# Redefining the Quistclose trust

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Barclays Bank Ltd v Quistclose Investments Ltd [1970] A.C. 567 (HL)
Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 A.C. 164 (HL)

A Quistclose trust is a type of loan arrangement that creates a trust over the loaned money

## *Conv. 26 Introduction

The case of *Barclays Bank v Quistclose Investments Ltd* [1] established that, where a person transfers money [2] to another for a specific purpose, subject to conditions on the use of the money such that the recipient has no beneficial interest in the money, the recipient will hold the money on trust. In the later House of Lords case of *Twinsectra Ltd v Yardley*, [3] it was held that the *Quistclose* trust was a resulting trust for the benefit of the transferor, with a power to apply the money to the agreed purpose. The doctrine has been applied in a number of domestic and commercial scenarios; it has been applied principally [4] in the event of the insolvency or bankruptcy of the recipient, where it has been used to establish that the money does not form part of the assets of the insolvent company.

The *Quistclose* trust has been the subject of extensive academic commentary, [5] which has largely focused on whether the *Quistclose* trust is, indeed a true trust, and how the trust should be conceptualised within the existing categories of trust. One question which has not, however, received particular attention is whether, and on what basis, the recipient of the money owes the transferor a fiduciary duty. In this article, I will examine whether, in the *Quistclose* jurisprudence, an examination of the facts reveals something more than a contractual relationship which justifies applying equitable principles in a commercial context. I will also consider whether an alternative construction is applicable to cases in which it is clear that no fiduciary duty exists.

A further question that arises is whether the presumption of a lack of intention to pass beneficial title, which is central to the establishment of a resulting trust, [6] can be applied in cases where the transfer of property is not voluntary. It has been held that a non-voluntary transfer, as where the property was transferred by way of loan, is inconsistent with a resulting trust. [7] Again, a close examination of the *Conv. 27 facts of the cases shows that it is possible to reconcile the presumed resulting trust model with the *Quistclose* trust.

A relatively minor redefinition of the necessary conditions of the *Quistclose* trust, which is largely consistent with the jurisprudence, reveals that the doctrine is consistent with both equitable principles and trust orthodoxy. In a minority of cases, including, in particular, the leading case of *Twinsectra*, [8] it will be shown that it is neither necessary nor consistent with orthodoxy to hold that a trust exists.

## The Quistclose trust

A Quistclose trust is a trust created where a creditor has lent money to a debtor for a particular purpose.

The case of *Quistclose* [9] involved four main parties: Barclays Bank, the defendants; Rolls Razor, the washing machine company built up by John Bloom; Quistclose Investments, John Bloom's investment company; and Sir Isaac Wolfson, the financier who underwrote the hire purchase agreements that Rolls Razor's customers entered into.

In early 1964, Rolls Razor was in deep financial trouble: sales had collapsed and the company had an overdraft of £484,000 with Barclays Bank. Bloom, needing money fast, approached Sir Isaac Wolfson [10] for help. Wolfson agreed to provide £1 million, provided that money could be found to pay a previously declared shareholders' dividend. Bloom was able to borrow this money through Quistclose Investments. A cheque for the exact amount needed to pay the shareholders—£209,719. 8s. 6d.—was sent by Quistclose to Rolls Razor; Rolls Razor sent it on to Barclays Bank, with a covering letter confirming an earlier conversation to the effect that the money was to be paid into a new account and that it was only to be used to pay the shareholders' dividend.

In the event, the rescue attempt failed and Rolls Razor entered voluntary liquidation two days later. Barclays Bank, purporting to exercise their right of set-off, amalgamated the two accounts, reducing Rolls Razor's indebtedness to the bank to £274,000.

Quistclose claimed that the money held in the shareholders' account was not the beneficial property of Rolls Razor, but that, being impressed with a specific purpose, was held in trust. The House of Lords agreed: Lord Wilberforce, giving the only substantive judgment in the case, held:

"That arrangements of this character for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person, has been recognized in a series of cases over some 150 years." [11]

The doctrine was not reconsidered by the House of Lords until the case of *Twinsectra*, [12] in which Lord Millett analysed, in detail, the theoretical basis of the *Quistclose* trust. In Lord Millett's analysis, where A transferred money, by way of loan, gift or consideration for a contract, to B, for the payment of a specific ***Conv. 28*** person, C, [13] or for a specific purpose, and the conditions of the transaction made it clear that the money was to be held separately and not to become part of B's general assets, B would hold the money on a resulting trust for the benefit of A with a power to pay the money to C or to apply it to the specified purpose. [14] If the property was identifiable, such a trust would arise by operation of law, because there was no intention, on the part of A, to pass beneficial title to B.

Lord Millett's analysis differs from Lord Wilberforce's in that there is no longer a division between the primary "purpose" trust [15] and the secondary resulting trust that arises when the purpose can no longer be carried out. The *Quistclose* trust is a presumed resulting trust ab initio and, as such, preserves the proprietary interests of A throughout the transaction, including on the insolvency of B.

The requirement that the money be returned to A if the purpose fails or is no longer capable of being carried out may be inferred from the condition that the money cannot be used other than for the specified person or purpose [16]: it does not need to be specified as part of the transaction.

Although there remains some academic controversy over the true nature of the Quistclose trust, [17] Lord Millett's analysis is the authority for England and Wales. His judgment has also been influential in other jurisdictions, including Canada, [18] Australia, [19] Hong Kong [20] and New Zealand. [21]

**A "surer ground"**

In an article published in 1985, [22] Peter Millett QC [23] identified an additional element that was relevant to determining whether the relationship between lender and borrower was fiduciary or merely contractual. He noted that, in *Re Northern Developments* [24] and in *Carreras Rothmans Ltd v Freeman Mathews Treasure*, [25] A had an interest, "separate and distinct" [26] from the interest of B, in seeing that the purpose of the loan was carried out. This, he held, was "surer ground" [27] for finding a trust in the case of *Re Northern Developments*.

In *Carreras Rothmans*, A was a tobacco company which had engaged B as an advertising agency. B was in financial difficulty, and A anticipated that, if B defaulted on payments to its creditors, those creditors would turn to A for payment of the borrower's debts: although A might have no legal obligation to pay, B's ***Conv. 29*** creditors had the power to refuse to carry A's advertisements. To ensure that A's planned advertising campaign would go ahead, A opened a bank account and paid money into it for B to meet its debts. On the insolvency of B, the money remaining in the bank account was held to subject to a trust.

In *Re Northern Developments*, a building company ("Kelly") was in financial difficulty. B, its parent company, was concerned that if Kelly became insolvent, it would bring the entire group of companies down. Seventeen banks, which had the parent company or other companies in the group as customers, agreed to lend £500,000 to provide liquidity to Kelly. A bank account was opened in the name of B: money was transferred from this account to Kelly's bank account as and when needed and at Kelly's request. Despite this additional support, Kelly was put into receivership. The question which was before the court was whether the balance of £350,000 in the account was part of Kelly's assets or if it belonged to the lenders.

In these two cases, then, A had an interest of its own in seeing the purpose of the loan carried out. In the case of *Re Northern Developments*, the banks sought to protect the loans they had already made to other companies in the group; while in the case of *Carreras Rothmans*, it was to ensure that the advertising campaign proceeded as planned.

 

**Other pre-Twinsectra cases**

While Lord Millett identified *Carreras Rothmans* and *Re Northern Developments* as showing that the transferor had a "separate and distinct" [28] interest in the transaction, it can be seen that, in the main *Quistclose* cases decided before *Twinsectra*, as well as in many of the subsequent cases, A had its own interest in making the loan which went beyond the normal interest of a commercial lender: A had an interest in the end result of the transaction and in the consequences of fulfilling the purpose for which the loan was made.

