

THE ENIGMA OF THE QUISTCLOSE TRUST

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Abstract – The *Quistclose* trust is an invaluable commercial device for lenders in view of its unique quasi-security element. It is the product of equity’s flexibility in navigating the strict rigours of the common law. Unfortunately, since its inception and recent resurgence in *Twinsectra v Yardley*, it has been an eternally baffling subject. This mystery is largely caused by the unconventional principles upon which the *Quistclose* trust is founded and its strategic straddle between the realm of trusts and insolvency law. However, its increasing importance in commercial contracts and international finance transactions such as securitisations sparks renewed interest in the subject. Analysing the doctrinal difficulties which confounds both equity scholars and legal practitioners alike, this paper argues that this trust device is too useful in commercial practice to be abandoned and ultimately lends support to the restitution-inspired arguments of Lord Millett in rationalising the juridical conundrums that afflict the trust.

A. INTRODUCTION

The institution of the *Quistclose* trust is a peculiar creature. It arises when a sum of money, on loan or otherwise is advanced to a recipient with a specific purpose stated as to the use of such monies. When this purpose fails or if it is not complied with, the *Quistclose* trust fastens on the monies, crucially conferring proprietary interest upon the transferor instead of a mere personal right which is contractual in nature.

It also represents a paradigm example of the conflicting tensions and inter-relationship between English trusts, security and insolvency law. This explains why the *Quistclose* trust has always attracted legal and academic analysis, not least because its enigmatic existence challenges the established principles of trusts law and seeks to extend its boundaries, which in turn has very practical commercial implications in the event of corporate insolvencies.

This has led many to criticise the lack of precise identification of the *Quistclose* trust as a convenient form of judicial law-making and some to view it as a legal anomaly which seeks to achieve only short-term justice on the facts but a doctrine which is incoherently applied to the wider range of

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commercial scenarios especially in the world of secured lending and advancement of credit.

This paper will attempt to unlock the juridical secrets surrounding this unique trust device and discuss the difficulties surrounding its existence which, in the author's view, is nevertheless a valuable trump card during insolvency situations and which serves as one of the most important yet unsung equity developments in English law over the past decades. The application of the Quistclose trust in other Commonwealth jurisdictions, particularly Malaysia, will also be explored.

B. THE GENESIS OF THE *QUISTCLOSE* TRUST

Just as with the Romalpa clause, which derives its name from a judicial pronouncement in relation to retention of title clauses¹, the Quistclose trust is borne out of the seminal decision of the House of Lords in *Barclays Bank v Quistclose Investments Ltd*².

In this case, Rolls Razor Ltd. was a company, which declared dividend payments but then lacked the necessary funds to satisfy such payments to shareholders. Therefore, the company sought to obtain a loan from Quistclose Investments. Quistclose duly advanced the requested loan monies but added specifically in the accompanying letter that the monies be employed only for the purposes of paying the dividends to shareholders.

The monies were paid into a special account the company had with Barclays. It is relevant to note that the company had an overdrawn overdraft facility owing to Barclays. Unfortunately, upon receipt of the loan monies but before the payments could be made to the shareholders, Rolls Razor Ltd. lapsed into insolvent liquidation.

Barclays then claimed the loan monies by exercising its rights of set-off *vis-a-vis* the amount owed to it against the company's indebtedness. The lender, Quistclose Investments, brought an action to challenge this outcome, claiming that it had equitable interests in the loan monies and this could not be absorbed to pay the company's creditors.

On appeal to the House of Lords, Lord Wilberforce held in favour of Quistclose Investments. At common law, the specified purpose is treated as merely an ordinary contractual term, non-compliance of which constitutes a breach of contract. However, recognising the weakness of this right *in*

¹ *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676.

² [1970] AC 567.

personam, which is non-exercisable against third parties, Lord Wilberforce felt that equity was able to imply a trust from the arrangements of the parties.

Capitalising on the fact that the loan monies were paid into a separate account and that a sole purpose was specified as to its usage, Lord Wilberforce was convinced that they were held on trust. Consequently, his Lordship held that it was an implied term of the loan contract that the monies were to be returned to the lender if the purpose could not be carried out, one way or the other³. Since Barclays had notice of it, they cannot now exercise any rights of set-off with respect to the loan monies.

To give effect to this, his Lordship held that there is first a primary trust, which arises by virtue of the purpose expressed as to the usage of the loan monies, which is meant to pay the dividend. When this primary trust fails, a secondary trust arises in favour of the lender.

With this crisp reasoning, the Quistclose trust is born.

C. THE QUISTCLOSE TRUST AS A SECURITY DEVICE

In order to understand the practical value of the Quistclose trust as a valuable security device for lenders, one must first grasp the treatment of trust assets during insolvency. When a company is insolvent, the liquidator has a duty to assemble the pool of assets owned by the insolvent company and distribute them to unsecured creditors in accordance to the *pari passu* rule⁴ subject to the legal exceptions⁵, if any are applicable.

Secured creditors, on the contrary, are an elite class of creditors set apart from the rest because, by virtue of their security, they are not subjected to the *pari passu* principle of distribution. Instead, secured creditors can rely upon their security and enforce the debtor to realise the debts owed to them. *Inter se*, the equitable principle '*qui prior est tempore potior est jure*' or literally interpreted as 'where the equities are equal, the first in time shall prevail', governs the order of priority⁶. This position of priority is not borne out of some privileged birthright but rather is the product of extensive and furious negotiations that relate to the relative bargaining strength of the parties.

³ *Toovey v Milne* [1819] 106 ER 514.

⁴ *British Eagle v Compagnie Nationale Air France* [1975] 1 WLR 758.

⁵ For example, the commercial practice of debt subordinations and the resulting tranches of debts commonly structured in securitisation and bond issue transactions.

⁶ Hugh Beale, Michael Bridge, Louise Gullifer and Eva Lomnicka, *The Law of Security and Title-Based Financing* (2nd edn, OUP 2012).

Thus, to all practical intents and purposes, an unenviable situation is created amongst unsecured creditors. This is embodied by the phrase ‘the race goes to the swiftest’ whereby the first who can obtain and enforce a judgment debt from the courts before the company lapses into insolvency, wins⁷. Metaphorically, one can imagine it as the pivotal moment before the doomed ship sinks.

Hence, there is every motivation for creditors to avoid being classified amongst this class of the unsecured who hold no form of security. Yet, in practice, although English law is notably liberal relative to most jurisdictions in allowing for the creation of security interests –in terms of less hassle and administrative convenience, it is simply not possible for every creditor to obtain security in order to safeguard its position. Broadly, there are two reasons for this.

Firstly, the corporate debtor may lack sufficient assets to grant security to all its creditors. Usually, it would be the largest financial institutions such as banks who will hold the best form of security. Secondly, some creditors may not command a sufficiently strong bargaining position *vis-a-vis* the corporate debtor to negotiate for a grant of security from it.

Therefore, the importance of quasi-security interests⁸ assumes practical importance because it surpasses the distinction between secured and unsecured creditors. Assets subjected to a trust are one such classic example, which is the subject of discussion in this paper.

The English concept of a trust is derived from equity whereby there is a split in the ownership of titles in a particular asset – *viz.* the legal and equitable title. The legal title is vested in the trustee who is, at law, the owner and as such, commands all rights incidental to a legal owner while the trust subsists. On the contrary, the equitable title to the asset in question is held by another person, called the beneficiary. This person is quintessentially the true owner of the asset in question⁹ because he can claim a proprietary interest in the property as opposed to a mere personal right to pursue a judgment debt.

⁷ This explains the careful drafting of cross-default clauses and negative pledge clauses in international loan contracts as unsecured creditors wish to obtain the comfort of being able to enforce judgments ahead of their counterparts or rather have the chances of them doing so considerably improved.

⁸ There are many types of quasi-security interests such as the retention of title clauses.

⁹ Pursuant to the *Saunders v Vautier* rights, a beneficiary of a bare trust can demand that the trust be collapsed and compel the trustee to transfer the legal title to the asset in question to him.

Therefore, following this structure, it is trite law that assets subjected to a trust cannot be claimed by liquidators for the purposes of distribution to creditors because the corporate debtor in question does not own the property¹⁰. It is only acting in its capacity as a trustee for the beneficiary-creditor.

This explains why trust assets constitute one of the prominent quasi-security devices immune from insolvency proceedings¹¹ and why many seek to claim this status. In order to illustrate this practical importance, two cases are often analysed in comparison to the Quistclose trust.

In *Re Kayford Ltd.*¹², a mail order company, which was in the twilight of insolvency, opened a separate account upon the advice of its accountant and paid customers' monies into it. When the company lapsed into subsequent insolvency, the customers brought claims to recover their monies, arguing that they were held on trust by the company. Megarry J was convinced that the courts are able to imply an intention to create a trust from the circumstances when the monies were paid into a separate account¹³.

The case of *Paul v Constance*¹⁴ is also illustrative of the situation whereby the requisite intention to create a trust need not be clearly expressed by the parties but yet can be found from the totality of one's conduct. Mr Constance and his mistress were avid gamblers and they set up a joint bank account to pay in the proceeds of their winnings. However, the account was registered under the sole name of Mr Constance. When Mr Constance died, a dispute arose between his wife and mistress in relation to the ownership of the monies in the account.

Scarman LJ reasoned that since Mr Constance repeatedly told his mistress that the money was as much his as it was hers and that the parties had always operated the account jointly, an intention to create a trust was sufficiently manifested although there were no clear words to that effect.

This case is crucial to the analysis of the Quistclose trust because Scarman LJ's reasoning emphatically indicates that one can create a trust without knowing or understanding the legal concept itself. Mr Constance himself was described to be an unsophisticated person who was not well-

¹⁰ Hamish Anderson, 'The treatment of trust assets in English insolvency law' in Ewan McKendrick and The Norton Rose Group, *Commercial Aspects of Trusts and Fiduciary Obligations* (OUP 1992).

¹¹ Per Lord Devlin, *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209.

¹² [1975] 1 All ER 604.

¹³ This reasoning was adopted in *Re Chelsea Cloisters* [1980] 41 P & CR 98.

