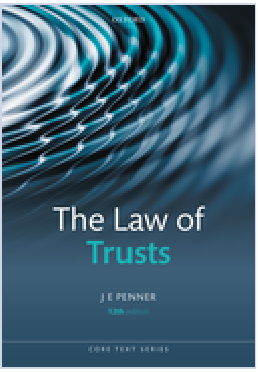

The Law of Trusts (12th edn)

J E Penner

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11. Bare trusts subject to contractual obligations and agent’s instructions

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Abstract

Titles in the Core Text series take the reader straight to the heart of the subject, providing focused, concise, and reliable guides for students at all levels. This chapter discusses a type of bare trust known as a nomineeship. Under a bare trust, a trustee holds property for a beneficiary on no specific trust terms; the trustee’s only obligation is to transfer the property to the beneficiary or to a third party as the beneficiary directs. Nomineeships typically combine the bare trust with a contract or relationship of agency. The first kind of nomineeship discussed is the solicitor-agent trust, followed by the *Quistclose* trust, and finally, unincorporated association trusts.

Keywords: bare trusts, nomineeships, agency, solicitor-agent trusts, Quistclose trusts, unincorporated associations

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Bare trusts in general

11.1 We have encountered the distinction between 'bare trusts' and special trusts already (**5.70**). Under a bare trust, a trustee holds property for a beneficiary on no specific trust terms; the trustee's only obligation is to transfer the property to the beneficiary or to a third party as the beneficiary directs. In contrast, a special trust is one created by a settlor with specific terms; the standard example is the typical family trust, in which the trustee has various duties, to invest the trust property, to pay the income to X, and so on. Bare trusts typically come about in three circumstances. The first is when all of the interests under a special trust 'fall into possession'. Consider a trust in which the company shares are held for Martha for life and then for her children in equal shares. When Martha dies, the children are absolutely entitled to the trust assets. There is nothing left for the trustee to do. At this point, the trustee becomes a bare trustee; his only obligation is to transfer the title to the assets to them, or to someone else as they direct.

11.2 The second circumstance in which a bare trust arises is that of a resulting trust, which we have already discussed (**10.74**). The third case is the intentionally created, ie express, bare trust, sometimes called a 'nomineeship', where the trustee is called a 'nominee'. For the sake of exposition, we shall use the term nomineeship in this chapter for all the trusts we will be considering where it is necessary to distinguish express bare trusts from others. A nomineeship can be created where the nominee has nothing to do but
p. 262 safeguard the trust assets, as for example, when A transfers title of a painting to B, but nomineeships typically combine the bare trust with a contract or relationship of agency. This is best explained by an example.

11.3 Perhaps the most common case of this bare express trust is the one upon which a solicitor holds purchase moneys prior to the completion of the sale of land. Where A intends to buy land from B, the transaction almost always occurs in two stages. The first stage is the parties' entering into the contract of sale. The contract will specify a future date for the 'completion' of the sale. Prior to the date of completion, A will transfer the purchase money to his solicitor, S, who will hold the money in his client trust account. Where part of the purchase price comes from a mortgage loan from C, C will typically use the same solicitor as A and so will also transfer the mortgage moneys to S. Of course S can only disburse the money according to his clients' instructions, here those of A and C. Normally these instructions will be that, on the day of completion, S will transfer the purchase moneys to S2, B's solicitor, upon S2's undertaking to S that S2 will pay off any prior mortgage on the land, complete the land transfer documents, secure a mortgage over the land in favour of C, and remit the remaining money to B. In this case, S is clearly an agent for A and C, who are her 'principals', and A and C grant her authority to complete the contract of sale on their behalf. The relationship between S and A and C is typically contractual; in the case of solicitors, this contract is often called a 'retainer'. But an agency of this kind need not arise under a contract. For example, suppose S is A's sister, and she is happy to do the work for free. In that case the agency relationship will be gratuitous.

11.4 These solicitor-agent/trustee cases give rise to special issues, and we shall examine those from **11.7** onwards. We shall also consider two other cases of nomineeships, that of a specific lender–borrower relationship known as a '*Quistclose* trust' (QT) (**11.35**), and trusts of property held for the benefit of an unincorporated association (**11.73**), both of which raise their own particular issues.

Nomineeships are typically trusts that are 'resulting in pattern'

11.5 Nomineeships are very frequently 'resulting in pattern', in that, although they are express trusts, the beneficiary is typically the provider of the funds for the trust. That doesn't have to be the case—your aunt may give you funds to buy a house and transfer those funds to your solicitor herself prior to completion, but obviously this is not the typical case. Unfortunately, because these trusts are so often resulting in pattern this has given rise to a fair amount of confusion in the analysis of QTs.

The beneficiary's power to direct the trustee is not derived from the principle of Saunders v Vautier

11.6 There is no clear definition of a 'bare trust', and just because the trust is bare does not mean that the trustee's only duty is to transfer the trust assets to the order of the beneficiary or beneficiaries (Lewin (2020), [1-036]–[1-043]). In particular, as we have just seen (**11.3**), the trustee may have duties as an agent or contracting party with respect to the trust assets. The key to understanding what distinguishes an express
p. 263 bare trust from a special trust is that with regard to the former, the beneficiaries can bring the trust to an end at any time, by ordering the T to transfer the assets to themselves, to one of them, to a third party, etc *without their doing so by invoking any rights under the principle of* Saunders v Vautier. It is a *term* of these trusts that the trustee holds the property to the order of the beneficiaries in this way. When they so order the trustee to transfer the assets in this way they are not *collapsing* a special trust under the *Saunders v Vautier* principle, they are simply invoking the main term of the trust. This point is important, as we shall see in the case of unincorporated associations. Where property is held on bare trust, the beneficiaries interests are *vested* (**3.85**), which means that the trust can go on forever, because at any time the beneficiaries can order the trustee to distribute the property as they choose.

Solicitor-agent trusts (SATs)

11.7 The leading case on the nature of solicitor-agent trusts (SATs) is *Target Holdings v Referns* (1996), but its reasoning has been very controversial. Target Holdings was a mortgage lender advancing money to its client to purchase land and, as is typical in such transactions, it transferred the £1.5m loan moneys to the solicitor whose job it was to complete the purchase of the land and obtain a mortgage over it in Target's favour to secure repayment of the loan, a standard SAT in other words.

11.8 Four companies were involved in the sale of a property in Birmingham, UK:

- Mirage Properties Ltd, 'Mirage', who owned the property.
- Panther Ltd, 'Panther'.

- Kohli & Co Ltd, 'Kohli'.
- Crowngate Developments Ltd, 'Crowngate'.

Panther, Kohli, and Crowngate were clearly associated companies, and a Mr Kohli was arguably, perhaps with associates of his, in control of all three. The later dealings with the money also suggest that Mirage was not simply an arm's-length vendor of the property and its controller(s) may have known about and been involved in the whole business.

11.9 In June of 1989 Crowngate applied to Target for a mortgage loan of £1.7m to purchase the property, the sale price being £2m; £1.5m of the loan money was to be used for the purchase of the property, the remainder for other purposes of Crowngate. Unbeknownst to Target, the title to the property was going to be flipped in a series of sub-sales. The arrangement was as follows:

- There was a contract of sale, Mirage to Panther for £775,000.
- A contract of sub-sale, Panther to Kohli for £1.25m.
- A contract of sub-sale, Kohli to Crowngate for £2m.

p. 264 ↵ It was not clear on the facts how the sub-sales were dated, or whether the sub-sales were meant to give bogus grounds for a valuer to show a rising property market but, in any case, Target was not told these facts. I should add that this arrangement was not necessarily fraudulent. The various sub-sales might simply have been a way of distributing the purchase moneys amongst associated companies for legitimate business purposes. In this case, however, the fact that none of this was disclosed to Target makes the transactions prima facie suspicious.

11.10 We now come to Target's instructions to Redferns. As stated by Lord-Browne Wilkinson (at 429A–B, emphasis added):

> *On 28 June 1989 Target transferred £1,525,000 to Redferns without giving any express instructions to Redferns as to its release. It is common ground that Redferns had implied authority to pay the money to or* to the order of *Crowngate when the property had been conveyed to Crowngate and Crowngate had executed charges in Target's favour.*

11.11 The following transactions then ensued:

- 29 June 1989: Redferns transferred £1.25m to Panther.
- 30 June 1989: Panther distributed £773k to Mirage, and £300k to others.
- 3 July 1989: Redferns transferred £240k to Kohli.
- 4 July 1989: Redferns falsely informed Target that the purchase in the name of Crowngate was completed and Target's 1st mortgage for £1.7m was obtained.
- 6 July to 31 July: Transfers of title through the sub-sales were completed, and Crowngate was registered as owner; Target's 1st mortgage for £1.7m was obtained.

