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Pars Ram Brothers and Commercial Certainty: The Future of the Rolling Charge

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I. Introduction

A trustee commingles multiple innocent beneficiaries' funds in an account and dissipates these funds to a level at which the total remaining is insufficient to satisfy all claims. This situation is one in which any beneficiary could find themself. In these circumstances, the court finds itself having to answer a difficult question: how should these remaining funds be distributed?

Several approaches to distribution have arisen in England and Wales jurisprudence. These can be categorised as the first in, first out method, *pari passu* and the rolling charge. The 2018 Singapore High Court case of *Pars Ram Brothers (Pte) Ltd v Austrian & New Zealand Banking Groups Ltd*[1] offers useful insight into the debate as to the correct approach, and from this several tenets of discussion can be synthesised.

It is submitted that the uncertainty surrounding the correct method of distribution is unacceptable in the contemporary commercial context of trust law, and that courts must therefore alight on a settled approach to resolving contests between rival beneficiaries. Following this, the three alternative methods will be analysed against the *Pars Ram* discussion points. It is concluded that, although not always practicable, the rolling charge is the most appropriate approach to adopt as default in England and Wales and should be incorporated moving forward. The

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1 [2018] SGHC 60.

pari passu approach should be used where the rolling charge is inappropriate, whilst the first in, first out rule should be formally recognised as redundant in this context.

II. Alternate Methods

In order to outline the functioning of the separate approaches, let us assume that A, B and C are all separate beneficiaries who have their equitable interests managed by a shared trustee (T).[2] T places £100 belonging in equity to A into an account, followed by a further £100 belonging to B. T then dissipates £100 from the account, before depositing a further £200 belonging in equity to C. There is £300 in the account, with £400 having been deposited and £100 withdrawn (*see table 1*). Upon discovering the breach, the beneficiaries will likely wish to retrieve their funds from the account, meaning the insufficient commingled funds must be distributed. There are several methods for doing so, with each, in most instances, producing different results (*see table 2*).

Table 1

Beneficiary	*Deposit*	*Withdrawal*	*Balance*
A	£100		£100
B	£100		£200
		£100 (Dissipated)	£100
C	£200		£300

A. Clayton's case

The first and most infamous method of distributing mixed funds between innocent beneficiaries is the first in, first out approach from *Devaynes v Noble*,[3] or *Clayton's* case. This principle dictates that "when sums are mixed in a bank account as a result of a series of deposits, withdrawals are treated as withdrawing the money in the same order as the money was deposited."[4] As such, in our above example, the £100 dissipated by T would be attributed to A's £100, as this deposit was the *first in* and the dissipation was the *first out*. As a result of A footing the entire

[2] Sarah Lowrie and Paul Todd, 'In Defence of the North American Rolling Charge' [1997] DLJ 43, 51.

[3] (1816) 35 ER 781.

[4] *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22, 35.

£100 dissipation, B would be entitled in equity to their full £100, and C would be similarly entitled to their £200 (*see table 2*).

B. Pari passu

The *pari passu* (or *pro rata*) approach attributes "all gains and losses in proportion to the total contributions made by each"[5] trust. As laid out by Lord Woolf in *Barlow Clowes*,[6] the practical reality of this method involves "establishing the total quantum of the assets available and sharing them on a proportionate basis among all the investors […], ignoring the dates [of investment]".[7] As articulated in *Re Diplock's Estate*,[8] all beneficiaries "share pari passu, each being innocent."[9] In our example, the total quantum of the assets is £300, three-quarters of the total £400 deposited. Consequently, each beneficiary is entitled in equity to three-quarters of their original contribution, and must each accept a proportional one-quarter loss. For A and B this entitlement is £75 each, whilst C has a claim for £150 (*see table 2*).

C. Rolling charge

The rolling charge is the most complex of the three methods. Commonly attributed to the Ontario Court of Appeal case of *Re Ontario Securities Commission v Greymac Credit Corporation*,[10] this method treats "the commingled fund as a blend or cocktail of credits made at different times and from different sources".[11] Withdrawals are treated "in the same proportions as the different interests in the account […] bear to each other at the moment before the withdrawal is made."[12] As such, each beneficiary's rateable interest must be "recalculated at *every instance of withdrawal*".[13] In our example, as their deposits occur before the dissipation, the rolling charge recognises A and B's equities as equal, apportioning the loss of the dissipated £100 equally between them (£50 each). C's funds are deposited after

5 David Hayton et al, Law of Trusts and Trustees (LexisNexis 2017) 90.35.
6 *Barlow* (n 4).
7 *Barlow* (n 4) 36.
8 [1948] Ch 465.
9 ibid 539.
10 (1986) 55 OR (2d) 673.
11 *Pars Ram* (n 1) [15].
12 *Barlow* (n 4) 35.
13 *Pars Ram* (n 1) [15].

the dissipation, and therefore the rolling charge considers them unaffected by the withdrawal, entitling them to £200 (*see table 2*).