¹⁴ [1977] 1 WLR 527.

versed with the law, let alone a person who would realise that his actions and words constituted the key indicia of an express private trust. Hence, equity's way of finding an intention to create a trust is by way of substance rather than by form¹⁵.

In addition, these cases share one important similarity with that of Quistclose, namely the fact that the monies were segregated into separate accounts. Most importantly, they illustrate the drastic impact of a trust on assets during insolvency. A creditor who can successfully claim that he is a beneficiary of a trust is essentially rendered a super-priority creditor.

Although there is no contemplation, negotiation or holding of any security, such creditors will enjoy the same privileges as though they are secured creditors during the insolvency of the corporate debtor. It is this dual effect of ownership in the assets, which confers upon the trust device its unique security element.

Even so, the role played by the *Quistclose* trust as a form of security device is unique to say the least because it is the failure of the purpose expressed in relation to the use of the loan monies which is being secured in effect rather than the failure to repay the monies itself, which is common in most conventional security arrangements. In other words, the trust serves to secure the execution of the debtor's promise to perform the purpose entwined in the advance of the monies. Once that purpose is executed, the lender will be treated as an unsecured creditor. It is this feature which gives rise to its peculiarity as a security device¹⁶.

The second point to note from trust assets is the availability of tracing¹⁷ whenever the assets are misapplied or misappropriated. It is apparent that a beneficiary who has proprietary interests in the trust assets can trace it into the hands of third parties who are in receipt of it with the exception of the bona fide purchaser for value¹⁸. Tracing is a powerful and far-reaching remedial process, which allows a beneficiary of trust assets to follow their property *in specie* or trace the value thereof beyond the hands of the trustee¹⁹.

In the context of a Quistclose trust, this affords the lender in such circumstances an additional recourse should their credit advancement be

¹⁵ Alastair Hudson, *Equity and Trusts* (7th edn, Routledge-Cavendish Publishing 2012).

¹⁶ Gerard McCormack, *Registration of company charges* (3rd edn, Jordans Publishing, 2009).

¹⁷ *Re Diplock's Estate* [1948] Ch 465.

¹⁸ See *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265, per Millett J in relation to equitable tracing of monies paid into a mixed account.

¹⁹ Lionel Smith, *The Law of Tracing* (Clarendon Press 1997).

abused from the terms of what was originally agreed upon. This must be contrasted from an ordinary debtor-creditor relationship because a judgement debt obtained is only in essence a personal remedy against the debtor. During insolvency, such a personal remedy is practically valueless, as the *pari passu* rule of distribution will grip hold on the entitlements of unsecured creditors.

This explains why the juridical basis of the *Quistclose* trust is debated to its full fury as legal practitioners and academics alike are keen to divine its true mechanics and how such a trust comes to existence in the first place. One's understanding of how this trust arises in turn becomes crucial to the requisite clarity needed when drafting the clauses in legal documentation. In addition, commercial certainty is required insofar as practitioners are concerned when advising the lending community of the intricacies involved in loan transactions.

D. THE EXPANSION IN *TWINSECTRA*

In many ways, *Twinsectra v Yardley*²⁰ represents a valuable decision insofar as the jurisprudence of the *Quistclose* trust is concerned, primarily because it marks the expansion of the trust to a different set of facts involving a distinct scenario than originally envisioned.

Twinsectra advanced a loan to companies owned by a Mr Yardley for the specific purpose of acquiring properties. Yardley's solicitor, Mr Leach refused to give an undertaking that the loan monies would be released only for the stated purpose but introduced Yardley to a fellow solicitor, Mr Sims who was prepared to give the undertaking. *Twinsectra* advanced the loan on the strength of this undertaking and paid it into the client account of Mr Sims's firm.

However, upon Leach's fraudulent instructions, Sims paid out the funds to the companies owned by Yardley contrary to the stated purpose as stipulated in the undertaking given. The funds were also utilised to pay off Leach's legal fees. When this fraudulent breach was exposed, *Twinsectra* brought a claim against Yardley and the solicitors. The success of the claim against Mr Sims depended heavily on the finding of a breach of trust and fiduciary duty.

Although the point on appeal involved the issue of dishonest assistance, the judgement contains a valuable exposition of the *Quistclose*

²⁰ [2002] 2 All ER 377.

trust by Lord Millett upon which the secondary liability of the solicitors depended.

This decision entrenches the Quistclose principle into the corpus of English trust cases. Whilst the facts of *Quistclose* involved a purpose, which is frustrated and could no longer be carried out, *Twinsectra* concerned misappropriation of monies and a malfeasant act done contrary to the stated purpose.

E. THE ENIGMA AND CRITIQUES

The enigma of the Quistclose trust is primarily borne out of the difficulties relating to its classification within the realms of trust law. From a doctrinal perspective, its existence seems to elude orthodox trust principles.

The seminal decision of Lord Wilberforce sets out a dual trust structure to explain how the Quistclose trust comes into being. Unfortunately, the judgement was silent as to the nature of the primary trust and which party holds the beneficial interest pursuant to this trust. Thus, it is this failure to define clearly the nature of this primary trust that causes the vagueness, which in turn represents a fundamental flaw in this double trust structure.

An intelligent and logical guess by many equity scholars would be that this primary trust is an express private trust as this accords with first principles. It is trite law that a failure of an express private trust will cause the beneficial interest to revert back to the settlor on an automatic resulting trust²¹. Nonetheless, to truly explain how this can arise in the first place from the facts of Quistclose is a challenge.

In a brilliant essay²² capturing these potential difficulties, Swaddling made some powerful criticisms against Lord Wilberforce's employ of the primary trust which is vague at best, and at worst objectionable. In a structured attack on the primary trust *inter alia*, there are two compelling arguments to be noted. As mentioned above, although the judgment was silent to the nature of this trust, there can only be one logical conclusion - that it is a form of express private trust.

Firstly, Swaddling was critical of the fact that there can be an express private trust without certainty of intention. This objection is borne out of equity's traditional refusal to give effect to precatory words, let alone no

²¹ *Re Vandervell's Trusts* (No 2) [1974] Ch 269.

²² William Swaddling, 'Orthodoxy' in William Swaddling (ed), *Quistclose Trust: Critical Essays* (OUP 2004).

words at all²³. On the facts of *Quistclose*, the parties did not pronounce their intention to create a trust.

Even if one can defend this criticism by arguing that it is not uncommon for the courts in the past to imply the requisite intention from the conduct of the parties, Swaddling found it objectionable that this can be implied from a mere purpose expressed by the lender attached to the use of the loan monies²⁴. He finds the facts of *Quistclose* unexceptional, as it is outright ordinary in creating only a debtor-creditor relationship.

The debate is whether a specified purpose sufficient for the courts to infer such an intention. When Lord Wilberforce answered this in the affirmative, it creates legal shockwaves simply because it was clear that the lender never understood what a trust is and its implications, let alone contemplating creating one.

It is apparent that his Lordship was keen to offer some measure of protective justice to the lender who was adamant that their advancement of credit be applied only to a specific purpose as agreed upon, the breach or frustration of which would allow the lender to gain the advantage of some sort during the event of the corporate debtor's insolvency. On its face, this seems to be the policy underpinning the tenor of Lord Wilberforce's judgement.

However, in terms of trust doctrines, this was hugely disappointing because the weight of precedent on certainty of intention points otherwise. Even if the certainty of intention hurdle can be surmounted, the primary trust still faces a formidable obstacle relating to the requirement of certainty of objects. Distinct from the other trust cases whereby there were human beneficiaries, the same cannot be said of the primary trust which does not arise in favour of any one but to carry out the purpose specified by the lender²⁵.

This leads to the second criticism which questions, not without force whether the *Quistclose* is in effect a purpose trust. Swaddling argues that the *Quistclose* is a disguised purpose trust not to benefit the lender but the object was to achieve the purpose attached to the loan advancement.

²³ *Lamb v Eames* [1871] L.R. 6 Ch. 597; *Re Adams Kensington Vestry* [1884] 27 ChD 394; *c/f Comiskey v Bowring-Hanbury* [1905] AC 84.

²⁴ *Re Sanderson's Wills Trusts* [1857] 3 K & J 497.

²⁵ Sarah Worthington, 'Equitable ownership: *Quistclose* trusts and related transactions' in Sarah Worthington, 'Proprietary interests in commercial transactions' (Clarendon Press 1996).

This is a strong argument because the peculiar feature of the Quistclose trust is the heavy focus on this purpose. It is the very pivot upon which all the analyses of the trust depended upon. In fact, the execution of this purpose is the all-or-nothing element in the success of the trust as a security device. If it is executed accordingly, there is no secondary trust arising, which will confer upon the lender the vital proprietary interest in the loan monies during insolvency.

Yet, unfortunately, if it is true that the Quistclose trust is indeed a form of purpose trust, this offends one of the most established trust principles, the beneficiary principle²⁶. This principle states that if a trust is created for a purpose, it is void as there is no one to enforce it against the trustees²⁷. The only exception is if the trust is for the benefit of individuals²⁸ or it is a charitable trust. Nonetheless, the Quistclose trust is clearly too personal to be one.

With the shortcomings of the primary trust as an express private trust exposed and yet if it is not one, then what can it possibly be? To leave it without any clear classification is undesirable because it is important to locate the beneficial interest in the loan monies at all times.²⁹

It is this flaw, which Alastair Hudson criticises about the dual trust structure. He argues that there is a disturbing time gap between the primary and secondary trusts which could not satisfactorily point out where the beneficial interest in the loan monies resides at this interval.³⁰

Because the resulting trust, which is the secondary trust, only arises much later upon the failure of the primary trust, there appears to be a time gap between the two trusts, leaving the beneficial interest in suspense. This beneficial vacuum is an objectionable flaw³¹ because if the borrower who holds the monies lapses into insolvency, it would be too late for the secondary trust to now arise to avail the lender. This is because when insolvency occurs, the debtor's assets are automatically absorbed by the

²⁶ *Morice v Bishop of Durham* [1804] 9 Ves Jr 399.

