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ICR AWARD FOR EXCELLENCE

The Uncertainty Surrounding the Quistclose Trust – Part One

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Introduction

A Quistclose trust arises when money is paid to a recipient for a specific purpose, if that purpose fails the money is held on trust for the payer. Although this type of trust can be traced back to 1819, considerable uncertainty shrouds the device. The Quistclose trust is most pertinent on insolvency as this is when it is imperative to decipher if the creditor in question holds a personal or proprietary right, the proprietary right of course allowing the otherwise unsecured creditor to bypass the insolvency regime as the beneficial owner and extrapolate the funds it transferred to the recipient. Judges and commentators alike have failed to reach a consensus on the type of trust the Quistclose trust is, which has resulted in confusion over the evidentiary standard that needs to be demonstrated to successfully establish a Quistclose trust. Furthermore, the policy motivations supporting the trust have been thought to introduce inconsistency into the ranking of claims on insolvency leading to certain unsecured creditors being indirectly preferred over others. It has been suggested that the Quistclose trust must be treated as any other fully fledged security device taking into account the protection it offers the payer on insolvency and should therefore be registrable, this proposal has too divided opinions. This paper will attempt to examine and untangle these issues to help build a clearer picture of the device’s scope and the philosophy underpinning it.

Barclays Bank Limited v Quistclose Investments Limited

The facts of the case are as follows; in July 1964 Rolls Razor a company in grave financial difficulties declared a dividend it could not meet. In a bid to meet the dividend and uphold the appearance of solvency Rolls Razor borrowed money from Quistclose Investments. The money was transferred to a separate account and was accompanied by a note specifying that the money must only be used for the purpose of paying the dividend. On 27 August before the dividend was paid Rolls Razor entered voluntary liquidation. Barclays claimed the funds comprised in the separate account provided by Quistclose Investments were eligible for set-off against other overdrawn accounts of the company. Quistclose Investments argued the money was held on trust for them. The House of Lords unanimously agreed with Quistclose Investments. Lord Wilberforce clarified that a debt and contractual relationship can co exist together:

‘There is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies’

Lord Wilberforce also explained the trust structure a Quistclose trust evoked:

‘That arrangements of this character for the payment of a person’s creditors by a third person to give rise to a relationship of fiduciary character or trust in favour, as a primary trust, of the creditors, and secondly if the primary trust fails, of the third person, has been recognised in a series of cases over some 150 years’

The effect of the courts finding a Quistclose trust elevates the unsecured creditor to a beneficial owner. The funds that have been supplied for the specified purpose

Notes

1 Toovey v Milne (1819) 2 B. & Ald. 683.
4 Ibid., at p. 580.
is ‘clothed with a specific trust’ so the money is not beneficially owned by the debtor and so does not fall into the debtors estate and cannot be distributed to the unsecured creditors. However there was unease surrounding the dual trust structure which commentators wanted to reformulate as it conflicted with traditional trust law principles. Though pragmatically it doesn’t really matter which structure is employed as the end result is the same – the payer has a beneficial interest in the money, as we decipher the different structures put forward we can begin to detect the structure influences the requirements that need to be demonstrated to establish a Quistclose trust. As we see the trust structure evolving, the requirements needed to assert a Quistclose trust are being increasingly watered down which has severe consequences on insolvency as it potentially extends the scope of the doctrine and starts to have wider application distorting the ranking of claims on insolvency much more frequently.

**Lord Millett’s initial conception**

In Lord Millett’s 1989 LQR article, ‘The Quistclose Trust: Who can Enforce It?’, Lord Millett scrutinised Lord Wilberforce’s judgement in Quistclose Investments particularly the dual trust structure advocated. Lord Wilberforce stated that initially the money is paid to the recipient for the benefit of a third party (the share-holders) creating the primary trust, however the third party are not the direct beneficiaries of the trust as the money is advanced for a purpose which in this case was to aid Rolls Razor avert insolvency so the primary trust takes the form of a private purpose trust. If the money was transferred under a regular trust for the benefit of the shareholders regardless of Rolls Razor being insolvent the beneficial interest would have resided with the shareholders. However the shareholders are the indirect beneficiaries as transferring money to them enables the ultimate purpose of the trust to be fulfilled (staving off insolvency). As this can no longer be achieved once Rolls Razor are made insolvent the private purpose trust fails and a secondary trust is triggered which holds the beneficial interest for the payer, thus enabling the transferor to obtain ownership over the fund.

