THE QUISTCLOSE TRUST REVISITED

In Bellis v Challinor [2015] EWCA Civ 59 and Gore v Mishcon de Reya [2015] EWHC 164 (Ch) the question arose whether monies transferred to a solicitors’ client account were held on trust for the solicitors’ client or on a Quistclose trust for the transferor. Both decisions have provided clarity as to when a Quistclose trust will be found to exist and the nature of the construction exercise the court will undertake.

Quistclose trusts are important where monies are provided for a specific purpose and the recipient becomes insolvent before that purpose is fulfilled. If there is a trust, then the transferor has a proprietary claim as opposed to ranking merely as an unsecured creditor. It also means that recipients – including solicitors holding monies in client accounts – could be sued for breach of trust if they part with any of the monies.

The Early Cases

The Quistclose trust first emerged in Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567. Quistclose lent money to Rolls Razor Ltd to enable it to pay a dividend it had declared when in financial difficulties. The money was paid into a separate new Barclays bank account on the basis of an express agreement between Rolls Razor and Quistclose that the money was only to be used to pay the dividend. After Rolls Razor went into liquidation, Barclays set off the amount in the dividend account against Rolls Razor's other indebtedness to it. The House of Lords held that Barclays was not entitled to do this as the monies were held on trust for Quistclose. Lord Wilberforce stated that there was a primary trust to use the money for the specified purpose and, if the primary trust failed, a secondary trust for the transferor.

The second major decision was Twinsectra Ltd v Yardley [2002] 2 AC 164. Loan monies were transferred by Twinsectra to a solicitor client account, but subject to a solicitor undertaking that the monies would be retained until applied for the sole purpose of land acquisition for their client, Mr Yardley. On the basis of this undertaking, the House of Lords held that the monies were held on a Quistclose trust. Lord Millett rejected Lord Wilberforce’s characterization, and instead characterised the Quistclose trust as a resulting trust arising at the time of payment for the lender’s
benefit, but subject to a power or duty to apply the monies in accordance with the stated purpose. Both characterisations have been criticised by academics, and the disagreements over the correct jurisprudential basis have made it more difficult to ascertain whether in any particular case a Quistclose trust has been created.

**Bieber v Teathers**

The third major decision was *Bieber v Teathers Ltd (in liquidation)* [2012] EWCA Civ 1466. Teathers promoted various investment schemes to take advantage of tax relief provisions for TV productions. Teathers used the appellants’ investment monies to set up partnerships in which the appellants were partners. The schemes were unsuccessful and the appellants sought to recover their monies in the partnership account on the basis that they were held on a Quistclose trust for the purpose of being used in investments in accordance with the Teathers’ information memorandum.

Norris J – after summarising the principles in *Quistclose* and *Twinsectra* – found that the terms of the information memorandum were insufficiently certain to give rise to a trust, and that a trust would in any event be inconsistent with the subscription agreement and partnership deed which provided for the monies to form part of the general assets of the partnership. The claim therefore failed. The Court of Appeal upheld the decision, with Patten LJ cautioning that when dealing with contractual or other arrangements like subscription agreements and partnership deeds, one must not superimpose a fiduciary relationship on them so as to alter their intended operation.

**Gore v Mishcon de Reya**

Mishcon de Reya obtained substantial payments from the claimant investors who intended that the monies be used to secure a bank guarantee which could then be used to procure a loan facility to refinance a development in Cardiff and to acquire a property development in Florida. Mishcons released the monies on the instructions of their client, Mr Shephard, but he retained the monies for himself. The claimants argued that the monies were paid to Mishcons for the purpose of acquiring the bank guarantee and were therefore held on a Quistclose trust for the investors, and that Mishcons had acted in breach of its fiduciary duties as trustee in disposing of those
monies. It was also argued that Mr Steele of Mishcons had dishonestly assisted Mr Shephard and had conspired with him to defraud the claimants, and that Mishcons was vicariously liable for the claimants’ losses. All the claims failed.