11.12 One point, which was not taken apparently by any of the counsel involved, was that it was arguable on the facts that, given the close associations between the companies and parties involved, the series of payments were proper, in that they were 'to the order' of Crowngate. If that was so the breach of trust did not lie in paying away the moneys to 'strangers', that is, persons not entitled to receive the funds, as Lord Browne-Wilkinson found (429H, 431C, 436G–H) but only in paying away the moneys *early*, ie without first getting the transfer of title to Crowngate and the charge securing Target's loan. (This is indeed the way Lord Toulson set out the facts of *Target* in *AIB Group (UK) Plc v Mark Redler & Co Solicitors* (2014), [21], (**11.29**).)

11.13 If this point is well taken, then the facts in *Target* are essentially on all fours with the hypothetical example with which Lord Brown-Wilkinson began his substantial analysis in the case (432C–E):

> *For example, say an advance is made by a lender to an honest borrower in reliance on an entirely honest and accurate valuation. The sum to be advanced is paid into the client account of the lender's solicitors. Due to an honest and non-negligent error (eg an unforeseeable failure in the solicitors' computer) the moneys in the client account are* p. 265 ↵ *transferred by the solicitors to the borrower one day before the mortgage is executed. That is a breach of trust. Then the property market collapses and when the lender realises his security by sale he recovers only half the sum advanced. As I understand the Court of Appeal decision, the solicitors would bear the loss flowing from the collapse in the market value: subject to the court's discretionary power to relieve a trustee from liability under section 61 of the Trustee Act 1925, the solicitors would be bound to repay the total amount wrongly paid out of the client account in breach of trust receiving credit only for the sum received on the sale of the security.*
>
> *To my mind in the case of an unimpeachable transaction this would be an unjust and surprising conclusion.*

11.14 It is not clear the trustee's wrongly paying a proper recipient at the wrong time, as opposed to wrongly paying a stranger—someone not entitled to receive trust funds at all—makes a prima facie difference to the correct analysis. Both are payments of trust moneys away in breach of trust. But obviously, the latter sort of breach would be more difficult to correct or iron out, whereas the former is much more easily seen as a kind of 'technical' breach, as indeed Lord Browne-Wilkinson seemed to regard it in his hypothetical example. Indeed, on this analysis, the breach of is essentially 'self-correcting' so long as any condition for a proper payment is later met. If this is correct then Redferns's strongest point might have not entered into the court's analysis.

11.15 When Crowngate defaulted on the mortgage payments (the company went into insolvent liquidation about 2 years after the purchase) Target was only able to realise £500,000 on the sale of the land, so it lost £1m in round figures. Target sued the solicitor's firm for the loss. It claimed that because the solicitor breached the trust by paying the money to a stranger, and upon that breach immediately came under a liability to repay £1.5m, the solicitor had no defence to a claim for summary judgment for £1.5m less the £500,000 Target got from the sale. Now, although it seemed pretty evident that a fraud of some kind lay in the background, because the case came to the court by way of an application for summary judgment, the issue of fraud was not before the court (under the Rules of the Supreme Court, Order 14, r 1(2)(b)), and so it had to be assumed that the solicitor had simply made a non-fraudulent error in paying away the money to the third party (at 432B). (At first instance the judge held that it was a triable issue whether Target would have proceeded with the transaction had it been given all the facts about the sub-sale arrangements, and this finding was not overturned in the courts above.)

11.16 Lord Browne-Wilkinson embraced a kind of 'fusionist' spirit in his judgment, taking the view that the principles for awarding 'equitable compensation' and common law damages were essentially seeking to achieve the same end, that is, to put the plaintiff in the position he would have been in but for the defendant's breach of duty (432E–433A). Implicitly Lord Browne-Wilkinson adopted what might be called the 'compensatory principle', a principle by which a plaintiff should only be awarded money compensation for consequential loss. This is not, however, the only principle upon which money awards are made either at common law or in equity (see Stevens (2009); Watts (2016); Penner (2018a)).

p. 266 **11.17** Briefly, what are sometimes called 'substitutive' awards are made both at common law and equity. As for the common law, the standard case is that of a sale of goods. Traditionally, where a seller delivers defective goods to a buyer, the buyer is entitled to damages reflecting the difference in value between the goods contracted for and the defective goods delivered. The buyer need not prove any consequential losses that flowed from this to succeed in his claim, nor does the seller's showing that the buyer suffered no consequential loss defeat the buyer's claim (*Slayter v Hoyle* (1920)). A similar award is made in equity where a trustee wrongfully pays away trust money (for example, to make an unauthorised investment). The trustee will be ordered to put the fund in the position it would have been in had he not breached his duty. As with the sale of goods damage award, this is essentially a valuation exercise (**13.32**), not one in which the beneficiaries have to prove a consequential loss.

11.18 Before applying this fusionist reasoning to the facts, Lord Browne-Wilkinson sought to distinguish the kind of trust in this case, a 'commercial' trust, from a traditional family trust, in which he seemed to accept that monetary awards against trustees were 'substitutive', as just explained. He said (at 436B, emphasis added):

> *The depositing of money with the solicitor is but one aspect of the arrangements between the parties, such arrangements being for the most part contractual. Thus, the circumstances under which the solicitor can part with money from the client account are regulated by the instructions given by the client: they are not part of the trusts on which the property is held.*

Students often find this passage tricky: how can provisions, contractually created or not, which govern a trustee's powers over the trust assets not be terms of the trust?

11.19 The key to understanding this is to consider the solicitor-agent's liability when he commits a wrong. Take a simple example of an SAT. A enters into a contract with B to buy B's land for £1m. Pursuant to the contract A pays B a deposit of £100k. A pays the balance of £900k to his solicitor, S, prior to the date of completion. In breach of his instructions, S fails to do anything on the date of completion, B repudiates the contract and keeps the deposit money. If the agency of S arose under a retainer contract, then S is liable in contract for the loss caused by his failing to complete, thus for £100k representing the lost deposit. Alternatively, if A made a good bargain in a rising market so that on the date of completion the value of the land was £1.2m, then S will be liable for £200k representing the value of A's lost bargain. But notice, by failing to complete, S *has not committed any breach of trust*. S hasn't done anything with the trust moneys—they are still sitting in his clients' account, held on trust for A, and a trustee, as we shall see (**Chapter 13**), is only ever liable for losses he causes to the trust fund, and there is no such loss here. (If S was A's *gratuitous* solicitor-agent (**11.3**) then S can only be liable in tort, and will probably not be liable at all here, for the general principle is that a gratuitous agent is not liable for merely failing to carry out her instructions (Bowstead (2018), 6-027 et seq)).

p. 267 **11.20** Another way of seeing this point is to contrast this case with a case where a trustee holds funds on special trust with an investment clause, which requires the trustee to spend £1m transferred on trust by the settlor to invest in shares. The trustee sits on his hands and does nothing for three years. Here his failure to do something, unlike the case of S just discussed, *does amount to a breach of trust* because the trust fund doesn't have an asset in it that the trustee was required to obtain. So if the shares he ought to have purchased are worth more than the £1m (plus, presumably, three years of bank account interest), then the trustee will be liable for the difference. Now again, contrast this with S's wrong—under his instructions he was not required to obtain any new asset to hold on trust for A. What he was required to do was disburse the trust moneys in order to secure A's benefit under the contract, that is A's *legal* title to the land. To summarise the arrangement then, the solicitor holds the trust assets on bare trust for A, with power to apply the money according to A's instructions, and a *genuine trust duty* NOT to apply the trust property in any that does not accord with A's instructions. So you might say that all the *positive* duties with respect to the trust assets come from the solicitors contractual or gratuitous agency, and the trust duty is essentially *negative*, NOT to spend the money in any other way.

11.21 Of course in *Target* itself the solicitors *did* commit just such a breach of trust by paying away the money otherwise in accordance with their instructions. Whenever a trustee actually misapplies trust assets that is a breach of trust. To use the 'accounting terminology' that is applied to breaches of trust (**13.10** et seq), Target here could on traditional principles 'falsify the account', which is to show that the payment was in breach of trust, rendering the trustee personally liable to repay the money.

11.22 It is something of a shame that Lord Browne-Wilkinson did not elaborate on the passage quoted at **11.18**, because what he is saying here is that the solicitor is not just a trustee, but also an agent, and in this case the agents (the members of the law firm) breached their principal's instructions. One would therefore have expected the court, having drawn our attention to this, to have discussed whatever principles of agency law applied to make sense of the facts. But agency principles were never discussed.