The case of *Toovey v Milne* [29] was followed in the House of Lords in *Quistclose*, and is the foundation of the doctrine of the *Quistclose* trust. In this case, Maxton, at the time in debtors' prison, asked his wife to borrow £120 from her brother, Milne, to pay his debts. It is apparent that the lender had a personal interest in achieving not the specific purpose for which the loan was made—Milne had no particular interest in whether the creditors received their due—but in the intended end result of the transaction: the discharge of his brother-in-law from prison and the consequent happiness of his sister. That to achieve this result required the payment of the creditors was incidental: a means to the end that Milne (and his sister) desired.

The other case which was followed by the House of Lords in *Quistclose* was *Edwards v Glyn*. [30] In this case, the end result sought (which was not achieved) was to rescue the firm of Oak & Snow from a predicted run which would cause their bankruptcy. ***Conv. 30***

In *Quistclose* itself, the interest of A in achieving the intended end result is also evident: the majority shareholder in Quistclose Investments was John Bloom, [31] the managing director of the borrower. Bloom's motivation was to keep his main business going: payment of the shareholders' dividend was merely a necessary step to be taken to achieve this end result.

It might, incidentally, be argued that there was a second *Quistclose* trust in existence in that case. If, as has been suggested, [32] Quistclose borrowed the money from Wolfson, [33] then it seems likely that the first loan—from Wolfson to Quistclose—was also impressed with a specific purpose: it was Wolfson who insisted that the shareholders' dividend be paid before he would provide additional finance to Rolls Razor. [34] Subject to the money being identifiable, this first loan would also meet the conditions for a *Quistclose* trust. If this first loan was a *Quistclose* trust, then it can also be seen that, as Stevens notes:

"As Wolfson was making large profits through the hire purchase contracts entered into by purchasers of Rolls Razor machines, he had an obvious interest in keeping the ailing golden goose alive for as long as possible." [35]

This, then, is Wolfson's interest in the end result: paying the dividend—and maintaining market confidence in Rolls Razor—were means to that end. By agreeing to pass the money on, and thereby achieve Wolfson's interests—incidentally but not necessarily Quistclose's own interests—Quistclose became obliged to act in Wolfson's interests.

Other cases heard before *Twinsectra* show that A had an interest in achieving the intended result of the transaction.

In *Re EVTR*, [36] A's interest was in the prosperity of B and the prospect that B might offer him further work. In the Australian case of *Re Australian Elizabethan Theatre Trust*, [37] the aim of A was to benefit a particular charitable cause: the transfer to B was a merely a tax-efficient means of achieving that aim.

Likewise, in the post-*Twinsectra* case of *Cooper v PRG Powerhouse Ltd*, [38] A clearly had an interest in achieving the end result of the transaction—gaining personal ownership of his company car—and passing the payment through the ***Conv. 31*** company was a means to achieving that end. In *Re Yarce*, [39] the aim of the transaction was to provide evidence that B's husband had sufficient means to support himself and was therefore eligible to be granted indefinite leave to remain in the UK. Other cases in which the court has found that money was held on a *Quistclose* trust can be seen to illustrate the same principle. [40]

What can be drawn from all these cases is that A had an interest in achieving the end result of the agreed purpose. And, if there had not been the interest on the part of A in the end result, it is improbable that they would have entered into the transaction: Milne, one may presume, was not in the business of lending money to debtors lying in prison.

 

Another significant feature of these transactions is that in none of those in which the money was loaned, as opposed to given, was the lender asking for interest on the loaned money or imposing a repayment schedule on the borrower: to have done so would have frustrated the lender's aim. In *Toovey*, for the lender to have sought to have enforced the debt would have resulted in the debtor being returned to prison; the formal letter of agreement sent by *Carreras Rothmans* [41] makes no mention of interest or repayment, other than if the agreed purpose could not be fulfilled; in *Quistclose* itself, there was no mention of interest or repayment in the letter sent by Quistclose to Rolls Razor. [42] In *Re EVTR*, [43] the interest accrued on the capital sum while held by the borrower's solicitors [44] was passed on to the borrowers, [45] not returned to the lender as interest on the loan.

These transactions may be characterised as "soft" or even "forgivable" loans: at no interest and with no repayment schedule imposed; or with no intention, on the part of the lender, of enforcing repayment should the money loaned be used in accordance with the agreement. Although these transactions create a debt enforceable against B, the circumstances show that A would have been acting against its own interests was it to seek to enforce repayment of the debt other than at a time when B was able to repay.

### *Twinsectra Ltd v Yardley*

The *Quistclose* trust returned to the House of Lords in 2002 in the case of *Twinsectra*. [46] This case involved unusual facts, which are worth examining in order to determine whether A had an interest in the intended end result of the transaction. ***Conv. 32*** [47]

The two principals in the case—John Yardley and Joseph Ackerman—were both successful businessmen with property interests. Yardley also had interests in the motor trade. Ackerman was one of the founders of and a director of Twinsectra Ltd, a holding company [48] : however, the company was wholly owned by Delapage Ltd, a registered charity. [49]

In 1992, Yardley was negotiating the purchase of a plot of land, some of which he had arranged to sell on for an immediate profit. As there was a delay in obtaining bridging finance from his bankers, Barclays Bank, he approached Ackerman, who offered to provide a four-month loan at 18 per cent, 11 per cent above base rate. Negotiations between Yardley and Ackerman were conducted with some speed: the initial approach was on Friday December 18, 1992; by the following Monday, the deal was agreed in principle. At this point, however, Ackerman, aware that solicitors' undertakings were protected by the Solicitors' Indemnity Fund, asked Yardley for an undertaking from his own solicitor, Paul Leach, to repay the money in the event of Yardley defaulting on the loan. When Leach refused to provide such an undertaking, Yardley asked another solicitor, John Sims, to provide the undertaking.

Sims emerges from the case as a pathetic figure, who was taken in by what now seems to be an obvious fraud: he had been promised $3 million for his assistance in securing the release of a payment of $49.2 million from the Nigerian Ministry of Aviation and Transport. He had already borrowed from Yardley in order to "oil the wheels" of this transaction. In return, he had undertaken to pay Yardley $1.5 million within three months, [50] whether or not he received the expected $3 million from his Nigerian contacts.

In return for a commission of £34,000, which he planned to use as a further bribe, Sims provided the requested undertaking to Ackerman: this included the condition that the money should only be used to purchase property. However, as the loan was about to be finalised, Ackerman unilaterally decided that the agreed interest rate should be increased to 24 per cent, 6 per cent more than the previously agreed figure. Meanwhile, at around 16.00 on the same day, Yardley had secured an offer of a loan from Barclays and had no need for the loan from Twinsectra, particularly given the increased rate. Certainly influenced by Ackerman's late increase in the interest rate, [51] and under pressure from Sims, who was desperate for the deal to continue, Yardley agreed that Sims could take the loan from Twinsectra in his own right, but would continue to represent himself as acting for Yardley.

The reason that Twinsectra required that the money be used only to buy property was not examined in detail at first instance. As Lord Millett noted in a 2011 article, ***Conv. 33*** "it is far from clear what the lender's motive was in restricting the uses to which the money could be applied". [52] Ackerman's solicitor did express concern that the transaction was not within the normal business of a solicitor and thus a claim might not be covered by the Solicitors' Indemnity Fund; however, this concern was not expressed until some time after the condition was included in a draft undertaking. It was suggested, by Carnwath J, [53] that the condition was included with "*Quistclose* in mind". [54] It is also possible that Ackerman's solicitor had concerns about the transaction being ultra vires. Twinsectra was a property company, and while it had the power, by para.3(h) of its memorandum of association, [55] to lend money, such powers were, under the doctrine of ultra vires, only exercisable in pursuance of the

 

company's objects. [56] Lending money for a property deal would be more likely to be regarded as ancillary to the company's objects, hence within the power of the company, than lending money for an unspecified purpose. In this context, that the owner of Twinsectra was a registered charity, hence subject to regulatory oversight by the Charity Commissioners, [57] may have been significant.

