THE WIDER AMBIT OF THE *QUISTCLOSE* DOCTRINE

Ying Khai Liew[*]

ABSTRACT

The *Quistclose* doctrine has largely been applied conservatively in English law. On a proper analysis, however, it has a wider basis than commonly presupposed. The *Quistclose* doctrine is better understood when it is recognised that that doctrine and the doctrine in *Rochefoucauld v Boustead* share the same basis: both doctrines respond to the same legally causative events and yield similar legal responses. This renewed understanding resolves many of the main deficiencies in our current understanding of the *Quistclose* doctrine, and illuminates our understanding of the principle underlying the two doctrines.

KEY WORDS

Quistclose trust. *Rochefoucauld v Boustead*. Event and response. Intention. Insolvency. Promise. Reliance.

I. INTRODUCTION

It is curious that the *Quistclose* doctrine has largely been applied conservatively in English law. There appears to be some unspoken[1] convention which prevents the *Quistclose* doctrine from being discussed and applied beyond a specific "comfort zone". The overwhelming majority of cases in which the doctrine has been relied on by counsel, and in which judgments have been given, have generally been limited to commercial, *inter vivos* arrangements involving money. Academic debates relating to the appropriate legal response and rationales of the doctrine likewise assume that it operates only within that ambit. This restrictive understanding of the *Quistclose* doctrine causes little concern when discussing the typical case which facts are highly similar to those that arose in *Barclays Bank Ltd v Quistclose Investments Ltd*.[2] However, it may be asked whether, in fact, the doctrine has a wider application than that which is commonly assumed. A number of important and related questions arise: can the doctrine be applied in other, non-typical factual scenarios; does the basis on which the doctrine rests also explain other equitable doctrines, so that our understanding of one doctrine may inform the analysis of another; what is the principle on which the doctrine is based; what does this tell us about the nature of the trust enforced; what degree of intention to create a trust is necessary; how does the doctrine relate to the borrower's insolvency?

This article suggests that the basis of the *Quistclose* doctrine is precisely the same as

---

[*] Lecturer in Law, University College London. I thank Professor Craig Rotherham, Professor Ben McFarlane, Professor Simone Degeling, and the two anonymous reviewers for their helpful comments on earlier drafts.

[1] Some commentators and judges, though, have expressly enunciated these perceived limitations to the *Quistclose* doctrine: see below, text to notes 20 – 21.

[2] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] A.C. 567.

that of the doctrine in *Rochefoucauld v Boustead*:[3] both doctrines respond to the same legally causative events and yield similar legal responses. Adopting a methodology first propounded by Peter Birks which analyses trusts as legal responses to legally significant, real-world causative events,[4] Section II begins by setting out the commonly accepted event and response of the *Quistclose* doctrine, and notes three categories of hypothetical scenarios which challenge the prevailing understanding. Section III sets out the event and response of the doctrine in *Rochefoucauld v Boustead*. By observing the similarities in their events and responses, Section IV attempts to demonstrate that both doctrines share the same basis. Three aspects of this renewed understanding are clarified in Section V: the first relates to a *Quistclose* arrangement which distinguishes between capital and income of the property; the second concerns the application of the doctrine in the insolvency context; the third relates to the role of intention. Finally, Section VI demonstrates how the renewed analysis illuminates our understanding of the principle underlying the two doctrines.

II. THE *QUISTCLOSE* DOCRTINE

In *Barclays Bank Ltd v Quistclose Investments Ltd,*[5] A loaned money to B for B to pay off dividends which B had declared and was unable to meet. The loan was accompanied by a letter indicating that the loan money "will only be used to meet the dividend".[6] The money had not yet been applied for the stated purpose and remained in a separate account in Barclays Bank when B went into voluntary liquidation. The House of Lords decided that B held the money on trust for A, and therefore A was entitled to the return of the money. The unique equitable doctrine[7] reflected by this case is described in *Underhill and Hayton* as follows: "[a] loan arrangement may commence as a trust of the money loaned to enable [B] only to carry out a particular purpose resulting, if the purpose is performed, in a pure debtor-creditor relationship excluding any trust, but in the event of non-performance of the purpose [A] can rely on the loaned money being held on trust for [A]".[8]

The operation of the *Quistclose* doctrine can be explained using orthodox trust principles. In a *Quistclose* arrangement, B may, or may not, apply the loaned money pursuant to the stated purpose. As the judgment in *Quistclose* indicates, if B does not so apply the money, and it becomes clear that he is unable to so anymore, it is A, not B's creditors (X), who is entitled to the money in B's account. X therefore does not become a beneficiary under a trust when B receives the money from A. Neither does B take the money absolutely, since his use of the money is restricted by the purpose: if B is to use the money at all, he must do so *exclusively* pursuant to the agreed purpose. This

[3] *Rochefoucauld v Boustead* [1897] 1 Ch. 196.

[4] See Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 U.W.A.L.R. 1; Peter Birks, 'Equity, Conscience, and Unjust Enrichment' (1999) 23 U of Melb L.R. 1.

[5] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] A.C. 567.

[6] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] A.C. 567 at 579.

[7] Note that the label "the *Quistclose* doctrine" does not imply that the doctrine arose for the first time in the *Quistclose* case, since many cases prior to that decision also apply the same doctrine (see eg cases discussed in P.J. Millett, 'The *Quistclose* Trust: Who can Enforce It?' (1985) 101 L.Q.R. 269, 270–4). Rather, it indicates that that case provided the first modern statement of the doctrine at the highest authority, and also contains the first serious attempt at rationalising the underlying basis of the doctrine.

[8] David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees*, 18th ed. (London 2010) at [1.25].

indicates that the beneficial interest of the property vests in A until and unless B applies the money for the agreed purpose. Thus, when B receives the money from A, B holds it on trust for A, subject to a power in B's favour to apply the money according to the agreed purpose. If however B carries out the purpose, the money vests absolutely in X, and the relationship between A and B is one of debtor-creditor.

The above analysis, first propounded by Sir Peter Millett Q.C. (as he then was) in 1985,[9] will be taken as the starting point for the present discussion. There are two compelling reasons for adopting this analysis. First, it has strength of authority: since Lord Millett reiterated this analysis in the House of Lords in *Twinsectra Ltd v Yardley*,[10] it has been unquestionably applied by the lower courts in England. It also represents the position adopted by the Australian courts.[11] Secondly, this analysis is the least controversial of the possible explanations of the doctrine.[12] Other attempts have been made to explain the doctrine on the basis that it creates a primary purpose trust which, if it fails, triggers a secondary trust for A's benefit;[13] that B holds the beneficial interest in suspense pending application of the money;[14] that it recognises a novel private purpose trust;[15] and that B obtains the entire beneficial ownership subject only to a contractual obligation in favour of A.[16] A counterpart argument to the last of the aforementioned is that the *Quistclose* doctrine is an exceptional example of a proprietary restitutionary response to unjust enrichment in respect of failure of consideration.[17] Each of these views has been convincingly criticised,[18] however, and need not be further considered for the purposes of the present discussion.

II.1 Event and Response

II.1.1. Event

The real-world events which trigger the *Quistclose* doctrine are not immediately obvious, and there is a temptation to make "subtle distinctions … between 'true' *Quistclose* trusts and trusts which are merely analogous to them".[19] To avoid this temptation, it is necessary to define the events which trigger the *Quistclose* doctrine.

---

[9] Millett (note 7).
[10] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164.
[11] See eg *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491, 502; *Compass Resources Ltd v Sherman* [2010] WASC 41 [74]; *Raulfs v Fishy Bite Pte Ltd* [2012] NSWCA 135 [50].
[12] See especially James Penner, 'Lord Millett's Analysis' in William Swadling (ed.), *The Quistclose Trust: Critical Essays* (Oxford 2004).
[13] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] A.C. 567 (Lord Wilberforce).
[14] *Re Northern Developments (Holdings) Ltd* (unreported, 6 October 1978) (Megarry V-C).
[15] Noted in Penner (note 12) p. 41 at text to fn 5.
[16] Robert Chambers, *Resulting Trusts* (Oxford 1997) Ch. 3.
[17] See Chambers (note 16) p. 148 – 149; Andrew Burrows, *The Law of Restitution* (3rd edn, OUP, 2010) at p. 400 – 401.
[18] See, respectively, *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [79] (on the primary/secondary trust analysis); Millett (note 7) p. 282 (on the "suspense" analysis); William Swadling, "Orthodoxy" in William Swadling (ed.), *The Quistclose Trust: Critical Essays* (Oxford 2004) and *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491, 502 (on the novel purpose trust analysis); *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [94]–[99] and Lusina Ho and P. St J. Smart, 'Re-interpreting the *Quistclose* Trust: A Critique of Chambers' Analysis' (2001) 21 O.J.L.S. 267 (on the contractual analysis).
On the "counterpart argument" mentioned in the text above, see Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2011) at [38-22] fn 61, which notes that Lord Millett's analysis in *Twinsectra* renders that argument otiose.
[19] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [99].

It is accepted that the doctrine requires (i) a transfer of property from A to B, (ii) based on an agreement that it will be used exclusively for a stated purpose. In addition, however, it is very commonly assumed that the *Quistclose* doctrine will apply only when three other events are present, without thought having been given as to why this is so and whether it is justified. First, it has been claimed that the property in question must be money, and not any other asset such as land, goods, or intellectual property.[20] Secondly, the arrangement between the parties must be a commercial agreement.[21] Thirdly, the agreement between A and B must be an *inter vivos* agreement. The latter restriction follows from the argument that *Quistclose* arrangements can be enforced as express trusts, as discussed below. Since it has never been suggested that a *Quistclose* arrangement is unenforceable due to the *informality* of the arrangement, and informal declarations of *testamentary* trusts are not legally enforceable as express trusts,[22] it follows that the arrangement must be *inter vivos*.