²⁷ *Re Astor's Settlement Trusts* [1952] Ch 534.

²⁸ *Re Denley's Trust Deed* [1969] 1 Ch 373.

²⁹ Gerard McCormack, 'Conditional Payments and Insolvency – the Quistclose trust' (1994) 9 Denning Law Journal 93.

³⁰ *Ibid* footnote 15.

³¹ As Lord Upjohn held in *Vandervell v IRC* [1967] 2 AC 291, 'equity abhors a beneficial vacuum'.

liquidator with immediate effect without affording any break in time for the resulting trust to grip hold of the monies.³²

Therefore, it is these jurisprudential difficulties coupled with the ironical fact that the Quistclose trust remains a useful security device in practice, which give the trust its enigma. These conceptual problems have led many equity scholars to doubt the legal foundations underpinning its very existence. Their common sentiment is that, surely trite law represented in the precedents dating back a century cannot be wrong or overruled by a mere freak of a judicial decision, albeit one from the highest appellate court of the land.³³

F. THE ENLIGHTENING MAGIC OF MILLETT'S PREQUEL

In light of the damaging criticisms directed at Lord Wilberforce's analysis of the Quistclose trust and the convincing manner in which its flaws are being exposed, this necessitates a search for an alternative theory.

In an article in 1989³⁴, Peter Millett QC (as he then was) attempts a gallant defence of the Quistclose trust when he defended the trust from criticisms that it is a purpose trust offending conventional trust principles. His citation of authorities supporting the Quistclose is a prior refutation of Swaddling's insistence that existing case law indicates that an intention to create a trust cannot be implied from a mere statement of purpose.

In doing so, Millett departed from Wilberforce's analysis and explained that if it was the transferor's intention not to benefit the transferee absolutely, the correct legal analysis was to treat the stated purpose as leaving the beneficial interest in the fund in the transferor throughout, subject to the transferee's obligation to apply the monies for the stated purpose. This stated purpose by the transferor is the mandate given to the transferee to apply the monies as instructed.

This analysis enjoys the advantage of having explained clearly where the beneficial interest in the loan monies resides and eschews the problematic issues relating to the creation of express private trusts. However, Millett's employ of the concept of a mandate is innovative to say the least and many are not convinced by this new equitable design.

³² This conceptual difficulty is explained in detail by Robert Stevens, 'Insolvency' in Swaddling (n 22).

³³ For a defence of Lord Wilberforce's views, see Jonathan Edwards, 'Quistclose Trusts: was Lord Wilberforce right after all?' (2013) 19 *Trusts & Trustees* 176.

³⁴ Peter Millett, 'The Quistclose trust: Who can enforce it?' (1985) 101 *Law Quarterly Review* 269.

G. THE GENIUS OF MILLETT'S SEQUEL

In a sequel to his stunning arguments a decade ago, Lord Millett formulated a slightly tweaked but more developed view of the Quistclose trust in his dissenting judgement in *Twinsectra*. This time, his views are stated in a judicial capacity, which gives it the requisite authority of a statement of law. Employing a single trust analysis, Lord Millett explained that the Quistclose trust is a kind of default trust known as the resulting trust, which arises from the outset. It follows that the beneficial interest in the loan monies belongs to the lender throughout, from the moment the monies are advanced but subjected only to the borrower's power³⁵ to apply the monies in conformation with the stated purpose.

If the purpose is satisfied, the power is exhausted and the trust is extinguished as the monies being the subject matter of the trust has been disposed of accordingly as instructed. However, if the purpose fails for one reason or another, the monies shall revert back to the lender under a resulting trust. If the borrower should misapply the monies contrary to the stated purpose, Millett is adamant that this amounts to a breach of trust. The crucial point about this resulting trust is that unlike most automatic resulting trust cases, it does not give effect to a contingent reversionary interest which arises only upon the failure of the stated purpose but one which arises from the outset to ensure that there is continuity in the beneficial interest of the monies³⁶.

Another interesting point to note is that the power to apply the monies for the stated purpose is irrevocable by the lender so long as that purpose can be carried out. Thus, it is Millett's fondness of using a qualification when explaining the Quistclose trust, which characterises his view. His Lordship conceptualises the trust, which arises as being subjected to a power and that functions like a switch, which turns on and off the lender's beneficial interest. But when it is turned on, it has always been there³⁷.

³⁵ Per Lord Upjohn in *Re Gulbenkian's Settlement Trusts* [1968] Ch 785 which sets out the 'any given postulant' test to establish certainty of objects in trust power cases.

³⁶ Paragraphs [100] - [102] of *Twinsectra v Yardley* [2002] 2 All ER 377.

³⁷ To conceptualise the power, perhaps one can draw an analogy with condition precedents in commercial contracts whereby an agreement is in principle a valid contract provided certain conditions are satisfied. See *Trans Trust v. Danubian Trading* [1952] 2 QB 297 and Ravi Tenekoon, *The Law and Regulation of International Finance* (Tottel Publishing 1991).

The distinctive feature of Millett's exposition in *Twinsectra* is that it firmly classifies the Quistclose as a resulting trust. At para 100, Lord Millett held that:

“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 in so far as he does not it is held on a resulting trust for the lender from the outset...When the purpose fails, the money is returnable to the lender, not under some new trust in his favour which only comes into being on the failure of the purpose, but because the resulting trust in his favour is no longer subject to any power on the part of the borrower to make use of the money...”

Earlier, at para 92, Lord Millett commented:

“The central thesis of Dr Chambers's book is that a resulting trust arises whenever there is a transfer of property in circumstances in which the transferor (or more accurately the person at whose expense the property was provided) did not intend to benefit the recipient. It responds to the absence of an intention on the part of the transferor to pass the entire beneficial interest, not to a positive intention to retain it. Insofar as the transfer does not exhaust the entire beneficial interest, the resulting trust is a default trust, which fills the gap and leaves no room for any part to be in suspense. An analysis of the Quistclose trust as a resulting trust for the transferor with a mandate to the transferee to apply the money for the stated purpose sits comfortably with Dr Chambers' thesis...”

This is an unconventional view by trusts standards as it engages the refreshing restitutionary ideas of Birks and Chambers in order to reconcile the Quistclose trust within resulting trust doctrines. In turn, Birks and Chambers argue that all resulting trusts arise because of a fact, namely that the transferor does not intend to benefit the transferee. This fact may be presumed or proven³⁸. In cases which are identified by the *Vandervell*

³⁸ See Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1989); Peter Birks, *Restitution and Resulting Trusts* in S. Goldstein, *Equity and Contemporary Legal Developments* (Jerusalem: H & M Sacher Institute 1992); Robert Chambers, *Resulting trusts* (Clarendon Press 1997); Robert Chambers, *Resulting trusts* in Andrew Burrows and Alan Rodger, *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006).

categorisation as ‘automatic resulting trust’, the fact is proven, whilst in cases such as the Quistclose trust, the fact may be presumed.³⁹

To elaborate, this intention not to benefit the transferee which Birks and Chambers designate in their theory of resulting trust does not necessarily mean a positive intention but instead could arise from a circumstance whereby it is no longer possible to benefit the transferee.

A classic example of this theory can be seen in mistaken payment cases. The *locus classicus* for discussion is *Westdeutsche v Islington BC*⁴⁰. The bank made a mistaken payment to the local council when it subsequently realised that the underlying contract was *ultra vires*. The bank argued for a resulting trust to recover the monies. Although Lord Browne-Wilkinson rejected that, Birks and Chambers viewed the resulting trust as the best vehicle to effect the restitution in question.

Millett supports this view in *Twinsectra* when he explained that what is relevant to raise the presumption of non-beneficial transfer is not an expression of positive intention from the transferor to retain his beneficial interest in the property but rather an absence of an intention to pass the entire beneficial interest in the property to the transferee absolutely. Hence, it follows that a mere condition or purpose stated to the loan advance would satisfy this view.

This lack of consciousness on the part of the transferor is best captured by Harman J’s statement of principle in *Re Gillingham Bus Disaster Fund*⁴¹, a case on automatic resulting trust where the judge stated that:

“The general principle must be that where money is held upon trust and the trusts declared do not exhaust the fund it will revert to the donor or settlor under what is called a resulting trust. The reasoning behind this is that the settlor or donor did not part with his money absolutely out and out but only sub modo to the intent that his wishes as declared by the declaration of trust should be carried into effect...This doctrine does not, in my judgment, rest on any evidence of the state of mind of the settlor...The resulting trust arises where that expectation is for some unforeseen reason cheated of fruition, and is an inference of law based on after-knowledge of the event...”

³⁹ See William Swaddling, ‘Explaining Resulting Trusts’ (2008) 124 Law Quarterly Review 72.

⁴⁰ [1996] AC 699.

⁴¹ [1958] Ch 300.

Although Harman J dismissed the methodology of presumed intent *vis-à-vis* automatic resulting trusts, it is important to note that according to Lord Millett's exposition in *Twinsectra*, the Quistclose trust is not an automatic resulting trust because the resulting trust arises from the outset. In this respect, one can say that Lord Millett is proposing an innovative form of resulting trust, premised on the restitutionary idea of non-beneficial transfer. Indeed, this strand of reasoning was previously reflected in Lord Millett's own decision in the Privy Council case of *Air Jamaica v Charlton*⁴², concerning the surplus of pension funds following the dissolution of an airline company. The tricky issue in this case was an express provision in the trust deed, which stated that no monies were to be returned to the company in any circumstances.

Nevertheless, his Lordship held that this is of no consequence and convincingly advised that a resulting trust of the pension monies arose in favour of the company with the result that the Crown could not take the benefit *bona vacantia*. Almost by way of legal fiction, Lord Millett explained that although intention is relevant and crucial in giving rise to a resulting trust, a resulting trust can still arise regardless of whether the transferor positively intended to retain a beneficial interest:

“Like a constructive trust, a resulting trust arises by operation of law, though unlike a constructive trust it gives effect to intention. But it arises whether or not the transferor intended to retain a beneficial interest – he almost always does not – since it responds to the absence of any intention on his part to pass a beneficial interest to the recipient. It may even arise where the transferor positively wished to part with the beneficial interest...”