What was clear was that the property acquired was not to be security for the loan. It was suggested, by Lord Millett in *Twinsectra*, that such an agreement would have been inconsistent with, though not necessarily fatal to, the finding that the loan money was held on a *Quistclose* trust:

"Arrangements of this kind are not intended to provide security for repayment of the loan, but to prevent the money from being applied otherwise than in accordance with the lender's wishes. If the money is properly applied the loan is unsecured. This was true of all the decided cases, including the Quistclose case itself." [58]

Whatever the reason for having included the condition in his undertaking, Sims did not abide by it. In the event, over £300,000 of Twinsectra's loan was used for purposes other than buying property, including the purchase of vehicles for Yardley's car sales company. Three weeks after the completion of the transaction, on January 16, 1993, Sims became bankrupt and his personal undertaking became worthless.

It is clear that, as far as Yardley was concerned, the repayment of Twinsectra's loan was not his problem. He had not signed a contract with Twinsectra and the liability for repayment rested solely with Sims. However, at trial, Carnwath J had "no doubt" that Yardley had entered into a contract with Twinsectra, with Sims acting as his agent. However, he rejected the argument that the money was held by Sims on a *Quistclose*, or any other sort of, trust: among other reasons, he held that the undertaking provided by Sims did not provide sufficient certainty as to the use of the money:

"Nor does the document itself have the certainty necessary to create a trust. A basic requirement for a Quistclose form of trust is that there is clearly ***Conv. 34*** identified the purpose, failure of which is to trigger the resulting trust in favour of the lender." [59]

The Court of Appeal overturned this finding, holding that the transfer from Twinsectra to Sims had been for a sufficiently specific purpose; and that B did not have beneficial ownership of the money loaned. The money was held separately, in Sims' client account. He therefore held it on a *Quistclose* trust for the benefit of Twinsectra. [60]

On appeal to the House of Lords, Lord Millett analysed the *Quistclose* trust and the underlying principles, finding that, on the facts of the case, Sims held the money on a *Quistclose* trust for *Twinsectra*. [61] Although Lord Millett dissented on the correct approach to be taken in determining dishonesty, which was the issue on which the appeal was determined, his view on the correct approach to the *Quistclose* trust has been accepted as the authority for English courts, and has been influential in other jurisdictions. [62]

### *Twinsectra Ltd v Yardley* —Lord Millett's judgment

In Lord Millett's view, the key question in determining whether the relationship between lender and borrower is fiduciary, rather than contractual, is whether the borrower has free use of the money.

"The question in every case is whether the parties intended the money to be at the free disposal of the recipient: *In re Goldcorp Exchange Ltd [1995] 1 AC 74*, 100 per Lord Mustill. His freedom to dispose of the money is necessarily excluded by an arrangement that the money shall be used exclusively for the stated purpose." [63]

Where, in a payment for a specific purpose, the money becomes part of the recipient's general assets, the money is at the free disposal of the recipient and no trust arises. If a borrower takes out a bank loan and, as part of the contract, agrees that the money is to be used for a specific purpose, no trust arises if it is not part of the agreement that the specific money borrowed is used for the agreed purpose: if the borrower is free to use the money borrowed, other money in his possession or a mixture of the two, there can be no trust.

However, money transferred as part of a contract for goods or services may become subject to a trust, as Lord Mustill noted in *Re Goldcorp*:

 

"That a sum of money paid by the purchaser under a contract for the sale of goods is capable in principle of being the subject of a trust in the hands of the vendor is clear. For this purpose it is necessary to show either a mutual intention that the moneys should not fall within the general fund of the company's assets but should be applied for a special designated purpose, or *Conv. 35 that having originally been paid over without restriction the recipient has later constituted himself a trustee of the money." [64]

Such an arrangement, in Lord Millett's view, imposes a fiduciary duty on B because

"a person who makes money available on terms that it is to be used for a particular purpose only and not for any other purpose thereby places his trust and confidence in the recipient to ensure that it is properly applied. *This is a classic situation in which a fiduciary relationship arises, and since it arises in respect of a specific fund it gives rise to a trust.*" [65] [Emphasis added]

Therefore, where A transfers money to B, on terms that the money is to be used solely for payment to a specific person or group of persons, C, or for a specific purpose, and the money is kept separate from B's own money so that B has no right to use the money other than as agreed, that is sufficient for B to hold the money on a *Quistclose* trust.

In Lord Millett's analysis, where there is a lack of intention that the beneficial ownership should pass with the legal ownership, [66] and the property is sufficiently identifiable, by operation of law, B will hold the money on a resulting trust of the form known as a presumed resulting trust, for the benefit of A. This is "an entirely orthodox example of the kind of default trust known as a resulting trust". [67]

With respect to Lord Millett, this appears to be placing the bar too low: while the specific purpose and identified fund may be necessary to found a *Quistclose* trust, I would argue that those conditions are not sufficient, without more, to impose a fiduciary duty on the borrower. Furthermore, while Lord Mustill held in *Re Goldcorp* that separation of property was necessary for there to be a trust over the property, that does not mean, as Lord Millett appears to hold, that separation of property is sufficient to show that the recipient should hold the property on trust: as discussed below, it is possible for a person to hold money separately and without having a beneficial interest in the money, without a trust being formed. What distinguishes a trust from other circumstances in which a person is holding a separate fund is a fiduciary obligation which goes beyond the contractual duty to pay the money—either back to the original owner or to a third party—as agreed.

**Property, rights and beneficial ownership**

Lord Millett arrived at his conclusion, in part, by a process of elimination:

"As Sherlock Holmes reminded Dr Watson, when you have eliminated the impossible, whatever remains, however improbable, must be the truth." [68]

The unspoken presumption appears to be that, wherever the legal owner of money does not have the free use of that money, a trust of some kind must exist. However, the starting point of an analysis of the ownership of funds held for a purpose must be the recognition that it is possible, in English law, for a person to hold funds *Conv. 36 separately from their own assets and in circumstances in which they do not have the free use of the money, without a trust being formed; and that holding money for another person does not, in itself, impose a fiduciary relationship.

The relationship of payer, payee and stakeholder, in which money belonging to the payer is paid to the stakeholder under the terms of a contract binding all three parties, for payment to the payee once the agreed conditions are met or to be returned to the payer if the agreed conditions are not met, is not a fiduciary relationship. A trust will not arise even where the stakeholder cannot be said to have the free use of the money it is holding, such as where the funds are held in a solicitor's client account and subject to the SRA Solicitors' Accounts Rules. [69]

In the case of *Potters v Loppert*, [70] an estate agent received a sum from the plaintiff as the deposit on a house. The sale was not completed, and the deposit was returned to the plaintiff. In an action for the interest earned by the money while it was held by the estate agent, it was held that the money was not held on trust and the estate agent was entitled to retain the interest. It is not clear, from the reported judgment, whether the deposit account referred to was used solely for client moneys, but it was, at the time, common practice for estate agents to hold client money separately. [71]

 

In the case of *Manzanilla Ltd v Corton Property & Investments Ltd*, [72] Millett LJ considered the position of a solicitor who was holding money as a stakeholder in a property transaction. He analysed the relationship between the three parties—vendor, purchaser and stakeholder—as being formed by two contracts: the first, between vendor and purchaser, was an agreement that the purchaser should deposit the money with the stakeholder; the second contract was a tri-partite contract, by which all three parties agreed the circumstances in which the money should be released to the vendor or returned to the purchaser. The stakeholder was not party to the first contract, which was agreed between vendor and purchaser before the stakeholder's involvement.

