

Equity and Trust Law - the Quistclose trust.

Essay Development Plan

Ever since *Barclays Bank Ltd v Quistclose*,¹ trusts have been inferred by English courts where a transferor gives an asset to a transferee for specific purpose and the latter uses the asset for another purpose. However, Quistclose trusts are valid as purpose trusts because there is no ascertainable beneficiary who can enforce the trust at the time of the transfer. The transferor only becomes empowered to enforce the trust in the event that the supposed trustee (the transferee) fails to perform their duties or fulfil the specific purpose. Also, there is no marker by which to measure the existence of the Quistclose trust. The transferor is entitled to take back the asset on the grounds that the purpose for the transfer was not fulfilled by the transferee giving the impression that the asset results back to transferor. However, a careful examination of the decisions that have applied *Barclays Bank Ltd v Quistclose* reveals that the decisions collectively distort traditional rules of equity. It is uncertain why a trust is inferred from a failed contract when the transferor may simply rely on the remedies for breach of contract. It is difficult to explain why courts continue to hold that a trust arises from the transferee's failure to fulfil the purpose set in the contract between the transferee and transferor.

It is against this background that this study seeks to determine whether the resulting Quistclose trust has been superimposed at the expense of logic on common law contractual duties in order to improve the nature of the remedy available to transferors. The transferor does not declare any intention to retain beneficial interest in the money or asset at the outset,

¹ [1968] UKHL 4.

and does not even intend to retain beneficial interest in the money or asset. Thus, it is uncertain why a trust should be inferred to the effect that the asset is held on trust for the transferor. The latter is not a beneficiary at the outset, and the lack of certainty of the beneficiary at the outset has been problematic for many decades because this generally works to invalidate trusts.² This study will therefore seek to determine whether the transferor may not be required to declare an intention to retain beneficial interest in the asset.

The study will comprise desk-based research. This will involve a critical review of the existing literature on philosophical arguments underpinning the Quistclose trust in order to situate the study in the context of extant evidence. The study will also analyse reports and databases, as well as synthesise the findings of existing studies in England and Wales and other common law jurisdictions that recognise Quistclose cases. The fact that the study will also analyse court decisions, statutes, regulations, and explanatory notes implies that the desk-based research will not focus exclusively on secondary data.³ These are sources that the primary authors have not interpreted and/or analysed. Hence, the researcher is required to analyse them in order to ascertain the decision-making patterns in the justice system, and also determine whether they provide solutions to the problem that is being investigated.⁴ In order to understand the justification for inferring a Quistclose trust, the study will attempt to determine the organising principle or consideration of social policy that guides the courts. The study will therefore employ the legal-doctrinal analysis. Although, it will not conduct an empirical survey, it will include the empirical arguments and statistical explanations put forward by other commentators.⁵ However, it must be noted that the doctrinal legal analysis

² Peter Millett, 'The Quistclose Trust: Who Can Enforce It?' (1985) 101 LQR 269, 269.

³ See Sunny Crouch and Matthew Housden, *Marketing Research for Managers* (Butterworth-Heinemann, 2003) 22.

⁴ Myron J Jacobstein and Roy M Mersky, *Fundamentals of Legal Research* (8th edn, Foundation Press 2002) 1.

⁵ Lee Epstein and Gary King, 'The Rules of Influence' (2002) 69 U Chi L Rev 1, 3-4.

is related solely to rhetorical practices within the justice system and avoids normative considerations that may be considered extra-legal.

In order to effectively use this methodology, the researcher will do the following:

- Ascertain the set of general principles or doctrine that makes the best overall sense of the relevant law
- Establish a link between the principles or doctrine and rules of morality
- Rank the principles according to how they explain legal and empirical data⁶

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⁶ Gerald J Postema, 'Philosophy of the Common Law' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 588, 608.

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Introduction

This essay examines the Quistclose trust and determines whether this conceptually uncertain English invention has been superimposed at the expense of logic on common law duties in order to improve the nature of the remedy to transferors. It begins by examining the trust and explains why it is inferred and what objective the inference is intended to achieve. This is followed by the discussion on how far English courts have pushed the trust. Emphasis is placed on the categorisations of trusts and how courts have justified inferring the Quistclose trusts. It is then argued that this trust ought to be reconceptualised in order to avoid it being stretched beyond acceptable limits. The essay concludes with suggestions on how to reconceptualise the trust.