Table 2

	A's Claim	*Percentage of Contribution*	*B's Claim*	*Percentage of Contribution*	*C's Claim*	*Percentage of Contribution*
First In, First Out	£0	0%	£100	100%	£200	100%
Pari Passu	£75	75%	£75	75%	£150	75%
Rolling Charge	£50	50%	£50	50%	£200	100%

III. Uncertainty and Contemporary Context

Table 2 highlights the potential for significant financial variation depending on the method adopted. In fact, the simplicity of the above examples may misrepresent the gravity of these potential variations. Imagine, for example, that the sums in question are ten or even one-hundred times larger than those above. With thousands at risk, the consequences can swiftly become severe.

Given the serious potential for substantial outcome variation between method of distribution, one would expect this area to be firmly settled. Unfortunately, this is not so. Following a discussion of the relevant authorities, it will be demonstrated not only that this area of law is uncertain, but that in the contemporary commercial context of trust law, this uncertainty is unacceptable.

A. Authorities

Current England and Wales authority for resolving contests between rival beneficiaries is uncertain and in need of clarification "at a high level".[14] The first in, first out approach from *Clayton's* case arose from a dispute between banker and customer,[15] and was adopted for use in an equitable distribution in *Pennell v Deffell*[16] in 1853. The method was eventually overruled for use in resolving contests between beneficiary and trustee in *Re Hallett's Estate*,[17] but was relied on in *Re Diplock's Estate*[18] for distribution between innocent beneficiaries (though "unenthusiastically"[19]).

[14] Matthew Conaglen, 'Contests between Rival Trust Beneficiaries' (2005) 64(1) CLJ 45, 47.
[15] Lowrie and Todd (n 2) 61.
[16] (1853) 43 ER 551.
[17] (1880) 13 Ch D 696, 750.
[18] *Re Diplock's Estate* (n 8) 554.
[19] Lowrie and Todd (n 2) 61.

Despite the rule's criticism having extended far beyond *Re Diplock's Estate*, the principle is yet to be abolished in England and Wales.

Continued acceptance of the first in, first out rule is not universal, with many international jurisdictions having overruled the approach entirely.[20] In *Re Ontario*, the court was "not aware of any argument of logic [...] or fairness which would support"[21] its application. Similarly, the Royal Court of Jersey described the rule's results as "haphazard".[22] In *Re Walter J. Schmidt & Co*,[23] American judge Learned Hand J suggested the rule delivered "a common misfortune"[24] and had "no relation whatever to the justice of the case."[25] Finally, the New South Wales Supreme Court found the rule to be inapplicable "as a matter of principle".[26]

England and Wales authority suggests the rule cannot be treated as a mere exception,[27] and thus the case remains a tokenistic starting point based on "long-established general practice."[28] However, a modern judicial trend against the rule has left it in a jurisprudential void,[29] remaining the first port of call,[30] but being regularly bypassed by courts with little effort. In *Russell-Cooke Trust Co v Prentis (No. 1)*,[31] for example, Lindsay J considered that the method could be displaced by even "a slight counterweight"[32] and that it may be best referred to as an exception rather than a rule.[33]

Unfortunately, even once the rule has been bypassed, the options available to courts remain unsatisfactory. England and Wales courts, despite willingness to do so,[34] have refused to accept the rolling charge. This refusal remains tentative, with reasons against its implementation being based predominantly on arguments of practicability,[35] not principle. Thus, the uncertainty caused by the continued

20 Conaglen (n 14) 46.
21 *Re Ontario* (n 10).
22 *In re Esteem Settlement* [2002] JLR 53 [107].
23 (1923) 298 Fed 314.
24 ibid 316.
25 ibid 316.
26 *Re French Caledonia Travel* [2003] NSWSC 1008 [169].
27 Conaglen (n 14) 46.
28 *Barlow* (n 4) 33.
29 Mark Pawlowski, 'The demise of the rule in Clayton's case' [2003] Conv 339, 345.
30 *Barlow* (n 4) 33.
31 [2002] EWHC 2227 (Ch).
32 ibid [55].
33 ibid.
34 *Barlow* (n 4) 35.
35 ibid.

existence of the first in, first out is not reduced by the availability of other methods, but instead increased.

The only certainty existing in this area of equity is that the *pari passu* approach *is* an actionable method of distribution in England and Wales. However, where certainty exists in the procedure, the functioning and outcome of this method lacks the degree of certainty necessary in the contemporary commercial context. It is clear therefore that clarification in this area of trust law is overdue, particularly given the trust's new role as an "entrepreneur for commercial uses."[36]

B. Contemporary commercial context

Although cited as the "greatest and most distinctive achievement"[37] of English jurisprudence, the trust's roots are alien from its contemporary applications. Stemming from the discretionary conscience of equity and the "Chancellor's foot",[38] trusts arose as instruments by which ownership interests were preserved in situations involving dishonest temporary landlords who, relying on the common law, would refuse to return land to knights returning from crusades.[39] Equity, in bypassing the common law's bite, "recognised that the true beneficial ownership of the land remained with the knight,"[40] thus introducing the concept of split ownership between law and equity.[41] The objectives of these earlier trusts were ostensibly private, rather than commercial.[42] This early model was inherently flexible, enabling the court to act as a pillar of conscience in unconscionable situations. Although the trust remains useful as the "characteristic device"[43] for the organisation of intergenerational wealth,[44] the traditional conception has expanded into its contemporary role as a "commercial device",[45] requiring a greater emphasis on certainty.