In this context, Lord Millett also commented on the judicial approach in *Re Vandervell No 2*⁴³ and explained that although Mr. Vandervell clearly did not intend the share option to result to him, at the same time he did not intend to make an outright gift to the trustee company.

His Lordship added that only if there is no evidence that there was an intention to create a trust, make a gift or a loan of the property to the transferee, can a presumption in favour of the transferor be made. Hence, although the transferor may not envisage the return of his property, this is immaterial if the circumstances inadvertently give rise to a resulting trust, which is a default trust arising by operation of law.

⁴² [1999] UKPC 20.

⁴³ [1974] Ch 269.

In other words, according to this view, all resulting trusts including the Quistclose trust arise as equity's response to the intention of the transferor – not to benefit the transferee. In the case of the Quistclose, that intention is *presumed*.

H. MILLETT'S NAYSAYERS

1. Penner's Criticisms

Whilst Millett's views are neat and accords with conventional trust doctrines in principle, they are not immune from criticisms. Professor Penner in a thought-provoking essay teased Millett's analysis on two aspects.⁴⁴

Firstly, Penner attacks the weakest point in Millett's views in *Twinsectra*, which is the power. It is notable that Millett jettisons the concept of a mandate in favour of a more established trust concept known as a 'power'. In a penetrating analysis, Penner argues that the power which the transferor imposes on the transferee to carry out a stated purpose must be personal and not under a trust because otherwise, it will have the effect of dislodging Millett's analysis. The first reason being contrary to what Millett argues, the imposition of trust duties will displace the transferor's beneficial interest in the loan monies. Secondly, the power to apply the loan monies was for an abstract purpose and if this is in a context of a trust, that would offend the beneficiary principle⁴⁵.

Unfortunately, the tenor of Millett's analysis in *Twinsectra* has been hesitant on this point. It remains the least clear aspect of his analysis. At several parts of his judgement, he hinted of trust duties. The most crucial was his description of the transferee's duties as a fiduciary whereby undoubtedly, this will involve a duty under a trust. Yet, at the conclusion of his analysis, Lord Millett clearly stated that the borrower's authority to apply the monies for a specific purpose is only a mere power. This is contradictory.

To reinforce this point, Chambers suggested as Penner did that the best way was to treat the Quistclose arrangements as contractually personal superimposed on a trust structure⁴⁶. This was expressly rejected by Lord Millett in *Twinsectra*. Hence, it undesirably seems that Millett's analysis

⁴⁴ James Penner, 'Lord Millett's Analysis' in Swaddling (n 22).

⁴⁵ In all the cases concerning a 'power' under a discretionary trust, it was to appoint an object and not to carry out a purpose.

⁴⁶ Lusina Ho and PJ Smart, 'Reinterpreting the Quistclose trust: a critique of Chambers' analysis' (2001) 21 Oxford Journal Legal Studies 267.

views the Quistclose structure as a trust essentially incorporating a power but unconvincing in his explanation whether that power is personal.

However, the only saving grace is that the effect is less severe in application because the test for mere power is applied the same for certainty of objects in relation to powers under a trust, courtesy of the judgement in *McPhail v Doulton*⁴⁷. Nonetheless, in terms of trust principles, the contradiction in terms threatens the viability of Millett's analysis to a certain degree.

Secondly, Penner argues that Millett's subscription to the theory of resulting trust by Birks and Chambers makes his Quistclose analysis unstable⁴⁸. There is some force in this argument because till today, there is no consensus or authority to settle the juridical debate surrounding the resulting trust. It follows that there is no way of finding out if the theory is correct and to hinge an important trust analysis such as the Quistclose on an unproven theory is indeed flimsy.

However, having said that, Millett's views, like that of Birks and Chambers, enjoys one significant merit - they are logically effective and share an uncanny ability to explain the most conceptual of trust conundrums. Hence, in the absence of an alternative superior view, rather than drastically banishing the Quistclose as an outcast of equity, why should we not subscribe to this view and save it?

Thirdly, Penner rightly points out that Millett's analysis has changed from his views a decade ago in a non-judicial capacity. The concern is that Millett no longer views the Quistclose trust as a product of positive intentions between the parties to create a trust but one which arises by operation of law as a matter of presumed intention.

This presents an obstacle because the Quistclose factual situation does not readily fit within the categorisation of resulting trusts set out by Megarry J in *Re Vandervell's Trust (No.2)*⁴⁹. It is important to note that this neat categorisation is a summary of the House of Lords decision in *Vandervell v IRC*⁵⁰, whereby many equity scholars and judges have accepted the speeches of Lords Upjohn and Wilberforce in that case as representing the current authority on resulting trusts. Therefore, if Millett's exposition of the

⁴⁷ [1970] 2 All ER 228.

⁴⁸ Jamie Glister, Review of 'The Quistclose Trust: Critical Essays' by William Swaddling (2004) 67 *Modern Law Review* 1032.

⁴⁹ [1974] Ch 269.

⁵⁰ [1967] 2 AC 291.

Quistclose trust is to gain valid acceptance, it must overcome the hurdle of being consistent with this categorisation.

In order to respond to Penner's argument, the exact words of Megarry J's categorisation will be reproduced in verbatim for analysis:

"...Where A effectually transfers to B (or creates in his favour) any interest in any property, whether legal or equitable, a resulting trust for A may arise in two distinct classes of case...

(a) The first class of case is where the transfer to B is not made on any trust...The question is not one of the automatic consequences of a dispositive failure by A, but one of presumption: the property has been carried to B, and from the absence of consideration and any presumption of advancement B is presumed not only to hold the entire interest on trust, but also to hold the beneficial interest for A absolutely...Such resulting trusts may be called "presumed resulting trusts."

(b) The second class of case is where the transfer to B is made on trust, which leaves some or all of the beneficial interest undisposed of. Here B automatically holds on a resulting trust for A to the extent that the beneficial interest has not been carried to him or others.

The resulting trust here does not depend on any intentions or presumptions, but is the automatic consequence of A's failure to dispose of what is vested in him. Since *ex hypothesi* the transfer is on trust, the resulting trust does not establish the trust but merely carries back to A the beneficial interest that has not been disposed of. Such resulting trusts may be called "automatic resulting trusts..."

On a careful reading of this excerpt, it is apparent that Lord Millett's exposition of the nature of the Quistclose trust is irreconcilable with Megarry J's categorisation of the resulting trust because the former cannot be readily fitted into any of the two categories set out above.

Firstly, Megarry J rigidly concludes that an automatic resulting trust only arises if property is transferred on trusts, which fails to exhaust the beneficial interest therein. To be exact, this 'trusts' refers to an express private trust. On the facts of Quistclose, the monies were advanced as a loan and not on trusts.

The second most important point is that Megarry J made no room for intentions or presumptions to operate in the context of an automatic resulting trust. One can appreciate Penner's doctrinal concerns based on this simple

logic. If the first category of resulting trusts is based on presumptions⁵¹, then surely, the second category cannot also be based on presumptions. Otherwise, the distinction between the two categories would be one without a difference.

Therefore, when Millett identifies the Quistclose trust as a resulting trust that arises based on the presumed intention of the transferor not to benefit the transferee as evidenced by the stated purpose in the loan advance, this becomes inconsistent with Megarry J's categorisation.

In fact, Millett's exposition of the Quistclose trust places it as a hybrid resulting trust in an entirely new category of its own. This is because it is not one of the 'automatic' resulting trust cases since equity *presumes* an intention of non-beneficial transfer from the outset. At the same time, it does not fall within the category of 'presumed' resulting trust because the fact presumed is not one of a declaration of trust owing to an evidential gap, but rather one of a non-beneficial transfer.

Further, Lord Millett described it as a resulting trust, which arises from the outset with a power attached to perform the stated purpose. Indeed, there are hardly any conventional resulting trust cases that match all these features in Millett's exposition. This is where the engima of the Quistclose trust emerges again as it eludes trust orthodoxy. In this sense, Penner's argument is valid.

However, having said that, it is argued that this is not a considerable concern because the law of resulting trust has never been an established area of equity. It is vague and its juridical nature continues to be a source of debate⁵². Suffice to say, the facts of Quistclose itself are unconventional and hard cases do justify an innovative approach.

In view of the current development of case law on resulting trusts and the potentially novel circumstances which may give rise to the trust since Megarry J's decision in *Re Vandervell Trusts (No.2)*, it is respectfully suggested that this categorisation needs to be revisited⁵³. There are three reasons for this suggestion.

⁵¹ See *The Venture* [1907] 77 L.J.P. 105; *Fowkes v Pascoe* [1874-80] All ER Rep 521; *Re Vinogradoff* [1935] WN 68; *Tinker v Tinker* [1970] 2 WLR 331; *Tinsley v Milligan* [1993] 3 WLR 126; *Tribe v Tribe* [1995] 4 All ER 236; *McGrath v Wallis* [1995] 2 FLR 114; *Lowson v Coombes* [1999] Ch 373.

⁵² See William Swaddling, 'A new role for resulting trusts' (1996) 16 Legal Studies 110.

⁵³ See *Laskar v Laskar* [2008] EWCA Civ 347.

Firstly, although one can appreciate that this classification of resulting trusts has offered valuable guidance in understanding resulting trusts, it has also imposed an equally significant barrier to a more rational understanding of resulting trust cases over the years. This is a direct consequence of its overly formalistic approach by merely fitting cases into rigid categories but failing to explain the essence of the categories satisfactorily.

One classic example is the very concept of the ‘automatic’ resulting trust, which continues to defy convincing legal analysis. Whilst Megarry J insists that in the category of ‘automatic’ resulting trust, there can be no room for intentions and the operation of presumptions, such a rigid designation goes no further than to explain anything meaningful. In fact, the only reason why the *Vandervell* judges came to this conclusion was because they were solely driven by the need to draw a factual distinction from the other line of cases they called ‘presumed’ resulting trusts.

Although one can understand such a motivation and grasp the simple differences on its surface, in substantive terms, the *Vandervell* categorisation offers no content in explaining *why* automatic resulting trusts arise. At best, it only identifies factual circumstances as to *when* such a trust arises.

