliance on T1's promise.

## IV. THE CAUSATIVE EVENTS

From the above discussion, it can be seen that the mutual wills doctrine requires the elements of agreement and reliance. However, on a more refined analysis, the causative events are in fact one party's *promise* and the other's reliance. It can be observed that the parties' agreement always consists of two promises, each party respectively committing him or herself to a future course of action or inaction. Yet, a constructive trust is not triggered by a mere agreement. After all, an informal agreement can in certain circumstances be revoked without consequence in equity. What is needed in addition is performance by one party of his or her promise, this being in reliance on the other party's promise. Once performed, however, there remains no outstanding promise on the part of the relying party which requires enforcement. Instead, what remains is the other party's unfulfilled promise. To state this differently, the party who is bound by a constructive trust is compelled to carry out his or her part of the agreement precisely because he or she made a (yet-to-be fulfilled) promise

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<sup>91</sup> This is extrapolated from the English courts' reluctance, in the context of the family homes constructive trust, to give effect to an express agreement concerning future action if it can be concluded that the agreement did not apply to the events which in fact transpired: *Gallarotti v Sebastianelli* [2012] EWCA Civ 865; [2012] 2 F.L.R. 1231 at [23].

<sup>92</sup> *Edell v Sitzer* (2001) 55 O.R. (3d) 198 (Ontario S.C.J.) at [65] – [66].

<sup>93</sup> This is the logical conclusion which flows from the rule, discussed above, that T2 is not bound if T1 secretly departs from the agreement during his or her lifetime but T2 has notice of this departure upon T1's death: *Stone v Hoskins* [1905] P. 194 at 137.

<sup>94</sup> There is the theoretical possibility that a statutory will may be drawn up on T2's behalf upon application to the Court of Protection (see especially ss. 16, 18 of the Mental Capacity Act 2005). However, it is extremely unlikely that any such will would have the effect of negating the mutual wills arrangement. This is because the Court must consider T2's "best interests" (s. 4 of the Mental Capacity Act 2005), and as part of that consideration s. 4(6)(a) provides that T2's "past and present wishes and feelings" must be considered. A statutory will, if drawn up, would therefore be unlikely to contradict T2's initial and likely ongoing intention to enter into a mutual wills arrangement.

<sup>95</sup> A modification of the facts in *Bigg v Queensland Trustees Ltd* [1990] 2 Qd. R. 11 (S.C. Brisbane) at 16.

and because the relying party has acted in reliance. As such, it is more accurate to speak of the mutual wills doctrine as being triggered by one's promise and the other's reliance.

## V. CONCLUSION: WHAT NEXT?

In the Law Commission's on-going review of mutual wills, it will be necessary first to define precisely the kind of arrangements which fall within the ambit of the doctrine. The analysis in Section II above is instructive. An arrangement falls within the purview of the doctrine where T1 and T2 intend to be legally bound through an agreement that each will carry out a course of action, which insofar as T2 is concerned relates to a testamentary disposition in favour of C, the disposition of which includes property owned by T2. Subject to these requirements, parties have latitude to customise the other terms of their agreement. The agreement can be proved expressly, or be inferred from the surrounding circumstances. It is however not necessary to establish that the agreement amounts to a contract enforceable at common law. This analysis helpfully distinguishes mutual wills from other closely related doctrines such as secret trusts, the doctrine in *Rochefoucauld v Boustead*, and common law contracts. In this regard, it is of no little significance that the Law Commission's review targets mutual wills and not these other doctrines, which emphasises the need for identifying the precise ambit of the mutual wills doctrine.

As discussed in Section III, however, the mere fact that an agreement falls within the ambit of the doctrine does not necessarily entail that the doctrine automatically *applies*, that is, that the parties are immediately bound by a constructive trust. Instead, it is necessary for one party to act in reliance on the arrangement before the other party will be compelled to perform his or her part of the agreement. And as seen in Section IV, it follows from this that the causative events of the doctrine can be refined as one party's promise and the other's reliance. It also follows that a more refined understanding of the "agreement-based" nature of the doctrine can be attained: it gives effect to informal promises where there is an agreed act of reliance by another.

On the Law Commission's website,<sup>96</sup> its review of the law concerning wills is described as having the aim of "reduc[ing] the likelihood of wills being challenged after death, and the incidence of litigation. Such litigation is expensive, can divide families and is a cause of great stress for the bereaved." This is reminiscent of Mummery L.J.'s comment in *Olins v Walters*<sup>97</sup> that the doctrine "continues to be a source of contention for the families of those who have invoked it. The likelihood is that in future even fewer people will opt for such an arrangement and even more will be warned against the risks involved." Along the same vein, commentators have increasingly taken an antagonistic approach in suggesting that mutual wills agreements are not "sensible",<sup>98</sup> and should be "avoided"<sup>99</sup> or even "abolished".<sup>100</sup> It might therefore be thought that the Law Commission ought ultimately to propose a complete abolition of the mutual wills doctrine.