11.23 Applying the principles of liability for consequential loss, Lord Browne-Wilkinson assessed whether Target's loss could properly be regarded as the consequence of the solicitor's breach of trust. That is, he invoked principles of causation and remoteness to say that, on a but-for basis, the loss was not a consequence of the solicitor's breach, but rather was a loss arising because of Target's initial decision to lend £1.5m on a property worth only half that at the time of sale; the cause of that loss was either that Target had been fraudulently induced by its borrower to make the loan on a property of insufficient value, or a decline in the property market. Since the court could not adjudicate the fraud claim, the loss could only be attributed to the decline in the property market, for which the solicitor was, of course, not liable.

11.24 As already mentioned (**11.7**), the reasoning in *Target* was controversial, and has given rise to a large
p. 268 secondary literature. But the main critical points can be addressed. Shortly after the case was decided, Lord Millett writing extrajudicially said (Millett (1998a), 227):

> *The solicitor held the plaintiff's money in trust for the plaintiff but with its authority to lay it out in exchange for an executed mortgage and the documents of title. He paid it away without obtaining these documents. This was an unauthorised application of trust money which entitled the plaintiff to falsify the account. The disbursement must be disallowed and the solicitor treated as accountable as if the money were still in his client account and available to be laid out in the manner directed. It was later so laid out. The plaintiff cannot object to the acquisition of the mortgage or the disbursement by which it was obtained; it was an authorised application of what must be treated as trust money. To put the point another way; the trustee's obligation to restore the trust property is not an obligation to restore it in the very form in which he disbursed it, but an obligation to restore it in any form authorised by the trust.*

In your author's view this criticism is sound because it showed that Lord Browne-Wilkinson did not need to depart from traditional trust accounting principles in order to resolve the case.

11.25 Edelman (2010, 2017) disputed Lord Millet's analysis. Edelman argued that a trustee cannot himself 'cure' his own breach if it involved paying away the money in breach of his instructions—unless his cure is adopted by the beneficiary or the right to return of the money is waived, he remains liable. Edelman reasoned to the result in *Target* by arguing that Target accepted the charge over the property and held it for two and a half years, and that this amounted to an election to waive the right to bring a claim for the money wrongly paid away. This analysis is doubtful as Target only found out the relevant facts very late in the day, and both beneficiaries vis-à-vis their trustees and principals vis-à-vis their agents must be in full possession of the relevant facts before any adoption or ratification (a subsequent approval by a principle of her agent's act in breach of instructions) can take place.

11.26 Even so, Edelman raises the important issue of whether a trustee or agent loses his authority upon committing a breach. Lord Millett, perhaps thinking along the lines of one argument put to the court in *Target* by Jonathan Sumption QC (at 425C) that 'The analysis of the Court of Appeal would appear to leave no room for the trustee voluntarily to make good the loss after the breach', didn't explore in his analysis whether there are cases where a trustee cannot rectify a breach on his own. Conaglen (2010) has argued that a trustee's trusteeship does not end just because he has committed a breach of trust and that in this case the trustee remained authorised to proceed to get in the mortgage.

11.27 Finally, we turn to the application of agency principles. Commenting upon Conaglen's argument, Watts (2016), 121 said:

> *It must be a question of construction whether there is scope for an agent who has deviated from instructions to cure the breach. Particularly where there is an ongoing mandate, even a serious breach may not bring the*
> p. 269 *agent's authority, and any associated ↵ agency contract, to an end unless the principal takes steps to cancel the agency. Where the agent has no reason to believe that the principal would not want the transaction completed, an inference of residual authority must be strong.*

11.28 One final point: Lord Browne-Wilkinson discussed at some length (433–436) how a trustee who misapplies trust money discharges his personal liability. In a special trust, the trustee would normally have to 'restore' the trust fund, eg by paying the monetary equivalent of the misapplied money into the trust bank account to be held on trust thereafter. But there would be no point in the solicitors in *Target* 'restoring' the trust by paying money into their client account to hold on bare trust for Target—there would be no purpose in doing so, so they should just pay the money to Target directly. This is clearly correct, but arguably this thought led Lord Browne-Wilkinson to assume that in the latter case the 'compensation' paid could only be in response to the beneficiary's consequential loss (**11.16**, **11.22**) which is incorrect. When the trustee misapplies trust assets the remedy is 'substitutive' (**11.17**), and so the measure of liability should be identical in both cases.

11.29 The reasoning of Lord Browne-Wilkinson in *Target* was endorsed by the UKSC in *AIB Group v Mark Redler & Co* (2014). In 2006 the defendant solicitors were instructed by the claimant lender, AIB Group, who wished to lend £3.3m taking a first mortgage over land of the borrowers valued at £4.25m. The land was already subject to a prior mortgage from Barclays Bank of about £1.5m, which secured two different loan accounts of the borrowers, one of about £1.23m and the other of about £270,000. Prior to the date when this transaction was to take place, the solicitors erroneously overlooked the second smaller loan account, and therefore paid Barclays £1.23m. As Barclays' outstanding loan balance on the second loan account was not discharged, it did not release its security over the borrower's land, although now, of course, it only secured an indebtedness of about £270,000. The remaining funds, about £2.1m, were paid to the borrowers. For about two years, nothing much further happened, but in 2008 AIB Group negotiated with Barclays to allow it to have a second mortgage on the land to secure the loan of £3.3m to the borrowers. The borrowers subsequently defaulted on their repayments, and the land was sold. The housing market had declined and the house only fetched about £1.2m, and so after paying the outstanding debt to Barclays, roughly £300,000, AIB Group recovered only £900,000.

11.30 The CA held that because of the solicitor's failure to discharge the prior mortgage, the entire outlay by the solicitors of AIB Group's £3.3m was a breach of trust, on the basis that obtaining a valid discharge of the prior mortgage (or obtaining a solicitor's undertaking from the prior mortgagee's solicitors that the mortgage would be discharged upon receipt of the payment) was a condition for paying out any funds at all. This finding was not appealed. Applying general principles of causation for loss as Lord Browne-Wilkinson did in *Target*, the UKSC held the solicitors liable only for the £300,000 the lender paid to clear Barclays' prior mortgage; even if there had been no breach and both prior mortgages had been cleared, the house would still have sold for only £1.2m because of the decline in the housing market, so AIB Group's loss owing to the breach on this
p. 270 'but for' test of causation was only the £300,000-odd needed to discharge the outstanding mortgage.

11.31 Whilst the result may seem, at first glance, roughly right, the reasoning of both Lords Toulson and Reed is unsatisfactory in several respects. (For an exacting analysis of the judges' reasons, see Davies (2015b); see also Conaglen (2016); Edelman (2017).) In the first place, neither clearly explained why the claimant was disentitled from falsifying the account (**11.21**). The court focused on determining whether *Target* was rightly decided but they did not squarely address the criticisms made of the case. The resulting *ratio decidendi* seems to be the following: where the trust arises in a 'commercial context'—a 'commercial context' is not clearly specified—a beneficiary of a trust will be disentitled from falsifying the account—the unauthorised expenditure will be regarded as an expenditure of the beneficiary's funds for the beneficiary's purposes. However the trustee's breach in expending the funds will, on the other hand, amount to a wrong sufficient to support a claim for a consequential loss, so that if the expenditure results in the beneficiary acquiring something of lower value than that which would have been obtained had the intended, authorised, expenditure been made, then the trustee will be liable for the difference.

11.32 It is submitted that the better analysis of the case is this: on the disbursement of the funds, AIB Group were entitled to falsify the account because the disbursement was a misapplication of the trust money. However, it is also clear that AIB Group, when informed of the situation, proceeded to accept the disbursement, and proceeded on its own to negotiate with Barclays ultimately to acquire Barclays' consent to the second charge over the property in question to secure the full value of its loan to the borrowers. By pursuing off its own bat the second charge with Barclays, they proceeded on the basis that it was indeed their money that went to Barclays to pay off its prior mortgage, thus making it impossible for the solicitors to restore the account. In other words, at this stage they *adopted* the solicitors' expenditure of the funds as a valid expenditure of the trust moneys. A beneficiary doesn't have to falsify the account in any case of breach. If, for example, a trustee makes an unauthorised investment the beneficiary can adopt the transaction an require the trustee to hold that investment as a trust asset. It appears clear that when AIB Group negotiated with Barclays it did so reasoning (as it turned out, wrongly), that there was sufficient value in the property to serve as security for the borrowers' entire indebtedness. On this analysis the solicitors should not have been liable at all, for the expenditure, though a breach, was effectively consented to afterwards.