The Quistclose Trust

Where a creditor lends money or gives an asset to a debtor for specific purpose and the latter uses the money or asset for another purpose, the court will infer a trust in favour of the creditor. This trust is called a Quistclose trust.⁷ The effect of the trust is that the creditor or transferor may be entitled to take back the asset or money given that the purpose for the transfer was not fulfilled by the debtor or transferee.⁸ This is based on the decision of the House of Lords in *Barclays Bank Ltd v Quistclose Investments Ltd*.⁹ As will be shown below, the Lords created a new type of proprietary interest in trust law whereby a trust is created

⁷ James Penner, 'Lord Millett's Analysis' in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 50; Alastair Hudson, *Equity and Trusts* (9th edn, Routledge-Cavendish 2017) 932; Timon Hughes-Davies, 'Redefining the Quistclose Trust' (2015) *Conveyancer and Property Lawyer* 26, 27.

⁸ Hugh Beale et al, *The Law of Security and Titled-Based Financing* (OUP 2012) 2160; Jamie Glistler, 'The Nature of Quistclose Trusts: Classification and Reconciliation' (2004) 63 *Cambridge LJ* 632, 633.

⁹ [1968] UKHL 4.

simply because the purpose of the transfer could not or was not fulfilled.¹⁰ They contended that in such instances the money or assets should become subject to a resulting trust in favour of the creditor. However, the Quistclose trust is not entirely a resulting trust given that in the latter instance, the transferor takes interest in the asset or money as the intended beneficiary under the nominee ship.¹¹ In Quistclose cases, the trust is inferred because the transferor is held not to have parted with the entire beneficial interest in the money, and the fact that the money is spent for another purpose or inappropriately spent, means that the money is still held on trust for the transferor. Thus, the Quistclose trust has been held to be simply an extension of the resulting trust beyond the traditional category.¹² This is because the transferor's legal rights to seek repayment and equitable rights to claim title in the debtor's estate are deemed to have co-existed from the outset.¹³ It is immaterial that the transaction was a loan, and where the debtor becomes insolvent, the money does not form part of his beneficial estate given that he only held it on a trust in favour of the lender. However, the lender is not required to register his beneficial interest.

The lack of certainty of the beneficiary has been problematic for many decades.¹⁴ This is because the lender is not required to declare any intention to retain beneficial interest in the money. Thus, the Quistclose trust is more of a purpose trust. However, purpose trusts or trusts created solely for the fulfilment of a purpose are generally considered invalid by English courts,¹⁵ unless they are charitable trusts.¹⁶ In *Leahy v Attorney-General for New*

¹⁰ See *Re EVTR* [1987] BCLC 646.

¹¹ James Penner, note 1, 51.

¹² Robert Chambers, *Resulting Trust* (Clarendon 1997) 68.

¹³ *Twinsectra Ltd v Yardley* [2002] 2 AC 164, 192-193.

¹⁴ Peter Millett, 'The Quistclose Trust: Who Can Enforce It?' (1985) 101 LQR 269, 269.

¹⁵ Richard Edwards and Nigel Stockwell, *Trusts and Equity* (8th edn, Pearson Longman 2007) 187.

¹⁶ Mark Pawlowski and Jo Summers, 'Private Purpose Trusts – A Reform Proposal' (2007) *Conveyancer and Property Lawyer* 440, 440.

South Wales,¹⁷ Lord Simonds noted that a gift cannot be made to a purpose or an object, and thus, the person who gives the gift does not become the cestui que trust for the purpose or object unless it is charitable. As such, a trust should be for the benefit of a specific person who can sue or enforce the trust. A purpose or object cannot enforce the trust.¹⁸ However, the rule against purpose trust is equally not clear-cut.¹⁹ In *Cocks v Manners*,²⁰ the court held that a purpose trust was valid as a gift to all members of an order and the Mother Superior was the trustee. In *Re Denley*,²¹ the court held as valid a purpose trust by which land was given as a sports ground for the benefit of employees of a company and other persons as the trustee would allow. Thus, although the trust was confined to a purpose, it benefited a group of people.²² What is important is that there is certainty as regards the trust's objective, and the beneficiaries should be ascertainable. The latter requirement is important because there must be somebody in whose favour the court may order performance.²³ Also, the fact that the beneficiary is ascertainable means that the trust cannot exist longer than the beneficiary's life plus 21 years. Thus, trust must conform to the rule against perpetuities.

It may therefore be argued that Quistclose trusts are valid as purpose trusts because there are ascertainable beneficiaries (the creditors) who can enforce the trust in the event that the trustees (the debtors) fail to perform their duties or fulfil the specific purpose. Also, there is a marker by which to measure the existence of the Quistclose trust. Thus, the creditor or lender holds the beneficial interest in the money or asset until the purpose for which the money or asset is lent is fulfilled. Nonetheless, the Quistclose trust has not been recognised as a new

¹⁷ [1959] AC 457.

