

## THE NATURE OF QUISTCLOSE TRUSTS: CLASSIFICATION AND RECONCILIATION

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### I. INTRODUCTION

THE facts of *Barclays Bank Ltd. v. Quistclose Investments Ltd.* are well-known.<sup>1</sup> In July 1964 Rolls Razor Ltd. declared a dividend payment that they were unable to meet. In order to meet their obligation, the company arranged to borrow the amount of the dividend, £210,000, from Quistclose Investments. The money was duly transferred into a separate account of Rolls Razor, opened specially for the purpose, held at Barclays Bank. The dividend was payable on 24 July but had not been paid when, on 27 August, Rolls Razor entered voluntary liquidation. Barclays and Quistclose both claimed the money. Barclays asserted a right of set-off against the Rolls Razor overdraft, while Quistclose claimed that the money was held in trust for them and, since Barclays were aware of this, the bank were accordingly constructive trustees of the funds.

Quistclose won. A unanimous House of Lords agreed that the funds were held in trust and that Barclays had the necessary notice of the arrangement. However, several issues were left open. Firstly, Lord Wilberforce referred to a “primary” trust for the creditors, and a “secondary” trust for the lender, yet the mechanics and nature of these trusts were not explored. Lord Wilberforce never categorised the “secondary” trust as express, resulting or constructive, nor did he comment on the issue of enforcement of the “primary” trust. Secondly, the scope of the *Quistclose* analysis was not defined. *Quistclose* itself involved an attempted financial rescue, as did the earlier cases that Lord Wilberforce approved.<sup>2</sup> Does this mean that the analysis can only apply in such cases,<sup>3</sup> or

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<sup>1</sup> *Barclays Bank Ltd. v. Quistclose Investments Ltd.* [1970] A.C. 567.

<sup>2</sup> *Toovey v. Milne* (1819) 2 B. & Ald. 683; *Edwards v. Glyn* (1859) 2 E. & E. 29; *Re Rogers* (1891) 8 Morr. 243; *Re Drucker (No. 1)* [1902] 2 K.B. 237.

<sup>3</sup> Discussing the line of cases prior to *Quistclose*, Swadling comments: “they form an anomalous rule applicable only to the law of bankruptcy and, for that reason, cannot be applied outside that context”. W. Swadling, “A New Role for Resulting Trusts?” (1996) 16 L.S. 110, p. 122. See also *Re Associated Securities* [1981] 1 N.S.W.L.R. 742.

is the underlying principle that property transferred for a specific purpose will be held on trust?<sup>4</sup>

This paper is concerned with the categorisation of *Quistclose* arrangements, an issue necessarily tied up with that of enforcement. Certain relationships, such as express trustee/beneficiary, have common proprietary consequences.<sup>5</sup> Thus the classification of a device as, for example, an express trust for a third party, would have the corollary of allowing that person to enforce the trust. Similarly, if parties did not label the transaction but contemplated that the third party would have a right to enforce the trust, it might be that the third party would be found to have a beneficial interest. In this way classification is necessarily made by both legal principle and the parties' chosen allocation of rights and liabilities. How one affects the other is a central thesis of this article.

Various commentators have argued that *Quistclose* arrangements should properly be termed express, resulting or constructive trusts.<sup>6</sup> Further, it has been argued that—at least while the purpose is still capable of fulfilment—*Quistclose* trusts are in fact not trusts at all but rather instances where both legal and beneficial title are held by the borrower, with the transferor holding only an equitable right to restrain the borrower's misuse of the funds.<sup>7</sup> The various possibilities are discussed and criticised below. It will be argued that these theories as to the nature of the *Quistclose* trust are not necessarily mutually exclusive and that there is no single "right answer": the finding of an express trust in one *Quistclose*-type situation would not preclude the finding of a resulting trust in another. As mentioned above, classification and an analysis of the parties' agreement necessarily inform each other: depending on that agreement it may in any given situation be more appropriate to categorise the relationship as that of express trust, resulting trust, or of no trust at all.

### *Security for the lender*

In *Twinsectra v. Yardley*, Lord Millett remarked in the context of *Quistclose* trusts that the "whole purpose of the arrangements ... is to prevent the money from passing to the borrower's trustee-in-

<sup>4</sup> As seems to be the correct view. See *Twinsectra Ltd. v. Yardley and others* [2002] UKHL 12, [2002] 2 A.C. 164, at [68] *per* Lord Millett: "In the earlier cases the purpose was to enable the borrower to pay his creditors or some of them, but the principle is not limited to such cases."

<sup>5</sup> For example the right of absolutely-entitled, *sui juris* beneficiaries to terminate an express trust: *Saunders v. Vautier* (1841) 4 Beav. 115.

<sup>6</sup> Should the *Quistclose* trust not fit into one of these three categories a further option is that it should be considered *sui generis*: see J. Payne, "Quistclose and Resulting Trusts", in P. Birks & F. Rose (eds.), *Restitution and Equity* vol. 1 (London 2000), ch. 5. As will become apparent, this author believes that *Quistclose* trusts are adequately served by the normal labels.

<sup>7</sup> R. Chambers, *Resulting Trusts* (Oxford 1997), ch. 3.

bankruptcy in the event of his insolvency”.<sup>8</sup> That is, a “true” *Quistclose* trust is characterised by the transferor retaining some form of security over the property. It is, of course, possible for parties to construct an arrangement whereby A transfers property to B to enable B to pay C and A does not retain any security in the advanced funds. It is not contended that such a transaction would be invalid due to the lack of A’s security, merely that the lack of security would prevent the arrangement from being termed a *Quistclose* trust within the meaning of Lord Millett’s analysis.

Correspondingly, the fact that a transferor holds security does not automatically make the arrangement a *Quistclose* one: the security may be held by way of charge, or the property may have been advanced subject to a retention of title clause. However, it is argued that a lack of security on A’s part will make a *Quistclose* analysis unavailable. It has already been mentioned that this would not make the transaction invalid, so it may be thought that the distinction is rather academic. As will become apparent it is used simply as a way of distinguishing between those trust constructions where the beneficial interest is in A (“true” *Quistclose*), and those where the equitable title is in C (still a trust, but not of the *Quistclose* type).

## II. BENEFICIAL OWNERSHIP IN C—TRUST FOR THE THIRD PARTY

If A transfers money to B subject to the condition that it only be used to pay C, it could be that a trust for C is created whereby B is the trustee. That is, A’s direction that B should use the money for C may go beyond a vague intention to benefit and become an intention that C has the right to use and enjoy the benefit of that money.<sup>9</sup> There is some support for this view that the beneficial interest vests in the third party. In *Quistclose* itself Lord Wilberforce said that “arrangements of this character for the payment of a person’s creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person”.<sup>10</sup> Extra-judicially, Lord Millett has expressed similar views. In 1985 he wrote: “If A’s intention was to benefit C, or his object would be frustrated if he were to retain a power of revocation, the transaction will create an irrevocable trust in favour of C, enforceable by C but not by A. The beneficial interest in the trust property will be in C.”<sup>11</sup>

<sup>8</sup> [2002] 2 A.C. 164, at [82].

<sup>9</sup> See *Paul v. Constance* [1977] 1 W.L.R. 527.

<sup>10</sup> [1970] A.C. 567, 580.

<sup>11</sup> P.J. Millett, “The *Quistclose* Trust: Who Can Enforce It?” (1985) 101 L.Q.R. 269, p. 290.