11.33 The only further question to ask is whether AIB Group could have consented to the expenditure in part, say consenting to the payment of £1.23m to Barclays, but not to the £300,000 overpayment to the borrowers. There is not much authority on the point but, as we shall see (**13.75** et seq), the test is essentially one of fairness, whether it is fair given what has happened for the beneficiary to turn round and sue the trustees. It is submitted that AIB Group did not act in any way which suggested that it wanted the overpayment to the borrowers to be reversed, so they adopted the disbursement as a whole. (For a full discussion of the issue, see
p. 271 Penner (2017); see also Ho (2017), 171–173.) As we shall also see (**13.66**), where the transactions (here the payments to Barclays and to the borrowers) form part of one composite transaction, which they surely did here, the beneficiary is not entitled to falsify one and adopt the other. Moreover, to borrow a common law analogy: whilst there is no 'duty to mitigate' one's losses, liability for damages both in contract and tort does not extend to losses which could reasonably have been avoided. AIB Group could easily have avoided the £300k loss. It had an immediate claim against the borrowers: the borrowers held the excess they received on constructive trust, and were in addition personally liable for that amount as knowing recipients (**2.71**, **15.29** et seq); Barclays could easily have got an order against the borrowers to transfer the requisite amount to Barclays to discharge the remaining indebtedness to Barclays (at the borrowers' expense in costs) had the borrowers refused to do this themselves.

11.34 Finally, in this case and other SAT cases, a principal can, as we have seen (**11.25**), ratify the act of his agent who acts in breach of her instructions. Watts (2016), 120–121, has said:

> *[W]hilst the solicitors in AIB Group were initially not forthcoming about their having accidentally released the money without a first mortgage being in place, they were soon driven to reveal the facts, and indeed some negotiations then directly occurred between their client and the existing mortgagee. In those circumstances, an inference of ratification was almost irresistible.*

By contrast it is not at all clear that Target adopted or ratified the breach of the solicitor. Recall that the solicitor lied to Target about what it had done, and one can only adopt or ratify in the full knowledge of the facts.

Quistclose trusts (QTs)

11.35 The '*Quistclose* trust' (QT) is named after the trust found in *Barclays Bank Ltd v Quistclose Investments Ltd* (1970). Quistclose (Q) was an investment company that advanced £209,000 to another company Rolls Razor (RR), in order to allow RR to pay a dividend that it had already declared. It was accepted by all concerned that if RR had used the money to pay the dividend, then RR would simply have owed Q £209,000 (plus interest); had RR paid the dividend and then gone into liquidation, Q would have been an ordinary creditor. RR was in trouble and did indeed go into liquidation, but before paying the dividend. The HL held that RR held the money on trust to pay the dividend and that, upon its failure to do so, the money was held upon trust for Q.

11.36 The judgment of Lord Wilberforce in *Quistclose* suggested that there was a primary purpose trust to pay a dividend, which purpose failed on RR's liquidation, giving rise to a resulting trust in Q's favour. There are any number of problems with this analysis (for a thorough demolition see Swadling (2004), 9 et seq), not least of which is that, to work, non-charitable purpose trusts must be valid, and they are not. The analysis is not viable, and can be ignored.

p. 272 **11.37** The leading case on this and similar trusts is now *Twinsectra v Yardley* (2002). Before going into the details of that decision, we must observe a few preliminary points. The first is, that on a broad view, any bare trust where the trustee is subject to a contractual obligation or agent's instructions in respect of how he deals with the trust property is a 'QT', and so every trust discussed in this chapter would be a QT. In his leading judgment on the nature of the *Quistclose* trust, Lord Millett himself suggested ([99]) this broad definition, one that would certainly include SATs. (See also Hudson (2017); Liew (2017), ch 13.) Here we shall use the term in a narrower way, to apply only to cases where (as in *Quistclose* itself) a borrower, B, holds the money advanced to her by a lender, L, on trust for L until such time as she properly spends the money in ways authorised under the loan agreement.

11.38 QTs represent a departure from the 'default' position when money is lent in a commercial context. Normally if L lends money to B, the money immediately becomes B's legal property and L becomes an ordinary creditor; it does not matter that L pays the money to B under certain conditions (eg to spend it only on certain business projects). If B spends the money otherwise, he just commits a breach of contract, but not a breach of trust (the consequence of such a breach of contract may be, for example, that the loan is immediately repayable). Lord Millett began his analysis as follows ([68]):

> *[I]t is well established that a loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce. In the earlier cases the purpose was to enable the borrower to pay his creditors or some of them, but the principle is not limited to such cases.*

These earlier cases are sometimes referred to as 'staving off bankruptcy' cases, because the loan was typically advanced to a trader in hopes that by paying 'his creditors or some of them' he would be able to trade out of a looming insolvency. This was indeed the motivation of the loan in *Quistclose* itself.

11.39 Lord Millett in *Twinsectra* also stated ([73]):

> *A Quistclose trust does not necessarily arise merely because money is paid for a particular purpose. A lender will often inquire into the purpose for which a loan is sought in order to decide whether he would be justified in making it. He may be said to lend the money for the purpose in question, but this is not enough to create a trust; once lent the money is at the free disposal of the borrower ... Commercial life would be impossible if this were not the case.*

11.40 In the case of a QT, L transfers the money to B on bare trust, with B having a power to apply the money to a specified purpose or purposes. If and when he applies the money to an agreed purpose, the trust is extinguished to that extent. So if L lends B £20k for the purpose of buying raw materials for his business, and then B spends £5k on raw materials, then he now holds £15k on trust for L, and now is a debtor to L for £5k. If
p. 273 B makes an expenditure of the money not authorised under the loan contract, this will be a breach of trust, and L can follow and trace this money; secondly, if B goes insolvent before spending some or all of the money, as happened in *Quistclose*, L, having the equitable beneficial interest under the trust, is safe from B's insolvency.

11.41 In *Twinsectra*, a Mr Yardley negotiated a loan of £1m, to be provided by a company, Twinsectra. This loan was, at the start of the negotiation, envisaged as a bridging loan to finance the purchase of a specific parcel of land. The only statement in the documents passing back and forth in the negotiation which would found a QT was that the moneys could only be used for 'the acquisition of property'. The loan moneys were first paid to into the client account of Yardley's solicitor, and at Yardley's request, his solicitor released the funds to him in tranches. About two thirds of the released moneys were spent on acquisition of real property, about one third for other purposes; the latter expenditures were held to have breached the QT for the lender.

11.42 In *Twinsectra*, Lord Millett stated quite categorically that QTs are resulting trusts that arise by operation of law. This departed in a serious way from the views he expressed in Millett (1985) where he persuasively argued that QTs are express trusts, ie based on the parties' actual intentions (see also Penner (2004), 50–56). According to that analysis, there is no 'resulting' trust at all: A's beneficial ownership is intended from the outset—he takes that interest as the intended beneficiary under the bare trust with a power in the borrower to spend the trust money in the ways authorised under the contract. In *Twinsectra*, however, Lord Millett said ([100]) that the QT is:

> *an entirely orthodox example of the kind of default trust known as a resulting trust. The lender pays the money to the borrower by way of loan, but he does not part with the entire beneficial interest in the money, and in so far as he does not it is held on resulting trust for the lender from the outset.*

11.43 This characterisation of the QT seems to follow from Lord Millett's approval of Chambers' general theory of the resulting trust, which he endorses in *Twinsectra* as follows ([92]):

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

11.44 There are a number of issues that arise on the resulting trust analysis. Notice first, all QTs are 'resulting in pattern' (**11.5**): the provider of the funds, the lender, is always also the beneficiary under the trust. So it may be the case that for this reason alone some judges and commentators are happy to say QTs are 'resulting trusts'.

p. 274 **11.45** It is unclear whether the resulting trust analysis actually works, at least upon Chambers 'lack of intention to benefit the recipient' view, for it is clear even on Lord Millett's own analysis in *Twinsectra* ([69], [71], [74]) that the restriction on the use of the money, limiting the borrower's power to apply the money only to specified purposes, *must be expressed to the borrower*, which is why in respect of this restriction the courts must look to the parties' expressed intentions, in the same way as the court proceeds to construe a contract. As Lord Briggs said in *Bellis v Challinor* (2015) ([59]):

> *A person creates a trust by his words or conduct, not by his innermost thoughts. His subjective intentions are, as Lord Millett said, irrelevant. In the Twinsectra case, a Quistclose trust was established despite the transferor having no subjective intention to create a trust. But the objectivity principle works both ways. A person who does subjectively intend to create a trust may fail to do so if his words and conduct, viewed objectively, fall short of what is required. As with the interpretation of contracts, this process of interpretation is often called the ascertainment of objective intention. In the contractual context the court is looking for the objective common intention, whereas in the trust context the search is for the objective intention of the alleged settlor.*

11.46 *Goyal v Florence Care Ltd* (2020) is illustrative. Mr Goyal transferred funds to the solicitors of his co-venturer in an investment scheme. A few hours later he emailed the solicitors making it clear that the moneys were not to be at the solicitors' free disposal. Because the email did not reflect a prior conversation or agreement, the solicitors rightly claimed that they held the money for their own client, not Goyal. But this should not have been the result on the Chamber's analysis, for it was quite clear that Goyal did not intend, had no intention that, the money was to be at the free disposal of the solicitors or their client. If 'absence of intention' founds a resulting trust, including a QT, then Goyal should have succeeded. But the broader point is that if we are looking at the intentions of the transferor on the objective basis of his words and conduct, how does this not amount to a finding of an express trust?