This shift into the commercial sphere is by no means minor. Langbein, for example, states that "over 90% of the money held in trust in the United States is

[36] Ruiqiao Zhang, 'The new role trusts play in modern financial markets: the evolution of trusts from guardian to entrepreneur and the reasons for the evolution' (2017) 23(4) T&T 453, 453.

[37] Frederic Maitland, 'The Unincorporated Body', *McMaster University Archive* (1902) <https://econ-papers.repec.org/paper/hayhetpap/maitland1902.htm> (accessed August 2020).

[38] John Selden, *Table Talk of John Selden* (Selden Society 1927) 25.

[39] Alastair Hudson, *Equity & Trusts* (9th edn, Routledge 2017) 37.

[40] ibid.

[41] ibid.

[42] Zhang (n 36) 454.

[43] John Langbein, 'The Secret Life of the Trust: The Trust as an Instrument of Commerce' (1997) 107(1) YLJ 165, 165.

[44] ibid.

[45] Paul Davies and Graham Virgo, *Equity & Trusts: Text, Cases, & Materials* (2nd edn, OUP 2016) 25.

in commercial trusts as opposed to personal trusts."[46] Furthermore, in the United Kingdom (UK), Thornton sets out that commercial trusts hold well over £200 billion in beneficial interests.[47] Examples of implementations across UK[48] and international markets include pension trusts, real estate trusts, oil royalty trusts and asset securitisation trusts.[49]

The trust offers clear benefits to commercial parties, for example through the automatic imposition of a fiduciary duty. The no conflict and no profit elements[50] assist in preventing fund managers from "being swayed",[51] therefore protecting investors' interests.[52] This prophylaxis offers further commercial benefits, with investors being more likely to commit capital when able to rely upon the managers' "being bound by [even] conventional fiduciary standards."[53] Furthermore, when this duty is breached, beneficiaries may rely on the strength of equity's proprietary remedies. The ability of an investor with an equitable interest to employ equity's "metaphysical"[54] methods and trace their mismanaged funds into mixed accounts and claim property *in specie* is exceptionally powerful.

It is apparent from this that the use of the trust in commerce introduces a conflict between equitable flexibility and commercial certainty. As noted by Hayton, Pigott and Benjamin, a continuing theme of commercial law is its need to defend itself against any "unanticipated impact"[55] of trust law and the potentially unwarranted strength of equitable proprietary remedies. Yip and Lee recognise that this inventiveness may be exploited by lawyers seeking advantages in commercial litigation - this poses clear challenges.[56]

With trillions held in commercial trusts worldwide,[57] it is vital that all components of trust law, including the approach taken in resolving contests between rival beneficiaries, are as certain as possible so as to promote general certainty within commercial dealings. Without this, the ability to assess costs and manage

[46] Langbein (n 43) 166.
[47] Rosy Thornton, 'Ethical Investments: A Case of Disjointed Thinking' [2008] CLJ 396, 396.
[48] Zhang (n 36) 456.
[49] Langbein (n 43) 168–172.
[50] *Boardman v Phipps* [1967] 2 AC 46.
[51] *Bray v Ford* [1896] AC 44, 51 (Herschell LJ).
[52] Matthew Conaglen, 'The nature and function of fiduciary loyalty' (2005) 121 LQR 452, 460.
[53] Langbein (n 43) 183.
[54] *Re Diplock's Estate* (n 8) 520.
[55] David Hayton et al, 'The Use Of Trusts In International Financial Transactions' (2002) 1 JIBFL 23, 25.
[56] Man Yip and James Lee, 'The commercialisation of equity' (2017) 37(4) LS 647, 651.
[57] Langbein (n 43) 168.

risk is thwarted,[58] with prudent investment being impossible and the likelihood of expensive litigation being increased.

The results of the uncertainty surrounding the correct approach of distributing commingled funds are plain in commercial trust cases such as *Re Ontario*. In this case before the Ontario Court of Appeal, $5,696,600 had become commingled in an account known as G account. The parties' respective positions in the account were as follows: $4,683,000 belonged in equity to one group of beneficiaries (*the companies*), $841,285.26 belonged to a different group of beneficiaries (*the participants*), whilst $172,314.74 was the trustee's. After $4 million was moved from G account into a separate account (C account), $1,343,191.34 was dissipated from the G account. As a result, G account's balance was reduced to $353,408.66 whilst the C account's balance remained at $4 million. Having established interests in the funds, the court was tasked with establishing the respective entitlements to the remaining $4,353,408.66 from the G and C accounts (*see table 3*).

Table 3

Beneficiary	*Deposit into G Account*	*Withdrawal from G Account*	*Balance of G Account*	*Balance of C Account*
The Companies	$4,683,000		$4,683,000	$0
The Participants	$841,285.26		$5,524,285.26	$0
Trustee	$172,314.74		$5,696,600	$0
		$4,000,000 (Transferred to C account)	$1,696,600	$4,000,000
		$1,343,191.34 (Dissipated)	$353,408.66	$4,000,000

As seen in table 4 below, the different methods of distribution available to the Court produced hugely different results for the beneficiaries. In fact, the variance in recoverable funds between the methods for either party in *Re Ontario* was $309,565.53 –[59] a vast sum, particularly in 1986 when the case was decided. It

[58] Iain MacNeil, 'Uncertainty in Commercial Law' [2009] EdinLR 68, 70.