The case of *Hassall v. Smithers* is also worth noting, although it may ask as many questions as it answers.<sup>12</sup> Funds were provided to enable the recipient to discharge certain debts he had incurred. However, the recipient soon died, intestate, without having satisfied these debts. The provider of the funds brought a joint action with the deceased's creditors and they were able to compel the deceased's representative to pay off the debts. This could be seen as the creditors (C) having a right to compel performance, which would suggest that they were the beneficial owners. However, it could also be argued that it was the action of the provider (A) that was successful, as he had retained the beneficial interest throughout.<sup>13</sup>

Of course there is nothing abhorrent about the idea of A transferring property to B, directing that it be held on trust for C. In most cases this transfer will create a simple express trust with B holding as trustee for C and the settlor, A, dropping out of the picture as a stranger to the trust.<sup>14</sup> However, there are some important considerations that must be addressed. Firstly, although the model above assumes that A is the settlor, it could also be B. On this construction B would borrow money from A to enable B to create a trust in favour of C: thus B settles the trust. If A intended that the money would end up in C's hands then the situation is less clear: the beneficial interest may pass straight from A to C. However, it is suggested that the level of A's knowledge or intention must be carefully scrutinised to see whether it is sufficient to effect the creation of a trust. If it is, then A is the settlor and B only ever receives legal title. However, it is more likely that A will recognise and contemplate that C will gain the ultimate benefit of the funds, but that this recognition will not be enough to show the requisite certainty of intention to create a trust.

The identity of the settlor may be crucial if the deal involves tax considerations, or if the trust for C is settled shortly before B's insolvency.<sup>15</sup> The capacity of B to create trusts may be a further

<sup>12</sup> (1806) 12 Ves. 119.

<sup>13</sup> The Court did not answer this question: see L. Ho & P. St. J. Smart, "Re-interpreting the Quistclose Trust: A Critique of Chambers' Analysis" (2001) 21 O.J.L.S. 267, p. 279.

<sup>14</sup> As Chambers points out, the transfer could also take effect as a secret (constructive) trust if the transfer was part of a testamentary disposition that did not satisfy the requirements of the Wills Act 1837: R. Chambers, "Restrictions on the Use of Money" in W. Swadling (ed.), *The Quistclose Trust: Critical Essays* (Oxford 2004), ch. 5.

<sup>15</sup> There seem to be two possible lines of reasoning as to why such a device would not be a preference. In *Re Kayford* [1975] 1 W.L.R. 279, 281, it was thought that the question was not one of preferring particular creditors, but rather of preventing donors of money from becoming creditors (by making them beneficiaries instead). The case has been criticised on this point, and the weakness is amply demonstrated by D. Waters in "The Trust in the Setting of Business, Commerce and Bankruptcy" (1983) 21 *Alberta L.R.* 395, p. 417.

Alternatively, following the distinction drawn by Millett J. in *Re MC Bacon Ltd.* [1990] B.C.L.C. 324, one could argue that whilst the debtor company may have intended to prefer

issue. Much more importantly for our purposes, though, the identity of the settlor tells us who receives the money in the event of the trust failing for uncertainty of objects. Should C be ill-defined, extinct or otherwise unidentifiable then the beneficial interest will revert to the settlor with B either holding on trust for A or obtaining full beneficial and legal title for himself.<sup>16</sup>

A situation is therefore conceivable whereby A transfers money to B, contemplating that B will use it to benefit C. However, A's contemplation, or indeed intention, is not sufficient to make her the settlor of the trust: instead the money is transferred to B who declares herself trustee of it in favour of C. It then transpires that C does not exist and the beneficial interest reverts on resulting trust to B as the settlor. A will almost certainly have a contractual claim against B, as it is very likely that B has borrowed the money from A, but this will provide little security in an insolvency situation. It may be possible to imply an intention that the beneficial interest should revert to A in the event of C being unidentifiable. However, this would be the equivalent of B declaring herself trustee in favour of A and would have the attendant problems regarding certainty of intention, preferences, and the capacity to create trusts.

We must also consider the mechanics of the trust whilst the purpose is still capable of fulfilment. Here the identity of the settlor is irrelevant: as long as the beneficial interest is vested in C it does not matter whether A created the trust or B declared himself trustee of money received from A. C is the beneficial owner while B holds legal title. B will owe fiduciary duties to C as trustee and may also owe contractual duties to A, both in terms of repayment of the loan and of fulfilling the purpose for which the loan was made.<sup>17</sup> In *Twinssectra* Lords Millett and Hoffmann spoke of the recipient (B) holding a power to apply the funds for the specified purpose,<sup>18</sup> although at the time their Lordships were clearly

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the creditor company, it did not necessarily desire to. That is, a declaration of trust would only be vulnerable if there was a positive desire to improve the creditor's position, rather than simply an appreciation of the necessity of such an act. This is a stronger ground on which to deny a preference but it must be recognised, as the judge, Robert Wright QC, noted in *Re Beacon Leisure Ltd.* [1991] B.C.C. 213, that the distinction may be very small. In short, a declaration of trust in the run up to insolvency may still be vulnerable to claims that the device created a preference. See further G. McCormack, *Proprietary Claims and Insolvency* (London 1997), pp. 58–64.

<sup>16</sup> It is important to note that we are concerned here with a trust failing initially for uncertainty of objects, not subsequently because of B's supervening insolvency. In that circumstance the funds will not be available for distribution amongst B's other creditors as the beneficial ownership of those funds would already be in C.

<sup>17</sup> It is recognised that A obligating B by contract to benefit C could easily be construed as A intending the beneficial interest to pass straight to C. However, this does not conflict with the notion of B owing contractual duties to A, and those duties replicating proprietary obligations that B owes to C. (Note also, of course, the potential application of the Contracts (Rights of Third Parties) Act 1999.)

<sup>18</sup> [2002] 2 A.C. 164, at [13]–[16] *per* Lord Hoffmann, and at [101] *per* Lord Millett.

contemplating the beneficial interest in the money to be in A.<sup>19</sup> It is rather redundant to speak of B having a power to benefit C when C is the beneficial owner. As regards A, B may have a contractual duty to pay C. As regards C, B will be susceptible to C terminating the trust.<sup>20</sup>

*Problems and Classification: is this a Quistclose trust?*

It is not doubted that the beneficial interest could vest in C in a transaction that appeared very similar to a *Quistclose* situation. However, it is argued that such a transaction should not properly be termed a *Quistclose* trust. The very essence of such a device is that it protects A's interests in the event of B's insolvency.<sup>21</sup> It could be argued that if A directed B to apply the funds to C, then A's interest would be adequately protected through the benefit gained by C: after all, this is what A desired in the first place. A could also protect the investment *de facto* by taking security over some of B's other assets. However, B may be incapable of giving such security, and it may be doubted whether such a course would be a commercially realistic route for A to take. Other than these frankly unsatisfactory suggestions, A's options—and security—would be severely limited.

Under this construction the only right A could have to compel performance would be contractual,<sup>22</sup> and indeed this is also problematic: what if B contracts with A to give the money to C in regular instalments, but C as beneficiary then directs B to give him all the money at once, terminating the trust? C could even terminate the trust and direct B to pay the money to someone else.<sup>23</sup> B has to comply with the wishes of his beneficiary, but in doing so necessarily breaches his contract with A.<sup>24</sup> The House of Lords in *Quistclose* held that the lender actually has “an equitable right to see that [the funds] are applied for the primary designated purpose”.<sup>25</sup> But how strong is this equitable right when facing the

<sup>19</sup> Lords Millett and Hoffmann may have disagreed over whether this was through the mechanism of an express trust or a resulting trust: see n. 62 below.

<sup>20</sup> C is an absolutely-entitled beneficiary and so may terminate the trust under the principle in *Saunders v. Vautier* (1841) 4 Beav. 115.

<sup>21</sup> See quotation cited above, n. 8.

<sup>22</sup> This may conflict with the decision in *Hassall v. Smithers* (1806) 12 Ves. 119, depending on one's view of that case.