These restrictions are borne out in the case law. A Westlaw search made in October 2014 revealed that the term "*Quistclose*" was mentioned in 72 reported English judgments in the last 10 years. Of these, an overwhelming majority — 70 — concerned commercial, non-testamentary transactions involving money. Only in two cases did the term arise cursorily in relation to land in a non-commercial context. In one case the *Quistclose* argument was rejected;[23] in the other case it was only necessary for the judge to hold that there was a "real prospect" (within the meaning of CPR Part 24 — summary judgment) "that the [parties'] Undertaking gave rise to a trust (whether on the basis of [the *Quistclose* case] or otherwise)."[24] This indicates that, in practice, attempts by counsel to rely on the *Quistclose* doctrine are almost always confined to factual scenarios which reflect the three restricting events.

The same is seen in the academic discussion. A search over the same period of leading general and subject-related law journals[25] returned nine papers[26] which substantively[27] discussed the *Quistclose* doctrine. Within that 10-year period also fell the publication of the collection of essays in *The Quistclose Trust: Critical* Essays,[28] which contained nine

[20] Robert Chambers, 'Restrictions on the Use of Money' in William Swadling (ed.), *The Quistclose Trust: Critical Essays* (Oxford 2004) p. 77. This is implicitly suggested in other trusts texts. See, eg, Penner (note 12) p. 41; John McGhee QC (ed.), *Snell's Equity* (32nd edn, Sweet & Maxwell 2010) [25-033], [25-034]; *Underhill and Hayton* (note 8) at [1.24] – [1.25].
[21] Implicitly suggested by Lord Millett in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [99]. See too Lord Millett, "Foreword" in William Swadling (ed.), *The Quistclose Trust: Critical Essays* (Oxford 2004).
[22] Declarations of testamentary trusts must comply with the Wills Act 1837, s. 9 to be legally enforceable as express trusts.
[23] *Potter v Potter* [2004] 2 P & CR DG23 (PC) [13].
[24] *Primary Trust Ltd v Seldon* [2006] EWHC 408 (Ch) [39].
[25] Law Quarterly Review; Modern Law Review; Cambridge Law Journal; Oxford Journal of Legal Studies; The Conveyancer and Property Lawyer; Journal of Equity; Trust Law International; Trusts and Trustees.
[26] J.A. Glister, "The Nature of *Quistclose* Trusts: Classification and Reconciliation" (2004) 63 C.L.J. 632; Michael Smolyansky, "Reining in the *Quistclose* Trust: A Response to *Twinsectra v Yardley*" (2010) 16 Trusts & Trustees 558; Keith Robinson, "Madoff meets *Quistclose*" (2011) 17 Trusts & Trustees 668; Lord Millet, "The Quistclose Trust – A Reply" (2011) 17 Trusts & Trustees 7; Barrie Lawrence Nathan, "In Defence of The Primary Trust: *Quistclose* Revisited" (2012) 18 Trusts & Trustees 123; Kelry C.F. Loi, "*Quistclose* Trusts and Romalpa Clauses: Substance and Nemo Dat in Corporate Insolvency' (2012) 128 L.Q.R. 412; Jamie Glister, 'Mutual Intention and *Quistclose* Trusts' (2012) 6 Jo Eq 221; Amber Lavinia Rhodes, "The *Quistclose* Trust's Detrimental Effect on Commercial Transactions" (2013) 27 T.L.I. 179; Jonathan Edwards, "*Quistclose* Trusts: Was Lord Wilberforce Right After All?" (2013) 19 Trusts & Trustees 176.
[27] Case notes, papers which make mere mentions of the doctrine, and papers solely concerned with the operation of the doctrine in another jurisdiction were excluded from the count, although the same three restrictions are also reflected in these papers.
[28] William Swadling (ed.), *The Quistclose Trust: Critical Essays* (Oxford 2004).

papers discussing the doctrine. The discussion in all of these papers proceeded on the basis that the doctrine related to commercial, *inter vivos* arrangements involving money. The commercial aspect of the doctrine arose most frequently:[29] this included discussions concerning the provision of security for the lender, as well as insolvency implications.

It is evident that the three restricting events are (explicitly or implicitly) taken to define the ambit of the *Quistclose* doctrine. While not necessarily denying that *a* trust may be imposed where one or more of these restrictions are not met, an assumption is made that the trust would not arise through an application of the *Quistclose* doctrine. This implies that a commercial, *inter vivos* transfer of money for an exclusive purpose gives rise to a novel set of concerns which cannot properly be addressed using existing equitable doctrines.[30] This perception is reflected by the fact that the *Quistclose* doctrine has been developed as a unique doctrine independently from other equitable doctrines.[31]

II.1.2. Response

Upon receipt of the money and pending his application of it for the stated purpose, B holds the money on trust for A. The nature of the trust remains an open question. Two views have garnered significant support. The first, propounded by Sir Peter Millett Q.C. (as he then was) is that B holds the property by way of an express trust.[32] As an express trust, A must comply with the three certainties — intention, subject matter, and objects.[33] A is thus taken to have had an intention to create a trust over the money for the benefit of himself.[34] For an express trust to be enforceable, A must also *properly* manifest his intention to create a trust. This involves complying with any formality requirements which may be relevant,[35] since non-compliance precludes the enforcement of the intended arrangement *qua* an express trust. Signed writing is required only for the enforcement of *inter vivos* express trusts concerning land[36] and testamentary express trusts;[37] *inter vivos* trust arrangements which do not concern land can be enforced *qua* express trusts even though they are orally declared. Because the *Quistclose* doctrine has typically been applied to *inter vivos* arrangements involving money, formality requirements have not prevented an analysis of *Quistclose* arrangements as express trusts. In addition, a settlor may unilaterally create an express trust,[38] and so the agreement between the parties to a *Quistclose* arrangement is

[29] A close second concerned the nature of the trust enforced.
[30] So, for example, this often leads to the misguided tendency of defining the whole purpose of the *Quistclose* doctrine as affording A priority in B's insolvency: see Section V.2., below.
[31] Cf the position in Australia, where, consistent with the conclusion reached in this paper, the *Quistclose* doctrine is understood as simply reflecting orthodox trust principles: see *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491, 502.
[32] Millett (note 7). As James Penner observes, "the ascertainment of A's genuine intentions" is a common theme running through that article: Penner (note 12) p. 51 at fn 31.
[33] *Knight v Knight* (1840) 49 E.R. 58.
[34] This is implicit in Millett (note 7) p.288.
[35] Robert Chambers, 'Constructive Trusts in Canada' (1999) 37 Alta. L. Rev. 173 p. 183. See also Chambers (note 16) pp. 220ff; Peter Birks, *An Introduction to the Law of Restitution*, revised ed., (Oxford 1989) p. 65; Simon Gardner, *An Introduction to the Law of Trusts*, Clarendon Law Series, 3rd ed. (Oxford 2011) p. 97.
[36] The Law of Property Act 1925, s. 53(1)(b) provides that "all declarations ... of trusts or confidences of any lands ... shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust".
[37] Wills Act 1897, s. 9 (see note 22, above).
[38] *Fletcher v Fletcher* (1844) 4 Hare 67, 67 ER 564; *Mallott v Wilson* [1903] 2 Ch 494 (Ch); *Re Kayford Ltd* [1975] 1 All ER 604, 607; *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, 100.

relevant insofar as it reflects A's intention to create a trust. B's assent to the arrangement is indicative of A's intention.

The second view, propounded by Lord Millett in *Twinsectra v Yardley*,[39] is that the trust is a resulting trust. In his Lordship's words, "[A] pays the money to [B] 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 [A] from the outset".[40] Resulting trusts, unlike express trusts, arise by operation of law and thus can be imposed despite the informality of an arrangement. The imposition of a resulting trust turns on showing, by way of presumption or actual evidence,[41] that the property A transfers to B is not meant to be at B's free disposal — that A has a negative intention, an absence of intention to benefit B.[42] It is unnecessary for the enforcement of an arrangement *qua* a resulting trust to adduce evidence of the parties' positive intention that B will hold the property on trust, but such evidence supports the finding of a resulting trust, since such a positive intention would indicate that the property is *not* meant to be at B's free disposal.[43] The parties' agreement, and hence B's assent to the arrangement, is indicative of the central element of the resulting trust — A's negative intention. Another feature of a resulting trust is that A is always the beneficiary under that trust. The term "resulting" originated from the Latin word "*resalire*", which means "to jump back"; hence the resulting trust invariably *returns* the beneficial ownership of the trust property to A because A was the previous owner of the property prior to the transfer to B.[44]

II.2. Applications Beyond the Prevailing Understanding

Since the cases which have shaped the *Quistclose* doctrine have concerned the return of money to A in an *inter vivos* commercial context, there seems to be little cause for concern so long as courts consistently impose *a* trust for A's benefit where B fails to apply the money for the agreed purpose. A careful examination, however, reveals that the doctrine can be applied beyond its traditionally perceived limits.

First, consider an informal *Quistclose* arrangement. Suppose A transfers land to B based on an informal agreement that B is to use the land solely for the purpose of raising a mortgage in his own name. Soon after acquiring the land from A, but before raising the mortgage, B dies. Or in a different case, suppose A executes a will naming a company, B, legatee of £100,000. B is eventually heavily indebted to a creditor, X. On A's deathbed, A and B's sole director reach an informal agreement that B will use the £100,000 exclusively to repay X, failing which the money will to revert to A's estate and thence to fall into residue. A dies without executing a revised will to reflect the arrangement, and B becomes insolvent soon after. In principle, there is no reason why the *Quistclose*

While Australian courts have suggested that the *Quistclose* trust is a specific example of an express trust created by the *mutual* intention of A and B (see *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 (Federal Court of New South Wales) 502), the better view is that an express trust can unilaterally be *created* by A, and that B's state of mind in receiving the property from A determines the duties which are imposed on B: see Glister ('Mutual Intention and *Quistclose* Trusts' (n 26)).

[39] See *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [92].

[40] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [100].

[41] See *Vandervell v I.R.C.* [1967] 2 A.C. 291 at 313, 315; Robert Chambers, 'Is There a Presumption of Resulting Trust?' in Charles Mitchell (ed.), *Constructive and Resulting Trusts* (Hart Publishing 2010).

[42] Chambers, *Resulting Trusts* (note 35).