11.47 This raises exactly the same issue we addressed with PRT's generally (**10.26** et seq), that is, the way in which the parties' intentions are understood to found a trust. In England it is orthodox to follow Lord Millett in describing the QT as resulting but, and you must judge for yourself when you read the cases, it is submitted by your humble author that the judges seem to make their findings in all the QT cases based upon the express or inferred actual intentions of the parties including in *Quistclose* itself, just as the courts do in the presumption of resulting trust cases (**10.30** et seq) even though they typically proclaim that PRTs arise by operation of law. In *George v Webb* (2011), following an extensive review of the case law and academic writing, Ward J took the view that the weight of authority in Australia is that a *Quistclose* trust is an express trust. (See also *Re Australian Elizabethan Theatre* Trust (1991); *Raulfs v Fishy Bite Pty Ltd* (2012).)

11.48 There is also a technical problem with the resulting trust analysis. In the first place, resulting trusts are bare trusts (**10.74**–**10.75**); they have no other terms besides the duty of the trustee to hold the property for the
p. 275 beneficiary(ies) absolutely. So the borrower's power to spend the property cannot be a 'resulting trust' power. Lewin ((2020), [9-052]–[9-053]) characterises the QT as an ART, where the trust for the lender arises over any unspent property on the basis that the borrowers power to spend the money 'fails' to the extent he doesn't spend all the money. But as we have seen (**3.8** et seq), one cannot create an equitable power over an asset 'in the air'—a power to apply trust assets must be one over assets otherwise held on trust. So there is no such thing as a power which fails and which *then* gives rise to a trust. Another way of putting this is simply to say that the doctrine of ARTs applies to *trusts*, *not powers*. When a power fails all that happens is that those who take in default of its exercise can no longer be deprived of their trust interest.

11.49 Treating QTs as express (if sometimes informal) trusts, rather than as resulting trusts arising by operation of law, is important, because that largely determines how the court should properly take into account evidence of the parties' intentions in determining whether a *Quistclose* trust has been created or has arisen, meeting the requirements of the three certainties, in particular certainty of intention, as *Bellis* and *Goyal* indicate. There is a danger that the resulting trust analysis will allow the court to find trusts in commercial circumstances on flimsy evidence about what might have been absent to A's mind, as opposed to determining the true intentions of the parties. It is arguable that this happened in *Twinsectra* itself (**11.56**; see also Penner (2004)). It is submitted that first thoughts were best thoughts, and that Lord Millett's 1985 analysis is superior to his *Twinsectra* account, which tries to bend his 1985 analysis to make it work within Chambers' theory of resulting trusts, which he clearly admires. (See also Hudson (2017) and Glister (2004).)

11.50 Of course, none of what Lord Millett said about QTs being resulting trusts means that a QT cannot clearly be an express trust. Lord Millet has written extrajudicially (Swadling (2004), Foreword):

> *[Distinguished academic lawyers] demand to know whether the Quistclose trust is a form of express, implied, constructive or resulting trust. If the mere author of a foreword may venture to intrude into a private dispute ... I would say that it may be any of them, depending on the facts of the particular case and the boundaries between these various forms of trust, on which not everyone is agreed.*

In *Latimer v Commissioner of Inland Revenue* (2004) Lord Millet held that an arrangement gave rise to an express QT. (See also Morris (2004).)

Certainty issues

Certainty of intention

11.51 As we have seen, a trust can be created without the use of the word 'trust' (**5.4**), and the use of the word 'trust' will not create a trust if that does not represent the parties' true intentions. But every trust must comply with the necessary features of a trust, and here the most significant feature is whether or not L
p. 276 requires, and B understands, that B must keep the loan moneys separate from all of his other moneys. In *Quistclose* and *Carreras Rothmans* (1985), for example, special bank accounts were set up to receive the money. In *Charity Commission v Framjee* (2015) Henderson J said ([28]):

> *Although not a pre-requisite, if there is a requirement for the money to be held by the recipient in a separate account, that will be a strong pointer in favour of the existence of a trust: see the Twinsectra case, at para 95, where Lord Millett referred to 'the evidential significance of a requirement that the money should be kept in a separate account'.*

(See also *Gabriel v Little* (2013), [43]; *R v Clowes* (1994) at 325j.)

11.52 Payment into B's solicitor's client account is sufficient for this purpose, because although a solicitor's client account mixes money from different clients, it is a trust account and there are specific rules by which solicitors track each client's equitable interest in the account. If neither L nor B see anything wrong in paying the loan money into an account in which B holds his own money, say her current account at a bank, this should give rise to a strong presumption that whatever the terms of the loan contract, including the use of the word 'trust', there was no intention to create a QT.

11.53 In *R v Common Professional Examination Board, ex p Mealing-McCleod* (2000), the contract of loan between L, B's banker, and B included a provision in the following terms: 'You must use the cash loan for any purpose specified overleaf … You will hold that loan, or any part of it, on trust for us until you have used it for that purpose.' That seems straightforward enough. But one should still look at how the money was advanced.

11.54 Assume you have current account with your bank with £1,000 in it, and you want to borrow £10k to buy a second-hand car. There are two ways in which the bank can advance you the 'loan money'. One would just be by giving you a £10k overdraft facility on your current account. When you draw upon your account taking it into overdraft, you will be charged interest by your bank. The second way is by the bank's crediting your account with £10k, raising the balance to £11k; the bank will also open a 'loan account', which is not an account you can draw upon—what it does is simply record the interest charges and your loan payments until your debt to the bank is fully discharged.

11.55 What if the bank did the second of these two, and paid the loan money into B's current account, thereby mixing the QT moneys with B's? That would strongly raise the suspicion that the contractual provision, especially if this was the bank's standard form, probably inserted on a solicitor's advice at head office to take advantage of the decision in *Quistclose*, would not reflect an intention on either B or L's local loan officer, who having no clue what it means, that the money was to be held on trust, for neither seems to think the 'trust' moneys should be kept separate. Of course one could take the view that B is bound by whatever documents he signs whether he understands them or not (*Twinsectra* [71], **11.56**, **11.59**) but one might reply that B's objective intention should be based on how the contract was explained to him, especially in a consumer context. Your
p. 277 humble author is preternaturally lazy when it comes to empirical research, but if you are not, here is a project you can undertake which might yield some interesting results. Go to the local bank branches in your area and say of course that you are pursuing a research project, and ask to look at their personal loan agreements. See if they have a QT clause as in **11.53**, and if they do, ask the loan officer what it means. One can easily imagine the adviser's saying something like 'it means you must spend the loan money on the purpose you told us about in applying for the loan', which of course indicates no intention to create a trust as opposed to a mere contractual obligation.

11.56 *Twinsectra* itself was a very close case on the facts. Carnwath J at first instance found that the lender and the borrower never really considered a trust of the loan moneys, leaving it up to their respective solicitors; for their part, a provision that the loan money was to be used solely for the acquisition of property formed part of the loan documents; but the solicitors never discussed the provision. In this respect the case was far from the typical purchaser's instruction to a solicitor under an SAT to complete a sale of a specific piece of land. Carnwath J decided that the purpose was too vague, and did not really form part of the parties' intentions in concluding the contract. Essentially, Carnwath J found that the restriction to property did not form part of the final contract. However, this decision was overturned in the CA, and the HL agreed. In both places much greater emphasis was placed on the presence of the provision in the loan documents, and it was held that 'the acquisition of property' was a trust obligation certain enough to be enforced, a point further discussed below (**11.59**).

Certainty of subject matter

11.57 Normally there is no difficulty in specifying the subject matter of a QT—it is just the money advanced under the loan. But assuming that the banker–customer QT set out at **11.53** is valid despite the immediate mixing of the trust moneys with the customer's own (**11.55**), then the principles of tracing money through bank accounts will have to be employed (**12.14** et seq) to determine whose money, the QT trust money or the borrower's own money or both of theirs, is being used in any particular expenditure.

11.58 Remember that the QT and the SAT are bare trusts but alongside which the borrower or agent is bound by contractual terms or agent's instructions. The bare beneficiary can often (and always in the case of a bare trust subject to agent's instructions, because an agent's instructions can always be revoked, even if this amounts to a breach of contract (Penner (2021a), 303)) call for the property to be returned.