<sup>23</sup> *Re Marshall* [1914] 1 Ch. 192; *Re Sandeman's WT* [1937] 1 All E.R. 368.

<sup>24</sup> This would still be a problem even if C had agreed not to direct B in this way. C's proprietary rights “trump” his contractual obligations. See J. Glistler, “*Twinsectra v. Yardley: Trusts, Powers and Contractual Obligations*” (2002) 16 *Trust Law International* 223, p. 228.

<sup>25</sup> “Equitable” may refer to a personal right enforceable by injunction, or to a proprietary right. The “equitable” right of the lender in Chambers' thesis is of the former kind: see discussion below, nn. 37–41 and associated text. For the purposes of the current discussion the distinction is irrelevant: the question is the strength of this right against the directions of an absolutely-entitled beneficiary.

directions of an absolutely-entitled beneficiary? If C's interest is subject to A's equitable right then it is difficult to see how C could truly be the beneficial owner. If, on the other hand, C's beneficial interest outweighs any equitable right of A then A's security is again limited.

Most importantly, though, if B becomes insolvent having applied half the funds for the agreed purpose, it is difficult to see how the other half could revert to A. This would be necessary for A to have any security, and thus necessary for this "trust for C" construction to be a "true" *Quistclose* trust. C has been the beneficial owner of all the money since the start of the arrangement,<sup>26</sup> and at the time of B's insolvency C has been paid—and thus acquired legal title to—half of the money. The purpose has been fulfilled as far as this half is concerned, whilst the other half is still owned by B on trust for C. How does A get it back? This is the "secondary" trust that Lord Wilberforce spoke about in *Quistclose*.<sup>27</sup>

A cannot unilaterally remove C's beneficial interest in the money, and neither can B. The only way would be to either impute an unlikely intention to C that he transfers his equitable interest in the remaining funds back to A, or to consider that C keeping the interest in the remaining money would be unconscionable: also, it is suggested, unlikely. It has been argued that a true *Quistclose* trust is characterised by the lender, A, retaining some form of security.<sup>28</sup> Such an arrangement is not possible if the beneficial interest in the transferred funds is taken to be in the creditor C.

Returning to Lord Millett's extra-judicial writing, he asserts that if "[A's] object would be frustrated if he were to retain a power of revocation, the transaction will create an irrevocable trust in favour of C".<sup>29</sup> Yet it would be a rare situation where A's object would be so frustrated: no doubt C would prefer it if A did not have a power of revocation, but A's foremost consideration will be the protection of his own investment. Should this not be his foremost consideration, A is always free to simply give the money to C or loan it to B without attempting any form of security. To summarise; it is suggested that a trust for third parties of the kind that Lord Millett envisaged, whilst of course conceivable, is not a true *Quistclose*-type trust. The trust for third parties encounters problems when applied to insolvency situations and, whilst it is recognised that *Quistclose* does not only apply here, it is suggested

<sup>26</sup> Whether the settlor was A or B.

<sup>27</sup> [1970] A.C. 567. See also discussion below, Section IV, of the trust being for A, whereupon the distinction between primary and secondary trusts collapses.

<sup>28</sup> See above, n. 8, and associated text.

<sup>29</sup> Millett, "The Quistclose Trust" (1985) 101 L.Q.R. 269, p. 290.

that the use of a “trust for C” construction would rather undermine the point of employing a *Quistclose* device in those situations. Perhaps the point is better made from another angle: that is, the lack of security for A’s advance would undermine any attempt to argue that A had not intended the beneficial ownership to vest in C.

### III. BENEFICIAL OWNERSHIP IN B—NO TRUST

It is clear that if B borrows money from A the beneficial interest in that money will normally be in B, with B owing A the money at common law under a contract of loan.<sup>30</sup> This will be the case whether or not B intends to pay C with the money. It will also be the case if A knows that B intends to pay C. We are concerned with the point at which A’s knowledge and intentions regarding B’s use of the money alter the location of the beneficial interest in those funds. When discussing the possibility of the beneficial interest being in C it was argued that either A or B would need to show the requisite certainty of intention to create a trust in favour of C.<sup>31</sup> If the requisite certainty of intention to create a trust for C is not present then we must determine where the beneficial interest lies: A or B.

If A merely contemplates that B will use the funds for a specific purpose then B will receive unrestricted beneficial ownership.<sup>32</sup> A good illustration is the recent Australian case of *Roxborough v. Rothmans of Pall Mall Australia Ltd.*, where the appellants were tobacco retailers who bought cigarettes from Rothmans, a wholesaler.<sup>33</sup> Tobacco wholesalers and retailers in New South Wales were required to pay a licence fee to the State, but any products in respect of which a fee had already been paid by the wholesaler were disregarded in the calculation of the retailer’s fee. Roxborough bought tobacco from Rothmans and was duly invoiced for the price, with the amount due being expressly apportioned between the

<sup>30</sup> Strictly speaking, a person solely entitled to both legal and beneficial estates in property does not have an equitable interest: the legal title carries with it all the rights. See *Commissioner of Stamp Duties (Queensland) v. Livingston* [1965] A.C. 694, 712 *per* Viscount Radcliffe; *Vandervell v. I.R.C.* [1967] 2 A.C. 291, 311 *per* Lord Upjohn; *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.* [1996] A.C. 669, 706 *per* Lord Browne-Wilkinson. In this discussion the beneficial and legal title will normally be kept separate, for ease of expression, even when they vest in the same person. However, the issue does become important when discussing the possibility of A “retaining” rather than “obtaining” the equitable interest. See discussion below, nn. 68–73 and associated text.

<sup>31</sup> Depending on who is considered the settlor.

<sup>32</sup> In *Re Osoba* [1979] 2 All E.R. 393 a man left money to his wife on trust for his daughter’s “training up to university grade”. It was held that the daughter took unrestricted ownership. See also *Re Bowes* [1896] 1 Ch. 507 where a trust was expressed as being for the planting of trees. It was held that the owners of the relevant estate took free of any trust, the tree planting being considered as merely expressing a motive.

<sup>33</sup> (2001) 185 A.L.R. 335.

actual cost of the cigarettes and the proportionate amount of the licence fee. In effect, Rothmans passed on the fee to its retailers. The licence fee was subsequently held to be constitutionally invalid by the High Court, but the retailers had already paid certain sums to Rothmans in anticipation of licence fees payable in the future. Since the invoices had specifically mentioned amounts payable as regards the licence fee, could the appellants claim that those sums of money now held by Rothmans were held on trust for them?<sup>34</sup>

In the High Court, Gleeson C.J., Gaudron and Hayne JJ., found that “the tax component of the net total wholesale cost was treated as a distinct and separate element by the parties”.<sup>35</sup> It could thus be argued that, given A’s clear contemplation that the money be applied for a specific purpose, B did not receive unrestricted beneficial ownership. However, although the parties considered the tax money to be severable from the rest of the contract, it did not necessarily follow that they also intended the further step of intending the beneficial interest in the tax money to remain in the donor (or at least restricting the beneficial ownership of the wholesaler). As Gummow J. held: “That is not to maintain that Rothmans failed to acquire ownership in specie of the funds it was paid; nor does it mean that Rothmans was obliged to earmark and keep those funds separate or otherwise treat them as if they were impressed with trusts in favour of the appellants.”<sup>36</sup>

In that case the intention was not “strong” enough to prevent B from receiving full ownership of the funds. What is required is a binding condition that the relevant money will only be used for a specific purpose. Simply put, if it had been contended that a *Quistclose* trust existed in *Roxborough*, the High Court could have said: “it is accepted that the retailers paid a specific and severable amount of money to Rothmans so that they could pay the licence fee; but we do not accept that the parties intended that *that specific property itself* should necessarily be the money applied”.