This lack of understanding of the ‘automatic resulting trust’ is best captured by Swaddling in an article where he questions with force the accuracy and logical truth of Lord Upjohn’s retention theory in *Vandervell*. According to Lord Upjohn’s explanation of the automatic resulting trust,

“If the beneficial interest was in A and he fails to give it away effectively to another or others or on charitable trusts it must remain in him. Early references to Equity, like Nature, abhorring a vacuum, are delightful but unnecessary”.

It is observed that this statement is a result of his Lordship presupposing the division of legal and equitable title in a property prior to the trust coming into being. However, this amounts to a misconception of fundamental trust understandings because surely one can appreciate that prior to the trust coming into being, the settlor has the absolute title in the property. As such, there is no division of legal and equitable title as of yet until the trust comes into fruition.

Therefore, it follows that nothing results ‘automatically’ back to the settlor if the trust is not established for either want of the three certainties because ownership of the property basically remains throughout with the settlor. Hence, if the express trust fails for whatever reason, nothing ever left the settlor and most certainly there is nothing to retain.

This same flaw was also judicially criticised by Lord Browne-Wilkinson in *Westdeutsche*:

“This argument is fallacious...A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title. Therefore to talk about the [transferor] ‘retaining’ its equitable interest is meaningless. The only question is whether the circumstances under which the money was paid were such as, in equity, to impose a trust on the [recipient]. If so, an equitable interest arose for the first time under that trust”.

In stark contradistinction from the weaknesses of the strict and formalistic *Vandervell* categorisation, the presumption of non-beneficial transfer proposed by Birks and Chambers, which is employed by Lord Millett in his Quistclose trust analysis neatly avoids these conceptual flaws. Unlike the *Vandervell* categorisation, it enjoys the advantage of being able to offer a unifying and coherent view as to why all resulting trusts arise. In other words, there is content in the theory rather than mere categorical distinctions. As such, it can be applied to a wider range of resulting trusts cases because the intention not to benefit the transferee is a fluid concept that can manifest in a variety of ways in practice. It can occur in situations whereby a person conveys property to another in gratuitous circumstances and there is no other possible explanation as to why there should be a gift. It can also occur in situations whereby an express trust fails for one of the three certainties or in situations such as the Quistclose trust when a purpose attached to the loan advance is not carried out to fruition. In all these cases, there is one common factor – the intention in question need not necessarily be one, which is borne out of conscious thought or express words to that effect. If need be, equity retains the ability to *presume objectively* from the totality of a given set of facts that the transferor did not intend to benefit the transferee.

Thus, there are two fundamental differences that one can appreciate between the *Vandervell* categorisation and the restitutionary approach exemplified in Millett’s exposition of the Quistclose trust. Firstly, the content of the fact presumed is different. In cases of ‘presumed resulting trust’ under the *Vandervell* categorisation, the presumption is one of declaration of trust caused by an evidential gap to explain a certain transfer

or conveyance of property.⁵⁴ This is best explained by Lord Upjohn himself in *Vandervell*:

“In reality the so-called presumption of a resulting trust is no more than a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution”

On the contrary, the restitutionary approach promotes the fact of non-beneficial transfer, which may be presumed or proven.

Secondly, under the *Vandervell* categorisation, the methodology of presumption is not consistently applied to all cases of resulting trusts. In fact, this methodology is used to distinguish between different cases of resulting trusts. As a result, as described above, the *Vandervell* categorisation suffers from a weakness in that it could not satisfactorily explain the category of cases it classifies as ‘automatic’. The same cannot be said of the unifying restitutionary idea of non-beneficial transfer which is the sole fact underlying all resulting trust cases.

It is thus observed that whilst the restitutionary approach can extend and apply to all conventional resulting trust cases, the existing trust orthodoxy as represented by the *Vandervell* categorisation cannot capture the Quistclose trust. This itself presents sufficient reason to revisit the categorisation especially when the retention theory set out by Lord Upjohn has been exposed to be a fallacy in explaining the automatic resulting trust. In view of these differences, it is argued that whilst categorisations are helpful in law because they provide certainty and focus one’s minds to the different factual scenarios in cases, such advantages can only emerge if the categorisation itself is supported by sound underlying theories and doctrines as to why the cases are drawn to the categories in the first place. Otherwise, a categorisation without content is a hollow one indeed and the area of resulting trusts continues to be riddled with ambiguity and debate precisely because of this reason.

Therefore, although the *Vandervell* categorisation may contain some fundamental truths, to entrench it as the exhaustive gospel for all resulting trust cases that is being surveyed is woefully inappropriate to say the least because its inadequacies regrettably fail to explain the principles underlying the law of resulting trusts.

Secondly, the area of ‘presumed resulting trusts’ identified by Megarry J is not without its own set of problems. It has come under heavy

⁵⁴ See William Swaddling, ‘Explaining Resulting Trusts’ (2008) 124 Law Quarterly Review 72.

criticisms in recent years for being anachronistic.⁵⁵ This argument is reinforced by the fact that Parliament has just partially reformed the law in this area.⁵⁶

Further, Chambers presents a more serious doctrinal objection to this category of ‘presumed’ resulting trust by attacking the content of fact it presumes – namely a declaration of trust⁵⁷. It is trite law that intention to create a trust should not be lightly presumed by the courts and the fact presumed in the *Vandervell* categorisation seems to run counter to existing law. As du Parcq L.J. reminded in *Re Schebsman*⁵⁸:

“Unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think the court ought not to be astute to discover indications of such an intention.”

It is indeed interesting to observe that this criticism is analogously similar to the objections presented against the primary trust in Lord Wilberforce’s dual trust structure, which Lord Millett skilfully avoided with a single trust analysis. Therefore, it is argued that the *Vandervell* categorisation be overhauled rather than allowing hotch-potch reforms to take place within a formal yet inadequate structure.

Thirdly, the proposal to overhaul the *Vandervell* categorisation presents itself as a viable way to restore coherence in the law of resulting trusts because at present, there exists an unsettled line of cases, which have developed within the categorisation over the years.

These cases mainly concern the beneficial ownership of surplus funds from anonymous subscription to funds and the dissolution of unincorporated associations. The legal issue litigated in these cases is whether the Crown takes the surplus funds *bona vacantia* or should the funds revert back to the donors on an automatic resulting trust? Whilst the courts have been adopting divergent views on this matter, this demonstrates the possibility of other types of factual circumstances that may give rise to an automatic resulting trust beyond the strict *Vandervell* categorisation.⁵⁹

⁵⁵ See for example, Lord Diplock’s famous lament of the presumption of advancement in *Pettitt v Pettitt* [1970] AC 777.

⁵⁶ s.199 of the Equality Act 2010 now abolishes the presumption of advancement.

⁵⁷ See further the comments in William Swaddling, ‘*Explaining Resulting Trusts*’ (2008) 124 Law Quarterly Review 72.

⁵⁸ [1944] Ch 83.

⁵⁹ See *Cunnack v Edwards* [1896] 2 Ch. 679; *Re Printers and Transferrers* [1899] 2 Ch 184; *Re Trusts of the Abbott Fund* [1900] 2 Ch 326; *Re Hobourn Aero Components Ltd.’s Air Raid Distress Fund* [1946] Ch. 194; *Re West Sussex Constabulary’s Widows, Children*

Although the facts of these cases, unlike the Quistclose trust, can be fitted within the *Vandervell* categorisation, there is a lack of any discernible principle underlying these cases, which creates a sort of ‘blackhole’ within the area of automatic resulting trust. To a certain extent, this questions the very existence of the automatic resulting trust because there are doubts as to when and in what situations exactly does an automatic resulting trust arise. Therefore, in light of Penner’s doctrinal concerns, it is argued that the *Vandervell* categorisation is ripe for an overhaul instead of being construed as causing a serious dent to Millett’s analysis of the Quistclose trust in substantive terms. Rather, the acceptance of Millett’s analysis of the Quistclose trust will serve to expedite this overhaul sooner rather than later and this enjoys the advantage of resolving the uncertainty in these two areas of equity.

Whilst it is conceded that Millett’s analysis of the Quistclose trust cannot be fitted within the existing *Vandervell* categorisation, this does not necessarily mean that Millett’s analysis is wrong. It only indicates that the *Vandervell* categorisation may no longer be an accurate description of all possible circumstances, in which a resulting trust may arise. As such, it may have outlived its usefulness in guiding future trusts development in this area. On a final note to this doctrinal contest, the answer to Penner’s argument on this point is to view the existing *Vandervell* categorisation as being authoritative but not exhaustive, thus leaving the possibility that there might be judicial modification of that categorisation in the near future especially if Millett’s views of the Quistclose trust are accepted as law.

Although *Vandervell v IRC* is a decision of the highest appellate authority, the development of equitable principles must not remain static and the law must be flexible to change in favour of improvement. This is necessary and inevitable because the cases on resulting trusts continue to develop and the categories need to expand accordingly to accommodate them.

Although Lord Millett has not expressly challenged the *Vandervell* categorisation of resulting trusts in *Twinsectra*, this approach moving forward can achieve reconciliation with existing trust cases. At the least, for the benefit of a more coherent development of trust doctrines, one should subscribe to this approach as Lord Millett had skilfully shifted the focus from the problematic issues concerning certainty of intention to the

and Benevolent Fund Trusts [1971] Ch. 1; *Re Bucks Constabulary Fund (No 2)* [1979] 1 WLR 936; *Re Osoba* [1979] 1 WLR 247; *Air Jamaica v Charlton* [1999] 1 WLR 1399.

application of restitutionary ideas proposed by Birks and Chambers. This has sparked new life into the juridical debate surrounding the resulting trust.

As the search for coherence in this area of law continues, it is thus argued that should the rigid and unpurposeful *Vandervell* categorisation be allowed to invalidate Millett's view of the Quistclose trust, equity stands to be the biggest loser because to cling on to an authority which proves inadequate in explaining the conundrums surrounding the juridical nature of the resulting trust is tantamount to subscribing to an unproductive hindrance to a better rationalisation of resulting trusts as a whole.