[43] Chambers, *Resulting Trusts* (note 35) p. 34. Chambers' analysis was expressly adopted by Lord Millett in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [92].

[44] See *Goff & Jones* (note 18) [38-07].

doctrine would not apply in these cases despite the informality of the arrangements: a transfer of property is made from A to B which is conditional upon an exclusive purpose, and a trust ought to arise for A's benefit upon B's receipt of the property. The failure to apply the property thus ought to result in the return of the property to A in precisely the same way as in the typical factual scenario.[45]

Next, consider a *Quistclose* arrangement with a different pattern from the typical scenario. Suppose A transfers money to B pursuant to an agreement that B will use the money exclusively to repay B's creditor, X, and failing which the money will vest absolutely in *C*. It would follow from the resulting trust analysis that this situation falls outside the ambit of the *Quistclose* doctrine because the arrangement does not contemplate the *return* of the beneficial interest in the money to A. However, because the *Quistclose* doctrine is concerned with resolving arrangements involving property transferred pursuant to an exclusive purpose,[46] it appears immaterial that the parties intend C (instead of A) to take the money if B fails to apply the money as agreed. In principle, an application of the doctrine ought to compel B to hold the money on trust for the benefit of C, subject to a power in B's favour to apply the money for the purpose of repaying X.

Lastly, consider a *Quistclose* arrangement which features both an element of informality and a unique pattern. Suppose an irrevocable discretionary trust of both capital and income of shares is held for the benefit of a class of potential beneficiaries (As), which includes a number of minors. Collectively they agree that their trustee should exercise his discretion in favour of B (also a member of As) pursuant to B's promise to use the shares exclusively for the purpose of repaying X, one of B's creditors, and failing which the money will vest in C, another member of As.[47] They also agree that B's power to apply the shares for the stated purpose will be revocable by C, and that C will receive the dividends while the shares remain in B's hands. The trustee of the discretionary trust duly transfers the shares to B absolutely, thus terminating the discretionary trust. In principle, the *Quistclose* doctrine ought to compel B to hold the shares on trust for C, subject to a power in B's favour to apply the shares for the stated purpose. Yet, the trust can neither be analysed as a resulting trust nor an express trust. It cannot be a resulting trust because the beneficial interest in the shares is not returned to As or As' original trustee, but is held for the benefit of C.[48] It is also not an express trust: since not all As were *sui juris*, they could not have exercised their *Saunders v Vautier*[49] rights to collapse the discretionary trust for themselves as joint tenants and then collectively created a new (express) trust.

The potential for the *Quistclose* doctrine to apply in these hypothetical scenarios ought to compel us seriously to reconsider our prevailing understanding. If, as argued, the *Quistclose* doctrine can apply in these scenarios, how can this be explained?

---

[45] This conclusion is reinforced by extrapolating from equity's willingness to enforce informal *inter vivos* trust arrangements through an application of the doctrine in *Rochefoucauld v Boustead* (discussed in Section III., below) and to enforce *testamentary* trust arrangements through the secret trusts doctrine (see e.g. *Cullen v A-G for Ireland* (1866) L.R. 1 H.L. 190; *McCormick v Grogan* (1869) L.R. 4 H.L. 82; *Blackwell v Blackwell* [1929] A.C. 318).
[46] See e.g. *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [69], [70]–[71]; Millett (note 7) p. 269.
[47] These facts are an adaptation of those which arose in *De Bruyne v De Bruyne* [2010] EWCA Civ 519, [2010] 2 F.L.R. 1240, discussed below at text from note 57.
[48] If the arrangement failed to name a beneficiary in default of B's exercise of the power, the property would either vest in B absolutely, be held on trust for X, or be treated as *bona vacantia*, depending on As' intention.
[49] *Saunders v Vautier* [1841] EWHC Ch J82, (1841) 4 Beav. 115.

III. THE DOCTRINE IN *ROCHEFOUCAULD V BOUSTEAD*

This paper suggests that analytical clarity is attained by recognising that the *Quistclose* doctrine and the doctrine in *Rochefoucauld v Boustead* share the same basis. Before establishing this point, it is first necessary to set out what the doctrine in *Rochefoucauld v Boustead* entails.

In *Rochefoucauld v Boustead*,[50] A's land was subject to a mortgage vested in D, a Dutch company, and was unable to repay when D wanted to call in the mortgage. So A entered into an agreement with B, whereby B agreed to purchase the land by auction from D and to hold it on trust for A, subject to A's repayment of B's outlay. Although the agreement was made informally,[51] the Court of Appeal decided that B held the land, upon acquisition, for the benefit of A.

The essence of the doctrine in *Rochefoucauld v Boustead* is rooted in the oft-quoted words of Lindley LJ's judgment:[52]

> [T]he Statute of Frauds does not prevent the proof of a fraud; and … it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and statute, in order to keep the land himself.

An application of the doctrine compels B to fulfil the agreement despite its informal nature.

III.1. Event

While the doctrine in *Rochefoucauld v Boustead*[53] has occasionally been applied in cases which closely mirror the facts in *Rochefoucauld* itself,[54] the doctrine has not been limited to cases involving a forced sale by a mortgagee.[55] For example, in *Bannister v Bannister*,[56] an elderly woman (A) agreed to sell two cottages which she owned absolutely to her brother-in-law (B) at an undervalue based on B's oral promise that A would be allowed to live rent-free in one of them for as long as she desired. Applying the

[50] *Rochefoucauld v Boustead* [1897] 1 Ch. 196.
[51] The relevant formality provision in that case was the Statute of Frauds 1677, s. 9, which has now been replaced by the more succinct Law of Property Act 1925, s. 53(1)(b).
[52] *Rochefoucauld v Boustead* [1897] 1 Ch 196 at 206. His Lordship delivered the joint judgment of the Court of Appeal, which also included Lord Halsbury L.C. and A.L. Smith L.J.
[53] Note that the label "the doctrine in *Rochefoucauld v Boustead*" indicates that the Court of Appeal's decision in *Rochefoucauld* provided the first clear enunciation of the doctrine. It does not imply that the doctrine arose for the first time in the case of *Rochefoucauld*, since many prior cases also apply the same doctrine. See e.g. cases cited at note 55, below.
[54] See e.g. *Lincoln v Wright* (1859) 4 De G. & J. 16, 45 E.R. 6.
[55] See e.g. *Davies v Otty (No. 2)* (1865) 35 Beav. 208, 55 E.R. 875; *Haigh v Kaye* (1872) L.R. 7 Ch. App. 469; *Booth v Turle* (1873) L.R. 16 Eq. 182.
[56] *Bannister v Bannister* [1948] 2 All E.R. 133.

doctrine in *Rochefoucauld v Boustead*, the Court of Appeal decided that B held one of the cottages for A for life under a constructive trust. The doctrine has also been applied to an agreement involving three parties where the subject matter was not land. In *De Bruyne v De Bruyne*,[57] the potential beneficiaries (As) of an irrevocable discretionary trust of shares reached an agreement to confer on the defendant (B), a member of As, all the shares pursuant to B's promise to set up a trust for his five children (Cs). The trustee of the discretionary trust exercised his discretion according to As' wishes. In breach of the agreement, B transferred the shares to his wife as his nominee. Citing *Rochefoucauld v Boustead* and *Bannister v Bannister*, the Court of Appeal held that a constructive trust compelled B to carry out the agreement.[58]

The judgments in the cases indicate that the crucial event is an *agreement* between the parties. Thus, in *Rochefoucauld*, it was the agreement between A and B which led the court to hold that the "[land] was … conveyed [to B] upon trust for [A], and that [B] … [was] denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself".[59] Similarly, in *Bannister*, the court held that it was essential to find a "bargain" or "agreement" which "include[s] a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another".[60] And in *De Bruyne*, the court "concentrate[d] … on the circumstances in which [B] came to acquire the property [that is, pursuant to the agreement between As and B] in order to provide the justification for the imposition of a trust".[61]

However, it is not any agreement reached between A and B which engages the doctrine: the agreement must exhibit three crucial features for the doctrine to apply. First, the transfer of property to B must be made *on the basis of* the agreement. If the relevant agreement is not secured before the transfer of the property, the doctrine does not apply. The cases of *Birch v Blagrave*,[62] *Cecil v Butcher*,[63] and *Childers v Childers*[64] reflect this point. In these cases, A transferred land to B without B's knowledge, and in each case B was found to hold the land on trust for A *on the basis that it was not A's intention to give B the beneficial interest in the land*. Because in these cases A did not reach an agreement with B prior to the transfer of the land, A's beneficial interest did not arise through an application of the doctrine in *Rochefoucauld v Boustead*, but under a resulting trust which responded to A's absence of intention to benefit B.[65]

Secondly, the agreement must *induce* A to transfer his property — the very property to which B's promise relates — to B. This is not a requirement to show that B's promise was a "but for" cause of A's transfer of property. So, if in *Bannister v Bannister* B did not promise to allow A to live rent-free in one of the cottages, A might still have transferred the cottages to B anyway, albeit not at an undervalue. Instead, the requirement is for B's promise to have in some way affected A's decision to transfer the property: B's promise must be *a cause* of A's transfer of property for the agreement to be the *basis* upon which A acts. The test can be set out in the reverse: if A's decision to transfer the property to B

---

[57] *De Bruyne v De Bruyne* [2010] EWCA Civ 519, [2010] 2 F.L.R. 1240.
[58] *De Bruyne v De Bruyne* [2010] EWCA Civ 519, [2010] 2 F.L.R. 1240 at [53].
[59] *Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 206.
[60] *Bannister v Bannister* [1948] 2 All E.R. 133 at 136.
[61] *De Bruyne v De Bruyne* [2010] EWCA Civ 519, [2010] 2 F.L.R. 1240 at [51].
[62] *Birch v Blagrave* (1755) Amb. 264 at 245, 17 E.R. 176 at 176.
[63] *Cecil v Butcher* (1821) 2 Jac & W 565 at 573, 37 E.R. 744 at 747.
[64] *Childers v Childers* (1857) 1 De G & J 482 at 492, 44 E.R. 810 at 814.
[65] See text to note 43, above.

can be shown to have been unaffected in any way by B's promise, B would not be bound by the agreement.