Millett LJ went on to hold that

"[t]he relationship between the stakeholder and the depositors *is contractual, not fiduciary*. The money is not trust money; the stakeholder is not a trustee or agent; he is a principal who owes contractual obligations to the depositors: *Potters v Loppert* [73]; *Hastingwood Ltd v Saunders Bearman*. [74] The underlying relationship is that of debtor and creditor, and is closely analogous to the relationship between a banker and his customer." [75] [Emphasis added]

Here is a relationship in which B is the legal owner of money provided by A, with the obligation, if conditions are met, to pay the money to C, and the obligation, if the conditions are not met, to repay the money to A. As, in this case, the stakeholder was a solicitor, the money would have been placed in a client account, unmixed ***Conv. 37*** with the stakeholder's own money; likewise, estate agents are now bound by statute to maintain client accounts and pay any money received from the purchaser into that account. [76] In those circumstances, B has no beneficial interest in the money he or she is holding: solicitors certainly have no right to use client money as their own.

While the stakeholder scenario may be distinguished from the *Quistclose* scenario—there is no need, in the latter, for the payee to be party to the arrangement or even to be an ascertainable person or persons—the features in common are more significant than the distinctions. In some cases, such as *Cooper* [77] or *Challinor v Juliet Bellis*, [78] the facts indicate a relationship much closer to a stakeholder than a *Quistclose* trustee.

The judgment in *Manzanilla* was recently followed by the Court of Appeal in the case of *Bennett v Bristol Alliance Nominee No.1 Ltd* [79]: in that case, the money was held in a solicitor's client account, to be released to the leaseholder on the completion of the surrender of a lease. In the event, the leaseholder went into administration before the transaction was completed. It was held that the money held by the solicitor was held as a stakeholder and was not subject to a trust.

However, in the 1998 case of *Barclays Bank v Weeks Legg & Dean*, [80] heard some 18 months after *Manzanilla*, the Court of Appeal held that money advanced by mortgagees, to be held by the purchasers' solicitors until good, marketable title was acquired, was held on trust by the solicitors for the benefit of the mortgagees. While it is common, in residential conveyancing, for the mortgagee and purchaser to instruct the same solicitor, in none of the three conjoined cases in this appeal were the solicitors acting for the mortgagee [81]: the only communication between them capable of forming a relationship—whether fiduciary or contractual—was the standard form undertaking returned, in each case, by the solicitor to the mortgagee.

Millett LJ, giving the main judgment (with which Pill and May LJJ agreed), noted that the undertakings were *contractually* binding on the solicitors. He continued:

"Such money is trust money which belongs in equity to the bank but which the solicitor is authorised to disburse in accordance with the terms of the undertaking but not otherwise." [82]

That was the extent of the analysis of how, and on what terms, the trust arose; and there was no consideration of the earlier stakeholder cases of *Potters* and *Manzanilla*.

Given the authority of *Manzanilla*, that a solicitor may hold funds in a client account without incurring fiduciary duties towards the provider of the funds, it is difficult to see how the trust in *Weeks Legg & Dean* arises. ***Conv. 38***

 

It may be significant that, between the judgments in *Manzanilla* and *Weeks Legg & Dean*, [83] Chambers' monograph on resulting trusts [84] was published. [85] Lord Justice Millett was clearly influenced by the monograph: in an article published in the July 1998 issue of the *Law Quarterly Review*, he referred with approval to Chambers' principal thesis, that a resulting trust will arise

"whenever the legal title has been transferred to another and the person who provided it did not intend to pass the whole beneficial interest to another." [86]

While there is clear authority that client money in a client account is held on trust, [87] authority for the proposition that the solicitor always holds client money on trust for a person to whom he or she does not owe a fiduciary duty is much thinner. Indeed, before *Weeks Legg & Dean*, there does not appear to be a case in which this was held. Yet in *Twinsectra* [88] Lord Hoffmann held that all money held by a solicitor, whether for an existing client or for another, was invariably held under a trust:

"The trial judge (Carnwath J) did not accept that the monies were 'subject to any form of trust in Sims and Roper's hands'. I do not imagine that the judge could have meant this to be taken literally. Money in a solicitor's client account is held on trust. The only question is the terms of that trust." [89]

Money held in an estate agent's client account is now, by statute, held on trust for the benefit of the intended recipient [90]: such money cannot, therefore, be subject to a *Quistclose* trust in favour of the payer. Without that provision, it is clear that, under usual circumstances and where the agent is acting for and owes a fiduciary duty to the seller, rather than the purchaser, the money is not held on trust for the purchaser. [91]

There is no equivalent statutory provision for money held in solicitors' client accounts. However, it is a standard term, under the *CML Lenders' Handbook*, [92] that money advanced by the mortgagee is held on an express trust for the benefit of the mortgagee until completion. [93] This express trust, therefore, mirrors the *Quistclose* trust. By accepting the mortgagee's advance on those terms, the solicitor becomes an express trustee and subject to fiduciary obligations.

However, in the absence of an express declaration of trust, in cases where the solicitor is not instructed by the mortgagee and therefore does not have fiduciary obligations to the mortgagee, it is not clear how a trust can arise in the absence of a fiduciary relationship, other than if one accepts Chambers' thesis. In that case, the resulting trust arises by operation of law, and any fiduciary duty on the legal ***Conv. 39*** owner arises as a result of that, not from any pre-existing relationship between transferor and transferee or as a consequence of the agreement whereby the property was transferred. [94] One might accept, therefore, that the fiduciary obligations arise as a result of the trust, rather than the trust arising as a result of the fiduciary obligations accepted as part of the agreement under which the property was transferred.

With respect to Chambers' thesis, and Lord Millett's evident enthusiasm for it, [95] it does not seem that the stakeholder relationship is easily accommodated within it. *Potters* is not one of the cases that Chambers considers, nor does he refer to the stakeholder model. Yet in the case of *Manzanilla*, the transferor paid money to the solicitor, to be held in the solicitor's client account until it was either paid on to the ultimate recipient or returned to the transferor. In these circumstances, it is clear that the transferor did not intend the solicitor to have any beneficial interest in the money—solicitors cannot have any beneficial interest in the moneys in their client account—yet no trust, resulting or otherwise, was formed.

It has not been suggested that either *Potters* or *Manzanilla* were wrongly decided, [96] so what distinguishes this relationship from the trust? I would suggest that the key distinction would either be that the recipient is a volunteer, in which case a presumed resulting trust is formed in accordance with the orthodox model [97]; or that the circumstances of the transfer imposed a fiduciary obligation on the recipient. Otherwise, the recipient will hold the money subject only to the contract between the parties: there will be no proprietary interest on the part of the transferor, and no duty on the part of the recipient to account for the property and any interest earned.

## Fiduciary relationships in commercial transactions

The *Quistclose* trust has been applied in both commercial and personal contexts: *Toovey* [98] and *Re Yarce*, [99] for example, were both purely personal arrangements, between family members. Other cases, such as *Cooper v PRG Powerhouse* [100] combine

the commercial and the personal: A was seeking to gain title to the car in question for his own personal use, following the termination of his employment with B.

The *Quistclose* trust has, however, been most significant in the commercial sphere: its most prominent application is in the context of insolvency, where A has been seeking to establish a proprietary claim to the property, in priority to ***Conv. 40** other creditors of B. [101] In a number of cases, the loan in question has been made in a failed rescue attempt. [102] Under other circumstances, where B remains solvent, the money may be recovered by a straightforward contractual claim, and there is no need to establish a *Quistclose* trust to recover the money loaned.