[59] See table 4.

is submitted therefore that the expense of litigation caused by the uncertainty as to the entitlement to the $309,565.53 could have been easily avoided with increased certainty surrounding the methods of distribution.

Table 4

	The Companies' Claim	*Percentage of Contribution*	*The Participants' Claim*	*Percentage of Contribution*
First In, First Out	$4,000,000	85.4%	$353,408.66	34.9%
Pari Passu	$3,690,434.47	78.8%	$662,974.19	78.8%

IV. Discussion and Analysis

Having established that greater certainty is essential, it will now be demonstrated that, although not always practicable to implement, the rolling charge is the appropriate approach to adopt as default in England and Wales jurisprudence and should be incorporated moving forward. The *pari passu* approach should be used where the rolling charge is inappropriate, whilst the rule from *Clayton's* case should be formally recognised as redundant in this context. This analysis will be guided by reference to tenets of debate synthesised from *Pars Ram*.

A. Pars ram

The 2018 case of *Pars Ram* offers useful insight into the debate as to the correct approach to be taken when distributing innocent beneficiaries' commingled funds. Pars Ram Brothers (the company), prior to its liquidation, traded primarily in spices. Trades were financed by banks who, through a chain of loans and securitisations, would have the company's financed stock (or the proceeds) held on trust for them by the company.[60] Upon entering insolvency proceedings, remaining pepper stocks were found in the company's warehouse. Given its perishability, it was agreed that the pepper would be sold, with the proceeds being held on trust for creditors.[61] Of the 17 categories of pepper sold, the proceeds of four were disputed. For the 13 non-contentious categories, only the lending banks could claim an interest. However, for the four disputed categories, both the lending banks *and* general creditors were permitted to assert interests.[62] The total sum of claims made against the disputed categories exceeded the $4.68 million total of their sale

[60] *Pars Ram* (n 1) [2].
[61] ibid [3].
[62] ibid [4].

proceeds,[63] meaning it was necessary for the court to identify the correct method for distributing the remaining funds.

For reasons discussed below, the court concluded that the rolling charge was most appropriate, thus further establishing the credibility of the rolling charge internationally. Several pillars of discussion have been synthesised from the judgement of Audrey Lim JC, and these will be used to guide the following analysis. These pillars are: outcome fairness and rough justice,[64] party intention,[65] and impracticability.[66]

B. Outcome fairness and rough justice

A key concern when determining the method of distribution is the fairness of the final apportionment. For litigants, this is naturally of paramount importance. However, given the nature of the scenario, in which the funds are insufficient to satisfy all claims, it is of course impossible for any method of distribution to provide complete justice to all beneficiaries.[67]

The fairness of the first in, first out rule requires little analysis. As set out by Learned Hand J, the rule delivers "a common misfortune […] which has no relation whatever to the justice of the case."[68] *Pars Ram* offers no fresh criticism, though this is perhaps because the judicial and academic condemnation of the principle is already extensive. The rule has been said to produce "arbitrary"[69] results as well as being "unfair to early investors".[70] As can be seen in table 2, the rule is harsh on beneficiary A who, in reality, is in a position no different to that of beneficiary B. As a result of this indisputable criticism, the *Clayton* "rule of convenience",[71] despite remaining a starting point, is often sidestepped "in favour of a method that would produce a more just and equitable outcome."[72]

The excessive injustice of the first in, first out approach may explain why England and Wales trust law has been content with the "rough justice"[73] of *pari passu*. Henderson J in *Charity Commission v Framjee*[74] describes this roughness

63 ibid [6].
64 *Pars Ram* (n 1) [26(b)].
65 *Pars Ram* (n 1) [22].
66 *Pars Ram* (n 1) [19].
67 *Re International Investment Unit Trust* [2005] 1 NZLR 27 [73]; *Graham v Arena Capital Limited* [2017] NZHC 973 [42].
68 *Re Walter* (n 23).
69 *Barlow* (n 4) 46.
70 *Barlow* (n 4) 32.
71 *Re Diplock's Estate* (n 8) 554.
72 *Pars Ram* (n 1) [11].
73 *Charity Commission for England and Wales v Framjee* [2014] EWHC 2507 (Ch) [61].
74 ibid.

as "unavoidable",[75] noting that the *pari passu* method responds to the human feeling that those affected by common misfortunes should bear any resulting burden equally.[76] It is certainly unavoidable that the shortfall in funds must be accounted for and reflected in the apportionments to the beneficiaries. However, it is submitted that the rough justice afforded by the *pari passu* approach can, in many cases, be avoided. The only possible justification for accepting such rough justice is in response to the rolling charge's impracticability.