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<sup>96</sup> <<http://www.lawcom.gov.uk/project/wills/>> (accessed ...).

<sup>97</sup> *Olins v Walters* [2009] Ch. 212 at [3].

<sup>98</sup> Roger Kerridge, *Parry and Kerridge: The Law of Succession*, 12<sup>th</sup> edn. (London: Sweet & Maxwell, 2009) at [6-41].

<sup>99</sup> Ruth Hughes, "Mutual Wills" (2011) 3 P.C.B. 131 at 136.

<sup>100</sup> Nicky Richardson, "Legislation for Mutual Wills in New Zealand" (2010) 24 T.L.I. 99 at 109.

However, the identification of promise and reliance as the causative events of the doctrine advises caution. It is observable that there are a number of other equitable doctrines which similarly impose constructive trusts in response to informal agreements by which one party makes a promise and the other acts in reliance,<sup>101</sup> for example secret trusts,<sup>102</sup> the doctrine in *Pallant v Morgan*,<sup>103</sup> and proprietary estoppel.<sup>104</sup> These doctrines have features which are very similar to the three minimum requirements of the mutual wills doctrine. Thus, secret trusts always involve a testamentary disposition; a promise in the context of proprietary estoppel relates to property owned by the promisor; and for the doctrine in *Pallant v Morgan* to operate the promisor must give “an assurance” as opposed to extending merely “a friendly gesture”,<sup>105</sup> which indicates the need for an intention to be legally bound. The similarities between these doctrines and the mutual wills doctrine suggest that irreconcilable inconsistencies may be caused if the mutual wills doctrine were to be abolished. If by way of these other doctrines constructive trusts can be imposed where one party makes an informal promise and another acts in reliance, the agreement of which reflects *one of* the three minimum requirements, then there is nothing in principle which would suggest anything sinister where *all* three requirements are fulfilled, and where the elements of promise and reliance are found on the facts of a case. After all, so long as it continues to be possible to make wills without legal advice,<sup>106</sup> then there will be a variety of arrangements testators might attempt to enter into, and these will need to be addressed consistently with how courts approach other related doctrines.

Instead of attempting to marginalise or abolish the mutual wills doctrine, attention should be focused on addressing the *practical* problems which may arise in relation to the doctrine. For instance, what *rights* does T2 have during his or her lifetime in relation to the property subject to a constructive trust, where such rights are not spelt out in the parties’ agreement? What avenues are available for C to *prevent or recover* dispositions made by T2 which are contrary to the agreement? Are the rules relating to *proving* an intention to create legal obligations firm enough?<sup>107</sup> It is submitted that the key to attaining the goal of reducing

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<sup>101</sup> See, generally, Simon Gardner, “Reliance-Based Constructive Trusts” in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Oxford: Hart Publishing, 2010).

<sup>102</sup> In the typical case, B informally promises a testator (A) that B will hold any property he or she receives under A’s will for C. A executes a will in B’s favour, which remains unchanged until A’s death in reliance on B’s promise. A constructive trust binds B to his or her promise.

<sup>103</sup> In the typical case, one bidding party (B) at an auction informally agrees to cede some part of the property yet to be acquired to another bidding party (A); and in reliance A refrains from attempting to procure the property. A constructive trust binds B to his or her promise if and when B successfully acquires the property.

<sup>104</sup> In the typical case, B induces A to assume (commonly through an informal promise) that B will cede an interest in property B owns to A, and A detrimentally relies on the assumption. Guided by the notion of the “minimum equity to do justice to the plaintiff”, a court may compel B either to pay monetary compensation or to make good B’s promise by imposing a constructive trust.

<sup>105</sup> *Pallant v Morgan* [1953] Ch. 43 at 46.

<sup>106</sup> Note, however, that the Law Commission is also reviewing the formalities required for a valid will.

<sup>107</sup> I have argued elsewhere that the answers to these questions are to be found in a simple application of orthodox trust principles: Ying Khai Liew, “Explaining the Mutual Wills Doctrine” in Charles Mitchell and Birke Häcker (eds), *Current Issues in Succession Law* (Oxford: Hart Publishing, 2016). This is in contrast to the increasingly popular view that satisfactory answers to these questions can only be found by treating the mutual wills doctrine as a *sui generis* or anomalous doctrine: see e.g. *Re Goodchild (Deceased)* [1997] 1 W.L.R. 1216 at 1230; TG Youdan, “The Mutual Wills Doctrine” (1979) 29 U. Toronto L.J. 390 at 401; Henry Legge and Alastair Norris, “Contract and Conscience: The Decline of the Mutual Will” (1998) 6 P.C.B. 332 at 336; Rosalind Croucher, “Mutual Wills: Contemporary Reflections on an Old Doctrine” (2005) 19 Melb. U. L. Rev. 390; *Parker and Mellows: The Modern Law of Trusts*, 9<sup>th</sup> edn. (London: Sweet & Maxwell, 2008) at [10 – 331].

litigation lies in a careful investigation of these practical issues, rather than a consideration of whether the mutual wills doctrine should be abolished.