In an article written in 1998, [103] Lord Millett, [104] writing extra-judicially, discussed the application of equity in the law of commerce. He referred to the High Court of Australia case of *Hospital Products Ltd v United States Surgical Corp*, [105] calling the rejection of any fiduciary relationship in a commercial agreement to distribute medical products "a welcome insistence on principle" [106] ; he also quoted, with approval, Dawson J's warning of the

"undesirability of extending fiduciary relationships to commercial relationships and the anomaly of imposing those duties where those parties are at arms' length from one another." [107]

In the same judgment, Dawson J held:

"Moreover, a fiduciary relationship does not arise where one of the parties to a contract has failed to protect himself adequately by accepting terms which are insufficient to safeguard his interests. Where a relationship is such that by appropriate contractual provisions or other legal means the parties could adequately have protected themselves but have failed to do so, there is no basis *without more* for the imposition of fiduciary obligations in order to overcome the shortcomings in the arrangement between them." [108] [Emphasis added]

While this second dictum of Dawson J is not cited in Lord Millett's article, it is clear that he approved of the High Court of Australia's approach to fiduciary relationships in a commercial context.

Lord Millett also approved the dictum of Sopinka J, in the Canadian Supreme Court case of *Norberg v Wynrib*, [109] that "fiduciary duties should not be superimposed on … common law duties to improve the nature or extent of the remedy". [110]

信託義務不應疊加在.....普通法義務上，以改善補救措施的性質或範圍。”

In defining when a fiduciary relationship will arise, Lord Millett states that such a relationship requires that:

"one party undertakes to act in the interest of another, or he places himself in a position where he is obliged to act in the interests of another". ***Conv. 41** [111]

This statement, of course, reflects his earlier dictum from the case of *Bristol & West Building Society v Mothew* [112] :

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence." [113]

However, merely being required to act in another's interest may not, of itself, be sufficient. Birks [114] analyses legal obligations in terms of "three degrees of legally obligatory altruism", [115] which correspond broadly to obligations under tort, contract and trust law. An obligation owed to another may be negative—such as the duty not to injure another—or positive. Positive duties include the duty to fulfil obligations undertaken under a contract or those imposed by an assumption of responsibility in tort: such positive obligations do require the promisor to act in the promisee's interests, but they are not fiduciary.

Birks的分析是，第三度的“法律上強制性利他主義”要求演員不僅要為他人的利益行事，還要“無私地”行事

In Birks' analysis, the third degree of "legally obligatory altruism" requires the actor not only to act in the other's interests, but to do so "disinterestedly": to put the other's interest ahead of his or her own. It is this that distinguishes the express trustee from other legal actors. While the actor is free to pursue his or her own interest while fulfilling their obligation, the relationship is not fiduciary; if the relationship between the parties is fiduciary, however, the actor has agreed or is obliged to put another's interest first: "the essence of a fiduciary relationship is that the fiduciary subordinates his own interests to his principal's". [116]

 

In some cases, the obligation will arise from the capacity in which each party is acting: in those cases, by agreeing to act in that capacity, the fiduciary will have undertaken to act in the beneficiary's interests. In particular, such an undertaking will exist where the parties are in one of the categories of relationship where a fiduciary relationship is established by law: the well-known examples of trustee and beneficiary, director and company, solicitor and client, agent and principal and partners need no further consideration. The strict approach taken by the courts to those relationships is well established. [117]

The fiduciary obligations do not, of course, attach to any relationship that a person, such as a solicitor, might form outside the scope of their fiduciary relationships: a company director owes no fiduciary duty to anyone other than the company by virtue of being a company director; and a solicitor does not, by virtue of being a solicitor, owe fiduciary obligations to anyone other than his or her clients, whether he or she is acting in a personal capacity or carrying on the normal business of a solicitor. [118] Indeed, where a solicitor is acting for one party, to hold that they owe a fiduciary duty to any other party involved in the same transaction is likely, in normal circumstances, to lead to a conflict of interest. [119]

In other relationships, as Lord Upjohn stated in *Boardman v Phipps* [120]: ***Conv. 42***

"Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case." [121]

While, in the New Zealand case of *Cook v Evatt (No.2)*, [122] Fisher J observed that

"[t]he existence and scope of fiduciary obligations are not to be determined by placing the instant case into a preconceived category and then invoking the duties thought to attach to that category; they must be tailored to the particular case after a meticulous examination of its own facts". [123]

If the "meticulous examination" of the facts of the relationship and any transaction entered into by the parties show that B has undertaken, or is obliged, to act in A's interest, if necessary at the expense of B's own interest, whether or not that interest conflicts with B's interest, then the relationship will be fiduciary, and any identifiable property held by B as a result of that relationship will be held on trust.

If, however, there is no such undertaking or obligation, then the relationship between them is not fiduciary and the fact that one party is holding identifiable property of the other is, as demonstrated above, not sufficient to create a trust. Where the parties are acting in their own interest in an arms' length commercial transaction, it is neither necessary nor appropriate to find a fiduciary relationship purely on the grounds that one party is holding money belonging to another, any more than it is where one party is holding a chattel on behalf of another.

In such circumstances, the conditions necessary for a presumed resulting trust are also unlikely to be fulfilled: participants in arms' length commercial transactions are not volunteers. Where the transfer is as a commercial loan from A to B, B will be providing value to A, in the form of the obligation to repay. Even in cases where B has not provided value directly to A, an examination of the facts will usually show that B is providing value in some way: for example, by the provision of professional services to C. [124]

On the other hand, if B agrees to carry out the purpose attached to the loan, in the knowledge that A has an interest in the consequences that will flow from the agreed purpose being fulfilled, then it can be seen that B may be agreeing to something more than merely to repay the loan on commercial terms, and the agreement becomes more than a loan contract. If the true nature of the agreement is that B will help A to achieve the intended end result, then it can be said that A is trusting B or, perhaps more significantly, relying on B to carry out the agreement: it is this element of trust or reliance that imposes fiduciary duties on B which go beyond the obligation to repay and which gives rise to the *Quistclose* trust.

The true nature of the agreement can be seen from a consideration of what would arise should B's interests change after the transfer has taken place.

In the case of *Twinsectra*, what would have happened if the proposed resale of part of the land that Yardley was relying on for a quick profit had fallen through? In that case, Yardley, acting in his own interest and not wishing to take on a parcel of land for which he had to find a new buyer, might have decided to withdraw ***Conv. 43*** from its purchase at the last minute, after

 

he had agreed the loan with Ackerman. In these circumstances, it is difficult to see that, as long as Yardley continued to meet his contractual obligations and service the loan, Ackerman would have had any cause to object.

By contrast, in the case of *Quistclose*, John Bloom, who had put the rescue deal in place, was relying on Rolls Razor to play its part: to achieve the end result that Bloom was seeking. Having agreed to accept the loan, Rolls Razor was bound to see it through and to act in the best interests of Quistclose, and its majority shareholder. In the event, the directors of Rolls Razor were advised that the company was "hopelessly insolvent" and voted to put the company into voluntary liquidation. [125] Bloom, who was not present at the meeting, wrote some 50 years later of the directors' decision, "I had been betrayed. […] That vortex of treachery and deceit sucked down Rolls Razor." [126]

By failing to carry through the agreed purpose, Rolls Razor, the borrower, failed to act in Bloom's interest, and it was this, rather than the prospect of Quistclose's loan not being repaid, [127] that was the reason for Bloom's sense of betrayal.