The predominant issue with *pari passu*'s rough justice is, simply, its inherent inaccuracy. This was recognised by Rimer J in *Shalson v Russo*,[77] in which it was noted that the *pari passu* approach ignores evidence of the transactional reality of the beneficiaries' monies.[78] As suggested by Audrey Lim JC in *Pars Ram*, an application of *pari passu* may "be unfair to the most recent contributors as they may have their interests in the fund diminished by withdrawals *prior* to their contribution".[79] This is undesirable from an academic perspective, although it could be justified with pragmatic arguments[80] if the differences in outcome between methods of distribution are negligible. Unfortunately, in many commercial cases, these differences are often extensive.[81]

Let us refer back to our example involving A, B and C beneficiaries. A's £100 is placed into the account, followed by B's £100. £100 is then dissipated, before C's £200 is deposited. The balance is £300, with £400 having been deposited and £100 withdrawn.[82] C's £200 is placed into the account *after* the £100 is dissipated by the trustee. This begs the question of why C should be affected by this dissipation? They are, for all intents and purposes, in a separate situation to the A and B beneficiaries. If the court were to adopt the *pari passu* method, C would be made to share the impact of a dissipation they were not party to. The rolling charge, conversely, recognises the true position of C and returns to them their £200 contribution.

The judgement of Henderson J in *Framjee* incorrectly purports that the *pari passu* method is rooted in equality. In *Barlow Clowes*, Woolf LJ cites *Sinclair v Brougham*[83] as justification for a *pari passu* distribution, Lord Sumner's judgement asserting that the *pari passu* approach may be adopted when the investors' claims

[75] ibid [61].
[76] ibid.
[77] [2003] EWHC 1637 (Ch) [149]–[150].
[78] Hayton et al (n 5) 90.36.
[79] *Pars Ram* (n 1) [16].
[80] See iv.d.
[81] See table 4.
[82] See table 1.
[83] [1914] AC 398.

are "equal and […] for the present purpose identical."[84] Woolf LJ spends little time assessing whether the *Barlow Clowes* investors' claims are "equal and […] for the present purpose identical",[85] concluding simply that they are. It is suggested that a more thorough analysis of the facts against the *Sinclair* dicta would have revealed that investors' claims are often not as equal as is initially apparent.[86] It is true that equal "equitable charges rank pari passu".[87] However, as recognised by Conaglen, it cannot be said that all contributors necessarily have equal equities just by virtue of being in the same account.[88] The rolling charge, unlike *pari passu*, recognises the differing equities of the contributors and distributes accordingly, unfairly prejudicing neither early nor late beneficiaries.

Audrey Lim JC in *Pars Ram* suggests that the rolling charge is likely to "produce a fairer and more equitable result compared to the *pari passu* method".[89] The fairness of the rolling charge's result is clear. However, can it be said that the rolling charge is "more equitable"?[90] This must be answered in the affirmative, as the method aligns more completely with equitable tracing principles, namely the lowest intermediate balance rule and equitable conceptions of chronology.

Following the lowest intermediate balance rule,[91] if a claimant's money is mixed with other monies in an account and the balance of the account falls below the value of the claimant's contribution, the amount the claimant can recover is limited to the "maximum amount that can be regarded as representing their money."[92] In *Roscoe v Winder*[93] a beneficiary's £455 was paid into an account by a trustee. The account's balance then fell, through dissipation, to £25, but then increased back to £358 following an unrelated deposit from the trustee. The court held that the highest figure available to the claimant was "the smallest amount to which the balance […] had fallen"[94] (£25), because the trustee had had no

84 ibid 458.
85 ibid.
86 However, adoption of *pari passu* was justified by impracticability concerns – see iv.d.
87 *Barlow* (n 4) 44.
88 Conaglen (n 14) 48.
89 *Pars Ram* (n 1) [21].
90 ibid.
91 Hayton et al (n 5) 90.36.
92 Graham Virgo, *The Principles of Equity & Trusts* (OUP 2018) 566–567.
93 [1915] 1 Ch 62.
94 ibid 70.

intention "to clothe those [newly deposited] moneys with a trust in favour of the"[95] beneficiary.

Despite criticism of the rule in situations of commingling with both beneficiaries and trustees,[96] the principle remains good law, having received judicial support in *The Federal Republic of Brazil v Durant International Corp*.[97] Here, Lord Toulson reminds us that if money in a bank account dwindles such that it "has ceased to exist, it cannot metamorphose into a later property interest."[98] It is clear that this rule follows and abides by proprietary principles, and thus, as Smith advocates, "must apply between innocent beneficiaries."[99] Whilst the *pari passu* method ignores this fundamental principle, the rolling charge recognises the account's lowest intermediate balance at each withdrawal and distributes accordingly. Therefore, even on a matter of principle, the rolling charge is preferable over *pari passu*.

It is apparent that the lowest intermediate balance rule and rolling charge both base their operations on a chronological analysis of a fund's transactional history. Despite arguments to the contrary, it is submitted that a chronological analysis is appropriate when resolving contests between rival beneficiaries. Given the contemporary commercial context in which trusts are employed, many beneficiaries will seek to trace through electronic accounts. This raises the need for reconciliation of tracing, chronology and bank accounts.

The crux of tracing is value, this being the "only constant that exists before, through and after the substitutions".[100] Despite seeming prima facie vital, cases such as *Foskett v McKeown*[101] have migrated tracing's emphasis away from strict chronology and transactional links[102] by clarifying that tracing operates through "attribution not causation."[103] Although the need for chronology is lessened, it is not negated entirely, and it is apparent that a degree of chronological analysis remains essential. For example, when discussing the possibility of tracing into a debt (backwards tracing), Leggatt LJ in *Bishopsgate Investment Management v Homan*[104]

95 ibid.