¹⁸ David Hayton, *Extending the Boundaries of Trust and Similar Ring-Fenced Funds* (Kluwer 2002) 192-193.

¹⁹ See Alastair Hudson, *Equity and Trusts* (6th edn, Routledge-Cavendish 2009) 173-174.

²⁰ [1871] LR 12 Eq 574.

²¹ [1968] 3 All ER 65.

²² Barrie Nathan, 'In Defence of the Primary Trust: Quistclose Revisited' (2012) 18 *Trusts & Trustees* 123, 128-129.

²³ Edwards and Stockwell, note 3, 188.

category of purpose trusts.²⁴ At the outset, the transferor has no intention to be a beneficiary. Thus, the money or asset is not given to the transferee for the benefit of the transferor. The failure to nominate a beneficiary would cause any trust to fail.²⁵ As such, the Quistclose trust is not a purpose trust. In the same vein, the question whether it is an express or resulting trust has also been the subject of extensive debates. Where X pays money to Y, intending to benefit W, this creates an express trust for W. If X's intention to create a trust is not effective because of the failure to clearly identify W, then Y will hold the money on resulting trust for X unless the evidence shows that X wanted Y to keep the money.²⁶ In both instances, the transferor's intention is sufficient to create a trust. However, in Quistclose cases, that intention is absent. Also, if it is argued that the beneficial interests remain with the transferor throughout, they cannot be said to result back to the transferor.

The Court of Appeal in *Twinsectra Ltd v Yardley*²⁷ contended that the Quistclose trust was actually a quasi-trust that did not necessarily satisfy the requirements for a valid trust. Although the House of Lords did not adopt this description, the Lords failed to provide a clearer description. It is difficult not to conceive of the Quistclose trust as a purpose and resulting trust. This is because there is a specific purpose for which the money borrowed must be used, and the failure to fulfil this purpose would give the transferor beneficial interest in the money. Hence, when the purpose fails, the money reverts to the creditor. That is why money advanced for the specific payment of a creditor was held to result in a Quistclose trust where that purpose was not fulfilled.²⁸ It is not important that there was no intention to create

²⁴ See *Twinsectra Ltd v Yardley*, note 6.

²⁵ Peter Birks, 'Retrieving Tied Money' in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 137.

²⁶ Robert Chambers, 'Restrictions on the Use of Money' in Swadling W (ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 108.

²⁷ *Twinsectra Ltd v Yardley* [1999] Lloyd's Rep 438.

²⁸ *Carreras Rothmans v Freeman Mathews Treasure* [1985] Ch 207.

an express trust or that no beneficiary was identified at the outset. It suffices that the purpose was sufficiently described.

Pushing the Quistclose Clause beyond Breaking Point?

The lack of any clear description by the courts has certainly pushed the Quistclose trust further than required. The fact that the transferor or lender is deemed to have a beneficial interest in the money or a proprietary claim in the asset enables him to reclaim the money or asset ahead of unsecured creditors in the event of the debtor becoming insolvent.²⁹ Thus, the transferor or lender is treated as a secured creditor although he has not registered any security interest against the debtor. It had been argued that Quistclose trust were an essential tool used by English courts to obtain an equitable outcome in the context of insolvency.³⁰ However, the failure to register the lender's interest is unfair to other creditors who are not aware of the preferential status of the lender's claim. Also, Watt has wondered why a rule of equity prevents a trust from being spelt out for a failed gift but the same rule does not apply to prevent a trust from being spelled out for a failed contract.³¹ A Quistclose trust is inferred from a failed contract given that it is held to arise from the transferee's failure to fulfil the purpose set in the contract between the transferee and transferor. Thus, the Quistclose trust overlooks traditional rules of equity.

Penner on his part noted that it is interesting that when the purpose is fulfilled the trust ceases and the lender becomes an unsecured creditor with no beneficial interests in the asset or

²⁹ Michael Bridge et al, 'Formalism, Functionalism, and Understanding the Law of Secured Transactions' (1999) 44 McGill Law Journal 567, 610.

³⁰ William Goodhart and Gareth Jones, 'The Infiltration of Equitable Doctrine into English Commercial Law' (1980) 43 MLR 489, 489-490.