Thirdly, the agreement must arise in a particular context: B's promise to act as trustee must relate to property that he, as promisor, does not yet own. As the courts explain, the property must be "*conveyed* [to B] upon trust".[66] It follows that, if the agreement concerns property which the promisor himself already owns, the doctrine in *Rochefoucauld v Boustead* will not apply. Rather, such cases would "depend on some form of detrimental reliance in order to re-balance the equities between competing claimants for the property"[67] by way of proprietary estoppel.

III.2. Response

A spate of decided cases has classified the trust which arises in the doctrine in *Rochefoucauld v Boustead* as constructive in nature.[68] Nevertheless, this has not prevented commentators from being divided as to whether the trust enforced is constructive[69] or express.[70] This divide in opinion is surprising. An express trust, being a facilitative device, is created when A *properly manifests* an intention to create a trust.[71] A feature of almost every case relating to the doctrine in *Rochefoucauld v Boustead* is the informality of the parties' agreement. The lack of compliance with the relevant formality provisions amounts to a lack of proper manifestation of intention, thus precluding the enforcement of the arrangement *qua* an express trust.[72] To enforce the arrangement as an express trust nevertheless would be to disregard Parliament's sovereignty by disapplying the relevant formality statutes.[73] The constructive trust categorisation is further buttressed by an analysis of the case of *Rochefoucauld* itself. The present author has undertaken a close examination of its facts, which reveals that the trust enforced could not possibly have been an express trust because none of the parties involved had

---

[66] *Rochefoucauld v Boustead* [1897] 1 Ch. 196 at 206 (emphasis added). See also *Bannister v Bannister* [1948] 2 All E.R. 133 at 136; *De Bruyne v De Bruyne* [2010] EWCA Civ 519, [2010] 2 F.L.R. 1240 at [51].

[67] *De Bruyne v De Bruyne* [2010] EWCA Civ 519, [2010] 2 F.L.R. 1240 at [51].

[68] See e.g. *Bannister v Bannister* [1948] 2 All E.R. 133 at 136; *Re Densham (A Bankrupt)* [1975] 3 All E.R. 726 at 732; *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All E.R. 400 at 409; *De Bruyne v De Bruyne* [2010] EWCA Civ 519, [2010] 2 F.L.R. 1240 at [51]; *Staden v Jones* [2008] EWCA Civ 936 at [31]; *Crossco No. 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [2012] 2 All E.R. 754 at [94]; *Groveholt Ltd v Hughes* [2012] EWHC 3351 (Ch), [2013] 1 P. & C.R. 20 at [14].

[69] See e.g. George P Costigan Jr., 'The Classification of Trusts as Express, Resulting, and Constructive' (1913–14) 27 H.L.R. 437; T.G. Youdan, 'Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v Boustead*' (1984) 43 C.L.J. 306; M.P. Thompson, 'Using Statutes as Instruments of Fraud' (1985) 36 N.I.L.Q. 358; Gbolahan Elias, *Explaining Constructive Trusts* (Oxford 1990) p. 108; Patricia Critchley, 'Instruments of Fraud, Testamentary Dispositions, and the Doctrine of Secret Trusts' (1999) 115 L.Q.R. 631; Ben McFarlane, 'Constructive Trusts Arising on a Receipt of Property *Sub Conditione*' (2004) 120 L.Q.R. 667; A.J. Oakley, *Parker and Mellows: The Modern Law of Trusts*, 9th ed. (London 2008) at [10–273]; Simon Gardner, 'Reliance-Based Constructive Trusts' in Charles Mitchell (ed.), *Constructive and Resulting Trusts* (Hart Publishing 2010) at 68; *Underhill and Hayton* (note 8) at [12.67]–[12.69].

[70] See e.g. Philip H. Pettit, *Equity and the Law of Trusts*, 11th ed. (Oxford 2009) p. 97; J.E. Penner, *The Law of Trusts*, Core Text Series, 8th ed. (Oxford 2012) at [6.10]; William Swadling, 'The Nature of the Trust in *Rochefoucauld v Boustead*' in Charles Mitchell (ed.), *Constructive and Resulting Trusts* (Oxford 2010); Paul Matthews, 'The Words which are Not There: A Partial History of the Constructive Trust' in Charles Mitchell (ed.), *Constructive and Resulting Trusts* (Oxford 2010).

The trust is seldom considered as a resulting trust, given that the doctrine is concerned with enforcing the agreement between the parties, as opposed to responding merely to A's negative intention.

[71] See text to note 35, above.

[72] McFarlane (note 69) p. 675.

[73] "[J]udges have no general power to disapply an Act of Parliament on the ground that it does or allows … 'fraud' … in individual cases": Gardner (note 35) p. 97.

the capacity properly to declare an express trust in the first place.[74] It may also be noticed from the events which trigger the doctrine in *Rochefoucauld v Boustead* that an "agreement" properly so-called — that is, a meeting of minds between A and B which evinces a bilateral intention — is essential to give rise to the doctrine: B's role in promising and hence inducing A's transfer of property is essential. This leads to the conclusion that the trust cannot be express in nature, since an express trust can be created by A's unilateral manifestation of intention.[75]

Based on the strength of authority and principle, it is overwhelmingly clear that the doctrine in *Rochefoucauld v Boustead* responds by enforcing a constructive trust. A's unilateral intention is insufficient; however his intention remains a relevant factor which, along with others, calls for the imposition of a constructive trust.[76] Because a constructive trust arises by operation of law, it is not affected by the informality of the parties' agreement. Where the parties agree that B will hold the property to be acquired on trust for A or C, and where A transfers the property in question to B being induced by B's promise to do so, a constructive trust arises to bind B upon his acquisition of A's property.[77]

IV. ALIGNING THE EVENTS AND RESPONSES OF BOTH DOCTRINES

It is seldom thought that there is anything of significance shared by the *Quistclose* doctrine and the doctrine in *Rochefoucauld v Boustead*. This perception appears to be rooted in the way these doctrines have historically developed. In relation to the *Quistclose* doctrine, the cases which have applied the doctrine since the first reported case of *Toovey v Milne*[78] have concerned the enforcement by way of trust of an arrangement concerning money advanced for a particular purpose, usually (but not invariably) for the payment of one's creditors.[79] On the other hand, the doctrine in *Rochefoucauld v Boustead* reflected an application of the maxim that a statute may not be used as an "instrument of fraud", a phrase that is likely to have originated from Lord Eldon's decision in *Mestaer v Gillespie*.[80] Despite being historically developed to deal with different factual scenarios, however, it is submitted that, in fact, both doctrines share the same basis: they both respond to similar causative events and yield similar responses.

IV.1. Event

One obvious similarity is that the doctrine in *Rochefoucauld v Boustead* and the

[74] See discussion in Ying Khai Liew, '*Rochefoucauld v Boustead* (1897)' in Charles Mitchell and Paul Mitchell (eds.), *Landmark Cases in Equity* (Oxford 2012).
[75] See text to note 38, above.
[76] Birks (note 35) p. 65; Chambers, *Resulting Trusts* (note 35) p. 224.
[77] Similar events were identified in McFarlane (note 69) p. 668 as triggering a constructive trust: see Section VI.2., below.
[78] *Toovey v Milne* (1819) 2 B. & Ald. 683.
[79] See Millett (note 7) pp. 270ff.
[80] *Mestaer v Gillespie* (1805) 11 Ves. Jun. 622; M. Pawlowski, 'Fraud, Legal Formality and Equity' (2001) 23 Liverpool L.R. 79, 79fn1. See also T.G. Youdan, 'Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v Boustead*', (1984) 43 C.L.J. 306.

Quistclose doctrine both involve a transfer of property from A to B. As to the event of agreement, it was earlier observed in relation to the *Quistclose* doctrine that on both the express and resulting trust analyses it is A's unilateral intention which is paramount, and that the parties' agreement is indicative of A's intention.[81] It might therefore be thought that a narrower definition of the relevant event of the *Quistclose* doctrine is possible: it is "*A's intention* that the property will be used exclusively for a stated purpose". In relation to the doctrine in *Rochefoucauld v Boustead*, it was earlier observed that an agreement properly so-called was required — that there must be a meeting of minds between A and B.[82] Regardless of whether the focus is on A's unilateral intention or the parties' bilateral intention, however, such intention is always gleaned from the parties' agreement, which is made prior to the transfer of property from A to B. And it can be seen that the relevant agreement in both doctrines share the same content and features.

IV.1.1. Content of the Agreement

In relation to the doctrine in *Rochefoucauld v Boustead*, the parties must in essence[83] agree that B will hold the acquired property on trust. In relation to the *Quistclose* doctrine, the parties' agreement must evince A's intention that B will use the property exclusively for a specific purpose. The contents of the agreement in both doctrines are in fact two sides of the same coin.