A fiduciary obligation cannot, of course, overrule a statutory requirement, [128] so the directors had no choice but to make the decision to place Rolls Razor into voluntary liquidation. If, however, the directors had decided that it was in Rolls Razor's best interests to use the money for another purpose—for example, to pay down the company's overdraft with Barclays Bank—then by acting in the company's best interests rather than Quistclose's, they would have been failing in their fiduciary duty to Quistclose.

To take another example, in the case of *Carreras Rothmans*, the interest of A was that its advertising campaign should proceed; B's interest was in avoiding insolvency. While A and B's interests could both be met by the payment of B's main trade creditors, who were the advertising space providers with the power to prevent the campaign from proceeding, B was able to act in A's interests without conflict. However, if a change in circumstances had led to a conflict, would B have been free to act in its own interests, rather than in A's?

For example, if B had received a statutory demand from a creditor other than one of the advertising space providers, B might have decided that it was in its interest to pay that demand rather than the advertising space providers: B might have calculated that the advertising space provider would refuse to run A's adverts but, having done that, would be unlikely to pursue B for the debt, while the other creditor would have the power to petition for the winding up of the company. [129] Would B, in those circumstances, be free to act in its own interests at the expense of A? I would suggest that, on the true agreement between A and B, B would not be able to so act: the agreement was to further A's interest; and having accepted the agreement, B's ability to act in its own interest was limited. This, in turn, means that the agreement imposed a fiduciary duty on B, and the money transferred as part of that agreement was held on trust. ***Conv. 44***

It is by agreeing to act in A's interest, if necessary adversely to its own interest, that B becomes subject to the fiduciary obligation; and merely agreeing to use the money, or other property, in a particular way, does not create a fiduciary relationship unless B is thereby advancing A's interests. That is true even if the transaction was conditional on B agreeing to the purpose. An agreement to use the money for a specific purpose, even if A regards that purpose as essential to the agreement, will not impose a fiduciary obligation unless it is in A's interests that the purpose be fulfilled and B has agreed to further those interests.

Nowhere is the difference between the fiduciary—the obligation to act in A's interest—and the contractual—the obligation to fulfil the terms of the agreement—more clearly seen than in the case of *Twinsectra* itself. The facts of that case show two businessmen, Yardley and Ackerman, who were not known to each other before the transaction in question, who owed each other no duty of trust or loyalty, and who were doing no more than peddling their own self-interest. In particular, Ackerman had no interest in whether Yardley used the money to buy property or any other purpose.

As in *Hospital Products*, this was an arms' length commercial transaction. Indeed, in *Hospital Products*, the pre-existing relationship between the owner of the defendant company and the claimant company would indicate a closer relationship—and one in which there was a degree of trust and confidence—than the relationship between Yardley and Ackerman.

**Voluntary transfers and resulting trusts**

As Lord Browne-Wilkinson noted in *Westdeutsche Landesbank Girozentrale v Islington LBC* [130]:

"[A] resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B […] there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A." [131]

Under normal circumstances, that money was loaned, rather than transferred voluntarily, is fatal to the creation of a resulting trust: in *Re Sharpe* [132] Browne-Wilkinson J held that:

"In my judgment, if, as in this case, moneys are advanced by way of loan there can be no question of the lender being entitled to an interest in the property under a resulting trust. If he were to take such an interest, he would get his money twice: once on repayment of the loan and once on taking his share of the proceeds of sale of the property." [133]

This, as Swadling has pointed out, [134] casts doubt on Lord Millett's categorisation of the *Quistclose* trust as a resulting trust. However, where a transfer is, if not voluntary, made on terms advantageous to the recipient, it does have more of the quality of a voluntary transfer than a transfer subject to a commercial rate of interest ***Conv. 45*** and a strict repayment schedule. For this reason, loans made to employees at low interest rates [135] and "forgivable" loans [136] may be taxable as income. In these circumstances, the consideration provided for the loan is the work provided by the employee, not the debt created by the loan.

Where a soft loan is made in the context of a *Quistclose* -type transaction, while the debt created is, in theory, consideration for the money loaned, if, in reality, there is no intention of charging interest or enforcing repayment, there may be no value provided by the recipient. In these circumstances, the model of the presumed resulting trust appears more convincing: A is conferring a benefit—the use of the money during the period of the loan or even indefinitely—for which B is providing no value. In those circumstances, B may be considered as a volunteer; and equity always requires evidence before ascribing beneficial ownership to a volunteer. [137]

However, a requirement that interest is paid on the money loaned must be inconsistent with a trust relationship: a trustee is always bound to pay any interest he or she receives on the trust property to the beneficiary. That is a consequence of the beneficial ownership (and all the benefits thereof) vesting in the beneficiary. In the case of *Twinsectra*, if Yardley had placed the money on deposit while looking for another property to purchase so as to meet the terms of his agreement, would he have been liable to pay any interest earned to Twinsectra; or would he have been able to set that interest off against the interest due on the loan? Under a contractual relationship, there would be no obligation to account for the interest. If, however, Yardley was a trustee of the money, his duty to account for interest earned would arise outside the contract and in addition to it. Yardley would, therefore, have been liable for the 24 per cent payable in contract; and accountable for any interest earned on the capital as a trustee. This seems unlikely to be the true construction of the transaction.

**Conclusions**

As has been shown, it is not necessary to impose a trust on the sole basis that the legal owner does not have the free use of an identifiable sum of money. It is submitted that, in order to find a *Quistclose* trust, there must be something more than the conditions outlined in *Twinsectra*, in order to establish that the relationship between A and B is fiduciary in nature, rather than contractual. This should follow a "meticulous examination" [138] of the facts and the nature of the transaction in order to determine whether B agreed or was obliged to act in A's best interests; and whether B received a benefit as a volunteer.

Such an examination of the facts in *Twinsectra* would have revealed that the relationship between the two principals could not be described as fiduciary or be characterised as a relationship based on trust and confidence. Nor do the other circumstances show that the transfer of the money was either voluntary or conferred a benefit upon B without value, in a manner consistent with the presumption necessary for a presumed resulting trust. It seems unlikely that the transaction in ***Conv. 46*** *Twinsectra* created a true *Quistclose* trust. On its facts, it is better regarded, as Carnwath J found it, as a straightforward loan entered into by Yardley through the agency of Sims, or as a transaction in which Sims was acting as a stakeholder under the contract agreed between Yardley and Ackerman.

It is striking, however, how often an examination of the facts in the other cases in which *Quistclose* trusts have been found does reveal that B had, by entering into the transaction, agreed to act in A's interests, if necessary in preference to their own interest. Furthermore, an examination of the true nature of the transaction in these cases—as a gift or soft loan—is sufficiently close to a voluntary transfer so as not to unequivocally exclude the presumption required for a resulting trust. To adopt these factors as necessary elements of the *Quistclose* trust would provide a more conceptually sound and intellectually satisfying basis for the doctrine, which—with the obvious exception of *Twinsectra* —would not be inconsistent with the jurisprudence or with the

 

conceptualisation of the *Quistclose* trust as a presumed resulting trust. Furthermore, it would allow the doctrine to develop in a way that did not impinge upon the reality of arms' length commercial dealing or introduce an element of uncertainty into commercial law.

**Timon Hughes-Davies**

## Footnotes

1 *Barclays Bank Ltd v Quistclose Investments Ltd [1970] A.C. 567; [1968] 3 W.L.R. 1097 HL*.

2 There does not appear to be any reason, in principle, that the doctrine should not apply to other forms of property. However, all the decided cases involve the transfer of money.

3 *Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 A.C. 164* at [80].