Certainty of objects

11.59 The HL in *Twinsectra*, applying the 'is or is not' test from *McPhail* (**4.14**), found that 'the acquisition of property' was a purpose that was certain. This is very contestable. Although your author agrees that this is the correct test, it still requires that it is certain whether any possible expenditure of the trust money clearly 'is or is not' within the purpose. What does 'property' mean here? Land? Any interest in land, such as the interest of
p. 278 a mortgagee? Business supplies? A new necklace for the borrower's wife? It is fair to say that when the loan agreement was finalised, the parties were not at all interested in this provision, focussing instead on the interest rate, and the CA and the HL got into a muddle over this because the *original* negotiations for the loan concerned the purchase of a specific parcel of land, which is obviously certain, and without thinking seemed to believe the certainty of that carried over to the vague purpose expressed in the documents which were exchanged prior to the final loan agreement.

11.60 In *Twinsectra* Lord Millett said ([101]):

> *Provided the power is stated with sufficient clarity for the court to be able to determine whether it is still capable of being carried out or whether the money has been misapplied, it is sufficiently certain to be enforced. If it is uncertain, however, then the borrower has no authority to make any use of the money at all and must return it to the lender under the resulting trust. Uncertainty works in favour of the lender, not the borrower*

This passage should be approached with some caution. If it means that if the intention to create a QT was clear, and the money passes from L to B, but an uncertainty arises, and then until the uncertainty is resolved B would have no right to use the money, then what Millett says is obviously correct. It is submitted, however, that this point should not displace the doctrine that where the initial intention to create a trust at issue, vagueness, hence uncertainty, about the trust subject or objects has the regular 'reflex action' (**5.3**) of generating a similar uncertainty as to whether a trust was genuinely intended at all.

The extent of the trust 'purpose'

11.61 In *Twinsectra* Lord Millett pointed out ([98]) that a trust does not fail merely 'because the settlor's purpose in creating it has been frustrated: the trust must become illegal or impossible to perform. The settlor's motives must not be confused with the purpose of the trust; the frustration of the former does not by itself cause the failure of the latter.' The point here is that one's ultimate goal in setting up a QT may have been thwarted, but that does not mean that the trust did not operate according to its terms. My purpose in providing for my children under a trust might be to make them happy, but if the trustee complies with the terms of the trust by transferring trust assets to them and yet they turn out to be ungrateful and unhappy, then my motive for the trust has been thwarted, but the trust 'purpose' embodied in its terms, has not. Likewise, a QT trustee who correctly applies the trust property according to the loan purpose disposes of the property correctly according to the terms of the trust, and at that point the trust over the property comes to an end.

11.62 Unfortunately, the confusion of the motive for or ultimate goal of QT with a proper application of the trust property according to loan purposes under its terms has dogged QT cases. In *Re EVTR* (1987) the appellant, who had received £250,000 following a premium bonds win, advanced £60,000 to his old employer to enable it to purchase new equipment. The employer then contracted with an equipment supplier and a
p. 279 leasing company, paying over the £60,000. The supplier provided temporary equipment until the new equipment could be delivered. The employer became insolvent before the new equipment arrived, and the supplier and leasing company refunded £48,000 to it. The CA held that, although the funds that had been advanced were properly paid out, the trust continued to the extent that, when the ultimate purpose failed, the refund was held for the original provider. Dillon LJ said:

> *True it is that the £60,000 was paid out by the [employer] with a view to the acquisition of new equipment, but that was only at half-time, and I do not see why the final whistle should be blown at half-time.*

11.63 The problem here, of course, is that the employer's payment out of the money appears to be the only appropriate point at which the trust relationship ends and its relationship with the provider of the funds becomes that of debtor and creditor. If that is not full time, what is? When the equipment has been used for a while? What if it transpires that after a year the equipment turns out not to be much use, and is sold? Are the proceeds of that sale to be held on trust for the original provider? Had the purchase gone ahead so no refund arose, the court could only have dated the transition from the trust relationship to one of debtor and creditor when the money was paid, and so it should have here.

11.64 It is submitted that the CA must have imposed some kind of constructive trust giving the provider an equitable title in the traceable proceeds of his loan money. There was, however, no basis in authority for such a trust, and it seems to give the provider an unjustifiable priority over the company's other creditors. Had it been found, on the true intention of the parties, that the appellant was to retain an equitable interest in the equipment and any traceable proceeds until he was paid back his loan, then the appropriate finding would have been, following *Re Bond Worth Ltd* (**5.84**), that he had an equitable charge, and that this was not a QT at all. Such a charge would have to have been registered to be valid against the company's creditors or liquidator.

11.65 The second case, *R v Common Professional Examination Board, ex p Mealing-McCleod* (2000), decided by a panel of two in the CA, is a tissue of confusions. A law student, following several court actions against the Common Professional Examination (CPE) Board, was liable to it for substantial legal costs. When she pursued a further legal remedy, the Board was awarded an order for security for costs, ie the student had to pay £6,000 into court before the action would proceed. She obtained the £6,000 from her bank, with the provision in the loan agreement quoted at **11.53**. The student paid the money into court, but as she was successful in her action, the money was not required to pay any costs of that action to the Board. The Board, however, claimed the money to defray the earlier costs awards against the student, which were still unpaid. Whether or not the Board's claim that money paid into court to cover the possible costs of one action should be available to pay the cost of previous ones was good in law, the basis upon which the CA refused the Board's claim was that the money was held upon a QT. At trial, Hidden J got it absolutely right. He held that, while there was an express
p. 280 QT of the money, the trust element ended when the student paid the money into court; and even if the trust endured beyond this point, the court, the recipient of the money, had no notice of it, so took free of any residual trust.

11.66 The CA, allowing the student's appeal, held that because the express agreement was that the money should only be paid as security for the student's costs in the particular action, and since the funds were not so required, the funds remained bound by the trust and could be demanded from the court by the student who would be bound in trust to return them to the bank. The trust of the money bound the court, irrespective of its notice of the trust, for the court was a volunteer, and 'effectively in the position of a stakeholder' (per Slade LJ). With respect, this reasoning is insupportable. It is true that a QT only comes to an end when the trust money is properly applied by the trustee/borrower (here the student) for the loan purpose, whereupon the trust disappears and the borrower is only personally bound to repay the money. But the only 'purpose' for such a loan is to make the proper payment under the loan agreement because, once that is done, there is no longer any trust corpus upon which any trust obligation by the borrower can bite. Here, that purpose was fully accomplished when the student paid the £6,000 into court to provide security for costs.

11.67 Since that payment was properly made, the trust over the money came to an end. Thus the 'purpose' of the loan that defines the extent of the trust cannot be made to encompass all the intended consequences that are expected to flow from the proper application of the loan money. On the CA's broad reading of purpose in this way, the money actually paid to creditors under a 'staving off bankruptcy' trust (**11.38**), or the dividend money had it been paid to the shareholders in *Quistclose* itself, would be held on trust by these payees to return to L if it turned out that the bankruptcy or liquidation was not averted: that was the 'purpose' of the loan broadly speaking. But if the trust attaches to that, not only is the trust an invalid purpose trust, but the whole point of the exercise would be useless, because if the creditors or shareholders were to receive their payments not as *theirs beneficially*, but on trust until the bankruptcy or liquidation was averted, then these payments would not satisfy their claims against the company thus allowing it to stave off its bankruptcy or liquidation, and would indeed almost certainly precipitate the bankruptcy or liquidation.

11.68 And this applies across the board to QTs. The money is only good to B if he can pay it over beneficially to third parties to accomplish the purpose of the loan. That B holds it in trust himself until he does so cannot alter his power to confer beneficial legal title on his payees if the loan is to have any value to him. Thus the terms of the trust defined by the 'purpose of the loan' must be restricted to the purpose of transferring the beneficial legal title to the money to the proper recipients as defined by the loan agreement.

11.69 Furthermore, putting these objections to one side, even if the L were to try by its loan agreement to bind third-party recipients to hold the payments they received from the borrower on trust, it could not do that simply by making it a term of its agreement with B. These third-party recipients would only hold the property p. 281 on trust if they were to undertake to do so, to either L or B, and in none of the cases are those the facts. Accordingly, the issue of the court or any recipient being a volunteer or having notice is perfectly irrelevant, because if B was entitled under the loan agreement to pay the money to the third party, then full beneficial legal title to the money was properly paid under the loan arrangement in full compliance with its trust provision. A third party could be bound only where the loan money was improperly paid, ie paid in breach of the trust in so far as it was specified in the loan agreement (and this happened neither in *Re EVTR* nor in *R v CPE Board*), the third party being bound either as a volunteer or, having given consideration, having had notice of the breach of trust (**2.56** et seq).