In the *Quistclose* doctrine, the parties' agreement is crucial for determining whether a trust relationship was intended.[84] Yet, even where the relevant intention is present, courts do not enforce the parties' contract, compelling B to apply the property for the stated purpose. Indeed, it would be impossible to do so in some cases such as *Twinsectra*,[85] where the purpose is expressed in less-than-certain terms. The "specific purpose" clause is therefore not significant as an end in itself.[86] Instead, the courts focus on the *implication* of the "exclusivity" of the stated purpose: it is taken to indicate a positive intention that the money is to be returned to A if it is not applied for the stated purpose. As Lord Wilberforce observed in *Barclays Bank v Quistclose*, "by process simply of interpretation, … if, for any reason the [purpose] could not be [attained], the money was to be returned to [A]: the word 'only' or 'exclusively' can have no other meaning or effect".[87] As earlier noted,[88] A can only demand the return of the property if B holds the property on trust for A upon receiving it. In effect, then, the *Quistclose* doctrine is concerned with enforcing that which is left unsaid but unmistakably intended by A, as revealed in the parties' agreement: that the property is transferred to B *on trust* for A

[81] See text to Section II.1.2., above.
[82] See text to note 75, above.
[83] It is unnecessary that the agreement "should include any express stipulation that [B] is in so many words to hold as trustee": *Bannister v Bannister* [1948] 2 All E.R. 133 at 136.
[84] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [69].
[85] The purpose in that case was the "acquisition of property": *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [9].
[86] Cf the recent decision of the Malaysian Federal Court in *PECD Berhad (in liquidation) v AmTrustee Berhad* [2014] 1 MLJ 91 (Federal Court, Malaysia), http://www.kehakiman.gov.my/directory/judgment/file/02_f_%C3%A2%E2%82%AC%E2%80%9C_59-08-2012_W.pdf (accessed 11 December 2014), where the 'specific purpose clause' was enforced. This decision is criticised in Ying Khai Liew and Weng Tchung Low, 'The *Quistclose* Doctrine: Resurrection of the Primary Trust?' (2014) 25 KLJ 8, republished in [2014] 6 Malayan LJ i – xiii.
[87] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] A.C. 567 at 580.
[88] See text to note 9, above.

pending application for the stated purpose. As succinctly observed in *Re Holiday Promotions (Europe) Ltd*,[89] "the decision in *Quistclose* does not undermine the basic proposition of trust law that you need to find an intention to create a trust, or at least an intention to do something that can only be given effect by the creation of a trust". Therefore, it becomes clear that the content of the relevant agreement in both doctrines is identical: it must indicate an (express or implied) intention that B will hold the property on trust.

The case of *Re Duke of Marlborough*[90] exemplifies this point. A, the Duchess of Marlborough, assigned a leasehold to B, the Duke, absolutely for the latter to raise a mortgage in his sole name. The parties orally agreed that B would later re-convey the equity of redemption to A. B died after raising the mortgage but before carrying out the re-conveyance. Stirling J decided that A was entitled to the equity of redemption despite the informal nature of the agreement. He also observed that, "[i]f [B] had in his lifetime refused to convey … he could not have set up the statute … [and B's creditors], as claiming under him, is in no better position".[91] This result can be explained on the basis of the *Quistclose* doctrine, because the parties' agreement that the transfer of the leasehold to B was to be subject to the exclusive purpose of raising a mortgage indicated A's intention to create a trust for herself. The result can also be explained on the basis of the doctrine in *Rochefoucauld v Boustead*, since the parties had agreed that B was to hold the leasehold on trust for A prior to the transfer to B. Both analyses are therefore consistent *inter se*: they both aim to give effect to a positive intention to create a trust as gleaned from the parties' agreement. That is, the transfer of the leasehold to B for an exclusive purpose precisely revealed an intention that B will hold the lease on trust for A pending its application for the stated purpose.

IV.1.2. Features of the Agreement

The relevant agreement in both doctrines also shares the same features. First, the agreement concerning B's use of the property is always the *basis* upon which A transfers the property to B. So, for example, if A transfers the property to B where B is unaware of, or disagrees to, any restriction placed on his use of the property, it would virtually[92] be impossible to say that a trust relationship was intended.[93] Secondly, the intention to create a trust, gleaned from the parties' agreement, always *induces* A to transfer the property to B. This is because, if A can be shown to have been indifferent as to whether B's application of the property was restricted, A would have essentially intended for the property to "be at the free disposal of [B] and may be used as part of his cash-flow".[94] Thirdly, similarly to the doctrine in *Rochefoucauld v Boustead*, *Quistclose* agreements relate to property which B *does not yet own*. B cannot be treated as having self-declared a trust after receiving the property absolutely from A: an application of the *Quistclose* doctrine imposes a trust from the moment B acquires the property, which means that B is never the absolute owner of the property.

IV.1.3. The Irrelevance of Other Events Restricting the Quistclose *Doctrine*

[89] *Re Holiday Promotions (Europe) Ltd* [1996] B.C.C. 671 at 674.
[90] *Re Duke of Marlborough* [1894] 2 Ch. 133 .
[91] *Re Duke of Marlborough* [1894] 2 Ch. 133 at 146.
[92] But see text from note 111, below.
[93] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [69].
[94] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [71].

It was earlier noted[95] that the applicability of the *Quistclose* doctrine is often thought to be restricted to a particular type of property (money), a particular context (commercial and *inter vivos*), and/or a particular pattern (the return of the property to A). The reason why these event-based restrictions ought to be rejected now emerges: they are inconsistent with the reality that the *Quistclose* doctrine responds to and enforces an intention to create *a trust*. Just as in relation to the doctrine in *Rochefoucauld v Boustead*, the *Quistclose* doctrine ought to — and does — apply indiscriminately in cases involving informal testamentary arrangements, informal *inter vivos* arrangements concerning land, and where the arrangement is that B will hold the property on trust not for A but for X, a third party volunteer. There is no reason in principle why the applicability of the *Quistclose* doctrine should otherwise be restricted.

IV.2. Response

In general terms, the *Quistclose* doctrine and the doctrine in *Rochefoucauld v Boustead* both elicit the same legal response — the enforcement of the agreement that B will hold the property on trust. Because A would already have transferred the property to B, the only outstanding act is for B to fulfil his promise; thus, the legal response can also be said to enforce B's promise[96] to hold the acquired property on trust for A or a third party volunteer, as the case may be. However, there appears to be a difference in the nature of the trust enforced. While the doctrine in *Rochefoucauld v Boustead* enforces a constructive trust, the prevailing understanding of the *Quistclose* doctrine is that B holds the property for A either on an express trust or a resulting trust. Upon closer inspection, however, this difference is more apparent than real.

IV.2.1. The Nature of the Trust Enforced in the Quistclose *Doctrine*

Consider first the nature of the trust enforced in the *Quistclose* doctrine. Express trusts and resulting trusts respond to A (the transferor)'s intention in fundamentally different ways. Express trusts focus on A's positive, properly manifested intention to create a trust; resulting trusts focus on A's negative intention that the property is not meant to be an absolute gift to B. Following Lord Millett's view in *Twinsectra v Yardley*[97] that the *Quistclose* doctrine gives rise to a resulting trust, the judicial trend has been to prefer this analysis.[98] Although it is often the case that A's positive intention to retain the beneficial interest in the property corresponds precisely to his lack of intention to give B the beneficial interest in the property, the distinction between the two types of trust is not illusory. There are two principled reasons why the express trust analysis should be preferred.[99]

The first relates to the facilitative nature of the express trust device. Through an express

[95] See text from note 20, above.
[96] See Elias (note 69) pp. 56–66.
[97] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [100].
[98] See e.g. *Dubey v Revenue and Customs Commissioners* [2006] EWHC 3272 (Ch), [2008] B.C.C. 22 at [33]; *Templeton Insurance Ltd v Penningtons Solicitors LLP* [2006] EWHC 685 (Ch), [2007] W.T.L.R. 1103 at [18].
[99] In Australia, it has been suggested that the express trust analysis is the dominant view of the *Quistclose* trust: see eg *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491, 500; *Walsh Bay Developments Pty Ltd v Federal Commissioner of Taxation* (1995) 130 ALR 415, 425; *Roxborough v Rothmans of Pall Mall Australia Ltd* (1999) 167 ALR 326, 346; *George v Webb* [2011] NSWSC 1608 [271], [282]. Cf, however, *Salvo v New Tel Ltd* [2005] NSWCA 281 [47]; *Raulfs v Fishy Bite Pte Ltd* [2012] NSWCA 135 [43].

trust, the law allows one legitimately to expect that his properly manifested intention to create a trust will be given legal effect. The fact that the law provides this facility indicates that equity's first preference is to give direct effect to a positive manifestation of intention wherever possible,[100] since a declaration of an express trust by an owner of property is the clearest possible way in which a positive intention to create a trust can be manifested. This in turn advances "the liberal vision of the institution of property".[101] As Simon Gardner explains, "[l]iberalism argues that everyone should be permitted the largest possible degree of autonomy … [A property owner's] autonomy is … maximized if we accord him the greatest possible freedom as to how he may intentionally give [his property] away. The law provides the vehicle of the express trust in order to permit this".[102] Preferring the resulting trust analysis over the express trust would be to ignore A's positive intention at the expense of giving effect to what A did *not* intend. Analytically, this would curb A's autonomy to decide what he wants done with his property.

The second reason is that the express trust analysis encourages judges to take the parties' intention seriously. This point has been thoroughly dealt with by James Penner. In brief, a resulting trust analysis artificially glosses over the parties' positive intention concerning B's use of the property;[103] it leads to "an unwillingness to explore [the parties' positive intentions] and draw the appropriate inferences".[104] Without basing the enforcement of the arrangement on A's positive[105] intention, courts are in effect exercising a broad discretion to find a trust, which causes uncertainty in the law.[106] Most worryingly, the resulting trust approach "amounts to an invitation to the courts to impose a trust wherever a purpose is stated".[107] It was seen earlier[108] that the "exclusivity" of the agreed purpose for which B is to use the property is that which indicates a positive intention to create a trust. Diminishing the importance of the element of "exclusivity" may, in some cases, subject B to a trust *even though A positively intends that the property transferred to B is to be at B's free disposal*. It is therefore only appropriate that judges should carefully investigate whether a positive intention to create a trust can be found before imposing a trust of any sort, and the express trust analysis encourages such a judicial attitude.