4 But not exclusively: see *Re Yarce [2012] UKUT 425 (IAC); [2013] Imm. A.R. 177*.

5 See, for example, *R. Chambers, Resulting Trusts (Oxford: Clarendon Press, 1997), pp.68–92*; W. Swadling, "Quistclose trusts and orthodoxy" (2004) 11 J.T.C.P. 121; J. Edwards, "Quistclose Trusts: was Lord Wilberforce right after all?" (2013) 19 T. & T. 176; M. Smolyansky, "Reining in the Quistclose trust: a response to Twinsectra v Yardley" (2010) 16 T. & T. 558.

6 *Chambers, Resulting Trusts (1997)*; Lord Millett "The Quistclose trust: a reply" (2011) 17 T. & T. 7.

7 *Re Sharpe Ex p. Trustee of the Bankrupt's Property [1980] 1 W.L.R. 219; [1980] 1 All E.R. 198 Ch D* at 201 per Browne-Wilkinson J.

8 *Twinsectra [2002] UKHL 12; [2002] 2 A.C. 164*.

9 *Quistclose [1970] A.C. 567; [1968] 3 W.L.R. 1097*.

10 *R. Stevens, "Rolls Razor" in William Swadling (ed.), The Quistclose Trust: critical essays (Oxford: Hart Publishing, 2004), p.5*.

11 *Quistclose [1970] A.C. 567; [1968] 3 W.L.R. 1097* at 580.

12 *Twinsectra [2002] UKHL 12; [2002] 2 A.C. 164*.

13 The convention of designating the transferor in a *Quistclose* trust as A, the transferee as B and the ultimate recipient as C will be followed in this article.

14 *Twinsectra [2002] UKHL 12; [2002] 2 A.C. 164* at [100].

15 Described as such in *Re Northern Developments (Holdings) Ltd Unreported October 6, 1978 Ch D*.

16 *Quistclose [1970] A.C. 567; [1968] 3 W.L.R. 1097* at 580 per Lord Wilberforce.

17 See, for example, *Chambers, Resulting Trusts (1997), pp.68–92*; Swadling, "Quistclose trusts and orthodoxy" (2004) 11 J.T.C.P. 121; Edwards, "Quistclose trusts: was Lord Wilberforce right after all?" (2013) 19 T. & T. 176; Smolyansky, "Reining in the Quistclose trust: a response to Twinsectra v Yardley" (2010) 16 T. & T. 558.

18 *HMQ v Two Feathers [2012] ONSC 5077*.

19 *Youyang Pty Ltd v Minter Ellison Morris Fletcher [2003] HCA 15*; *Marriner v Australian Super Developments Pty Ltd [2012] VSCA 171*.

20 *Hiranand v Harilela (2004) 7 ITELR 450*.

21 *Zhong v Wang [2006] NZCA 242*.

22 P. Millett, "The Quistclose trust: who can enforce it?" (1985) 101 L.Q.R. 269.

23 Now Lord Millett of St Marylebone.

24 *Re Northern Developments Unreported October 6, 1978*.

25 *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd (In Liquidation) [1985] Ch. 207; [1984] 3 W.L.R. 1016 Ch D*.

26 Millett, "The Quistclose trust: who can enforce it?" (1985) 101 L.Q.R. 269, 279.

27 Millett, "The Quistclose trust: who can enforce it?" (1985) 101 L.Q.R. 269, 278.

28 Millett, "The Quistclose trust: who can enforce it?" (1985) 101 L.Q.R. 269, 279.

29 *Toovey v Milne (1819) 2 B. & Ald. 683; 106 E.R. 514 Ct of KB*.

30 *Edwards v Glyn (1859) 2 El. & El. 29; 121 E.R. 12 Ct of QB*.

31 *Quistclose Investments Ltd v Rolls Razor Ltd*; sub nom. *Barclays Bank Ltd v Quistclose Investments Ltd [1967] Ch. 910; [1967] 2 W.L.R. 1064 Ch D* at 916.

 

32 S. Tappenden, "Commercial equity: the Quistclose trust and asset recovery" (2009) 2 Journal of Politics and Law 11, 12.

33 It was also stated, by Sir Kenneth Cork, who, as liquidator of Rolls Razor, was in a position to know, that Quistclose borrowed the money from Barclays Bank. This seems unlikely: Stevens states that Barclays had a fixed charge over Rolls Razor's Cricklewood factory which was for nearly the full amount of the company's overdraft. Setting off the money loaned by Quistclose against Rolls Razor's debt to Barclays would have reduced the amount Barclays could have recovered from their fixed charge. At the same time, it would have been likely to mean that Quistclose was unable to repay their debt to Barclays. See *Stevens, "Rolls Razor" in The Quistclose Trust: critical essays (2004), pp.5–6*.

34 *Quistclose Investments Ltd v Rolls Razor Ltd [1968] Ch. 540 CA* at 561.

35 *Stevens, "Rolls Razor" in The Quistclose Trust: critical essays (2004), p.5*.

36 *Re EVTR (1987) 3 B.C.C. 389; [1987] B.C.L.C. 646 CA (Civ Div)*.The donor had won £240,000 on a premium bond, and made a loan to a company with which he had a previous personal and professional relationship, in order that the company might buy video equipment.

37 *Re Australian Elizabethan Theatre Trust [1991] FCA 344*. The donor wished to make a donation to the Victorian Tapestry Workshop, a charity. The money was given to the Australian Elizabethan Theatre Trust, with the request that it be passed on to the Workshop. Donations to the Trust were tax-deductible, and the Australian Commissioner of Taxation had accepted that donations to the Trust which the donor wished to be passed to another arts organisation would also be tax-deductible as long as the request did not fetter the recipient.

38 *Cooper v PRG Powerhouse Ltd [2008] EWHC 498 (Ch); [2008] 2 All E.R. (Comm) 964*.

39 *Re Yarce [2012] UKUT 425 (IAC); [2013] Imm. A.R. 177*. The donor was making regular payments into her daughter's bank account. The Upper Tribunal found that the payments were made for a specific purpose and the daughter did not have a beneficial interest in them for the purposes of determining whether she was eligible for benefits.

40 See, for example, *Re Niagara Mechanical Services International Ltd (In Administration) [2001] B.C.C. 393; [2000] 2 B.C.L.C. 425 Ch D*; *Freeman v Customs and Excise Commissioners [2005] EWHC 582 (Ch); [2005] S.T.C. 610*; *Templeton Insurance Ltd v Penningtons Solicitors [2006] EWHC 685 (Ch); [2007] W.T.L.R. 1103*; *Re N (a child); [2009] EWHC 11 (Fam); [2009] 1 W.L.R. 1621*; *Global Marine Drillships Ltd v Landmark Solicitors LLP [2011] EWHC 2685 (Ch)*; *Challinor v Juliet Bellis & Co [2013] EWHC 347 (Ch)*.

41 *Carreras Rothmans [1985] Ch. 207; [1984] 3 W.L.R. 1016* at 212.

42 *Quistclose Investments Ltd v Rolls Razor Ltd [1968] Ch. 540* at 550.

43 *Re EVTR (1987) 3 B.C.C. 389; [1987] B.C.L.C. 646*.

44 Interest is payable by solicitors on money held in their client account: SRA Accounts Rules 22.1.

45 *Re EVTR (1987) 3 B.C.C. 389; [1987] B.C.L.C. 646* at 648.

46 *Twinsectra [2002] UKHL 12; [2002] 2 A.C. 164*.

47 *Twinsectra Ltd v Yardley Unreported December 12, 1996 Queen's Bench Division*. The facts are, unless otherwise indicated, taken from Carnwath J's judgment in this case.