³¹ Gary Watt, *Cases and Materials on Equity and Trusts* (10th edn, OUP 2016) 90.

money.³² He then argued that this reflects the traditional trust law principles, although where the purpose is imposed on the transferee under a contract, it may be difficult to talk of an actual trust duty. This is because the transferee has a contractual duty to fulfil the purpose, and where a trust duty is imposed, the lender's beneficial interest in the loan or asset is displaced. Moreover, where the power to use the loan or asset is for a purpose other than promoting the beneficiary's interests, this offends the beneficiary principle under trust law. This implies that the Quistclose structure ought to be based on a contract rather than a trust that incorporates power or mandate to apply the borrowed money or asset.³³ The courts have deliberately overlooked the fact that there is no beneficiary per se at the outset, and the purpose may not necessarily promote the transferor's interests.

The above inconsistencies certainly push the Quistclose trust beyond breaking point. They are still current because there is no consensus or dictum to settle the debate on the category of trust in which the Quistclose trust may be placed. As shown above, it does not fit within the categorisation of purpose, express or resulting trusts. The problem is that the Quistclose trust is not created by the intention of the lender to create a trust but by the operation of the law. However, in *Re Vandervell's Trust (No 2)*,³⁴ Megarry held that where A effectively transfers to B (or creates in his favour) any interest in any property, a resulting trust for A may arise in two distinct instances: first, where the transfer to B is not made on any trust; and secondly, where the transfer to B is made on trust and some or all of the beneficial interest is not disposed of. In the first instance, the resulting trust is based on a presumption that B holds the entire interest on trust. Thus, it is a presumed resulting trust. In the second instance, B holds

³² Note 1, 51.

³³ Lusina Ho and PJ Smart, 'Reinterpreting the Quistclose Trust: A Critique of Chambers' Analysis' (2001) 21 OJLS 267, 270.

³⁴ [1974] Ch 269.

the entire interest on a resulting trust for A by operation of the law. It may then be argued that the resulting trust is a consequence of the failure by A to dispose of the beneficial interest vested in him. The resulting trust carries back to A this beneficial interest. Thus, it is called an automatic resulting trust. What is intriguing here is that the Quistclose trust cannot be fitted in either of the two categories. The first category, the presumed resulting trust is actually an express private trust given that the asset is transferred on trust but the beneficial interest is not exhausted. However, in a Quistclose trust, the asset is transferred as a loan for a specific purpose. The second category, the presumed resulting trust, the transfer is made on trust unlike transfers in Quistclose cases. As such, the Quistclose trust ought to be reconceptualised in order to avoid it being stretched beyond acceptable limits.

Reconceptualising the Quistclose Trust

In *Laskar v Laskar*,³⁵ the court noted that there was a problem with the categorisations in *Re Vandervell's Trust (No 2)*. They are overly formalistic and require a mechanical fitting of cases into narrowly defined categories. It has been suggested that the Quistclose trust may be reconceptualised as a constructive trust.³⁶ Following from above, what distinguishes the Quistclose cases from resulting and express trusts is the transferor's lack of intention to retain the beneficial interest in the asset transferred to the transferee. The lack of intention is certainly a good indication that the parties intended that the beneficial interest should equally pass to the transferee. The lender or creditor clearly transfers the asset or money in consideration for repayment of both interest and principle, and does not envisage retaining any beneficial interest in the asset or money. It is therefore only logical that Quistclose cases

³⁵ [2008] EWCA Civ 347.

³⁶ Michael Smolyansky, 'Reining in the Quistclose Trust: A Response to *Twinsectra v Yardley*' (2010) 16 *Trusts & Trustees* 558, 558.

should be categorised as constructive trusts because these trusts are implied by the court to benefit parties who have been wrongfully deprived of their rights.³⁷

Lord Millet however subsequently argued that the only flaw with the Quistclose trust as initially established is the assumption that the beneficial interest in the asset will reside in the transferee unless there was an express intention for the interest to remain in the lender.³⁸ However, in loan agreements there is always an intent, express or implied, to transfer all the interest to the debtor. The difficulty in justifying the categorisation of Quistclose cases as trusts led the Australian judge, Gummow J, to conclude that the Quistclose trust should be excluded from insolvency cases.³⁹ He noted that this trust may be an express trust in some instances and a remedial constructive trust in others, but advised that it should be categorised as an express trust in order to set a high evidentiary standard. This suggestion is based on the fact that it is unfair to presume the Quistclose trust where there is no evidence of the lender's intent to retain beneficial interest in the loan. Presuming a trust has serious implications for distribution in case the debtor becomes insolvent.⁴⁰ Lord Millet however argued that the Quistclose trusts cannot be narrowly defined as Megarry J attempted to do in *Vanderwell v IRC (No 2)*.⁴¹ He noted that it suffices that the use of the loan was restricted and the debtor accepts the loan on these terms.⁴² The debtor has a legal obligation to fulfil the purpose of the loan or a trust should be implied in favour of the lender. It is uncertain whether a distinction should be made between vague purposes and clear purposes. It remains that Smolyansky's suggestion that a constructive trust should arise is more cogent given that the

³⁷ Graham Virgo, *The Principles of the Law of Restitution* (2nd edn, Clarendon 2006) 606-607.