IV.2.2. Aligning the Responses of the Doctrines

Is it significant that the parties' agreement is enforced as a constructive trust in the doctrine in *Rochefoucauld v Boustead*, but as an express trust in the *Quistclose* doctrine? It is submitted not. It is crucial to recall that the express trust analysis is capable of explaining the *Quistclose* doctrine only where the analysis is not barred by non-compliance with any formality requirement, as in the typical *Quistclose* arrangement concerning the return of money to A in an *inter vivos* context. Given, however, that the *Quistclose* doctrine would apply even where the subject matter is land and/or the

[100] It is "possible" to do so if and when, *inter alia*, A complies with any relevant formality requirements.
[101] Gardner (note 35) p. 31.
[102] Gardner (note 35) p. 32.
[103] Penner (note 12) p. 52.
[104] Penner (note 12) p. 64.
[105] Or, in Penner's terms, the parties' "true" intention: Penner (note 12) p. 56.
[106] Penner (note 12) p. 56.
[107] Penner (note 12) p. 54.
[108] See Section IV.1.1., above.

agreement is made in a testamentary context,[109] then where a *Quistclose* arrangement cannot be enforced as an express trust,[110] it may still potentially be analysed and enforced as a constructive trust. This would give effect to a positive intention to create a trust according to the parties' agreement, in line with the doctrine in *Rochefoucauld v Boustead*. Where before receiving A's property B agrees to hold it on trust for A or C (pending application for the exclusive purpose), and where A transfers the property in question to B being induced by B's promise to do so, a constructive trust would compel B to perform his promise, preventing him from taking an advantage for himself contrary to the parties' agreement.[111]

However, there is potentially one minor exception. Strictly speaking, an express trust responds to the settlor's unilateral intention.[112] Theoretically, then if A unilaterally creates a *Quistclose* arrangement without first securing B's prior agreement, and if the arrangement cannot be enforced as an express trust for any reason such as the informality of the declaration, the doctrine in *Rochefoucauld v Boustead* would be of no application, since the constructive trust requires an agreement evincing A's and B's bilateral intention.[113] One might suggest therefrom that there is a practical difference in the responses of both doctrines. This conclusion ought to be resisted, however. In the first place, *Quistclose* arrangements in almost all but the rarest of cases involve an agreement between A and B. Moreover, it is difficult to imagine a situation where an attempt unilaterally to create a *Quistclose* arrangement will be held to evince the requisite certainty of intention to declare an express trust short of such declaration being put in signed writing; and where such writing is present, it is difficult to see why it would not be enforceable as an express trust. So, if A informally and unilaterally attempts to create a *Quistclose* arrangement by transferring property to B subject to its application for an exclusive purpose despite B's ignorance of, or disagreement to, the arrangement, it would be an extremely unlikely conclusion that A did in fact intended to create a trust arrangement at all. In such a case, the result would be that B holds the property on a *resulting* trust for A on the basis that A did not intend to give B the beneficial interest in the property.[114]

IV.2.3. Constructive Trusts Subject To a Power?

It might be objected that there is no authority for the notion of a "constructive trust coupled with a power". In truth, however, it is analytically sound. Consider a slight variation to the facts of *Re Duke of Marlborough*[115] — that B, who was in doubt as to his

[109] As argued in Section II.2., above.

[110] A *Quistclose* arrangement is also unable to be enforced as an express trust where the purported group of settlors, "As", are unable properly to declare an express trust where, for instance, a number of As are not *sui juris*, as the third example in Section II.2., above, indicates. In that case, a constructive trust would nevertheless compel B to carry out the agreement, since B had promised to hold the property he will receive on trust for C, and this promise induced As to transfer their collective interest in the property to B.

[111] It must be emphasised that the possibility of analysing a *Quistclose* arrangement as a constructive trust is based on the same principle as that which underpins the doctrine in *Rochefoucauld v Boustead*. It is not based on the nebulous notion of B's "unconscionability" as some commentators have suggested: see e.g. C.E.F. Rickett, 'Trusts and Insolvency: The Nature and Place of the Quistclose Trust' in Donovan W.M. Waters (ed.), *Equity, Fiduciaries and Trusts* (Scarborough 1993) p. 340; Craig Rotherham, *Proprietary Remedies in Context* (Oxford 2002) p. 160; Michael Smolyansky, 'Reining in the *Quistclose* Trust: A Response to *Twinsectra v Yardley*' (2010) 16 Trusts & Trustees 538, 567–68.

[112] See note 38, above.

[113] See text to note 75, above.

[114] In a similar vein to the discussion at text to note 65, above.

[115] *Re Duke of Marlborough* [1894] 2 Ch. 133. For the facts of the case, see text from note 90, above.

legal position, sought a court's declaration to determine the beneficial ownership of the leasehold. A declaration would undoubtedly be made to the effect that B holds the lease on a constructive trust for A, subject to a power in B's favour to raise a mortgage in his own name. Consider also a slight variation to the facts of *Rochefoucauld v Boustead*[116] — that the parties' agreement included an additional term allowing B to make use of the rental income generated by the land exclusively for the repayment of B's creditor, X. The arrangement would have given rise to a constructive trust in A's favour, subject to a power in B's favour to apply the income for the stated purpose. Moreover, in *Twinsectra v Yardley*, Lord Millett countenanced the notion of a "resulting trust … with a mandate to the transferee to apply the money for the stated purpose".[117] This indicates that trusts arising by operation of law — particularly one arising from the moment of B's acquisition of the relevant property — can be qualified by a power in B's favour. It can be seen, therefore, that the notion of a "constructive trust coupled with a power" has a sound legal basis, and its potential applicability where a *Quistclose* arrangement cannot be enforced as an express trust emphasises equity's commitment to give effect to a positive intention to create a trust.

V. THREE CLARIFICATIONS

The foregoing analysis indicates that the prevailing understanding presents too narrow an account of the *Quistclose* doctrine. Instead, by recognising that the *Quistclose* doctrine shares similar events and responses as the doctrine in *Rochefoucauld v Boustead*, a more refined understanding of the *Quistclose* doctrine emerges, which indicates a wider basis than that which is normally presupposed. This section makes three clarifications. The first concerns the proper analysis where *Quistclose* arrangements make a distinction between income and capital of the property in question. The second considers the impact of the *Quistclose* doctrine in the context of B's insolvency. The third notes how courts ought to deal with the element of intention.

V.1. Income and Capital in Quistclose Arrangements

It has been a common feature of the cases concerning the doctrine in *Rochefoucauld v Boustead* and the *Quistclose* doctrine that the relevant trust arrangement deals with both the capital and income in the property as a singular entity. However, nothing in principle prevents the parties from distinguishing between income and capital of the property. For example, an agreement might be reached whereby A transfers land to B for B to use the rental income exclusively for a stated purpose, and to return the land to A at a stated time. Alternatively, the parties may contemplate that B will apply the land for the stated purpose, but must account for its rental income to A until such time as the land is so applied.

In resolving such cases, again the parties' positive intention is paramount. First, if the *entire* property is made the subject matter of the power, then the analysis is similar to the typical *Quistclose* arrangement: once the property is applied for the stated purpose, then the (constructive or express, as the case may be) trust comes to an end. Prior to exercising the power, B would hold any income generated from the property on trust

[116] *Rochefoucauld v Boustead* [1897] 1 Ch. 196. For the facts of the case, see text from note 50, above.
[117] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [92].

for A, because A is the beneficiary under the (constructive or express) trust pending B's exercise of power. Secondly, B's power may be intended to cover a less-than-absolute interest in the capital. Here, upon acquiring the property from A, B would hold it on trust for A; if and when B exercises the power, the remaining interest in the property will still be subject to a trust in A's favour. So, for example, if A transfers land to B exclusively for B to raise a mortgage and that power is exercised, B would still hold the equity of redemption on trust for A.[118] Thirdly, if the parties contemplate that B's power should cover only the *income* of the property, then B's application of the income according to the stated purpose will not affect the underlying trust of the capital held in A's favour; and pending the said application, B will, of course, hold the income on trust for A.

V.2. The Insolvency Context

The typical situation in which the *Quistclose* doctrine has been applied has led the doctrine to be conceived of as a means of distributing assets in the context of insolvency. In *Twinsectra*, Lord Millett observed that "the whole purpose of the arrangements … is to prevent [A's] money from passing to [B]'s trustee in bankruptcy in the event of his insolvency".[119] It has also been said that "a 'true' *Quistclose* trust is characterised by [A] retaining some form of security over the property".[120] The doctrine is sometimes criticised as conferring on A an undeserved advantage in B's insolvency;[121] at other times it has been lauded as a flexible tool that takes into consideration "the overriding commercial objective of conditional payment arrangements".[122] There have also been suggestions that the doctrine should only be applied after an evaluation is undertaken as to whether it would produce "a just and commendable decision" as between A and B's general creditors.[123]

It is submitted that the *Quistclose* doctrine is best understood as sharing the same set of concerns as the doctrine in *Rochefoucauld v Boustead*, as opposed to being conceived of as a security tool or means of gaining priority in the context of B's insolvency. This is because the latter conception masks the fact that the priority afforded to A is merely an upshot and not the aim of the *Quistclose* doctrine. In the first place, the *Quistclose* doctrine is certainly not applicable only to cases where B becomes insolvent. And even where B does become insolvent, his insolvency is irrelevant: the trust responds solely to the parties' positive intention, and arises prior to (and continues to exist despite) B's insolvency. This can be seen in relation to the typical case applying the doctrine in *Rochefoucauld v Boustead*, where A transfers land to B based on the informal agreement that B will hold it on trust for A. If B becomes insolvent, there is no question that A, as beneficiary under a constructive trust, will have "priority" in B's bankruptcy insofar as the land is concerned. The basis of the constructive trust — and the reason A has

[118] See also *Coolbrew Pty Ltd v Westpac Banking Corp* [2014] NSWSC 1108 (Supreme Court of New South Wales) at [49].
[119] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [82].
[120] J.A. Glister, 'The Nature of *Quistclose* Trusts: Classification and Reconciliation' (2004) 63 C.L.J. 632, 634. See also Michael Bridge, 'The *Quistclose* Trust in a World of Secured Transactions' (1992) 12 O.J.L.S. 333; W.M.C. Gummow, "Equity: Too Successful?" (2003) 77 Aust. L.J. 30 p. 37; Ewan McKendrick, 'Commerce' in William Swadling (ed.), *The Quistclose Trust: Critical Essays* (Oxford 2004) p. 150.
[121] See e.g. Swadling (note 12).
[122] Gerard McCormack, 'Conditional Payments and Insolvency' (1994) 9 Denning L.J. 93, 115.
[123] William Goodhart and Gareth Jones, 'The Infiltration of Equitable Doctrine into English Commercial Law" (1980) 34 M.L.R. 489 p. 494.

preference in B's bankruptcy — is the prior agreement between the parties. The specific "justice" in the particular case of according A priority in B's bankruptcy is therefore irrelevant.