The validity of the primary trust has been questioned against traditional trust law principles as private purpose trusts are not deemed to be legitimate. English trust law advocates that all purpose trusts barring charitable trusts and a select list of specific purpose trusts are invalid. This follows from the beneficiary principle which purports that all trusts must have direct human beneficiaries that can enforce the trust, if the object of the trust is a purpose theoretically no one can enforce the trust. Though many offshore jurisdictions have renounced this principle English law has rigidly upheld it. Lord Wilberforce’s conceptualisation of the private purpose trust in this context can be rationalised however by developments in Re Denley which states that private purpose trusts can be upheld as long as the purpose confers an indirect benefit on a class of human beneficiaries, as this class of individuals can enforce the trust. This was endorsed by Megarry VC in The Northern Development.

However Lord Millett probes the strength of this in the context of purposes which don’t confer an indirect benefit on any individuals as in Twinsectra Ltd v Yardley the purpose was to acquire property this didn’t cast any indirect benefit on any clearly ascertainable individual. But even if individuals are indirectly benefited under the trust why would the transferor want to surrender his beneficial interest in the money to give to the recipient’s creditor as Scott states ‘Where the debtor [A] has not agreed with the creditor [C] to make the dispo-sition, there is ordinarily no reason why the debtor should surrender his control over the property, and the inference is that he does not intend to do so’.11

Instead Lord Millett advocates that it is much more feasible that the transferor from the outset retains a beneficial interest in the money so that the money is on a bare trust for the transferor with a mandate conferred on the recipient to use the money for a specific purpose. If this mandate is fulfilled the trust ceases and the transferor is rendered into an unsecured creditor, until then the money remains beneficially for the transferor.

Penner12 acclaimed this analysis as largely in keeping with traditional trust law principles and he clarified that the mandate imposed on the recipient must be of a contractual nature, it cannot be an actual trust duty as ‘Where A genuinely imposed trust duties upon B to expend the property in various ways so as not to benefit A, during such time as those duties were in place (not revoked), As beneficial interest in the trust funds would be to that extent displaced ... and such cases would depart from the thrust of Lord Millett’s analysis’13

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**Notes**

6 Toneway v Milne (1819) 2 B. & Ald. 683, p. 684.
8 Re Denley (1969) 1 Ch 373.
9 Re Northern Development (Holdings) Ltd (unreported, 6 October 1978).
10 Twinsectra Ltd v Yardley (2002) 2 AC 164.
11 Scott on Trusts, para. 126.1.
12 The Quistclose Trust, Critical Essays, p. 45.
13 Ibid.
The key point about this analysis by Lord Millett is that it heavily focuses on the party’s intention and ascribes great significance to deciphering both parties’ intent to ascertain if the parties intended to deviate from a traditional loan structure to a trust structure ‘must depend upon the parties intention’.14 Though there is no need for either party to use the word trust or have any knowledge of the device the courts must be able to construe some sort of positive intent that the equitable interest was not to reside in the transferee. This acts as an effective safeguard against the Quistclose trust being evoked in lots of insolvency cases as there is a heavy evidentiary burden to overcome. However Lord Millett’s refinement of this analysis in Twinsectra Ltd v Yardley15 has jeopardised this as he subtly denounces the emphasis previously placed on the party’s intent.

**Twinsectra Ltd v Yardley**16

The borrower was seeking short term finance of £1m for the purchase of land, he approached his usual lender for the money but was worried that he would not be able to give him the money on time so he approached another lender. The borrower’s original lender was able to give the money on time and B promptly used it to purchase the land. He carried on negotiations with the new lender for the money, he was owed GBP 1.5m by his solicitor under a previous transaction both had carried out and so he asked his solicitor to give a personal undertaking to repay the loan if he was unable to, the solicitor agreed. The money was transferred to the solicitor with the stipulation that the money be utilised ‘solely for the acquisition of property on behalf of our client and for no other purpose’.17 And that ‘loan money will be retained by us until such time as they are applied in the acquisition of property on behalf of our client’.18 The difficulty surrounding ascertaining whether a Quistclose trust had been intended here was due to the party’s intention being wholly focused on ensuring the solicitor had given his consent to the personal undertaking, and no real regard or importance was ascribed to the specific purpose outside the contract.