HHJ Hodge QC (sitting as a High Court judge) – relying on the principles summarised in Bieber – held that there was no Quistclose trust:

- There were no express terms on which the monies were to be held.
- The only communications concerning the transfer of the monies were the express statements that the monies were to be held to the account of Mr Shephard’s company and to the order of Mr Shephard, and these statements were manifestly inconsistent with the monies being held on a Quistclose trust.
- The claimants – on whom the burden lay – could not show that it was “clear” from the circumstances of the transaction there was an intention that the monies transferred should not form part of the general assets of Mishcons' client "but should be used exclusively to effect particular identified payments, so that if the money cannot be so used then it is to be returned to the payer."

**Challinor v Bellis**

The claimants were investors in a scheme to develop Fairoaks Airport in Surrey. The defendant solicitors acted for the investment vehicle (AFL) which had acquired the land. The claimants transferred money to the defendant solicitors’ client account. Most of the money was then paid out to reduce AFL’s bank borrowing. The scheme failed, and AFL went into administration. Other than the transfer of monies, there were no dealings between the claimants and the defendant, but the claimants had previously invested in several similar property schemes where the same solicitors had acted as escrow agent under express escrow terms. The claimants argued that this history supported the view that they intended to retain the beneficial interest, and that their monies were held on a Quistclose trust and had been released in breach of trust. Hildyard J found for the investors, but the Court of Appeal overturned this decision.

Briggs LJ set out the key principles to determine whether a Quistclose trust has been created:
“[56] Quistclose-type trusts are a species of resulting trust which arise where property (usually money) is transferred on terms which do not leave it at the free disposal of the transferee. That restriction upon its use is usually created by an arrangement that the money should be used exclusively for a stated purpose or purposes …

[57] There must be an intention to create a trust on the part of the transferor. This is an objective question. It means that the transferor must have intended to enter into arrangements which, viewed objectively, have the effect in law of creating a trust …

[58] …they are not presumed to exist…

[59] A person creates a trust by his words or conduct, not by his innermost thoughts. …. the search is for the objective intention of the alleged settlor.

[60] Usually, the question whether the essential restrictions upon the transferee’s use of the property have been imposed (so as to create a trust) turns upon the true construction of the words used by the transferor. But where, as in Twinsectra and indeed the present case, the transferor says or writes nothing but responds to an invitation to transfer the property on terms, then it is the true construction of the invitation which is likely to be decisive.”

Briggs LJ construed the offering documents as inviting the claimants to make loans to AFL, and not as asking them to remit monies to the solicitor to be held to their order. He also held that – in light of Ellis v Goulton [1893] 1QB 350 – payment to a solicitors’ client account constituted evidence of an intention that the monies be held for the solicitors’ client, rather than to the order of the transferor. He therefore found that there was no Quistclose trust and so the claim for breach failed. The claim for unjust enrichment also failed, and furthermore there was a change of position defence.

Practical Considerations
A Quistclose trust will only be found to exist where there is clear evidence of an objective intention to create a trust on the part of the transferor. Whilst the latest authorities suggest the court is taking a stringent approach, such cases will continue to turn on their facts and so the possibility of making a Quistclose trust claim should continue to be carefully considered.

In deciding whether to allege a Quistclose trust, one will wish to consider:

- What documents are available, and on a proper construction do they support a finding of an objective intention on the part of the transferor to create a trust?
- What conversations took place, and can the terms of these conversations be established with sufficient certainty to form part of the construction exercise?
- What background material is available that might assist in the proper interpretation of the available documents and conversations?

Where monies are transferred into a solicitors’ client account:

- In most cases these monies will be held on trust for the client.
- If there is any uncertainty as to the basis on which the funds are held, there is a duty on the solicitor (as trustee) to seek instructions from the transferor before disposal, even if disposal is intended to be to the client.
- The Solicitors’ Accounts Rules provide the implied terms of the trust such that any breach of those rules will constitute a breach of trust.

When transferring monies – whether as part of an investment scheme or for any other purpose – the transferor will wish to consider whether it would be appropriate to make a declaration of trust or to seek the provision of security. This will be particularly important when one is dealing with risky investments or financially volatile transferees. Failing that, the only likely remaining prospect will be to try to fit within the narrow confines of the Quistclose trust, which will not always be possible.

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