³⁸ Millet P, 'The Quistclose Trust – A Reply' (2011) 17 *Trusts & Trustees* 7, 8.

³⁹ *Re Australian Elizabethan Theatre Trust* (1991) 102 ALR 681.

⁴⁰ Michael Bridge, 'The Quistclose Trust in a World of Secured Transactions' (1992) 12 *OJLS* 358, 358.

⁴¹ See Deepa Parmar, 'The Uncertainty Surrounding the Quistclose Trust – Part One' in *International Corporate Rescue* (Chase Chambers 2012) 130.

⁴² *Ibid.*

debtor's unconscionable conduct in failing to fulfil the purpose justifies implying a trust in favour of the innocent lender. This further justifies the giving of priority to the lender who is an unsecured creditor.

Conclusion

It is shown above that the Quistclose trust is inferred because the transferor is held not to have parted with the entire beneficial interest in the money. However, it is uncertain how it should be categorised. It has been held to be an extension of the resulting trust beyond the traditional category because the transferor's legal rights to seek repayment and equitable rights to claim title in the debtor's estate are deemed to have co-existed from the outset. However, the transferor did not declare any intention to retain beneficial interest in the money at the outset. It for the same reason that the Quistclose trust has not been recognised as a category of a purpose trust.

It is however difficult to argue that a trust should be implied under traditional principles of trust where a loan is given with the intention of transferring the absolute title to the debtor.⁴³ Swaddling notes that a trust does not arise accidentally but in response to a declaration by the trustee to hold an asset or funds for another or by conveyance by the transferor seeking to create a trust in favour of some person other than the transferee.⁴⁴ What is intriguing with Quistclose trusts is that the transferor intends the transferee to hold the money absolutely.⁴⁵ Thus, if the latter declares a trust, this may be interpreted as a fraudulent preference in the transferor's favour given that the intention at the outset was for the transferee to hold the

⁴³ The question of trust is based on the lack of discretion. See *The Charity Commission for England and Wales v Framjee* [2014] EWHC 2507 (Ch).

⁴⁴ William Swaddling, 'Orthodoxy' in William Swaddling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 15.

⁴⁵ See *Guardian Ocean Cargoes Ltd v Banco de Brasil* [1994] 2 Lloyd's Rep 152.

money absolutely, and any subsequent declaration of a trust simply places other creditors in an unfavourable position. It is argued above that the transferor should be required to register the interest if a trust ought to be inferred in order not to disadvantage the other creditors.

It must be noted that trust law has traditionally frowned upon the attachment of conditions to use trust property in a particular way. In *Re Sanderson's WT*, it was held that 'If a gross sum be given ... and a special purpose assigned for that gift, this court always regards the gift as absolute.'⁴⁶ Hence, the purpose simply defines the gift and does not make the recipient the nominal owner or creates a trust. Also, it was held in *Re Osaba* that the court should treat 'the reference to the purpose as merely a statement of the testator's motive in making the gift.'⁴⁷ It is difficult to argue that the requirement of the fulfilment of a purpose is an intention to create a trust, whether the requirement is a contractual term or not. A contractual obligation does not make a party a trustee,⁴⁸ else aggrieved parties would not seek damages for breach of contract but simply claim that they retained a beneficial interest in the asset that was transferred under the contract. Also, arguing that a trust is created in this instance would be tantamount to arguing that the recipient or borrower is a fiduciary. In *Noreburg v Wynrib*, Sopjinka J cautioned against superimposing fiduciary duties on common law duties in order to improve the nature or extent of the available remedy.⁴⁹ Hence, rather than infer a resulting Quistclose trust, it is more appropriate for the courts to infer a constructive trust or simply hold that the transferor has an equitable right of restraint against the transferee from using the money for a purpose other than that stated in the loan agreement.

⁴⁶ (1857) 3 K&J 497, 503.

⁴⁷ (1979) 1 WLR 247, 257.

⁴⁸ That is why costs associated with office overheads are not normally recoverable, see *Mealing-McLeod v The Common Professional Examination Board* [2000] EWHC 185 (QB).

⁴⁹ (1992) 92 DLR (4th) 449, 481.

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