**Lord Millett’s reassessment**

In Twinsectra Ltd v Yardley Lord Millett detracts from his prior position of a Quistclose trust being a bare trust with a mandate whereby the beneficial ownership resides with the transferor from the outset, instead he states that Quistclose trusts are resulting trusts which arise by operation of law deviating from what he previously maintained – ‘Quistclose trusts are intentional trusts, that is, trusts that arise on the basis of the genuine intentions of the parties involved’.19 This subtracts from the position that the courts have taken that a Quistclose trust arises based on the parties intentions and not based on a presumption – ‘in no case has A ever been identified as having the beneficial interest based on a evidentiary longstop’.20 (Penner).

Lord Millett is driven to this conclusion by his approval of Chamber’s general theory of resulting trusts21 which centres on a resulting trust emerging when ‘there is a transfer of property in circumstances (or more accurately the person at whose expense the property was provided) in which the transferor did not intend to benefit the recipient’.22 Following this, the finding of a Quistclose trust will no longer be based on finding a positive intent but the presence of a lack of intent for the recipient to benefit ‘the question in every case is whether the parties intended the money to be at the free disposal of the recipient’.23 This could have severe ramifications on insolvency as it would allow many loan relationships to be re-categorised into a Quistclose trust where there is no actual intent for a trust like relationship to occur to the detriment of the general creditors. As Penner states ‘This approach is a recipe for a largely unfettered discretion in the court to find trusts in commercial circumstances on flimsy evidence about what might have been absent to `As mind, as opposed to determining the true intentions of the parties’.24

Lord Millett underlines the importance of finding that the parties didn’t intend the money to be at the recipient’s free disposal to import a Quistclose trust which could lead to the worrying possibility of courts construing ‘that any loan which is expressed to be for a stated purpose should give rise to a Quistclose trust, for expressing that sort of restriction is tantamount

**Notes**

15 Twinsectra Ltd v Yardley [2002] 2 AC 164.
16 Ibid.
17 Ibid.
18 Ibid.
19 The Quistclose Trust, Critical Essays, p. 50.
20 Ibid., p. 51.
23 Ibid., p. 185.
24 The Quistclose Trust, Critical Essays, p. 54.
to saying the money is not to be at B’s free disposal’. In *Twinsectra* itself Lord Millett based the finding of a *Quistclose* trust mainly on a stipulation in the loan contract that the money be applied ‘solely for the acquisition of property on behalf of our client and for no other purpose’. Despite the fact that up till *Twinsectra* in all *Quistclose* cases the purpose for which money is being advanced is very precise, the vagueness and lack of specificity over which property was to be acquired did not trouble Lord Millett and he refrained from looking into the parties actual intentions.

Carnworth J at First Instance stated that the vagueness shrouding the purpose was not an impediment to finding a *Quistclose* trust but the real obstacle was that the lender never really settled on any purpose for the loan which indicates that the parties never intended the money to be held for a specific purpose ‘If equity were to impose a trust it would not be giving effect to the parties intentions’. He reached this conclusion by construing the surrounding circumstances. Lord Millett shrugged this off however stating that the parties’ subjective intent is of no concern to the courts ‘his subjective intentions are irrelevant’.