96 Tatiana Cutts, 'The Role of Tracing in Claiming' (University of Oxford 2015) 183; Virgo (n 92) 567.

97 [2015] UKPC 35.

98 ibid [17].

99 Lionel Smith, 'Tracing in Bank Accounts: the Lowest Intermediate Balance Rule on Trial' (2000) 33 Can Bus LJ 75, 80.

100 Lionel Smith, *The Law of Tracing* (OUP 1997) 119.

101 [2001] 1 AC 102.

102 Alexandra Clarke, 'The future after *Durant*: is backwards tracing the way forward?' [2016] OUULJ 91, 93.

103 *Foskett* (n 101) 137.

104 [1995] Ch 211.

suggests it is not possible since value "cannot be followed into something which existed […] before the money was received".[105]

Any further analysis of the legitimacy of backwards tracing is not within the scope of this article. However, it is clear that the distribution of a commingled fund relies on tracing's approach to chronology. Despite attaching weight to the order of transactions, the rolling charge's focus on chronology is different to that of the first in, first out approach. The rolling charge is not concerned with the often arbitrary order of specific contributions, but instead the chronological connection between deposits and withdrawals. As per *Foskett*, the rolling charge operates through attribution, not causation, selectively adopting the transactional history so as to attribute withdrawals to deposits and obtain "the substance of the transaction[s] in question and not […] the strict order".[106] The first in, first out rule, conversely, is inherently causative, its principles based not on attribution of value but on debt appropriation.[107] It is therefore true that the rule "has nothing to do with tracing".[108]

Cutts writes that, "even though there is a long-established consensus that a bank account cannot be conceptualised as a linear progression of independent debts,"[109] trust law has not yet "outgrown the process of appropriating debits and credits chronologically".[110] Cutts' argument's focus on the reality of bank accounts' functioning is indisputable. However, this is not the reasoning behind the procedure of distributing commingled funds. The process is inherently artificial.[111] No amount of evidence is available to assist in determining exactly which beneficiary's money was dissipated at any certain point;[112] the commingled funds lack identity and ownership is "impossible to determine".[113] Instead, presumptions are required to interpret deposits and withdrawals so as to determine how best the remainder should be distributed.

This artificiality may appear primitive; this is not so. The rolling charge is utilised to best distribute the funds in the account according to its transactional history. Although physically impossible to conclude what happened to a beneficiary's money after being commingled, it is possible to construct a narrative so as to assume how the losses could have occurred following dissipation. Despite

[105] ibid 221.
[106] *Foskett v McKeown* [1998] Ch 265, 283; *Brazil* (n 97) [38].
[107] D.A. McConville, 'Tracing and the Rule in Clayton's Case' (1963) 79 LQR 388, 401.
[108] *Barlow* (n 4) 44.
[109] Cutts (n 96) 15.
[110] ibid.
[111] Smith (n 99) 78.
[112] ibid.
[113] *Re Ontario* (n 10) [682a-b].

Cutts' position, such analysis can apply to bank accounts because the content of the mixed bulk is unimportant. Whether it be a bank account, stocks of pepper,[114] or any other collection of fungibles – the contexts are analogous. A degree of chronological attribution is necessary to best establish the respective equities of the claimants so as to appropriately distribute their commingled assets.

It is therefore submitted that, as suggested in *Pars Ram*, the rolling charge is the "fairer and more equitable"[115] method of distribution, and should be incorporated moving forward. However, this incorporation cannot be immutable, and must give way to alternative party intention and administrative impracticability concerns.

C. Party intention

Audrey Lim JC in *Pars Ram* sets out that the intention of the parties is "an important overarching consideration"[116] for choosing a method of distribution. This intention may be express, inferred or presumed and,[117] although all the circumstances of the case should be considered,[118] it is likely that the terms and structure of the relevant contribution or investment will be indicative.[119]

Where no explicit intention is present, implied and presumed intentions must be relied upon. These pose greater difficulty to the courts and are plainly harder to ascertain with certainty. In *Pars Ram*, Audrey Lim JC relies on the *Barlow Clowes* judgement as an example of the courts interpreting the facts to presume the parties intended to distribute *pari passu*.[120] Lord Woolf sets out that, when investments are "required […] to be paid into a common pool this indicates that the investors did not intend to apply"[121] the rule from *Clayton's* case. Furthermore, his Lordship continues to state that, despite even a potential intention to invest separately, the existence of a common misfortune generates a common pool, meaning the first in, first out rule again cannot be presumed to have been intended.[122]

This, as Audrey Lim JC recognises,[123] is an inappropriate example to rely upon on as a guide by which to assess party intention. The two methods with a realistic chance of application in the case were that of *Clayton's* case and *pari passu*, the former of which the court was openly opposed to. Despite seeming "ready

[114] *Pars Ram* (n 1) [35].
[115] *Pars Ram* (n 1) [21].
[116] *Pars Ram* (n 1) [26].
[117] ibid [22].
[118] ibid [25].
[119] ibid [25].
[120] *Pars Ram* (n 1) [23].
[121] *Barlow* (n 4) 42.
[122] ibid.
[123] *Pars Ram* (n 1) [39].

to implement"[124] the rolling charge, the method was never given a chance due to its impracticability. As such, *Barlow Clowes* offers little guidance on the intention necessary to engage the *pari passu* method, but instead the intention needed to stray from the first in, first out rule.