#### *The lender’s right—personal or proprietary?*

Chambers argues that the existence of a binding condition need not necessarily mean that the beneficial interest remains in A, but

<sup>34</sup> Interestingly, in the Full Federal Court the retailers had conceded that Rothmans had not received money on terms of a *Quistclose* trust. This was because there was no obligation to keep the “tax money” segregated. Bryan and Ellinghaus question the need for this concession in “Fault Lines in the Law of Obligations: *Roxborough v. Rothmans of Pall Mall Australia Ltd.*” (2000) 22 Sydney Law Review 636, p. 664, n. 101; and the current author has argued elsewhere that a requirement of segregation is not necessarily determinative in these cases: Glister, “*Twinspectra v. Yardley*: Trusts, Powers and Contractual Obligations” (2002) 16 Trust Law International 223, p. 230.

<sup>35</sup> (2001) 185 A.L.R. 335, 342.

<sup>36</sup> (2001) 185 A.L.R. 335, 350.

rather than B can receive the beneficial ownership, albeit restricted by that condition.<sup>37</sup> The existence of the condition as a restriction on B's ownership would carry with it a right, exercisable by A, to restrain B's misuse.<sup>38</sup> The nature of this right is important: if it is a merely personal right then A's security is denied as the right will not be enforceable against third parties.<sup>39</sup> Yet if the right is a proprietary right then it is difficult to identify. In acknowledging that it does not fit into the accepted categories of proprietary rights to money,<sup>40</sup> Chambers argues that we are dealing with a form of personal right that developed in parallel with restrictive covenants in land and the *De Mattos v. Gibson* principle.<sup>41</sup> In short, the *Quistclose* right is a personal right to money that should have, but never did, make the transition into a proprietary right.

As mentioned above, the problem with A's right being merely personal is that the level of security that that would afford is less than if the right was of the proprietary kind.<sup>42</sup> Under this construction once the purpose had failed A would become the beneficiary of a resulting trust. However, A's position before the trust fails may also be important, and it is unclear whether Chambers' analysis adequately accounts for this situation. Not only is there the problem of A's right to restrain being a merely contractual right; it may also be legitimately questioned whether *Quistclose* cases are indeed characterised by the lender's right to restrain misuse rather than, at least in some cases, a right to compel performance. In *Gibert v. Gonard*, North J. appeared to be mindful of a right to compel when he observed that "if [a recipient] 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".<sup>43</sup> Similarly, in *Hassall v. Smithers*, Grant M.R. held that the "intestate was bound so to apply that remittance".<sup>44</sup> Ho and

<sup>37</sup> Chambers, *Resulting Trusts*, pp. 73–78.

<sup>38</sup> Note that even if the right is purely personal A could still seek specific performance of B's obligations by injunction: *Conservative and Unionist Central Office v. Burrell* [1982] 2 All E.R. 1.

<sup>39</sup> It might be that as soon as B misapplied any money the rest could revert to A on resulting trust, because in those circumstances it was never intended that B should have full ownership. See discussion below, n. 52. However, and in any case, a resulting trust construction involving the remaining property does not account for the money that has already been misapplied. Chambers, "Restrictions on the Use of Money", in Swadling (ed.), *The Quistclose Trust*, points out that this misapplied money would normally have disappeared anyway, either into the hands of a *bona fide* purchaser or received by an innocent volunteer who has since changed their position. This may often be true, but not all the time and it is suggested that it would still be clearly more beneficial to A to be able to exercise a proprietary right.

<sup>40</sup> Ownership, possession, a right of rescission and security interests.

<sup>41</sup> Chambers "Restrictions on the Use of Money", pp. 94–97, discussing *Tulk v. Moxhay* (1848) 41 E.R. 1143; *De Mattos v. Gibson* (1859) 45 E.R. 108.

<sup>42</sup> Neither would afford as much security as beneficial ownership, discussed below. (1884) 54 L.J. Ch. 439, 440.

<sup>44</sup> (1806) 12 Ves. 119, 121.

Smart also point out that “if counsel had asked the directors of the plaintiff in *Quistclose* whether it was intended that Rolls Razor might sit on the money (for an indeterminate time) or, alternatively, that Rolls Razor had (within a reasonable time) to use the money to pay off the dividend, one suspects an obvious reply would have been forthcoming”.<sup>45</sup>

At least in some cases, it seems that B’s application of the funds for the specific purpose is obligatory, not permissive. That is, B is under a positive obligation to apply the funds, not merely a negative obligation to not misapply them. Ho and Smart contend that Chambers’ view is “unavailable” in these cases involving positive obligations: the existence of a positive obligation would necessarily mean that “the ‘entire beneficial ownership’ of the money could scarcely be in the lender”.<sup>46</sup> This seems irreproachable, and received support from Lord Millett in *Twinsectra*.<sup>47</sup> Lord Millett did not accept Chambers’ opinions regarding the nature of the lender’s right to restrain misuse:

The duty is not contractual but fiduciary. It may exist despite the absence of any contract at all between the parties, as in *Rose v. Rose* (1986) 7 NSWLR 679; and it binds third parties as in the *Quistclose* case itself. The duty is fiduciary in character because a person who makes money available on terms that it is to be used for a particular purpose only and not for any other purpose thereby places his trust and confidence in the recipient to ensure that it is properly applied. This is a classic situation in which a fiduciary relationship arises, and since it arises in respect of a specific fund it gives rise to a trust.<sup>48</sup>

### *Reconciliation*

In his recent piece on *Quistclose*, Chambers acknowledged that his model was not universally applicable, but maintained that the analysis should still stand as a legal device that may be employed by parties who choose to do so.<sup>49</sup> However, although the potential existence on certain facts of a “no-trust” construction can be accepted,<sup>50</sup> it is argued that there is more to be said about the relationship between the different models of Chambers and Millett.

<sup>45</sup> Ho and Smart “Re-interpreting the *Quistclose* Trust” (2001) 21 O.J.L.S. 267, p. 278.

<sup>46</sup> *Ibid.* (footnote omitted).

<sup>47</sup> [2002] 2 A.C. 164, at [95].

<sup>48</sup> [2002] 2 A.C. 164, at [76]. For further discussion of fiduciary duties in this context see below, nn. 74-80 and associated text.

<sup>49</sup> Chambers, “Restrictions on the Use of Money”, p. 88. In his 1997 book Chambers had appeared to think that the two models were necessarily inconsistent: *Resulting Trusts*, p. 86.

<sup>50</sup> Chambers admitted that a resulting trust model “may even be the most likely outcome when a binding restriction on the use of money does not create an express trust”: Chambers, “Restrictions on the Use of Money”.

What circumstances would give rise to one or the other, given that parties' express wishes may well be absent?<sup>51</sup>

It is suggested that it is necessary once more to separate positive and negative obligations. Lord Millett's words seem to suggest a positive duty, *i.e.* the fiduciary duty arises when A trusts that B will properly apply the money; when A makes money available on terms that it is to be used for a particular purpose only. To disregard these terms would be unconscionable. Chambers on the other hand is concerned with cases involving negative duties: where B may not spend the money on anything else, but is not actually compelled to apply the money. It may seem a very narrow distinction, but could it not be argued that it is the intention of the parties that B be *compelled* to apply the funds that is crucial? That is, if the parties agree that B will not use the money for anything other than C then no fiduciary relationship arises: if B misapplies the money then A is left to his remedy in contract.<sup>52</sup> However, if they agree that B must spend the money on C then B becomes A's fiduciary. There is clearly a distinction between being compelled to do something and merely being at liberty to do so: in this circumstance it is suggested that the distinction determines where the beneficial ownership in property lies.<sup>53</sup>

Chambers' model has also been criticised for being unable to apply in instances where the transfer is not pursuant to a contract.<sup>54</sup> In this situation, so the argument goes, there would be no basis for a contractual right to prevent misuse, and so the duty must be fiduciary. It is suggested that this is somewhat misleading: the contract exists as evidence of the parties' intentions as to the beneficial ownership of the funds. I have argued that if the contract creates a positive duty on the part of the recipient, B, then that is indicative of an intention that B should not be the equitable owner.