Nevertheless, it is acknowledged that from a precedent perspective, it would require a decision of the Supreme Court to give effect to Millett's views, as *Vandervell v IRC* is a House of Lords decision that remains good law at present time⁶⁰.

(2) Smolyansky's criticisms

Michael Smolyansky, in a separate article, also launches scathing criticisms at Millett's analysis, calling it "wrong"⁶¹. Firstly, he was critical of the fact that Millett's resulting trust analysis implies intention too loosely, even looser than in *Paul v Constance*.

However, Smolyansky failed to realise that the reason Millett employs a single trust analysis was to avoid the conceptual problems riddling Lord Wilberforce's primary trust structure. Hence, the arguments relating to certainty of intention hold no weight, as that is a requirement of an express private trust. Thus, it follows that *Paul v Constance* has no comparative significance at all in this respect.

Smolyansky's caption on intention is a misinterpretation of Lord Millett's exposition because what his Lordship was discussing is the presumption of non-beneficial transfer proposed by Birks and Chambers. Therefore, the intention not to benefit the transferee in resulting trust terms cannot be equated to an intention to create a trust in the express private trust sense. The failure to appreciate this fundamental distinction is apt to cause confusion as surely one can appreciate that a resulting trust is not dependent on the intention of the parties manifestly expressed to create a trust but rather, it is an implied trust arising by operation of law.

⁶⁰ See the Practice Statement [1966] 3 All ER 77 set out by Lord Gardiner L.C.

⁶¹ Michael Smolyansky, 'Reining in the Quistclose trust: a response to *Twinsectra v Yardley*' (2010) 16 *Trusts and Trustees* 558.

Indeed, the juridical argument offered by Millett is that the resulting trust is equity's response to the transferor's lack of intention to benefit the transferee. Applying the Quistclose facts within this structure, the fact that the lender attaches a purpose to the loan advance is evidence not of a positive intention to retain his beneficial interest in the monies but rather evidence of an intention not to transfer his beneficial interests in the monies absolutely to the borrower. This remains the logical beauty of Millett's analysis and should not be argued out of context. As such, Smolyansky's criticism of the low threshold in which equity presumes intention to give rise to a resulting trust is misplaced because he is implicitly measuring it to the high threshold of finding certainty of intention in the express private trust sense.

Secondly, Smolyansky argues that Millett contradicted himself when he classified the Quistclose trust as a resulting trust on the basis of his approval of Lord Browne-Wilkinson's categorisation in *Westdeutsche*. It is submitted that this accusation is at best, careless, and at worst, naive.

If Lord Millett's judgement in *Twinsectra* is read carefully, his analysis was the conclusion of his explanation of the various views on the Quistclose trust. Lord Millett had a distinct style of writing in *Twinsectra*. He first discusses all the possible explanations of the Quistclose trust, pointing out their respective advantages and flaws before presenting his own exposition. By doing so, his Lordship only adopts those elements, which he thinks are the best points. For example, although he generally supported Chamber's views, he later objected to some of its flaws.

Similarly, Lord Millett was merely approving Lord Browne-Wilkinson's categorisation as examples of how resulting trusts arise. It may be 'authoritative' but it is certainly not conclusive of all factual circumstances that give rise to a resulting trust. Therefore, this cannot be taken to have been subscribed to by Lord Millett as the all-or-nothing truth in the absence of clear words to that effect.

Secondly, it is helpful to note that Lord Millett's evident support of the restitutionary views of Birks and Chambers lies at the heart of his exposition of the Quistclose trust in *Twinsectra*. In turn, this view of the resulting trust as a vehicle to effect restitution is diametrically opposite to Lord Browne-Wilkinson's own juridical view that all resulting trusts arise because the transferor intends to create a trust for himself.

Hence, it is inconceivable that someone as experienced and brilliant a judge as Millett to have failed to realise the stark divergence in these

views⁶². Smolyansky's failure to explain this fundamental point is indicative of his misinterpretation. Thus, there is no contradiction as Smolyansky exaggerates, because the Quistclose trust can be added to the existing jurisprudence of resulting trust cases and Lord Millett is aware of that.

I. A SPECIES OF CONSTRUCTIVE TRUST?

Whilst the focus of Millett's arguments above, were directed at the Quistclose being a species of resulting trust, there are some views which hold that it would be better to classify the Quistclose as a constructive trust.⁶³ In fact, this seems to be the approach of the Canadian courts.⁶⁴ The basis of this is it would be unconscionable for the borrower in any event to apply the loan monies contrary to the stated agreed purpose associated with the advancement of loan monies.⁶⁵

At first glance, this view seems to be more coherent as unconscionability is a well-known doctrine in trusts law, which often supports the imposition of constructive trusts by the courts.⁶⁶ This can be seen especially in breach of trust and breach of fiduciary cases. One such notable use of the constructive trust as a punitive measure to punish wrongdoing fiduciaries can be seen in Lord Templeman's decision in *AG for Hong Kong v Reid*⁶⁷ whereby a constructive trust was imposed on the proceeds of bribes received by a Crown Prosecutor in Hong Kong. This proprietary remedy led to a successful tracing for the Crown to recover those properties bought in Australia with the proceeds of bribes.⁶⁸

Nonetheless, it is argued that it is undesirable for the Quistclose to be absorbed into the classification of a constructive trust for two reasons.

Firstly, there are unsettled fundamental criticisms directed at the doctrine of unconscionability being employed as a basis to impose a

⁶² Lord Millett himself has responded to Smolyansky's criticisms, see Peter Millett, 'The Quistclose trust – a reply' (2011) 17 *Trusts & Trustees* 7.

⁶³ Charles Rickett, 'Different views on the scope of the Quistclose analysis: English and Antipodean insights' [1991] 107 *Law Quarterly Review* 608.

⁶⁴ *Pettkus v Becker* [1980] 2 S.C.R. 834.

⁶⁵ Robert Chambers, 'Resulting trusts' (Clarendon Press 1997).

⁶⁶ For a more thorough explanation of the subject, see the monograph of essays by Charles Mitchell, 'Constructive and Resulting Trusts' (Hart Publishing 2010).

⁶⁷ [1994] 1 AC 324.

⁶⁸ Note that Lord Neuberger M.R.'s leading judgement in *Sinclair Investments v Versailles Finance Ltd* [2011] EWCA Civ 347 has today reversed this position.

constructive trust, let alone the Quistclose trust.⁶⁹ This is primarily because unconscionability is essentially a vague concept, void of any true meaning unless important judicial guidelines can be formulated.⁷⁰ The consistent failure of the courts to set out a precise meaning to the term would necessarily mean that judges are always required to subjectively interpret its meaning on a case-by-case basis.⁷¹ Therefore, being uncertain and contrary to the rule of law⁷², if the Quistclose trust is rooted on the doctrine of unconscionability, this will only create an unsatisfactory ground for further development of trust principles.

Secondly, Lord Millett's views of the Quistclose trust have offered rare judicial support to the modern restitutionary ideas of Birks and Chambers which convincingly gave the resulting trust, an area which has been fraught with juridical difficulties, a sense of purpose. This helps to create a more structured jurisprudence of case laws in this area. Hence, it is argued that the classification of the Quistclose trust as a resulting trust within these principles will be more purposeful insofar as the future development of trust doctrines are concerned.

J. THE ENIGMA UNRAVELS

Although no consensus has yet been achieved, an equity scholar and an insolvency practitioner can choose to view the Quistclose trust from either two perspectives. Firstly, as a legal commentator noted, one can choose to ignore the obsession of precise classification of the trust itself, safe in the knowledge that it is a product of equity's intervention to protect well-deserved lenders in certain defined circumstances⁷³.

Alternatively, one can adopt the reasoning of Lord Millett who brilliantly captures the phenomenon of the Quistclose trust by subscribing to the restitutionary ideas of Birks and Chambers who in turn argued convincingly that the resulting trust arises because the transferor does not intend to benefit the transferee.

⁶⁹ John Dewar, 'The Development of the Remedial Constructive Trust' (1982) 60 *Can Bar Rev* 265; Robert Chambers, 'Constructive trusts in Canada', Pt 1 (2001) 15 *Trusts Law International* 214; Pt 2 (2002) 16 *Trusts Law International* 2.

⁷⁰ See the criticisms of Margaret Halliwell [2003] *Conveyancer* 192 regarding Arden LJ's employ of this doctrine in *Pennington v Waine* [2002] 4 All ER 215 as an exception to the rule in *Milroy v Lord* [1862] 45 ER 1185.

⁷¹ See also the criticisms of Nourse LJ's judgement in *BCCI v Akindele* [2000] 4 All ER 221 relating to the legal test establishing the equitable wrong of knowing receipt.

⁷² Charles Rickett, 'Unconscionability and commercial law' in John Lowry and Loukas Mistelis, 'Commercial law: Perspectives and Practice' (LexisNexis Butterworths 2006).

⁷³ Alastair Hudson and Geraint Thomas, 'The Law of Trusts' (2nd edition, OUP 2010).

From a doctrinal perspective, this analysis excels because it neatly circumvents the cumbersome conceptual difficulties of the primary trust, which is inherent in Lord Wilberforce's dual trust structure. Secondly, the element of continuity of beneficial interest in the single trust analysis overcomes the tricky insolvency issues identified by Hudson as the resulting trust arises from the beginning prior to any possible breach of the purpose to which the monies are advanced. Thus, the flaw of a beneficial vacuum does not arise.

Thirdly, Millett's analysis of the *Quistclose* trust develops the jurisprudence of resulting trust by offering invaluable judicial support to Birks and Chambers' restitutionary view that all resulting trusts arise based on the presumption of non-beneficial transfer. Whilst the criticisms launched at Wilberforce's dual trust structure has alienated the *Quistclose* trust, Millett views the resulting trust as the body, which will absorb it.

In this way, it is able to explain the nature of the *Quistclose* trust in a coherent fashion whereby one can no longer criticise it as the product of palm-tree justice. Instead, it is now a purposeful addition to existing resulting trust cases. This is where a wider reconciliation of trust doctrines is achieved.