However it seems that Lord Millett is missing the point, the parties’ subjective intent (no intention to create a trust or to deprive the recipient of the beneficial interest) matched the party’s actual intent and the intent that was objectively expressed to each other. From *Twinsectra* it seems that the parties ascribed no real significance or importance to the purpose so even basing the finding of a *Quistclose* trust on Lord Millett’s newly configured resulting trust analysis, in *Twinsectra* there is no real intent on the lenders part to ensure that the recipient doesn’t receive the money at his free disposal. Authorities like *National Westminster bank plc v Spectrum Plus Limited and others* have illustrated the importance of construing not only the parties intent as recorded in the contract but also at looking outside the contract to the surrounding situations, due regard must be given to substance as well as form. Lord Millett’s approach is allowing form to prevail – ‘Lord Millett refuses to look to the surrounding facts which indicate that the parties intended the lender to be an unsecured creditor. Even putting aside the lack of intent to retain the beneficial ownership the arrangement of the loan is highly suggestive of an unsecured loan. *Twinsectra* took no security interest over any property that the borrower owned or would acquire with the loan money as the loan was a very short term arrangement. It was to be repaid on the seventh day following *Twinsectra* giving notice of its intention to be repaid and the loan was meant to last a maximum of 4 months. The loan also required an extremely high rate of interest to be paid (24%) which is reflective of the high risk the lender was taking in making available funds unsecured to the borrower.

Previous cases have demonstrated the importance attached to the requirement of the transferred funds to be segregated from the borrowers general assets, this signifies to the courts that the borrower and the lender did not intend the money to become part of the borrowers general estate leading them to the conclusion that the beneficial interest must be located elsewhere. However here Lord Millett ascribed no importance to the act of segregating funds which seems to indicate that even if the money hasn’t been segregated a *Quistclose* trust can be found. A key aspect of any intent to create a trust always revolves around the funds being held separately by devaluing this factor Lord Millett is detracting from traditional trust law principles and in the process is making it much easier to find a *Quistclose* trust in situations where it was never intended.

Following Lord Millett’s stance in *Twinsectra* of the *Quistclose* trust being a resulting trust arising by operation of law it alienates the examples of express *Quistclose* trusts which have originated purely from the parties intentions to create a trust which are clearly evidenced in the documents and in the parties conduct (Penner). It also dispenses with the need to satisfy the crucial requirements underpinning all trusts-certainty of object and intention.

Certainty of object or here purpose focuses on the purpose being sufficiently certain to pass the ‘is or is not’ test in *Re Gulbenkian* this involves being able to conclusively decipher if exercise of the power falls within the purpose. ‘Acquisition of property’ it seems would not pass this test as it lacks any specificity and it’s hard to determine which acquisitions would be

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**Notes**

25 *Twinsectra Ltd v Yardley* [2002] 2 AC 164.
26 Ibid., p. 30.
27 Ibid., p. 185.
29 The *Quistclose Trust*, Critical Essays, p. 64.
31 Critical Essays, Ch. 3.
32 *Re Gulbenkian’s Settlements* (1970) A C 508 HL.
allowed by the power and which wouldn’t. Carnworth J supported this point ‘Nor does the document itself have the certainty necessary to create a trust’.34

Quistclose originally was conceived as a device which had a limited scope and therefore it only disrupted the insolvency regime in very few situations. Yet as the device is being developed the requirements needed to establish the trust is being increasingly reduced. Following Twinsectra it is a resulting trust which arises by operation of law and all you need to show is that the lender never intended the recipient to receive the money at his/her full disposal which can be shown by the lender asserting a purpose the money should be used for. And the purpose does not have to be unduly specific or restrictive it can be quite vague, which allows the borrower huge discretion as to how to use the money yet if the borrower goes insolvent before doing so the money is encumbered with a trust for the unsecured lender. It dispenses with the need to demonstrate that the money was segregated, the purpose was certain and the parties actually intended a trust to occur. This could lead to a need for legislators to reassess if the Quistclose trust should be part of a registration scheme if it gives larger cohorts of creditors the status of a secured creditor.

Constructive trust

Smolyansky35 critiques the decision in Twinsectra and argues for the Quistclose trust to be reconceptualised as a constructive trust in a bid to narrows its application. He states Lord Millett bases the finding of a resulting trust on Chambers’ assertion that if there is an absence of an intention on the lenders part to transfer the entire beneficial interest to the borrower a gap is created and this gap is filled by the beneficial interest rebundling to the lender. But surely this is not enough to create a resulting trust in a loan contract. ‘In a two party loan transaction if there is truly no intention that the lender retains a beneficial interest in the loan money, then this can only mean one thing that the parties must have intended that the beneficial interest should pass to the borrower.’36