Helpfully, Audrey Lim JC also introduces *Re International Investment Unit Trust*[125] (*Re IIUT*) as an example of the presumed intention necessary to trigger a *pari passu* distribution.[126] Williams J in *Re IIUT* identifies two key factors indicative of this intention. Firstly, in the case, the investors knew that similar returns were offered to all, and due to the repayment structure, they would have known that their funds would be used to repay earlier investors. Secondly, the pattern-less nature of the funds indicated that all funds were available to all investors.[127] Williams J's comments in *Re IIUT* are much more appropriate as a guide as to the intention required to distribute *pari passu* than Woolf LJ's in *Barlow Clowes*, the latter serving as an instrument for distinguishing from the first in, first out rule rather than as a practicable set of principles for assessing investor intention.

The first in, first out method from *Clayton's* case has been recognised not as a rule, but instead an "evidential presumption and no more"[128] which must give way to contrary intentions.[129] Such contrary intentions seem likely. For example, the *Barlow Clowes* judgement suggests that, in commercial contexts, it "can be presumed that [investors] would not want to subject what was left of the pool to the vagaries of chance […] of the first in, first out principle."[130] It is unlikely that any agreement would lead the court to conclude that investment funds were intended to be distributed first in, first out. Campbell J in *Re French Caledonia Travel* suggests that there may be rare situations, such as in *Re Diplock's Estate*, in which *Clayton's* presumed intention has "some reality."[131] Further analysis shows, however, that even this tentative proposal seems generous, given that the approach was only relied upon in *Re Diplock's Estate* for its convenience against the "difficulty and complication in practice"[132] of a rateable distribution. This judgement is over 70 years old, and it is unlikely that such difficulties would arise today.[133] Thus, there is no material chance of the *Clayton* presumed intention arising in contemporary

[124] ibid.
[125] [2005] 1 NZLR 27.
[126] *Pars Ram* (n 1) [24].
[127] ibid.
[128] *Q&M Enterprises Sdn Bhd v Poh Kiat* [2005] SGHC 155 [56].
[129] *Re Hallet* (n 17) 728.
[130] *Barlow* (n 4) 41.
[131] *Re French Caledonia Travel* (n 26) [171].
[132] *Re Diplock's Estate* (n 8) 554.
[133] See iv.d.

cases, meaning there is little standing in the way of abolition of the first in, first out rule in this context.

The *Pars Ram* and *Re IIUT* judgements suggest that a pattern-less fund in which contributions are mixed and likely used to repay other investors may be indicative of an intention to distribute *pari passu*. It is also clear from *Pars Ram*'s analysis of *Barlow Clowes* that an intention not to use the first in, first out method is not necessarily equal to an intention to distribute *pari passu*, the court's reasoning being more of an artificial escape from being bound to apply *Clayton's* case.

In the United Kingdom, commercial trusts generally fall into two categories – unit trusts and investment trusts. Unit trusts are "collective investment scheme[s] under which the property is held on trust for the participants",[134] whilst investment trusts collectively pool investors' money together so as to spread funds across a diversified portfolio.[135] Regardless of the phraseology of collective pools and schemes, it is suggested that, for commercial parties seeking investment certainty, it should be prima facie presumed that their intention is to adopt the method most reflective of the transactional history – the rolling charge. As Smith argues, it seems overtly fictitious to assume that investors form a common intention "to embark on some kind of joint venture, sharing losses like partners."[136] Of course, if the intention to distribute *pari passu* is clearly established, such as in *Re IIUT*, this must prevail. However, in absence of such clear intention, it should be taken as default that the intention of the parties is to distribute with the rolling charge.

D. Impracticability

The main barrier to adoption of the rolling charge is its potential impracticability. Quite simply, the approach's implementation costs more, leading courts to prefer the cheaper, rough justice of *pari passu*. Case law identifies two distinct elements to the rolling charge which can prove expensive: the complex calculations, and the organisation of raw data. Although both elements can be easily sidestepped by distributing *pari passu*, it is submitted that, given the increased availability of sophisticated computer software, only the latter is a justifiable bar to the rolling charge.

A clear example of the rolling charge's prohibitive cost comes from *Barlow Clowes*. Barlow Clowes International (BCI) received capital from investors on the terms that it would be invested into risk-free government backed bonds. However, it was later discovered that much of the investment capital had been used illegally by BCI's co-founder, Mr Clowes, for the personal purchase of expensive luxury

[134] Financial Services and Markets Act 2000, s 237(1).
[135] Zhang (n 36) 457.
[136] Smith (n 99) 90.

items.[137] As a result, upon liquidation, the "amount of assets available fell far short of what would be needed to satisfy all the investors' claims in full."[138] Distribution of these remaining funds was complicated by the size of the BCI operation, with the £100 million in investments consisting of contributions from around 11,000 investors.[139] The Court of Appeal eventually settled on the *pari passu* method of distribution, finding the first in, first out rule and the rolling charge inappropriate. Among other reasons, these two methods failed due to their impracticability.