The employ of fresh restitutionary ideas also helps to bind and give the resulting trust a firm juridical foundation and unity of purpose. It is no longer a vague implied trust, which merely fills in a beneficial vacuum from a conveyance. Most importantly, restitutionary principles are usefully extended to capture new situations.⁷⁴

Restitution itself is a common law cause of action premised on the concepts of unjust enrichment and total failure of consideration. It is unique in that it also straddles in-between the boundaries of trusts law as unjust enrichment itself is an equitable concept. Millett has always been a supporter of this thesis⁷⁵, which enjoys the distinction of being able to explain some very odd resulting trust cases⁷⁶, the *Quistclose* now being one of them with Millett's judicial support.

In the final note to this section, I would now discuss the possible implications of recognising the *Quistclose* trust from Lord Millett's perspective. Firstly, the *pari passu* rule will be further displaced. It can be

⁷⁴ See *Lipkin Gorman v Karpnale* [1991] 2 AC 548 relating to unjust enrichment and *Kleinwort Benson v Lincoln CC* [1998] 4 All ER 513 concerning recoveries of monies paid out of a mistake of law.

⁷⁵ *Air Jamaica v Charlton* [1999] 1 WLR 1399.

⁷⁶ *Hodgson v Marks* [1971] 2 All ER 684.

appreciated that Millett's analysis has extended the application of the Quistclose trust further to gifts and is not confined to loan monies. This will inevitably dent further the entitlements of unsecured creditors.

In addition, unlike the express private trust in *Re Kayford*⁷⁷, the Quistclose trust is not vulnerable to the claw-back provision in section 239 of the Insolvency Act 1986 for voidable preference. This is because it cannot logically be established that the debtor desires to prefer one creditor to another since the trust springs into existence from the beginning as a result of the lender's stated purpose.⁷⁸

Thus, with more circumstances being captured by the Quistclose trust, the fate of unsecured creditors as governed by the general rule of distribution looks extremely bleak indeed. Perhaps the final death knell for the *pari passu* rule will have to be pronounced soon⁷⁹.

This supports the argument that the courts have offered disproportionate protection to some classes of creditors at the expense of those holding no security at all.⁸⁰ This is a valid point for legal thought amidst the brilliance of Millett's judicial innovation in defending the Quistclose trust.

Secondly, Lord Browne-Wilkinson's views of the resulting trust in *Westdeutsche* will be further displaced. Indeed, if Lord Millett's analysis is taken as the dominant view of the Quistclose trust, it will indirectly serve as a powerful impetus for the decision in *Westdeutsche* and the juridical views of the resulting trust expressed therein to be revisited if coherence in the law is not to be compromised.⁸¹

With Millett's views analysed in totality, the enigma of the Quistclose trust is now being unravelled, the orthodoxy restored and the uncertainty⁸², if any, is being resolved. If there are still any residues of doubts remaining, as

⁷⁷ Sarah Worthington, *Personal property law: text and materials* (Hart Publishing 2000).

⁷⁸ K. Loi, 'Quistclose trusts and Romalpa clauses: substance and nemo dat in corporate insolvency' (2012) 128 *Law Quarterly Review* 412.

⁷⁹ Riz Mokal, *Priority as pathology: the pari passu myth* (2001) 60 *Cambridge Law Journal* 581.

⁸⁰ Roy Goode, *Is the law too favorable to secured creditors?* (1983) *Modern Law Review* 53; M. Gronow, *Secured creditors of insolvent companies: do they get too good a deal?* (1993) 1 *Industrial Law Journal* 169.

⁸¹ Lord Browne-Wilkinson's *obiter* views of the resulting trust is inconsistent with the authority of the House of Lords key judgment in *Vandervell v IRC* [1967] 2 AC 291 as his presumption of a declaration of trust underlying all resulting trusts fails to explain the phenomenon of the automatic resulting trust.

⁸² Deepa Parmar, *The uncertainty surrounding the Quistclose Trust* (2012) 9 *International Corporate Rescue* 137.

Lord Millett states in *Twinsectra* quoting Sherlock Holmes, “when you have eliminated the impossible, whatever remains, however improbable, must be the truth”.

K. THE PRACTICAL RELEVANCE OF *QUISTCLOSE*

In view of the rearguard defence led by the wizardry of Lord Millett’s arguments, powered by the refreshing restitutionary ideas of Birks and Chambers, the practical relevance underlying the Quistclose trust must now be considered.

Notwithstanding the force of Penner’s arguments, it is submitted that they are not sufficient to destroy the essence of Millett’s view and thus cannot be adopted in their entirety because this will restrict the expansion of trust doctrines and hinder the relevance of the jurisprudence of equity to accommodate the needs of contemporary business realities.

The foremost consideration is the justifiability of offering protection to a lender who specifies a purpose attaching to the advancement of monies. From a commercial perspective, it makes for efficient business when monies are needed to be advanced immediately and a split-second decision needs to be made. There is simply no scintilla in time, which allows for the more cumbersome creation of security, let alone the negotiation of it from the corporate debtor.

In such circumstances, the law needs to offer protection to lenders who are not able to obtain security for one reason or another. If such lenders are deprived of the protection offered by the Quistclose trust, their financial interests stand to be prejudiced. This will inevitably result in the emasculation of credit, which may have deep resonance in economic reality. Businesses will only suffer if the flow of temporary bridging finance is impeded.

Let us not forget the often underestimated reality that short-term credit provides a valuable means for any corporate entity to survive the day when faced with unexpected financial pitfalls⁸³. Hence, without the Quistclose trust, it is companies who will be the ultimate losers when credit is withheld from them in crucial times and the grant of security is not feasible.

The facts of *Quistclose* itself are illustrative. Rolls Razor’s more established banker, Barclays refused to extend further credit due to the

⁸³ For example, credit enhancement facilities in securitization transactions with the status of senior creditor being conferred upon such lenders in the waterfall of payments as reflected in the tranches of debt.

overdrawn overdraft the company owed. Indeed, it was a less prominent lender who agreed to save the day for the company, but only to suffer the disappointing reality of its debtor entering into voluntary liquidation. Instead, its well-intentioned loan monies are now being claimed by another fellow lender in satisfaction of the company's debts. What a measure of commercial injustice!

Therefore, this justifies the protection of the Quistclose trust, which is being afforded to such bona fide lenders who advanced credit. Their stipulation of a purpose attached to the advance is evidence of their contractual bargain and thus merits equity's protection.

When unscrupulous recipients breached that condition as demonstrated in *Twinsectra*, it is only right for the lender to have recourse in equity. This is a classic situation whereby trusts law, especially the doctrine of a resulting trust can intervene and prove its usefulness. After all, equity looks at substance and not form.

The argument that this will cause prejudice to other creditors cannot be sustained simply because the lender who is claiming the protection of the Quistclose trust is furnishing cash consideration upfront and this is further reinforced by the condition stated, which reflects his contemplation of how his monies should be employed. Surely, this cannot amount to an undeserved protection conferred to such a lender in question.

The second point to note is the advantage of the Quistclose trust in terms of convenience and simplicity in its creation. The effect of its security can be created by simply including a term in the loan contract stating the purpose of the advance. This is invaluable as an effective quasi-security device when time is of the essence in commercial transactions and where the cumbersome procedures associated with the creation of security is simply not feasible.

Today, the importance of the Quistclose trust in secured lending cannot be underestimated. In view of the ongoing financial crisis and emasculation of credit facilities, equity must be sufficiently flexible to adapt to the needs of the business community.

This echoes with greater resonance in current business conditions because banks and financial institutions are often unwilling to lend large sums over an extended period of time, since the global economic crisis hit. Instead, it is the non-mainstream lenders such as pension funds and insurance companies, which have stepped up to the fore.

Therefore, the grant of quasi-security interests such as the Quistclose trust assumes greater importance than before, as these non-mainstream

commercial lenders are keen to obtain some form of legal protection to safeguard their financial interests against the potential insolvencies of corporate entities before agreeing to advance credit.

English commercial law needs to defend the advantage it has built up all these years, such as the relative convenience in the creation of security, which has always provided sublime trade conditions. This liberal attitude, which it assumes towards effective security creation, is also a key factor why English law has always been the governing choice of law in high-level financial contracts. The Quistclose trust is a device, which can help to further that aim, giving it an edge over its continental counterparts⁸⁴.

Seen in this light, there is no room for old-fashioned sentiments. Hence, the criticisms by Penner, whilst one can appreciate their doctrinal concerns, cannot be absorbed to legal reality. It must be processed and the intellectual challenges taken to improve trusts law. However, the objections must be abandoned in favour of modernity.

L. QUISTCLOSE FROM A COMMONWEALTH PERSPECTIVE

Although the Canadian and New Zealand courts seem to subscribe to the view that the Quistclose trust be classified as a species of the constructive trust premised on the doctrine of unconscionability⁸⁵, other eminent Commonwealth jurisdictions such as Malaysia continue to follow the English approach.

In a gesture of international comparative perspective, the decision of the Malaysian Court of Appeal in *Perman Sdn Bhd. v European Commodities*⁸⁶ will now be discussed. The claimants were two private companies controlled by a wealthy businessman, Rangoonwala. He wanted to use the business connections of one Raja Zainal and they promptly engineered a joint venture with two other entities.

A new company, Fimaly Sdn Bhd was incorporated to achieve the objectives of this joint venture. 3% of shares in Fimaly were held by Raja Zainal through Perman Sdn. Bhd. Although Perman is wholly owned by Raja Zainal and his wife, Rangoonwala provided the cash consideration for Perman's subscription of the Fimaly shares through his private companies because Raja Zainal lacked the requisite cash to subscribe for the shares.

⁸⁴The English concept of a 'trust' is alien in continental civil law systems practiced in most European countries.

⁸⁵ Fiona Burns, 'The Quistclose Trust: Intention and the Express Private Trust' (1992) 18 Mon. LR 147.

⁸⁶ [2006] 1 MLJ 97.

Raja Zainal and his wife then died in an accident, which prematurely ended the joint venture. The Fimaly shares have now appreciated in value and Rangoonwala claims ownership of the 3% shares through his claimant companies.