Smolyansky states that there is no real basis for an express trust in Quistclose cases as there is no real strong positive intent for the lender to retain a beneficial interest. And there is no scope for a resulting trust as Westdeutsche Landesbank Girozentrale v. Islington London Borough37 illustrates the two type of resulting trusts and Quistclose trusts fit into neither. The first example is a voluntary payment i.e. one not supported by consideration which is obviously not the case in the Quistclose trust as the lender transfers the money in consideration for repayment of interest and principle. The second example is of a resulting trust arising as a declared express trust which doesn’t exhaust the entire beneficial interest which is in line with Lord Wilberforce’s description of a Quistclose trust which Lord Millett refuted.

So Smolyansky states that the Quistclose trust should be based on a constructive trust which can arise irrespective of express or implied intentions and it would be imposed when it’s unconscionable for the legal owner of the property to claim a beneficial interest in the funds. Smolyansky states the trust was created in response to the unfairness of the unsecured creditors getting a windfall at the expense of a lender who has provided funds to a struggling company, so these can be the grounds on which the constructive trust can arise.

Lord Millett rather controversially has directly replied to these criticisms levelled by Smolyansky.38 Firstly Lord Millett reverses the assumption that but for an express intention for the beneficial interest to remain in the lender the beneficial interest in a loan must reside in the borrower, stating it is in fact the opposite unless you can find an express intention for the borrower to possess the beneficial interest it will stay with the lender. This seems to miss the point – in a loan the assumption is always that the borrower gets absolute title to the funds and you need strong evidence to convince courts it remains with the lender.

A similar approach has been advocated by Gummow J, who said there should be a strong presumption against the finding of a Quistclose trust in insolvency. In Re Australian Elizabethan Theatre Trust39 Gummow J stated that the Quistclose trust is teetering between being an express trust or a remedial constructive trust, and opted for it to be seen as an express trust which introduces a higher evidentiary standard as you need a clear manifestation of intent and perhaps even explicit trust language. This suggests that many commentators are uneasy with the Quistclose trust being radicalised to be implied on the basis of weak evidence and creating upheaval in the insolvency regime ‘too-easy judicial inference of a trust could have disturbing implications for insolvency distribution’.40

Lord Millett acknowledges his conception of the resulting trust in Quistclose does not fit into the model

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36 Ibid.
advocated in *Westdeutsche* but argues that the model in that case is not conclusive, and if it was it wouldn’t be able to explain cases like *Vanderwell v I.R.C.*\(^41\) which is a resulting trust but does not fit into the two examples in *Westdeutsche*. Lord Millett also states that his argument that a *Quistclose* trust arises based on a restriction on the use of money is a strong basis on which to imply a trust. He expounds that the money is made available on those terms and it’s well known law that ‘if he (borrower) chooses to accept the money tendered for a particular purpose, it is his duty, and there is a legal obligation on him to apply it for that purpose’.\(^42\)

Though this is correct Lord Millett is not segregating cases where there is a particular/specific purpose, which is at the core of the agreement, from cases where the purpose is very vague and unspecific and is not at the forefront of the agreement and no real thought is given to it. The former example definitely provokes the reasoning that such a purpose cannot be ignored as the money has been made available only for this purpose creating a legal obligation on the borrower. But in cases like the latter (as in *Twinsectra*) the money is just tendered it is not tendered for a particular (particular being key here) purpose and so shouldn’t invite the same consequences.

Lord Millett goes on to critique Smolyanskys’s proposal of a *Quistclose* trust arising as a constructive trust based on the unconscionable conduct of the unsecured creditors, he argues there would be nothing unconscionable about the unsecured creditors behaviour as the claim of whether or not there is a trust is between the lender and the borrower/borrower’s trustee in bankruptcy. Though this is correct ultimately the trustee in bankruptcy/liquidator is really working for the unsecured creditors benefit and so all claims are fought with their interests in mind. This weakens Lord Millett’s point.

Many commentators have queried the nature of the *Quistclose* trust and instead of arguing for a return to the *Quistclose* trust being inferred much more stringently (like Smolyansky) they have called for the trust to be eradicated purporting that a trust in the *Barclays Bank v Quistclose Investments* and all the cases preceding it should never have been established.