It is not explicitly specified by Woolf LJ whether difficulties in apportioning the funds using *Clayton's* and the rolling charge were due to the organisation of the data, or the actual act of implementing the rules and conducting the necessary calculations. However, his Lordship's reference to the "expense and time which will be involved in having to apply [them]"[140] suggests that the issue stems from the application of the rules, and not the availability or organisation of raw accounts. Computer technology was of course much less accessible in 1992 when this judgement was given, and as such it is no surprise that the Court of Appeal were hesitant to decide upon a method of distribution reliant on the complex calculation of vast quantities of data when simpler methods were available.

Concerns over the cost of locating, organising and inputting the raw data involved with large-scale trust transactions were expressed in 2014's *Framjee*. Here, Henderson J recognised that modern computers are more than capable of performing the necessary calculations,[141] and that the prohibitive barrier in modern claims arises instead from the "reconstruction of the raw data […] needed in the absence of any computerised record keeping".[142] No figure is offered by Henderson J as to how expensive organising the Dove Trust's records would have been, however estimations given by Mander J in New Zealand's *Arena Capital*[143] suggest that similar data organisation tasks at the commercial level could cost hundreds of thousands of dollars.[144] Such tasks are inevitable when parties fail to correctly manage records. Although a number of modern automated services are available to convert paper documents into digital datasets,[145] these are expensive and remain useless against incomplete, poorly managed or non-existent accounts. Thus, when fraudsters obfuscate transactional paths, rendering it "practically

[137] Diana Wright, 'UK: Lessons of a systematic swindler - the barlow clowes affair.' (*Management Today*, 1 Jun 1992) <https://www.managementtoday.co.uk/uk-lessons-systematic-swindler-barlow-clowes-affair/article/409293> (accessed August 2020).

[138] *Barlow* (n 4) 26.

[139] *Barlow* (n 4) 26.

[140] *Barlow* (n 4) 35.

[141] *Framjee* (n 73) [55].

[142] ibid.

[143] *Arena* (n 67).

[144] ibid [13].

[145] See for example United States organisation Smooth Solutions–https://smoothsolutions.com/clients/financial-documents-scanning/.

impossible to match credits against debits",[146] there is little courts can do other than distribute *pari passu*.

The *pari passu* approach is the simpler and cheaper approach to adopt. It is not necessary to construct a precise transactional history,[147] as only the "total quantum of the assets available"[148] and a list of the beneficiaries' respective contributions are required. Once obtained, the calculations needed to distribute are comparatively simple.[149] Conversely, incomplete records will almost always thwart the deployment of the rolling charge, and in these instances *pari passu* is the only available solution. Similarly, even if present, the expense of locating, organising and inputting the raw data can be prohibitively costly. Smith asks, quite fairly, whether it is "really a principle of private law that parties' rights may be forfeited to convenience?"[150] Naturally, such outcomes are undesirable, however when costs are high, it is uneconomical to waste significant proportions of the recoverable fund on organising data when the *pari passu* method remains available. *Pars Ram* offers no insight into determining when such costs become too high as to be uneconomical, and it seems that what constitutes a cost "likely to exhaust the fund available"[151] remains at the judge's discretion.

When the necessary data is present, it is no longer an acceptable argument to claim that the rolling charge's calculations are too expensive to implement; powerful computer software is too readily available to courts,[152] lawyers and commercial litigants to justify this reasoning. Given that both the rolling charge and *Clayton's* case calculations require a full transactional history, if one method is available, so is the other.[153] As such, the two approaches cannot be distinguished on practicability grounds. However, given the number of arguments in favour of the rolling charge over the first in, first out approach, the latter is simply redundant in these circumstances.

V. Conclusion

The current uncertainty, when viewed against trust law's contemporary commercial context, is unacceptable and costly. Thus, for the reasons laid out above and in *Pars Ram*, the rolling charge should be adopted as default in England and Wales. Its outcomes are more accurate, more equitable and fairer than those

[146] *National Crime Agency v Robb* [2014] EWHC 4384 (Ch) [65].
[147] Lowrie and Todd (n 2) 57.
[148] *Barlow* (n 4) 36.
[149] See ii.b.
[150] Smith (n 99) 88.
[151] *Barlow* (n 4) 39.
[152] *Framjee* (n 73) [55].
[153] Conaglen (n 14) 48.

of the other available methods. Similarly, its operation aligns closely with equitable tracing principles, and its distributions are more likely to match the presumed intentions of commercial parties.

Despite this, the use of the rolling charge should not be unqualified. Use of the method should be displaced either when an intention to adopt *pari passu* is clear, or in response to impracticability concerns. That said, concerns based solely on the rule's calculations are no longer justifiable thanks to the availability of accessible computer software to courts, lawyers and litigants. Instead, only a lack of transactional data, or excessive costs of constructing digital accounts, should render the rule's application impracticable. In response to the arguments canvassed above, the first in, first out rule should be formally recognised as redundant for resolving contests between rival beneficiaries.