V.3. The Role of Intention

As a matter of commercial efficacy, it would, of course, be undesirable if a loan of money from A to B creates a trust in A's favour whenever B reveals some purpose for which he intends to use the property.[124] In a usual loan arrangement, B is contractually bound to repay A; the contract generally indicates that the property is at B's free disposal, and it creates a debtor-creditor relationship between A and B. This ought properly to be the default position between the parties.[125] However, the existence of a contractual debt does not necessarily preclude the existence of a trust,[126] and the line at which the trust relationship begins depends on the intention of the parties.[127]

Unlike the doctrine in *Rochefoucauld v Boustead* where the parties' intention to create a trust arrangement is often clearly expressed, determining the relevant intention in the *Quistclose* doctrine requires a degree of interpretation. That is to say, where B's use of the property is duly restricted, courts interpret this as an intention that B will hold the property on trust for A pending application for the stated purpose.[128] The aim of this process of interpretation should not merely be to determine whether the parties did not intended the property to be at B's free disposal.[129] Instead, as the foregoing analysis indicates, the overriding concern in every case should be to discover whether the parties positively intended for B to hold the property on trust pending its application for the stated purpose. And such a positive intention is often merely implicit in a *Quistclose* agreement — hence the need for interpretation in order to discern whether the intention exists.

Focusing on the parties' positive intention to create a trust relationship affects how the courts ought to interpret the agreement between the parties. In particular, the requirements that the stated purpose must be defined with sufficient certainty, and that the purpose should be "exclusive", ought to be treated as part of the overarching aim of discovering whether there was a positive intention to create a trust.[130] It follows that the mere use of the word "exclusive" may not give rise to a trust relationship if, from the circumstances, the courts objectively determine that a trust relationship was not intended.[131] It also follows that a trust relationship is not necessarily precluded if the stated purpose is not defined with a high degree of precision, so long as there exists sufficient evidence that a trust relationship was in fact intended: in such a case, the power may yet fail for want of conceptual certainty, but this would not affect the

[124] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [73].
[125] Penner (note 70) at [9.47].
[126] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] A.C. 567 at 581–82.
[127] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [69].
[128] See Section IV.1.1., above.
[129] Cf *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [74].
[130] This was precisely the approach taken by Beech J in *Compass Resources Ltd* v Sherman [2010] WASC 41 (Supreme Court of Western Australia) at [66] – [67]. He rejected the submission that an agreement to use the loaned funds for an exclusive purpose was itself sufficient to create a trust; what was needed was an intention that the monies should not become part of B's general assets and only be used for the particular purpose. See also *George v Webb* [2011] NSWSC 1608 (Supreme Court of New South Wales) [195].
[131] See Tito v Waddell (No. 2) [1977] Ch. 106, 211.

underlying trust in favour of A where a sufficiently certain intention to create a trust is found.

VI. THE UNDERLYING PRINCIPLE

In recent years, there have been two significant suggestions, made by Simon Gardner and Ben McFarlane respectively, that the principle underlying the doctrine in *Rochefoucauld v Boustead* also underpins a number of other equitable doctrines. Unsurprisingly, their discussions do not take into account the *Quistclose* doctrine. If, however, the *Quistclose* doctrine and the doctrine in *Rochefoucauld v Boustead* share the same basis, then evaluating the *Quistclose* doctrine in the light of their discussions can illuminate the coherency of their theses.

VI.1. Simon Gardner's Loss-Based Model

According to Simon Gardner, the doctrine in *Rochefoucauld v Boustead*, along with secret trusts, mutual wills, the doctrine in *Pallant v Morgan*,[132] proprietary estoppel, and the principle propounded in *Neale v Willis*,[133] aims to correct a "loss that [A] suffers when, acting in reasonable reliance on [B]'s undertaking, he forgoes his opportunity to achieve the content of the undertaking in some other way."[134] As a result, "holding [B] to his undertaking … is always required to achieved that end [of precisely restoring A's lost opportunity]."[135]

VI.1.1. The Doctrine in Rochefoucauld v Boustead

In relation to the doctrine in *Rochefoucauld v Boustead*, Gardner writes:[136]

> [A] makes an *inter vivos* transfer of his land to [B], after an undertaking given by [B] to hold the land on trust for [A] … [A] will normally rely on [B]'s undertaking, and will suffer a detriment in doing so. For before he engages with [B], [A] has the opportunity to establish the trust for [himself]. In reliance on [B]'s undertaking to hold the land for [A], [A] transfers it to [B]. [A] thereby loses his opportunity to establish his desired trust for [himself] in some other way. The law addresses that loss by requiring [B] to honour his undertaking.

On Gardner's model, it is implicit that the reliance loss A suffers must be substantial enough for equity to compel the enforcement of the parties' agreement; otherwise it is difficult to explain why the law does not respond merely by awarding compensatory damages for the loss A suffers. The model is a plausible analysis of the cases concerning the doctrine in *Rochefoucauld v Boustead*: A loses the opportunity to secure a trust for himself by properly declaring an express trust to that effect. Since A has put the ability to deal with his own property out of his hands, trusting B to do as promised, the severity of this loss of opportunity is arguably significant enough to justify compelling B to

[132] *Pallant v Morgan* [1953] Ch 43 (Ch).
[133] *Neale v Willis* (1968) 19 P. & C.R. 836 (CA).
[134] Gardner (n 69) p. 63.
[135] Gardner (n 69) p. 70.
[136] Gardner (n 69) p. 69.

perform his promise.

VI.1.2. The Quistclose *Doctrine*

In relation to the *Quistclose* doctrine, however, it is unclear what loss A suffers. The "content of B's undertaking" in the typical case is to use A's property, if at all, exclusively for the agreed purpose, and to hold it on trust for A in the meantime. For the doctrine to fit within Gardner's model, it is necessary to identify what opportunity A had of achieving this arrangement in some other way. The first possibility is that A could have secured a contract with B to that effect. This can easily be dismissed, since in the cases A never *loses* the opportunity to enter into a contract with B. Indeed, in *Barclays Bank Ltd v Quistclose Investments Ltd* itself, a trust was found on the basis of the contractual terms between A and B, and Lord Wilberforce specifically rejected the argument that a contractual loan arrangement could not also give rise to a trust.[137]

A second possibility is that A could have properly declared an express trust to the effect that B will hold the property for A's benefit subject to a power to apply the property for the agreed purpose. This fails to explain the typical *Quistclose* arrangement involving money. Because in these cases a *Quistclose* arrangement is enforced as an express trust subject to a power, A does not *lose* the opportunity to declare an express trust. On the other hand, this may, on the face of it, explain cases where an informal *Quistclose* arrangement is enforced as a constructive trust in a testamentary context or an *inter vivos* context concerning land. However, there remains the (arguably insurmountable) difficulty of explaining why this "loss" justifies the enforcement of B's promise instead of a mere award of compensatory damages, in view of the fact that A would have a contractual right to the return of the property loaned to B whether or not a trust is imposed.

A third possibility is that A could have taken out a security over the loan to B. This is, however, not a relevant "loss" on Gardner's model, since this is not an opportunity A loses "to achieve the content of the undertaking in some other way". A secured loan would result in a different state of affairs than a *Quistclose* arrangement. Notably, a secured loan never gives rise to a trust of the loaned money or property for the benefit of the lender; and where the borrower makes use of the loaned money of property, the parties' relationship does not turn into a mere debtor-creditor relationship so as to deprive the lender of his security.

In fact, it is difficult to say that A loses *any* opportunity whatsoever by entering into a *Quistclose* arrangement. He does not lose an opportunity to secure the return of the loan, since even without an application of the *Quistclose* doctrine A would normally have a contractual right to the return of the money or property. A also does not lose an opportunity to secure the return of the loan *on trust*, since, as discussed above, this is precisely the outcome of a *Quistclose* arrangement in the typical scenario where an express trust is enforced. In addition, A does not lose an opportunity to save B from bankruptcy, since a loan of any form would give A precisely this opportunity. Finally, A does not lose an opportunity to revoke B's power to apply the loan pursuant to an exclusive purpose, since A surely does not enter into a *Quistclose* arrangement *with the aim of* revoking B's power.

[137] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] A.C. 567 at 581.

VI.1.3. Impact on the Loss Model

The difficulty of explaining the *Quistclose* doctrine on the basis of Gardner's thesis provides reason to rethink its justificatory power. Since the *Quistclose* doctrine and the doctrine in *Rochefoucauld v Boustead* share the same basis, both doctrines must be underpinned by the same principle. If an application of the *Quistclose* doctrine imposes a trust obligation on B although he does not suffer any significant detrimental reliance, then the loss-based model cannot justify the enforcement of a *Quistclose* arrangement. This in turn raises doubts concerning Gardner's explanation of the principle underlying the doctrine in *Rochefoucauld v Boustead*.

VI.2. Ben McFarlane's Advantage-Based Model

Ben McFarlane has also provided an analysis of the principle underpinning the doctrine in *Rochefoucauld v Boustead*, secret trusts, the doctrine in *Pallant v Morgan*, as well as the trusts that arose in *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd*,[138] *Neale v Willis*[139] and *Ashburn Anstalt v Arnold*.[140] He argues that B is bound to fulfil his promise if and only if two conditions are met: "first, that [B] has made an undertaking to confer on another a right relating to the property purchased; secondly, that [B] has, by means of this undertaking, acquired an advantage in relation to the [transfer] of the property."[141] The law responds to this event by "preventing [B] from acting inconsistently with the undertaking, at least to the extent that the undertaking relates to the property in relation to the acquisition of which [B] has gained an advantage."[142]

The two key components in McFarlane's model are "undertaking" and "advantage". In relation to B's "undertaking", this must be to confer on A or C a right "relating to"[143] or "in respect of"[144] the property B acquires. The undertaking must be one "subject to which [B] received the property".[145] And the right that B undertakes to confer on A or C can either be a proprietary right or a merely personal right relating to the property.[146] As for the element of "advantage", only a certain kind will do: it must "relate to"[147] or "assist"[148] B's acquisition of the property. Furthermore, it is necessary for B to receive the advantage "by means of [B's] undertaking".[149]

VI.2.1. The Doctrine in Rochefoucauld v Boustead

The doctrine in *Rochefoucauld v Boustead* proves to be an easy fit for McFarlane's model. Prior to acquiring A's property, B always gives an undertaking that he will confer on A or C a (proprietary) right relating to the property he will acquire, and B's subsequent

[138] *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] A.C. 108 (PC).
[139] *Neale v Willis* (1968) 19 P. & C.R. 836 (CA).
[140] *Ashburn Anstalt v WJ Arnold & Co* [1989] Ch 1 (CA).
[141] McFarlane (note 69) p. 668.
[142] McFarlane (note 69) p. 668.
[143] McFarlane (note 69) p. 668.
[144] McFarlane (note 69) p. 667.
[145] McFarlane (note 69)pp. 667, 678 – 9.
[146] McFarlane (note 69) p. 682.
[147] McFarlane (note 69) p. 688.
[148] McFarlane (note 69) p. 690.
[149] McFarlane (note 69) p. 668.

acquisition of the property is subject to that undertaking. Furthermore, B's undertaking assists his acquisition of the property: B would not have acquired the legal title to A's property as easily otherwise.