### Orthodoxy — Swaddling

Swaddling argues in his article 'Orthodoxy'\(^43\) that the House of Lords was wrong to give the unsecured creditor priority in *Barclays Bank v Quistclose Investments* as following traditional trust law principles no trust should have been found. He argues the trust arises not sporadically but in response to an act – either a declaration by the trustee to hold the money for another or by conveyance by the transferee with the intent that the transferee holds the money on trust for another. Although cases like *A-G for Hong Kong v Reid*\(^44\) exemplify that trusts can arise from events which are not ‘manifestations of consent’ *Quistclose* cases have always been grounded on consent. The consent cannot come from the recipient as if the lender intends the recipient to hold the money absolutely and the recipient declares a trust this would equate to a fraudulent preference in the lenders favour as the money was absolutely the borrowers and his declaration created a trust to benefit the lender and impair the chances of the other creditors.

Lord Wilberforce seizes on the requirement that the money be used for a specific purpose as grounds for a declaration from the lenders for the money to be held for another. However traditionally trust law has advocated that just by attaching a condition of use to property does not create a trust – ‘If a gross sum be given ...and a special purpose assigned for that gift, this court always regards the gift as absolute’\(^45\) (*Re Sander son’s WT*)\(^46\) the purpose is seen to define the gift not create a trust – ‘treating the reference to the purpose as merely a statement of the testators motive in making the gift’ (*Re Osaba*).\(^47\) Swaddling clarifies that regardless of if the purpose was an enforceable term of the contract makes no difference – it doesn’t equate to an intention to create a trust ‘if a non-contractual expression of a purpose is not an expression of an intention to create a trust, the same intention incorporated as a term of a contract is not an intention to create a trust either’\(^48\) ‘the mere fact an obligation has been laid upon a person does not mean that a trust has thereby been created’.\(^49\)

Swaddling also goes on to state that pertinent facts in *Quistclose Investments* indicate no trust was intended. Firstly the money was paid in a loan contract which meant that the money was repayable regardless of its application yet Lord Wilberforce stated the money was

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\(^{42}\) *Giber v Gonard* (1884) 54 LJ (Ch.) 439.

\(^{43}\) The *Quistclose Trust*, Critical Essays, Ch. 2.

\(^{44}\) *A-G for Hong Kong v Reid* (1994) 1 AC 324.

\(^{45}\) *Re Sanderson’s WT* (1857) 3 K & J 497, p. 503.

\(^{46}\) *Re Sanderson’s WT* (1857) 3 K & J 497.

\(^{47}\) *Re Osaba* (1979) 1 WLR 247. 257.

\(^{48}\) The *Quistclose Trust*, Critical Essays, p. 15.

\(^{49}\) Ibid.
only repayable if the purpose was fulfilled. Swaddling disagrees stating that if Barclays Bank had gone insolvent Rolls Razor would still be liable to repay the sum but in a normal trust situation a trustee would not be liable for the money (Morley v Morley).\(^{50}\) Furthermore, in Twinsectra the borrower had to pay 24% interest from the moment the money was transferred, yet if the money is not owed to the lender until the money is transferred for the purpose and the loan only activates then and until the money is applied the borrower is a trustee how can you be charged interest on money you don’t owe.

In addition, in Quistclose Investments there was no requirement to segregate the funds which as shown in cases like Neste Oy v Lloyds Bank plc\(^{51}\) it was held ‘no obligation on the agent to keep the payments separate, he was not a trustee of them, with the consequence that the principal had no priority on the insolvency of the agent’. Swaddling also argues that the facts of Quistclose Investments should never have given rise to a fiduciary relationship as can you really testify that a borrower who borrows money and states he will only use it for a certain endeavour is a fiduciary? Sopjinka J in Noreburg v Wymrib\(^{52}\) warns that ‘fiduciary duties should not be super imposed on … common law duties simply to improve the nature or extent of the remedy’.\(^{53}\)