<sup>51</sup> Express wishes might also by their existence result in another construction entirely: that of an express trust.

<sup>52</sup> A is left to this remedy for the money that has already been misapplied. Any remaining funds will be held by A beneficially under a resulting trust: see above, n. 39. One consequence of this analysis might appear surprising: following an initial misapplication this model would suggest that any further application of property—even precisely within the original agreement—would be unlawful. This might seem unpalatable to innocent volunteers dealing with trust property within the original purpose. Perhaps we could construct the resulting trustee B as also holding a power to apply the funds to the original purpose: that is, although the misapplication gave rise to a resulting trust, this is a matter of presumed intention and is not the same as saying that the trust sprang up because the purpose had failed. Failure of purpose would give rise to a resulting trust, but that is not to say that only a failure of purpose may do so.

<sup>53</sup> Lord Millett, [2002] 2 A.C. 164, at [76], stated that it would be "unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it". It is suggested that this supports the suggested distinction: if B receives money under a negative obligation, then as long as he does not misapply it he is not disregarding the terms on which he received those funds.

<sup>54</sup> See the comments of Lord Millett in *Twinsectra v. Yardley* [2002] 2 A.C. 164, at [95], and those of Ho and Smart, "Re-interpreting the *Quistclose* Trust" (2001) 21 O.J.L.S. 267, p. 279.

B has undertaken to apply the funds for a purpose, A has reposed trust and confidence in B to this effect, and B is therefore A's fiduciary. If the agreement does not create a positive duty to apply the money, then there is no fiduciary relationship. It so happens that, in a case where this transfer was pursuant to a contract, A may have a contractual right to prevent misuse. Yet Chambers' model does not suggest that it automatically follows that voluntary transfers cannot involve fiduciary relationships: it merely asserts that there is no contract that can be used as evidence to determine whether the parties intended a relationship that the law may classify as fiduciary. Evidence must be sought from other means: a non-contract transfer may or may not involve fiduciary duties on the part of the recipient. The only difference is that where a non-contract transfer does not involve fiduciary duties there will also not be any contractual duties upon which the transferor could rely.<sup>55</sup>

#### IV. BENEFICIAL OWNERSHIP IN A—TRUST FOR THE LENDER

In 1985, Lord Millett proposed that under a *Quistclose* trust the beneficial ownership of the transferred property might remain in the lender.<sup>56</sup> This suggestion "cleared away a lot of the fog"<sup>57</sup> in the *Quistclose* area and was received with considerable academic and judicial favour.<sup>58</sup> The construction has also been recently adopted by the House of Lords in *Twinsectra v. Yardley*.<sup>59</sup> When A transfers funds to B, B does not take them beneficially but instead holds the money on trust for A, under either an express trust or resulting trust. B becomes the holder of a power to apply the funds for C, the agreed purpose.<sup>60</sup>

<sup>55</sup> Again, as soon as some of the property is misapplied the rest of the funds will be held by the transferor on resulting trust: above, n. 39 and 52.

<sup>56</sup> Millett, "The Quistclose Trust" (1985) 101 L.Q.R. 269.

<sup>57</sup> The phrase is Chambers': *Resulting Trusts*, p. 74.

<sup>58</sup> See in particular M. Bridge, "The Quistclose Trust in a World of Secured Transactions" (1992) 12 O.J.L.S. 333, p. 352; and J. Priestley, "The Romalpa Clause and the Quistclose Trust", in P.D. Finn (ed.) *Equity and Commercial Relationships* (Sydney 1987), ch. 8, p. 237. The construction was also adopted by the New Zealand Court of Appeal in *General Communications Ltd. v. Development Finance Corp. of New Zealand Ltd.* [1990] 3 N.Z.L.R. 406, and was favourably considered by Gummow J. in the Australian Federal Court in *Re Australian Elizabethan Theatre Trust* (1991) 102 A.L.R. 681.

<sup>59</sup> [2002] 2 A.C. 164.

<sup>60</sup> On the personal level B will almost certainly owe a contractual duty to A to apply the funds to C. As a matter of property law B holds on trust for A, but B also has a power to benefit C. That is, the parties' understanding that B must apply the funds to C provides the equitable basis for the fiduciary power. Evidence of this understanding will almost always be in a contract. However, if the intention that B should be compelled to apply the funds can be adduced from other sources then a "trust for A" construction will still be available.

*Express trust for A*

The lender, A, may hold the beneficial ownership of the transferred property as a beneficiary under either an express or resulting trust. Under the former construction A transfers both legal and beneficial title to B who, immediately and pursuant to the contract, declares himself trustee of those funds in favour of A. B will hold a power to apply the funds for the agreed purpose. This model has attracted academic support,<sup>61</sup> and seems to have been the basis upon which the majority of the Lords found a trust in *Twinsectra*.<sup>62</sup> Lord Hoffmann made no mention of *Quistclose* trusts, but held that the money Sims had received from *Twinsectra* was indeed held in trust: “The terms of the trust upon which Sims held the money must be found in the undertaking which they gave to *Twinsectra* as a condition of payment.”<sup>63</sup> That is, the trust was an express trust with the agreement between the parties containing the requisite certainty of intention to the effect that Sims would hold that money in trust for *Twinsectra*.

There should be no objection to this. As long as the necessary intention to create a trust can be inferred from the parties’ agreement, there is no reason to deny them the relationship that they objectively intended. One issue to consider, though, is the identity of the settlor. In the model described above the settlor is B, as she declares herself trustee of the property (notwithstanding that she is contractually obliged to do so). It could also be argued that A is the settlor and, as a result, never relinquished the beneficial interest.<sup>64</sup> This distinction is discussed more fully below.

*Resulting trust for A*

A lender may also retain or acquire the beneficial interest in the transferred funds through the mechanism of a resulting trust. Here the legal title may pass from A to B, with the beneficial title remaining in A. Alternatively full ownership may pass but, since the funds have not yet been applied to the purpose (and B was not intended to receive full beneficial ownership), the equitable interest immediately jumps back to A on resulting trust. In either case B

<sup>61</sup> A. Speirs, “Escape from the Tangled Web” [2002] 3 Web J.C.L.I.; C.E.F. Rickett, “Quistclose Trusts and Dishonest Assistance” [2002] R.L.R. 112.

<sup>62</sup> This cannot be stated with certainty. On the trust point Lord Millett held that a resulting trust had been created, and Lord Hoffmann appeared to think it was an express trust. Lord Slynn agreed with Lord Hoffmann. Lord Steyn agreed with Lord Hoffmann and Lord Hutton, who agreed with both Lord Hoffmann and Lord Millett.

<sup>63</sup> [2002] 2 A.C. 164, at [12].