11.70 Finally, if any more need be said, on the CA's reasoning, on payment of the £6,000 into court the court would either itself have been under an obligation to keep that £6,000 separately, as trust money, or be considered a wrongdoer, since, according to the CA, the money was bound by the trust throughout. Really, however, as in *Re EVTR*, the court was merely imposing a constructive trust because it felt it was the just thing to do in all the circumstances, but with even less justification here, because at least in *Re EVTR* the holder of the property was B. Here, the constructive trustee, ie the court, was a third party who was transferred the legal title to money in full compliance with the QT agreement with no notice of its provisions.

11.71 It is submitted that the only conceivable way to bring the decisions in *Re EVTR* and *R v CPE Board* within workable trust law principles is to analyse them along the following lines: consider the case where L transfers the money into B's account with his bank, and then B transfers the money to his solicitor, to hold on trust for him in the latter's client account, prior to making a purchase that will carry out the purpose of the loan. Now assume that B becomes insolvent. It would seem appropriate to allow L to claim that B's right to the money in his solicitor's client account should be held on trust for L, on the basis that B's transfer to his solicitor was merely preparatory to his expending the loan moneys. Notice that the solicitor does not, under this analysis, hold the money on trust for L, as the courts in *Re EVTR* or *R v CPE Board* would have it. Rather, B himself holds his right against the solicitor on bare trust for the lender, as an asset that is merely a change in form from his prior right to the money in his own bank account. On this analysis, *the rights B held* to the refund in *Re EVTR* and to the repayment of money deposited in court in *R v CPE Board* were held on trust for the lender. Nevertheless, this analysis still requires one to determine at which point the trust moneys are properly expended according to the trust terms, and thus it would still seem that the cases were wrongly decided, as these rights were not rights acquired merely in preparation for carrying out the trust purpose; rather, they were rights that adventitiously arose following the expenditure of the trust moneys in complete fulfilment of the trust purpose.

Policy considerations

11.72 We have already observed (**11.38**) that some examples of QTs are attempts to stave off the bankruptcy of B. In certain circumstances, the use by B of the loan money to pay certain creditors might amount to an
p. 282 unlawful preference (**5.85**) or constitute 'fraudulent (or unlawful) trading'. (See in general Stevens (2004); Hudson (2017), 798 et seq.) We shall not explore these issues for a simple reason: it is not the QT itself that constitutes an act of unlawful preference or fraudulent trading *unless* the terms of the loan detailing its purpose, in particular which expenditures B is entitled to make of the QT money, themselves disclose an intension to so act. In that case the QT may be an illegal contract/trust (**3.80** et seq), and so invalid.

Unincorporated association trusts (UATs)

11.73 An 'unincorporated association' (UA) is a collective body of individuals, like a student law society, which does not have its own legal personality as a company does, hence the name *unincorporated* association. In *Conservative and Unionist Central Office v Burrell* (1982), Lawton LJ stated (at 4) four criteria for the existence of an unincorporated association. Such an association will exist where there are:

> *[1] two or more persons bound together for one or more common purposes, not being business purposes, [2] by mutual undertakings, each having mutual duties and obligations, [3] in an organisation which has rules which identify in whom control of it and its funds rests and on what terms and [4] which can be joined or left at will.*

11.74 The existence of mutual undertakings giving rise to mutual duties and obligations indicates that the members are bound by a contract *inter se* (ie amongst themselves). Each member is party to a contract that creates the legally binding rules of the association. So, for example, the contract amongst the members of a student law society may set rules about joining or leaving the society, about membership fees, about electing a president or treasurer, and so on. The last requirement Lawton LJ gives, ie that the association can be joined or left at will, is ill put. Read strictly, it must be doubted, because there may be rules limiting both who can join the association and upon what basis, and similar rules about leaving. The idea underlying this criterion is that any individual enters the contract voluntarily.

11.75 A question that immediately arises is how UAs 'hold property' on behalf of their members. The question is in a sense meaningless, because UAs have no legal personality, so they cannot own anything. Reformulated, the question is on what basis do titleholders of property hold that property if it is intended to be used for the members of the UA? Prior to its decisive rejection by the PC in *Leahy v A-G for New South Wales* (1959) it was thought that the property was held on a kind of valid, anomalous purpose trust (**7.20** et seq). So leading up to *Leahy* there was a line of cases which tried to deal with the property of UAs on a purpose trust basis, leading to all sorts of difficult issues. Happily these cases are no longer authoritative.

11.76 The correct analysis may already have occurred to you, and is completely in keeping with the analysis of SATs and QTs, which is that the titleholders hold their property on a nomineeship, a bare trust yet one subject to contractual obligations created by the members, the rules of their UA. This analysis of the way in which unincorporated associations receive gifts and hold property is generally termed the 'contract-holding theory', although this term is misleading if it obscures the trust element of the relationship, which does sometimes happen in judicial pronouncements, particularly in the context of gifts to UAs.

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11.77 In *Neville Estates Ltd v Madden* (1962), Cross J interpreted *Leahy* to hold that there are three possible constructions of a gift to a UA. The first is as a gift to the individual members as co-owners, whereby each may take their own share. In reality this is not a gift to the UA *as a UA* at all; rather the gift is to a group of individuals who are just identified by their membership in the UA, and it is not clear that a gift has ever been construed in this way in any actual case. Secondly, the gift may be to the individual members (at 849):

> *but subject to their respective contractual rights and liabilities towards one another as members of the association. In such a case a member cannot sever his share. It would accrue to the other members on his death or resignation, even though such members include persons who become members after the gift took effect ...*

This is perfectly correct so long as 'subject to their respective contractual rights and liabilities' refers to the contract governing the nomineeship under which the titleholders to the assets, ie the contractual obligations binding the bare trusts for the UA membership on which the titleholders hold the assets. This is important.

One cannot hold property for others 'under a contract'. I cannot transfer a title to some asset to you on the basis that you will hold it under some contractual obligations you owe to someone else. If you agreed to do so, that would be just a bare promise you owe me, unsupported by consideration. Even if I paid you to do this, that would just be a contractual obligation *to me* to use *your property*, the title now in your hands, for the other parties to the contract. It could not create any rights in them, and certainly no beneficial interest for them in the property I transferred to you.

11.78 Cross J continued (at 849):

> *Thirdly, the terms or circumstances of the gift or the rules of the association may show that the property in question is not to be at the disposal of the members for the time being, but is to be held in trust for or applied for the purposes of the association as a quasi-corporate entity. In this case the gift will fail unless the association is a charitable body.*

This is also quite correct. Nothing stops a testator or *inter vivos* donor from trying to create an invalid purpose trust, though his efforts will be in vain. *Re Lipinski's Will Trust* (1976) provides an illustrative example.

11.79 *Re Lipinski* concerned a gift to a UA that could well have been construed as a purpose trust. A testator left half of his residuary estate to 'the Hull Judeans (Maccabi) Association in memory of my late wife to be
p. 284 used solely in the work of constructing the new buildings for the Association and/or improvements to the said buildings'. Note how close this gift is to the one that failed in *Re Endacott* (**7.21**). Interpreting the provision, Oliver J felt that little turned on the fact that the gift was expressed as a memorial to the testator's wife—while that expressed a tribute the testator wished to pay, it did not, by itself, indicate a desire to create a perpetual endowment. Neither did the fact that money was to be available solely for construction or improvements indicate a perpetual purpose, because such money could be spent right away—'improvements' is different in this respect from 'maintenance', which may well indicate a perpetual purpose trust. Framing the legacy in terms of a sole purpose only ruled out construing the gift as one to the members absolutely in equal shares.

11.80 Oliver J interpreted the gift to be a valid one to the UA. He said:

> *If a valid gift may be made to an unincorporated body as a simple accretion to the funds which are subject-matter of the contract which the members have made inter se … I do not really see why such a gift, which specifies a purpose which is within the powers of the unincorporated body and of which the members of that body are the beneficiaries, should fail. Why are not the beneficiaries able to enforce the trust or, indeed, in the exercise of their contractual rights, to terminate the trust for their own benefit? Where the donee body is itself the beneficiary of the prescribed purpose, there seems to me to be the strongest argument in common sense for saying that the gift should be an absolute one within the second category, the more so where, if the purpose is carried out, the members can by appropriate action vest the resulting property in themselves, for here the trustees and the beneficiaries are the same person.*

11.81 In *Re Recher's Will Trusts* (1972), Brightman J expanded on the nature of the second kind of gift (at 539):

> *In the absence of words which purport to impose a trust, the legacy is a gift to the members beneficially, not as joint tenants or as tenants in common so as to entitle each member to an immediate distributive share, but as an accretion to the funds which are the subject-matter of the contract which the members have made inter se.*

Again, this is also quite correct so long as the accretion to the funds means an accretion to the UAT.