Swaddling goes on to explore the indications in Twinsectra that a Quistclose trust can arise not based on intentions but as an operation of law. Glancing at A-G of Hong Kong v Reid\(^{54}\) trusts can arise based on wrongdoings committed by a party, yet in Quistclose Investments there was no wrongdoing by Rolls Razor at the time of the receipt of funds which is when it was thought the trust arose. Similarly trusts can arise on the basis of unjust enrichment as in Chase Manhattan v Israel – British Bank\(^{55}\) but in Quistclose Investments there was no unjust enrichment as the money was transferred to Rolls Razor and they were contractually liable to repay this so receipt of the money is not an enriching event. However Swaddling seems to miss the point that the courts in Quistclose Investments strongly felt that if the money had been deemed to be beneficially owned by Rolls Razor the money would have been distributed to the pool of unsecured creditors. And they would have been unjustly enriched as the money was supplied only on the condition that it is used for a specific purpose and as that purpose couldn’t be achieved its unfair that the general creditors obtain a windfall.

Swaddling goes on to contemplate that the Quistclose trust could form a new category of non intentional trusts where a trust is triggered if a restriction is placed on the funds as its inequitable to use it for another purpose and this prompts equity to raise a trust. Lord Wilberforce’s speech is indicative of this ‘It is unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it … The duty is fiduciary in character’.\(^{56}\) A right of restraint is found in cases like Tulk v Moxhay\(^{57}\) but they take the form of restrictive covenants over burdened land and in Tulk v Moxhay the right was not held on trust by his neighbour the dominant owner held it for himself. This clearly isn’t applicable here.

Chambers\(^{57}\) too sides with Swaddling stating there was no primary trust, he instead opines that there was an equitable right of restraint against the borrower from using the money for any external purposes and this right was binding on third parties. Yet Swaddling admonishes that there is no case law which supports such a right being a proprietary right ‘So for example, a trustee’s liability to his beneficiaries for losses made through his negligent investment, even though enforced in equity, binds the trustee alone. It is a personal right’\(^{58}\) and so it cannot be enforced against third parties even if they are aware of the right of restraint. Barker v Strickney\(^{59}\) states a right of restraint is not a proprietary right, and in Quistclose Investments the right has to be proprietary if not it wouldn’t have been capable of binding Barclays Bank.

Swaddling points to the earlier cases to evidence that courts were uneasy with inferring a trust in these loan contracts, in Gibert v Gonard North J stated money lent was traceable ‘in the same way as if it had been trust money’.\(^{60}\) In Re Drucker Wright J said ‘impressed with a trust – not in the strict sense of the word – but in substance with a quasi-trust’.\(^{61}\)

Swaddling’s analysis raises key arguments to counter the imposition of a trust in Quistclose cases. However he fails to appreciate that in these cases particularly in the

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Notes

50 Morley v Morley (1678) 2 CH Cas 2.
53 Ibid., p. 481.
56 (1848) 2 Ph 774.
57 The Quistclose Trust, Critical Essays, Ch. 5.
58 Ibid., p. 31.
60 (1984) 54 LJ (Ch.) 439.
61 (1902) 2 KB 55.
line of cases before Quistclose Investments the restrictions on the use of money was different to the usual loan terms based on the purpose of the loan which are really vague and open ended. All loans will specify what the money is to be used for as purely from a legal angle banks wish to ensure that a purpose is specified for the loan so that if the money is later used for illegal purposes the bank can point to the purpose written down in the loan contract to show it believed the money was being used in a legal venture and absolve itself of any liability.

The conditions used in the line of cases before Quistclose Investments were rather specific and the facts differed from the usual loan scenario. Here the money was being specified for the sole purpose of rescuing the company. These indications along with segregation of funds unsurprisingly led the courts to find a trust. Cases post Quistclose Investments have begun to find trusts on weaker grounds as in Twinsectra, and the courts have begun to ignore the role of fraudulent preference in these transactions as in Re Kayford Ltd and Re Chelsea Cloisters – this is lamentable and there is a strong case for arguing these decisions should be overturned. But the finding of a trust in Quistclose Investments and cases preceding it is theoretically and pragmatically justifiable and doesn’t violate traditional trust law as certainty of intention, object and subject matter is strictly observed.

Notes

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International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, The US Corner, Economists’ Outlook and Case Review section – each issue of International Corporate Rescue brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

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