<sup>64</sup> This may be the better view of the facts in *Twinsectra*: see Rickett “Quistclose Trusts and Dishonest Assistance”, p. 113. See also the discussion below regarding “single transactions” and “grant and grant-back transactions”.

will have a power to apply the funds for the specified purpose. Lord Millett preferred a resulting trust model in *Twinstetra*:

As Sherlock Holmes reminded Dr. Watson, when you have eliminated the impossible, whatever remains, however improbable, must be the truth. I would reject all the alternative analyses ... and hold the *Quistclose* trust to be an entirely orthodox example of the kind of default trust known as a resulting trust. The lender pays the money to the borrower by way of loan, but he does not part with the entire beneficial interest in the money, and insofar as he does not it is held on a resulting trust for the lender from the outset.<sup>65</sup>

Resulting trusts arise “whenever there is a transfer of property in circumstances in which the transferor ... did not intend to benefit the recipient”.<sup>66</sup> That is, proof that the transferor intended to retain the benefit of the property is not necessary: a resulting trust requires only that the recipient was not intended to receive the full beneficial interest. It is argued that this requirement is satisfied by the recipient, B, being under a positive duty to apply the funds for the stated purpose. Given this major restriction on B’s use of the property, it could hardly be claimed that she was intended to have the full benefit of the funds.<sup>67</sup>

#### *Single transaction or grant and grant-back?*

Both the express trust and resulting trust constructions involve B receiving legal title and A holding the equitable interest. However, there are two ways in which this end might be achieved: either the beneficial interest remains in A throughout with only the legal title moving, or full legal title is transferred and a grant-back is made of the equitable estate.

There is authority to the effect that beneficial interests cannot be “retained”: in *Re Bond Worth Ltd.*, Slade J. commented that the grantor of a proprietary interest can only retain equitable interests which are in existence at the time of the grant.<sup>68</sup> Given that a person solely entitled to property has only a legal title, albeit one which carries with it equitable rights, it would seem impossible to retain beneficial ownership and the analysis must then be one of

<sup>65</sup> [2002] 2 A.C. 164, at [100].

<sup>66</sup> This is the “central thesis” of Chambers’ book *Resulting Trusts*; quoted with approval by Lord Millett in *Twinstetra v. Yardley* [2002] 2 A.C. 164, at [92]. Note Penner’s view that it “would be unfortunate were the analytic clarification of the nature of *Quistclose* trusts to depend upon the adoption of Chambers’ thesis as to the nature of resulting trusts, as elaborated by Lord Millett, irrespective of how compelling some commentators find it”: J.E. Penner, “Lord Millett’s Analysis” in Swadling, *The Quistclose Trust*, p. 52.

<sup>67</sup> It is argued above, text to n. 53, that the important distinction which determines the location of the equitable ownership is whether the restriction enables A to compel B to apply the funds, or alternatively whether it merely enables A to restrain misuse.

<sup>68</sup> [1980] 1 Ch. 228, 253.

“grant and grant-back”.<sup>69</sup> The House of Lords recently approved such a construction in *Westdeutsche*.<sup>70</sup>

On the other hand a “single transaction” construction had been adopted in *Abbey National Building Society v. Cann*, a case decided only five years earlier and also by the House of Lords.<sup>71</sup> It may also be legitimately questioned why it is possible to transfer an interest but not to retain one. Further, as Worthington points out, when a resulting trust arises because of a voluntary transfer (rather than on election to avoid a voidable contract) the correct view seems to be that the beneficial interest never left the donor.<sup>72</sup> Of course, *Quistclose* trusts are very rarely voluntary transfers: almost invariably the borrower will provide consideration for the advance. However, since the *Quistclose* analysis can be applied to a voluntary transfer, it would seem strange to construe the transactions differently.

It might be that this rather narrow distinction need not worry us unduly: with express trusts the genesis of the trust will be contained within the same agreement as that which transfers the property, and similarly with a resulting trust model the transfer of funds takes place at the same instant as the trust arises. Any difficulties would only appear when and if the property became beneficially that of B, for there would be a risk that the property could be enveloped by another creditor’s floating charge. If it is accepted that this could never happen, and that the grant and grant-back necessarily occurred *eo instanti*, then in the context of a trust for A it would not matter whether the correct analysis was one of retention or acquisition of an equitable interest.<sup>73</sup>

#### *Express trust or resulting trust?*

At first sight it may also appear that it does not matter much whether the device is taken to be an express or resulting trust: what is important is that the beneficial ownership of the property is in the lender. However, there is reason to distinguish between the two:

<sup>69</sup> See R.M. Goode, *Legal Problems of Credit and Security* (3rd ed., London 2003), p. 21. See also n. 30 above.

<sup>70</sup> [1996] A.C. 669.

<sup>71</sup> [1991] 1 A.C. 56.

<sup>72</sup> S. Worthington, *Proprietary Interests in Commercial Transactions* (Oxford 1996), p. x, referring to R. P. Meagher and W. M. C. Gummow, *Jacob’s Law of Trusts in Australia* (5th ed, Sydney 1986), p. 263: “the property comes back to [the beneficiary] after it has been given away, although in truth the beneficial interest may never have left”.

<sup>73</sup> The identity of the settlor would still be relevant in a “trust for C” construction: if A effectively splits the estates and transfers the legal title to B at the same time as the equitable title vests in C then B can never acquire beneficial ownership. If, however, A transfers “both” estates to B, there may be a gap before B declares himself trustee of the property for C. It is this gap which exposes the property to another creditor’s floating charge and may expose the subsequent declaration of trust to avoidance as a preference. See discussion above, n. 15 and associated text.

whilst in either case A is an absolutely-entitled beneficiary, it is not necessarily so clear that B's duties to A would be the same. As a beneficiary under an express trust A would doubtless be able to terminate the trust and call for the property; but the law is not so clear on the position of beneficiaries under resulting trusts.<sup>74</sup>

The separation of legal and equitable ownership, while creating a trust, does not necessarily create fiduciary relations:<sup>75</sup> thus a resulting trust is not, ipso facto, a fiduciary arrangement. However, as Millett points out, "the circumstances which give rise to it may ... be sufficiently known to the trustee to subject him to such obligations".<sup>76</sup> It is suggested that a *Quistclose* situation is one of those instances where the trustee would be sufficiently aware of the transferor's intention and motivation as to make him the subject of fiduciary duties.<sup>77</sup> However, these duties need not be the same as those owed by some conventional express trustees: in the United States a resulting trust gives rise to some fiduciary obligations, at least in relation to the trust property,<sup>78</sup> but does not expose the trustee to the same liabilities as an express trustee in English law. Millett argues that the same is true in this country: that is, while all fiduciaries are subject to fiduciary obligations, they are not all subject to the same fiduciary obligations.<sup>79</sup> It is thus argued that the fiduciary duties owed by B to A could vary, depending on whether A is the beneficiary under an express or resulting trust.<sup>80</sup>

If A transfers money to B and the parties agree that B is under a positive duty to apply the funds for that purpose, then I have argued that B will not receive beneficial ownership. Rather, the positive contractual duty will mean that the proper construction in property law will involve A being beneficially entitled and B

<sup>74</sup> See Chambers, *Resulting Trusts*, pp. 196–200; A. Burrows, "Swaps and the friction between common law and equity" [1995] R.L.R. 15, p. 27; P. J. Millett, "Restitution and Constructive Trusts" (1998) 114 L.Q.R. 399, p. 404.

<sup>75</sup> Millett, "Restitution and Constructive Trusts", discussing the comments of Lord Browne-Wilkinson in *Westdeutsche v. Islington L.B.C.* [1996] A.C. 669, 703.

<sup>76</sup> Millett, "Restitution and Constructive Trusts", p. 405. Of course, attaching the fiduciary label is not the end of the matter. As Frankfurter J. noted in *S.E.C. v. Chenery Corp.* (1943) 318 US 80, 85–86, "to say that a man is a fiduciary only begins analysis ... What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?". This passage was quoted with approval by Lord Mustill in *Re Goldcorp Exchange Ltd.* [1995] 1 A.C. 74, 98.

<sup>77</sup> In the case of an express trust this could be shown by the contract containing the required certainty of intention to create a trust. As regards resulting trusts it has been argued that the recipient must be compelled to apply property to the purpose, and if the trustee is under such a positive duty then we can impute knowledge as to her lender / beneficiary's intentions.

<sup>78</sup> *Tricentral Oil Trading Inc. v. Annesley* (1991) 809 S.W. 2d, 218.