11.82 We can spell out the UAT a little more by looking at a typical arrangement. Typically a UA will have a treasurer who holds title with himself or other trustees of the UA assets, such as land if the UA is a club or recreational UA, bank accounts, chattels (the furniture in the clubhouse, sporting equipment), and so on. The treasurer-trustees of the association hold the association's funds on bare trust for the members of the association, to deal with the funds according to the instructions properly given to them (sometimes called contractual 'mandates') which may be individual and specific, eg when the membership together or through the decisions of the UAs executive directs the trustees say, to sell a building, or standing orders, which authorise the trustees, say, to pay recurring bills. All of these powers to direct the trustees arise under rules of
p. 285 the association created by the contract of the members *inter se*, which will usually generate a governance structure, rules about eligibility for membership, and so on.

11.83 Transfers of property 'to the UA', whether made by members as membership fees, or by outsiders, eg as fees paid to use the UA's premises for events, and gifts *inter vivos* or testamentary are just settlements of property, ie transfers on trust. Thus the funds become subject to the bare trust with mandate that determines the way the treasurer-trustee deals with all the rest of the UA's assets. (See *Re Ray's Will Trusts* (1936); *Abbatt v Treasury Solicitor* (1969); *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society* (No 2) (1979).) This is all perfectly conventional as a matter of trust law. S can always transfer property to T to hold on the same trusts it is holding other assets upon.

A donor's claim for the return of the money where the basis of the gift fails

11.84 Swadling (2000), 376, raises the possibility that a donor of money to a UA may have a claim for the return of the money in certain circumstances:

> *In the case of money subscribed to a movement or campaign [**7.45** et seq] via its secretary, it is tolerably clear that any surplus left when the campaign is abandoned or frustrated must be returned as on a failure of consideration. This is a matter for the law of unjust enrichment. It is by no means clear that the same should not apply to property given on the basis that it be subject to the contract between the members [of a UA]. Much must depend on the precise construction of the basis on which the donations were given and, in turn, on the rules of the society.*

The clearest case in which such a claim could be made would be where the UA shortly disbands following the receipt of the gift, for the donor could claim quite reasonably that she made the gift for the members of the UA *as members*, ie on the basis that the UAT would continue to govern the use of the funds. On the other hand, any donor to a UAT must take the risk that the UA will disband some day, so the possibility of such a claim should lapse after a reasonable period of time.

Duration of the trust

11.85 There is no issue with an UAT lasting for an excessive duration (**3.87** et seq), as being a bare trust, the interest of the member-beneficiaries is always vested in possession. As members leave and join they are added to or deleted from the class of beneficiaries under an explicit or implicit power of the trustees or members to add or delete members-beneficiaries. There are no obligations to unascertained future members, because they are not beneficiaries, even contingent ones, under the trust at any time.

S 53(1)(c) LPA 1925

11.86 It might be thought that UATs give rise to a s 53(1)(c) problem, ie that whenever a member leaves or a new member joins all members of the old class of beneficiaries must, in writing, assign their trust interests under the trust to the new class of member/beneficiaries, but this is a mistake, which follows from an over-
p. 286 broad interpretation of the section. The section does not apply to powers to add or delete beneficiaries, and every member of a UA understands that under the rules he will lose his interest in the trust property should he leave or be expelled from the association, and so this possibility is part and parcel of his interest (**9.22** et seq).

Inward versus outward-looking purposes

11.87 One hold-over from the idea that UA's 'held' their property under an anomalous valid purpose trust was that the purpose should be 'inward-looking', in the sense that the purpose should benefit the members and only the members. But this is quite wrong. The members, through their contractual mandates and standing orders, can direct the treasurer-trustees of the UAT to spend it in any way they want—it is their property after all. In *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No 2)* (1979) Walton J got it right (at 626–627):

> *whether the purpose for which the members of the association associate are [sic] a social club, a sporting club, to establish a widows' and orphans' fund, to obtain a separate Parliament for Cornwall, or to further the advance of alchemy. It matters not. All the assets of the association are held in trust for its members—of course subject to the contractual claims of anybody having a valid contract with the association—save and except to the extent to which valid trusts have otherwise been declared of its property. As long as the 'purpose' framing the gift is one which the members themselves pursue by spending their own money under the rules of their association, the gift is to their 'inward-looking' benefit, and the court can construe such a gift as an accretion to the association's funds.*

The dissolution of unincorporated associations

11.88 In principle, what should happen when an UA decides to disband or dissolve should be straightforward. The members, either via decisions of an executive committee properly empowered by their contract of association or by voting at a general meeting, should resolve that the UA should come to an end and a decision made about what the treasurer-trustees should do with the UAT assets. Unfortunately, in many cases UA's come to an end without any decisions of this kind being made. For example, membership dwindles, the UA assets stop being used, and so on, and then one of the treasurer-trustees dies, or the only one, and then the court has to determine where the assets she holds on trust should go.

11.89 The leading case on the dissolution of UAs is *Hanchett-Stamford v AG* (2008) where a UA had dwindled to one member, who held the title to the UA's only significant property, a real property. Lewison J quite properly held that, all the contractual obligations of the UA having come to the end with the death of the penultimate member, that she was solely entitled to the property.

11.90 Of course if the rules of a UA provide for the distribution of its assets on dissolution, these must be followed. For an example of a case where such rules were construed and applied, see *Hardy v Hoade* (2017). But
p. 287 often the court has to go through a difficult exercise in determining who is entitled to the assets where the rules are not very clear. The judge needed to undertake such an exercise in *Re Horley Town Football Club* (2006), distinguishing the rights of different categories of members.

11.91 UAs are often astonishingly cavalier about keeping records recording the basic contract amongst themselves, even keeping records of who are members of the association, or what levels or categories of members there are and who is what kind of member (full member, half member, associate member, honorary member, and so on), and even when the assets are substantial, running into the millions of pounds. Can your humble author please suggest the if you are ever a member of a UA, you do your best to make sure basic records are kept and give legal advice when necessary, because the failure to do so creates such a legal mess that it will almost certainly involve protracted litigation when, for example, the UA is dissolved.

Further reading

Chambers (1997 Chapter 3, 2004)

Conaglen (2010, 2016)

Davies (2015b)

Edelman (2017)

Glister (2004)

Hudson (2017)

Matthews (2005)

Millett (1985, 1998a)

Penner (2004, 2018a)

Smith (2004)

Stevens (2004)

Swadling (2004)

Watts (2016)

Must-read cases: *Target Holdings v Redferns* (1995); *AIB Group v Redler* (2014); *Twinsectra v Yardley* (2002); *Bellis v Challinor* (2015); *Re Lipinski's Will Trusts* (1977); *Hanchett-Stamford v AG* (2008)

Self-test questions

1. Natasha transfers £1m to her solicitor, Karen, to complete the purchase of a house on 1 July. On 25 June, Karen transfers £15,000 from her client account to her law firm's current account as an advance payment for her services to Natasha. Karen goes on holiday and forgets about completing the land transfer on 1 July. The vendor then tells Natasha because of her failure to complete on time, he is repudiating the contract and keeping her £100,000 deposit. Advise Natasha.

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2. Brian, a collector of art, transfers £50,000 to Frances, a dealer, to 'buy antiques for me that have good investment prospects'. Brian tells Frances that she is entitled to 'take a 10 per cent commission' on any purchases she makes. Frances pays the money into her current business account, which is in overdraft, raising the balance to £40,000. She then (i) spends £30,000 on seventeenth-century furniture; (ii) draws a cheque on the account for £3,000 as her personal commission, which she pays into her personal account; (iii) uses £2,000 to pay for travel and hotel expenses to attend an antiques auction where she buys nothing; (iv) transfers £1,000 to another dealer as a deposit on a future purchase, which is not, in the end, completed. With the balance in the account at £4,000, Frances's bank fails. Advise Brian.
3. Raymond, a builder, borrowed £20,000 from Floyd's Bank. The loan document stated 'You will hold this money on trust for us until you spend it on the Loan Purpose (see overleaf)' and under 'Loan Purpose' was written 'for business purposes'. The loan was negotiated at his local Floyd's branch and Floyd's Bank paid the money into Raymond's business account at his branch the next day (the bank's standard practice). In the next several weeks Raymond drew cheques on the account (i) to pay £3,000 in past parking fines he mostly incurred parking his van near job sites; (ii) to pay his brother £4,000 he owed him, money borrowed to buy his van; (iii) to give £1,000 to his mother as a birthday present. Discuss.
4. How do unincorporated associations hold property?
5. Smith dies, leaving £100,000 to the Aylesbury Morris Dancing Society 'for the purpose of building a Morris Dancing Centre as a memorial to myself'. Shortly after Smith's death the club decides to wind up, as most members wish to join another morris dancing club. The treasurers report that the Society's current funds are £8,150, which amounts to a share of £163 for each of the 50 members, a figure that does not include the bequest of Smith, of which they have just been advised. Advise the treasurers.

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