Yet, certain important questions remain. For example, to what extent need B's undertaking "relate to" his acquisition? And what precisely is an "advantage"? Say B decides to enter into the relevant arrangement only as a favour or based on a mere moral obligation towards A. Although the arrangement is not "advantageous" to B, this does not prevent an application of the doctrine. Because the doctrine in *Rochefoucauld v Boustead* and the *Quistclose* doctrine share the same basis, an analysis of the *Quistclose* doctrine sheds light on these issues.

VI.2.2. The Quistclose *Doctrine*

At first sight, the *Quistclose* doctrine (or, more precisely, its non-applicability to normal, purely contractual loan arrangements) appears to cause difficulties. Every loan arrangement involves a contractual promise by B to return the loan money, whether or not the arrangement includes an "exclusive purpose" clause. Since on McFarlane's model it is sufficient for B to undertake to confer a personal right relating to the property, it may appear that a mere contractual promise by B to return the loan money counts as an "undertaking", thus leading to the imposition of a trust obligation on B. In addition, A would surely not advance the loan without securing a contract for the return of the money, so it might be said that B's contractual undertaking "assists" B's acquisition of the money. One would then expect that whenever a contractual loan is made, the *Quistclose* doctrine would apply.

Yet, McFarlane explicitly states that it is inaccurate to view the principle he identifies "as an example of the binding nature of contractual undertakings."[150] This is because, *inter alia*, a contractual right "can arise as soon as [B] has entered the contract, whereas [the principle he identifies only binds [B] when [B] has received the property."[151]

VI.2.3. Impact on the Advantage Model

Upon closer inspection, the *Quistclose* doctrine in fact provides a number of essential clarifications for McFarlane's model. In relation to the element of "undertaking", B must undertake to confer a right *in* the property he acquires; it is insufficient to say that B must confer a right "relating to" or "in resect of" the property. This explains why it is insufficient for B contractually to undertake to repay the loan, instead, B must undertake to hold *the very money he receives* on trust for A pending application pursuant to the agreed purpose.[152] It is not the mere fact of B's undertaking which is significant; it is the fact that he undertakes to *qualify* the interest he will obtain *in the property* he acquires.

In relation to the element of "advantage", it is clear that this is not a requirement for subjective benefit: the arrangement need not benefit B in a personal capacity. Such a

[150] McFarlane (note 69) p. 683.
[151] McFarlane (note 69) p. 684.
[152] This undertaking is often not expressly stated by the parties but is unmistakably intended in the parties' agreement, which follows from the "exclusivity" of the agreed purpose: see Section IV.1.1., above.

benefit is unnecessary, as the doctrine in *Rochefoucauld v Boustead* indicates; it is also insufficient, since a contractual loan, which at least temporarily eases B's financial situation, is not enough to engage the *Quistclose* doctrine. Instead, "advantage" appears to have a narrower meaning — that B's opportunity to acquire the property was made easier by his undertaking. The relevant advantage is therefore not to be found in the *substance* of the arrangement, but *in the fact that* B's opportunity to obtain the legal title of the property was increased through B having given the relevant undertaking.

VI.2.4. Going Further

Beyond providing definitional clarifications to McFarlane's advantage model, it seems possible to go further. Gardner has criticised McFarlane's thesis for "not tell us *why* the fact that [B] receives an advantage should mean that [B] should be held to his undertaking, and no more and no less."[153] The analysis propounded in this paper, that the *Quistclose* doctrine can also give rise to constructive trusts in the same way as an application of the doctrine in *Rochefoucauld v Boustead*, can assist in providing a satisfactory response to this criticism.

VI.2.4.1. From Advantage to Reliance

We can start with the element of "advantage", which relates to the fact that B's acquisition was made easier through his undertaking. It appears that the term "advantage" does not fully encapsulate what the cases in fact require. McFarlane stresses that B's undertaking must be a "stipulation of the bargain" between A and B.[154] Since B's undertaking must have had some effect *on A*, and since it is *A* who must act in such a way that assists B's acquisition, it is suggested that A's "induced reliance" instead of B's "advantage" provides a more refined requirement. Not only does this draw A into the picture, it also sheds light on the requisite causal link. McFarlane's model does not require B's undertaking to be a "but for" cause of his acquisition;[155] yet it remains necessary for B's undertaking to be a "but for" cause of *B's acquisition on the terms of B's undertaking*. Therefore, in the context of the *Quistclose* doctrine and the doctrine in *Rochefoucauld v Boustead*, so long as it can be demonstrated that A did not transfer the money or property to B being indifferent as to whether or not B made the undertaking, B's undertaking induces A's reliance. Only then can it properly be said that B's acquisition was assisted *by his undertaking*.

It is to be stressed that this is not merely a semantic point. Because the normative basis of "reliance" is more easily discernible than that in relation to "advantage", it is possible to address Gardner's criticism. The explanatory force of the element of reliance lies in its ability to shed light on why B is bound to carry out his undertaking although it is trite law that a mere promise is unenforceable[156] and that equity will not assist a volunteer.[157] Because B's undertaking induces A to rely on B by transferring the property *on the stated terms,* B acquires the property on the basis of his undertaking,

[153] Gardner (n 69) p. 82.
[154] *Bannister v Bannister* [1948] 2 All E.R. 133 at 136.
[155] McFarlane (note 69) p. 687.
[156] *Commonwealth of Australia v Verwayen* (1990) 170 C.L.R. 394 (High Court of Australia) at 416 (Mason CJ). See also eg *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [92].
[157] *Milroy v Lord* (1862) 4 De GF & J 264, 45 ER 1185; Jeffrey Hackney, *Understanding Equity and Trusts* (Fontana Press, 1987) p. 118.

and therefore ought not take the property for his own unqualified use.

VI.2.4.2. From Undertaking to Promise

Turning to the element of "undertaking", it seems that, while that term has an almost identical meaning to the term "promise", the normative force of a "promise" is again more easily identifiable. For instance, Joseph Raz writes that there is a reason to keep one's promise, which lies in the fact that, by promising, one gives a normative assurance to the promisee that the promised act will be performed.[158]

If, however, "promise" and "reliance" are the relevant events which trigger the responses of the doctrines, two further questions arise. First, why is B bound to his promise even though that promise need not even be contractually binding? Secondly, why is B not merely compelled to pay compensatory damages for any reliance loss A suffers, or simply to reverse B's unjust enrichment?

VI.2.4.3. The Normative Basis

It is submitted that an answer can be found by exploring the norm at play. Suppose that B is given something by A that the parties agree should not be taken by B for his unqualified use. In these circumstances, there exists a well-established norm that B ought not to take that thing for his own enjoyment. This norm is so entrenched that we seldom pause to give it any thought. Yet examples of its application are aplenty. Thus, if A lends a book to B, it is clear that B should return the book to A within a reasonable time; and if B agrees to do A a favour by delivering A's coat to C, it is unacceptable for B to take the coat for himself: he is morally obliged to deliver it to C. In the doctrines, by making a promise to A, B obtains property from A that both parties agree should not be taken by B for his own enjoyment. Hence, equity enforces B's promise to prevent him from taking the property for his own enjoyment. The circumstances in which B acquires the property represent the clearest situation in which B ought never to take the property for his own benefit: there is no doubt that *the very* property B acquires is the property to which B's promise relates, and is also the property to which A's reliance relates. There is therefore a straightforward way to ensure that B does not take the property for his outright enjoyment, which is to hold him to his promise from the moment of acquisition. And given that the aim of the doctrines is not to compensate for A's detrimental reliance, the remedy is therefore not compensatory in nature.

Furthermore, it can be observed that it is indeed *necessary* for B to be held to the full extent of his promise. Through these doctrines, equity recognises the reality that there is more to the fact, which is apparent at common law, that B holds the legal title to the property in question. Uncovering that reality reveals that B ought not to take the property for his unqualified use precisely because B had made a promise to that effect; in addition, it also indicates that B's promise induces A's reliance in relation to that very property. Equity therefore holds B to his promise because it recognises the reality of what transpires — that B's promise is the basis on which B acquires the property. The parties intend that B should not take the property for his own unqualified enjoyment

[158] Joseph Raz, 'Is There a Reason to Keep Promises?' (16 October 2012). Columbia Public Law Research Paper No. 12-320; Oxford Legal Studies Research Paper No. 62/2012; King's College London Law School Research Paper No. 2014-15. http://ssrn.com/abstract=2162656 (accessed 12 December 2014).

precisely because B promises to qualify his interest in the property; and therefore upon acquisition B is held to his promise to prevent him from taking the property for his unqualified use. It would under-represent the reality of the situation merely to reverse B's unjust enrichment to A, since B's promise is rendered irrelevant to the courts' reasoning by such a response.

Thus, the alignment of the *Quistclose* doctrine with the doctrine in *Rochefoucauld v Boustead* has much explanatory and justificatory potential. Refining McFarlane's model, it can be seen that "promise" and "reliance" are the key events which trigger the constructive trust response; these events draw out the normative underpinnings of this response.