<sup>79</sup> Millett, "Restitution and Constructive Trusts" (1998) 114 L.Q.R. 399, p. 403. See also the comments of Lord Browne-Wilkinson in *Henderson v. Merrett Syndicates Ltd.* [1995] 2 A.C. 145, 206.

<sup>80</sup> It might also be noted, recognising the commercial nature of the great majority of these transactions, that it would rarely be appropriate to subject express or resulting trustees to the very strictest of duties.

holding a fiduciary power. What if A promises not to revoke B's power to use those funds for that purpose, but then breaks that promise and attempts to terminate the arrangement while the purpose is still capable of fulfilment? This situation involves a conflict between proprietary rights and contractual obligations. If entitled under an express trust, there is little doubt that A could successfully revoke B's mandate and leave B to his remedy in contract. In short, the lender's proprietary rights will "trump" the contractual rights of the recipient.<sup>81</sup> However, if A is entitled under a resulting trust he may not be able to exercise the same control, owing to differing fiduciary duties.<sup>82</sup> Further, in a case where there is no certainty of intention to create an express trust in favour of A, and where A promises not to revoke B's ability to use the funds, it is arguable that there was never a resulting trust in the first place. As Chambers explains:

That contract is the indirect source of the resulting trust. The reason why B holds the money on resulting trust for A is because the contract between A and B prevented B from obtaining beneficial ownership of the money. If the contract gave B an enforceable right to use the money to pay C, then B would have a beneficial interest in the money and would not hold it wholly on resulting trust for A from the outset.<sup>83</sup>

If the terms of the agreement were clear enough to be able to infer an intention to create an express trust for A, then a promise by A not to revoke B's power would not, it is submitted, undermine that intention. However, it would undermine an inference (or indeed rebut a presumption) that A had not intended B to have beneficial ownership. It is thus tentatively suggested that the difference between the express and resulting trust constructions is that a person entitled under a resulting trust is unable to terminate the arrangement whilst the purpose is still capable of fulfilment.<sup>84</sup>

<sup>81</sup> Glistler, "Twinsectra v. Yardley: Trusts, Powers and Contractual Obligations" (2002) 16 Trust Law International 223. It should be noted here that, although this discussion has presumed that the transferred property would be money, there is arguably no theoretical bar to the type of property that can be subject to a Quistclose trust: see *Carreras Rothmans Ltd. v. Freeman Matthews Treasure Ltd.* [1985] 1 Ch. 207, 222 per Peter Gibson J; Worthington (1996), *op. cit.*, n. 72, p. 63. This is mentioned because of the possibility of B getting specific performance of A's contractual duties if A should wrongly revoke B's power to apply the funds.

<sup>82</sup> See the sources cited above, n. 74, and the associated text.

<sup>83</sup> Chambers, "Restrictions on the Use of Money", p. 86.

<sup>84</sup> Birks takes a slightly different view, commenting that "It is not unusual to find the *Saunders v. Vautier* right fettered by contract, but under the *Twinsectra* construction it must be. Otherwise the transfer would be instantly revocable. In the absence of any express contract there must be an implied contract not to attempt to recall the legal title so long as the [purpose] remains in place." P. Birks, "Retrieving Tied Money" in Swadling, *The Quistclose Trust*, p. 126.

... Or both?

Clearly an express trust model can by definition only be employed in cases where there is sufficient certainty of intention to find a trust in favour A. It is not contended that such intention could never be found in the case of a non-contract transfer, but it is certainly true that evidence of that intention would normally be found in the terms of the parties' express agreement. Thus an express trust construction could only be used in certain situations, and in many of the older cases the requisite intention to create a trust would seem to be lacking.<sup>85</sup>

It is therefore argued that both constructions must be potentially valid, depending on the facts of the case. An express trust requires intention to create a trust, while a resulting trust analysis requires only that A did not intend B to receive full beneficial title.<sup>86</sup> As Yeo and Tjio point out, this clearly involves "a lower threshold for proving a trust".<sup>87</sup> However, as suggested above, the two constructions do differ in their effects and it would still be more advantageous to a lender to be in the position of a beneficiary entitled under an express trust.

#### V. CONCLUSIONS

Where A transfers property to B, so that B can pay C, several constructions are possible. Depending on the facts of a particular case it may be more appropriate to classify the relationship as one of any of the following:

- Express trust for C, with B as trustee.
- Express trust for A, with B as trustee.
- Resulting trust for A, with B as trustee.
- Full ownership to B, with A holding a personal right to restrain misuse.
- Full ownership to B, unrestricted by A.

This conclusion seeks to determine three issues: firstly, whether or not each model concurs with established equitable principles. Secondly it must be decided whether the differing models can co-

<sup>85</sup> See, for example, *Toovey v. Milne* (1819) 2 B. & Ald. 683; *Hassall v. Smithers* (1806) 12 Ves. 119; *Gibert v. Gonard* (1884) 54 L.J. Ch. 439; *Re Vautin* [1900] 2 Q.B. 325.

<sup>86</sup> See the comment of Potter L.J. in the Court of Appeal decision in *Twinsectra v. Yardley* [1999] EWCA Civ 1290 [1999] Lloyd's Banking Rep. 438 at [81]: "Express trusts are fundamentally dependent upon the intention of the parties, whereas the role of intention in resulting trusts is a negative one, the essential question being whether or not the provider intended to benefit the recipient and not whether he or she intended to create a trust." See also the discussion above, n. 66 and associated text.

<sup>87</sup> T. M. Yeo and H. Tjio, "The *Quistclose* Trust" (2003) 119 L.Q.R. 8, p. 12.

exist, or whether some must necessarily contradict each other. Finally we must identify the constructions that are “true” examples of a *Quistclose* trust.

#### *Non-Quistclose arrangements*

##### *Express trust for C*

There are two constructions that, it is suggested, can be dealt with quickly. The first of these is the “trust for C” construction whereby the beneficial interest in the advanced funds is held on trust by the recipient, B, for the third party, C. Such a model would be apposite where the agreement between A and B contained the requisite certainty of intention to create the trust for C. Under this construction A could transfer his equitable interest directly to C, or he could transfer full ownership to B who would subsequently declare himself trustee of that property for C. The third party would be an absolutely-entitled beneficiary under an express trust, able to restrain misuse, terminate the trust, and possibly compel performance.<sup>88</sup> The identity of the settlor would be relevant in the event that C could not be the object of a trust, but otherwise this model is straightforward and does not pose any problems as regards concordance with equitable principles. However, the problem with characterising this arrangement as a *Quistclose* trust is the lack of security that would be held by A. As has already been mentioned, “the whole purpose of the arrangements ... is to prevent the money from passing to the borrower’s trustee in bankruptcy in the event of his insolvency”.<sup>89</sup> It is thus concluded that while such a trust would be consistent with orthodoxy, and can exist happily without undermining the other models, it should not properly be termed a *Quistclose* trust.

##### *Unrestricted ownership to B*

The second model that is also unproblematic arises where A transfers money to B to enable B to apply those funds for a particular purpose, but does not attempt to restrict B’s use of that money. In this instance the full ownership of that property is transferred to B, most commonly with B owing A an appropriate amount under the terms of a loan agreement. A does not attempt to retain beneficial ownership, nor restrict B’s use of the money

<sup>88</sup> As an absolutely-entitled beneficiary, C would be able to restrain her trustee’s misuse of the funds. C could also terminate the trust under the principle in *Saunders v. Vautier* (1841) 4 Beav. 115. C would be able to compel performance if she could rely on the contract between A and B under the Contracts (Rights of Third Parties) Act 1999. However, given that C would be entitled to terminate the trust, a right to compel performance may not be required anyway.

<sup>89</sup> *Twinsectra v. Yardley* [2002] 2 A.C. 164, at [82] *per* Lord Millet.