The claimants argued that Raja Zainal held the Fimaly shares under a trust. The argument was based on the claimants' provision of the purchase price for the Fimaly shares. The trial judge held that the shares were held under a resulting trust and the defendants appealed the decision.

Gopal Sri Ram JCA delivering the sole judgement of the court held in favour of the defendants stating that the trial judge had erred in holding that a resulting trust arises in favour of the claimants. It was important to determine in what capacity the claimant companies advanced the monies. If they were indeed purchasers and Raja Zainal was merely a proxy doing their bidding, then a presumption of resulting trust will indeed arise.

However, his Lordship held that since the evidence only pointed to the claimants' being lenders in advancing the money for Raja Zainal to subscribe to the Fimaly shares, a presumption of a resulting trust cannot arise. Since the loan advance was made for the specific purpose of subscription to the Fimaly shares, the monies were held on a Quistclose trust by Raja Zainal. It follows that since the purpose had been accordingly carried out, applying Millett's analysis in *Twinsectra*, the judge held that only a debtor-creditor relationship exists. Therefore, the claimants can only assert a personal claim for the monies and not proprietary rights over the shares.

Although the application of the legal principles in this case is fairly straightforward, this decision represents a rare affirmation of support to Lord Millett's analysis in *Twinsectra*. In addition, it entrenches the Quistclose trust into Malaysian jurisprudence, thereby offering valuable inter-judicial support⁸⁷ for the viability of Millett's efforts to lodge the Quistclose firmly within the realms of the resulting trust. Further, as demonstrated in this case, the application of the Quistclose trust in emerging economies across the Commonwealth serves to highlight its value in commercial transactions.

⁸⁷ Contrast with Gummow J's decision in *Re Australian Elizabethan Theatre Trust [1991]* 102 ALR 681.

M. POSTSCRIPT

In view of the analysis above, it would be helpful to examine two recent decisions, which represent the latest developments in this ever-dynamic area of law.

In the Court of Appeal case of *Beiber and others v Teathers Limited*⁸⁸, the Quistclose trust was engaged in a challenging commercial scenario. The defendant promoted a scheme called ‘The Take 3 TV Partnerships’ and presented an information memorandum to invite subscriptions to it. The claimant was attracted by the scheme and paid subscription monies into a settlement account at HSBC. Once the minimum threshold of subscription monies is reached, the defendant then transferred the monies into a separate partnership account at Barclays Bank for the purposes of investing in the Take 3 Scheme projects. This was done pursuant to the terms of the subscription agreement.

The scheme failed and the defendant lapsed into insolvency. In order to claim their monies back, the claimant argued that they advanced the monies for the specific purpose of enabling the defendant to invest the funds for the Take 3 Scheme.

When the defendant did not carry this out, they argued that a Quistclose trust arose in their favour. Crucially, if this argument succeeded, this would put the claimant in a favourable position to recover their monies ahead of the defendant’s other unsecured creditors. However, the Court of Appeal rejected this argument to the relief of most unsecured creditors and explained that a Quistclose trust only arises when a person loans money to another for a specified purpose. On the facts, the subscription monies do not constitute a loan.

Further, Arden LJ traced the chronology of events in which the monies were being paid into and transferred between the two accounts. When the claimant first made the payment into the HSBC account, the court was prepared to accept that it was held on a Quistclose trust because it was paid pursuant to the purpose of subscription thereof. However, when the monies were then transferred to the Barclays partnership account, this was done in accordance with the terms of the subscription agreement.

From that moment, the claimant’s rights in the monies were regulated by the partnership deed. The Quistclose trust, if any, lapses and the

⁸⁸ [2012] EWCA Civ 1466.

beneficial interest of the claimant in the monies cease to exist. At that point, they only had a contractual right to share in the profits of the partnership and in its net assets upon dissolution.

Arden LJ also agreed with the first-instance decision that a Quistclose trust did not fasten onto the monies in the partnership account because the specific purpose crucial for the trust to arise was not objectively certain during the time of the transfer. This is because the specific purpose for which the funds are advanced *viz.*, the pursuit of profitable investments was not sufficiently clear to enable determination as to whether the purpose was actually satisfied. This casts doubts as to whether the Quistclose trust had arisen in the first place.

This decision reinforces the integrity of the trust device by holding that although a Quistclose trust may arise without the positive knowledge and intention of the parties, provided monies are advanced for a specific purpose, at the same time the courts are unwilling to allow the trust to be conveniently argued in vague circumstances as a measure of last resort in order to save a party's entitlement from the undesirable effects of insolvency.

In addition, *Beiber* offers a glimpse of the possible factual complexity in which a Quistclose trust can be argued in commercial practice. Fortunately, the judges demonstrated that they are up to the challenge to deal competently with the issues and to ensure certainty prevails in the law. Therefore, in this regard, this decision must be applauded because it seeks to prevent any disrepute in the law.

In the second case of *Gabriel v Little*⁸⁹, the High Court further clarified the factors which trigger a Quistclose trust, in particular, emphasising the need to specify the purpose as clearly as possible. The facts of this case are atypical. A Mr. Gabriel advanced a loan intended as an investment to a property venture company headed by a close friend, Mr. Little, which then lapsed into insolvency. In asserting a claim to recover his monies, Mr Gabriel seeks to establish that the monies were held on a Quistclose trust which in turn supports his claim against Mr. Little for the equitable wrongdoing of knowing receipt.

The argument for a Quistclose trust was predicated on a term in the facility letter, which states that the purpose of the loan was '*to assist with the costs of development of the Property*'. Instead of being used for property

⁸⁹ [2012] EWHC 1193 (Ch); this case was heard in the Court of Appeal on 26 June 2013, which currently awaits the results of a reserved judgment.

development, the loan monies were misapplied contrary to the stated purpose which prompted Mr. Gabriel to sue.

The High Court accepted that a purpose specified, indeed merited the possibility of a Quistclose trust arising. However, the judge concluded that the word 'development' was vague and too uncertain on the facts to mean anything. Therefore, this lack of clarity in the purpose specified means that no Quistclose trust arises.

This case sheds important light onto the willingness of the court to find a Quistclose trust and it is clear that the threshold in which such a trust arises is indeed high. The mere fact that a purpose is specified is insufficient to give rise to a Quistclose trust although the court did make a concession that the description of the purpose as being 'sole' or 'exclusive' is not a prerequisite. Nonetheless, the court did seem to hint that these words may be crucial and would strengthen a case for a Quistclose trust. Therefore, this decision reveals the judicial approach in finding the requisite precision in the words used to specify the purpose. This greatly improves the clarity in the drafting of clauses in legal documentation especially loan transactions.

In addition, banking and security lawyers would be well-advised to elaborate in as much detail as possible, the purpose for which the loan is advanced, fitting into and considering the context of the transaction and its surrounding circumstances so as to enable a court to find a sufficiently workable and clear purpose.

A second material point that transaction lawyers may derive from this decision is the need to segregate the loan monies from the general funds of the borrower. The discussion of this factor revisits the unique factual similarities shared in *Paul v Constance*, *Quistclose* and *Twinsectra* whereby the monies were paid into a designated bank account. In trusts parlance, this factor has often held sway amongst equity judges because it establishes the certainty of subject matter, which is a traditional characteristic strongly indicative of the presence of a trust.

Therefore, upon an examination of the authorities, the High Court explained that although segregation of the monies *ipso facto* is not a prerequisite to the finding of a Quistclose trust, it could operate as a crucial element, which reinforces the finding of a trust especially if the surrounding factors in a case are equal and balanced.

For example, if the purpose on a given set of facts is identified but insufficiently precise, had the monies been deposited into a specific bank

account, this may help to persuade the court to hold that a Quistclose trust attaches to the monies.

In the aftermath, these cases ensure better clarity in the drafting of contracts by specifying the degree of precision, which the court expects in the purpose attached to the loan advance, and highlight the need to segregate monies into a specific account. One can also conclude that the Quistclose trust is not a second fiddle trust device of sorts, which functions to save a creditor from the damnation of its debtor's insolvency. The circumstances in which it arises are strictly regulated by the courts and for the trust to be triggered, the specific purpose in question must be sufficiently identified and capable of determination when the monies are advanced.

N. CONCLUSION: THE WAY FORWARD

As discussed in the foregoing, the Quistclose trust serves as a valuable commercial device employed in favour of lenders when such lenders advanced credit without security. The insolvency impact of a trust is evidently far-reaching as it preserves the proprietary interest of the lender and it is this crucial advantage offered by this unique quasi-security device which fuels the debate to unravel the enigma of the Quistclose trust.

Despite its robust classification within the realms of the resulting trust which is itself plagued with the uncertainties surrounding its juridical basis⁹⁰, the commercial utility of the Quistclose trust cannot be denied especially to lenders in times of insolvency.

Therefore, its peculiarity should not lead one to be overly critical of its existence. If its inconsistencies with conventional trust doctrines are to be of any concern, it only serves to illustrate the ingenuity of equity to deal flexibly with the commercial needs of the lending community. Thus, when viewed in this simplicity, one should accept the Quistclose trust as an established part of trusts law. It might be peculiar but it is certainly not an anomaly.

In the final analysis, it must be appreciated that Lord Millett's twin analysis over the span of two decades has helped legal scholars and practitioners alike, truly grasp the nature of this unique trust device. To a large extent, this helps to facilitate the drafting of commercial contracts and allows one to understand better the legal implications, which results from such transactions.

⁹⁰ See William Swaddling, 'A new role for resulting trusts' (1996) 16 *Legal Studies* 110; William Swaddling, 'Explaining Resulting Trusts' (2008) 124 *Law Quarterly Review* 72.

Commercial certainty thus becomes a crucial legal commodity here and it is time that the enigma of the Quistclose trust be unravelled for all to see or be allowed to disappear forever as a legal heresy⁹¹.

⁹¹ See for example, the Court of Appeal decision in *Re New Bullas* [1994] 1 BCLC 485 which has been overruled by the House of Lords in *Re Spectrum Plus* [2005] UKHL 41 in relation to the divisibility of charges over book debts and its proceeds.