(although a purpose may be intended or contemplated), and thus A does not have any security over the funds.<sup>90</sup> Again, while such an arrangement is clearly conceivable—and may appear similar in some cases to a *Quistclose* device—given that the legal and equitable estates are never split the device cannot properly be termed a trust.

### *True Quistclose arrangements*

#### *Express trust for A*

Three constructions remain: an express trust for A, a resulting trust for A, and a situation whereby B owns the property but A holds a personal right to restrain misuse. The first of these is relatively straightforward, but requires a high degree of scrutiny of the parties' expressed intentions. Under this model A becomes the beneficiary of an express trust, the requisite certainty of intention being contained within the parties' transfer agreement (most commonly a loan contract). However, there must be a clear intention that B is to hold the funds on trust for A: a mere intention that B is not to receive full beneficial title himself is not sufficient. It is in this respect that the intentions must be carefully scrutinised: as Ulph suggests, "there is at least some risk that promises made during negotiations for a loan could be found to suffice as evidence of an intention to create a trust".<sup>91</sup> That said, should the required intention be present, there would be no reason to deny the existence of an express trust in favour of A: such an interpretation is clearly consistent with established principles. The effect of such an arrangement would be that A would have security over the funds: as B would not be the beneficial owner the property would not be available to his trustee in bankruptcy. In addition to this security in the event of his debtor's insolvency, A would also be able to exercise certain rights during the life of the trust through his position as beneficiary: he would be able to restrain misuse and could also bring the arrangement to a end by terminating the trust.<sup>92</sup>

<sup>90</sup> It may be possible for A to have *de facto* security through other means, but again this would not pertain to a restriction on B's use of that particular property.

<sup>91</sup> J. Ulph, "Equitable Proprietary Rights in Insolvency: The Ebbing Tide?" [1996] J.B.L. 482, p. 495.

<sup>92</sup> Revoking the power would result in a pure bare trust with the trustee B holding property to the order of the beneficiary A. As a matter of property law A could also compel B to consider the exercise of the power, although A would have to rely on a contract to actually compel B to carry out his duties. Should such personal rights exist, it may well be easier for A to restrain misapplication through the common law, especially given that B would still be solvent. The equitable rights would then act as a "long-stop".

*Resulting trust for A*

An express trust for A is both conceivable and, due to A's security, a true example of a *Quistclose* trust. However, it is also argued that such a construction is not the only one available to the courts: a resulting trust analysis may be more appropriate. This is similar to the express trust model in that B holds on trust for A, but it arises in different circumstances. Whereas an express trust construction would require certainty of intention to create a trust for A, a resulting trust model requires only that B was not intended to receive full beneficial ownership of the property. The beneficial title would then revert to A. It has been argued that, should B be required to apply the funds for the purpose (rather than being merely at liberty to do so), then this is indicative of an intention that B should not receive full beneficial title. That is, A reposes trust and confidence in B to the effect that B will apply the funds, B is fully aware of the situation, and B is thus a fiduciary. It should also be noted that, unlike in an express trust situation where the certainty of intention will nearly always need to be adduced from a contract, a resulting trust analysis is more readily available in the case of non-contract transfers.

Under a resulting trust, the beneficiary A would be able to restrain misuse and compel application of the funds.<sup>93</sup> However, it has been argued that the fiduciary duties owed by B to A will differ if the trust is resulting, and more specifically A may not be able to terminate the arrangement whilst the purpose is still capable of fulfilment.<sup>94</sup> Simply put, B's fiduciary obligations should not extend this far. This is the distinction between a situation where A is entitled under an express trust and a case where the device is a resulting trust.

A resulting trust construction satisfies our criteria: both models are potentially valid in that a finding of the requisite intention to create an express trust in one case would not preclude a resulting trust analysis in another; analysis in this area would proceed in the same way as any other resulting trust case; and the lender does indeed hold security over the transferred assets.

*Restricted ownership to B*

The final construction is that of B obtaining full ownership of the transferred funds, but with A holding a personal right to restrain misuse of those funds. This is the theory advanced by Chambers, although he appeared to think that such an analysis was

<sup>93</sup> By exercising personal rights under the contract and equitable rights held by virtue of his position as beneficiary. See n. 87 above.

<sup>94</sup> See above, nn. 74–80 and associated text.

inconsistent with a resulting trust analysis.<sup>95</sup> That is, Chambers argued that *Quistclose* trusts were characterised not by an ability to compel performance, but by the restriction of the recipient's right to use the property.<sup>96</sup> This assertion has been rightly criticised,<sup>97</sup> but it is argued that Chambers' theory is still valid in the cases where there was indeed no right to compel performance. In such a situation the lack of A's right to compel performance would undermine any argument that B had not been intended to gain full beneficial ownership. Thus a resulting trust would not arise. Instead B would receive full ownership, subject to A's personal right to restrain misuse of the money.

Such an arrangement seems unproblematic, but it also seems to deny A any security. Unlike beneficiaries under express or resulting trusts, here the lender cannot compel the application of the funds to the purpose: all she can do is seek an injunction to prevent misapplication. However, it is important not to confuse a lack of control during the life of the transaction with security on a debtor's insolvency. Under this construction the distinction between primary and secondary trusts, irrelevant when dealing with trusts for the lender, becomes important again. During the primary stage—while the property has not been misapplied and the purpose is still capable of fulfilment—the beneficial title to the property is vested in the borrower. At this stage A does intend B to have beneficial ownership. However, there is a potential secondary stage: should B misapply some of the money, or become insolvent and thus unable to carry out the purpose, the beneficial interest will at that point revert to A.<sup>98</sup> The lender has very little control over the borrower in the first stage, but that does not mean that she has no security in the potential second stage. Thus, although under this construction there exists only a “secondary” trust, this may be accurately described as a *Quistclose* trust.

Express trusts for third parties and unrestricted transfers are not *Quistclose* trusts: not because they are invalid, but simply because they do not provide security for the original lender. Although

<sup>95</sup> It is now accepted that the models are not contradictory: Chambers, “Restrictions on the Use of Money”, p. 88.

<sup>96</sup> Chambers, *Resulting Trusts*, p. 86.

<sup>97</sup> See the comments of Ho and Smart, “Re-interpreting the *Quistclose* Trust: A Critique of Chambers' Analysis” (2001) 21 O.J.L.S. 267, p. 278; and Lord Millett in *Twinsectra v. Yardley* [2002] 2 A.C. 164, at [76] and [95].

<sup>98</sup> Regarding B misapplying the funds, see discussion above, nn. 39 and 52. The resulting trust could also spring up when B becomes unable to apply the funds. B's inability could be objective: for example, the appointment of a receiver; or could be provided for in the original contract between A and B (in much the same way as parties may choose an event that will crystallise a floating charge in to a fixed charge). In either of these cases the problem of an initial misapplication followed by a subsequent “correct” application, discussed above at n. 52, does not arise.

evidential issues may mean they are relatively rare, express trusts for lenders are *Quistclose* trusts: they are entirely consistent with established principles and provide security for the original transferor. Resulting trusts for lenders and instances where restricted ownership is vested in the recipient are perhaps more worthy of discussion due to the various attempts to categorise all *Quistclose* trusts as one or the other. Yet such attempts are unnecessary: both are consistent with orthodoxy, provide adequate security and can co-exist with each other. If A attempts to restrict B's use of money, but does not compel her to use that money, then the former construction will apply. A's ability to control B during the primary stage will be much less than if A were a beneficiary, but in the secondary stage the beneficial title reverts to her under resulting trust. If on the other hand A does have a right to compel B to spend the money, then that is indicative of A retaining a beneficial interest. It is argued that both models are potentially valid, with the critical distinction being A's right to either compel the application of funds, or merely to restrain misuse.