48 Twinsectra was almost completely inactive as a trading company: its balance sheet for the years ending 1993 and 1994 show no profit or loss, and no expenditure on staff or any other commercial activity. The loan to Yardley is also not recorded in its accounts, although it was still outstanding on March 31, 1993. See *Twinsectra Ltd, "Accounts 31 March 1993", Submitted to Companies House January 31, 1994*. See also the comments of Millett LJ in *Twinsectra Ltd v Yardley (Application for security for costs) Unreported April 30, 1998*.

49 *Twinsectra Ltd, "Accounts 31 March 1993", Submitted to Companies House January 31, 1994*.

50 Sims' unconditional undertaking to pay Yardley £1 million was described as an "extraordinary bargain": *Twinsectra Ltd v Yardley Unreported December 12, 1996*. It is difficult to disagree with the comment that Sims had "lost his reason and judgement": *Twinsectra Ltd v Yardley [1999] Lloyd's Rep. Bank. 438; [2000] Lloyd's Rep. Bank. P.N. 239 CA (Civ Div)* at [33].

51 Carnwath J commented that Yardley's attitude to Ackerman was "strongly coloured" by the increase. Others involved in the deal regarded it as a breach of good faith and one wrote to Ackerman to express his concern.

52 Millett, "The Quistclose trust: a reply" (2011) 17 T. & T. 7, 16.

53 Now Lord Carnwath JSC.

54 *Twinsectra Ltd v Yardley Unreported December 12, 1996*.

 

55 *Twinsectra Ltd, Memorandum of Association, July 1, 1975*.
56 *Rolled Steel Products (Holdings) Ltd v British Steel Corp [1986] Ch. 246; [1985] 2 W.L.R. 908 CA (Civ Div)*.
57 Charities Act 1960 ss.1, 6 –9.
58 *Twinsectra Ltd [2002] UKHL 12; [2002] 2 A.C. 164* at [72].
59 *Twinsectra Ltd v Yardley Unreported December 12, 1996*.
60 *Twinsectra Ltd v Yardley [1999] Lloyd's Rep. Bank. 438; [2000] Lloyd's Rep. Bank. P.N. 239* at [94].
61 *Twinsectra [2002] UKHL 12; [2002] 2 A.C. 164* at [103].
62 See *HMQ [2012] ONSC 5077*; *Youyang Pty Ltd [2003] HCA 15*; *Marriner [2012] VSCA 171*; *Hiranand (2004) 7 ITELR 450*; and *Zhong [2006] NZCA 242*.
63 *Twinsectra [2002] UKHL 12; [2002] 2 A.C. 164* at [74].
64 *Re Goldcorp Exchange Ltd (In Receivership) [1995] 1 A.C. 74; [1994] 3 W.L.R. 199 PC(NZ)* at 100 per Lord Mustill.
65 *Twinsectra [2002] UKHL 12; [2002] 2 A.C. 164* at [76].
66 *Twinsectra [2002] UKHL 12; [2002] 2 A.C. 164* at [92]. See also Millett, "The Quistclose trust: a reply" (2011) 17 T. & T. 7, 16.
67 *Twinsectra [2002] UKHL 12; [2002] 2 A.C. 164* at [100].
68 *Twinsectra [2002] UKHL 12; [2002] 2 A.C. 164* at [100] per Lord Millett.
69 SRA Accounts Rules (2011) are issued by the Solicitors Regulation Authority under the provisions of the Solicitors Act 1974 and other legislation. The Rules provide that solicitors may hold client money as "agent, bailee, stakeholder" (Rule 12.2 (b)) or in other capacities, including as a trustee.
70 *Potters v Loppert [1973] Ch. 399; [1973] 2 W.L.R. 469 Ch D*.
71 *Clark v Ulster Bank Ltd [1950] N.I. 132*.
72 *Manzanilla Ltd v Corton Property & Investments Ltd (no.1) Unreported November 13, 1996 CA*.
73 *Potters [1973] Ch. 399; [1973] 2 W.L.R. 469* at 406.
74 *Hastingwood Property Ltd v Saunders Bearman Anselm [1991] Ch. 114; [1973] 2 W.L.R. 469 Ch D* at 123.
75 *Manzanilla Unreported November 13, 1996*.
76 Estate Agents Act 1979 s.14.
77 *Cooper [2008] EWHC 498 (Ch); [2008] 2 All E.R. (Comm) 964*.
78 *Challinor [2013] EWHC 347 (Ch)*.
79 *Bennett v Bristol Alliance Nominee No.1 Ltd*; sub nom. *A/Wear UK Ltd (In Administration) [2013] EWCA Civ 1626; [2014] 1 P. & C.R. DG15*.
80 *Barclays Bank Plc v Weeks Legg & Dean [1999] Q.B. 309; [1998] 3 W.L.R. 656 CA (Civ Div)*.
81 In one case, the solicitor was instructed by the mortgagee to register the mortgage.
82 *Weeks Legg & Dean [1999] Q.B. 309; [1998] 3 W.L.R. 656* at 324 per Millett LJ.
83 Between November 13, 1996 and May 21, 1998.
84 *Chambers, Resulting Trusts (1997)*.
85 On May 15, 1997.
86 P.J. Millett, "Restitution and constructive trusts" (1998) 114 L.Q.R. 399, 401. See also *Air Jamaica Ltd v Charlton [1999] 1 W.L.R. 1399; [1999] O.P.L.R. 11 PC(Jam.)* at 1412 per Lord Millett; *Twinsectra Ltd v Yardley [2002] UKHL 12; [2002] 2 A.C. 164* at [91]–[92] per Lord Millett.
87 *Brown v Inland Revenue Commissioners [1965] A.C. 244; [1964] 3 W.L.R. 511 HL*.
88 *Twinsectra [2002] UKHL 12; [2002] 2 A.C. 164*.
89 *Twinsectra [2002] UKHL 12; [2002] 2 A.C. 164* at [12] per Lord Hoffmann.
90 Estate Agents Act 1979 s.14.
91 *Potters [1973] Ch. 399; [1973] 2 W.L.R. 469*.
92 *Council of Mortgage Lenders, Lenders' Handbook (2013)*. All the main banks and building societies are members of the CML and virtually all residential mortgage transactions are carried out under its terms.
93 *Council of Mortgage Lenders, Lenders' Handbook (2013), para.10.7*.
94 *Chambers, Resulting Trusts (1997), p.198*. "Resulting (and constructive) trusts create a problem for the imposition of fiduciary obligations. The recipient of the property is a trustee and therefore a fiduciary for its provider, but that trust arises by operation of law as a response to an event, rather than from a voluntary undertaking of that relationship. Although the resulting trust is accepted as a fiduciary relationship, it often appears to be more like a case of fiduciary obligations arising from an event rather than a relationship. Whether the resulting trustee is regarded as a 'status-based' or 'fact-based' fiduciary should depend on the

 

situation giving rise to the resulting trust, as should the nature and degree of the obligations associated with it."

95 See Millett, "Restitution and constructive trusts" (1998) 114 L.Q.R. 399, 401. See also *Air Jamaica Ltd [1999] 1 W.L.R. 1399; [1999] O.P.L.R.* at 1412 per Lord Millett; *Twinsectra [2002] UKHL 12; [2002] 2 A.C. 164* at [91]–[92] per Lord Millett.

96 See *Bennett [2013] EWCA Civ 1626; [2014] 1 P. & C.R. DG15*.

97 *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669; [1996] 2 W.L.R. 802 HL* at 708 per Lord Browne-Wilkinson.

98 *Toovey (1819) 2 B. & Ald. 683; 106 E.R. 514*.

99 *Re Yarce [2012] UKUT 425 (IAC); [2013] Imm. A.R. 177*.

100 *Cooper [2008] EWHC 498 (Ch); [2008] 2 All E.R. (Comm) 964*.

101 See, for example, *Quistclose [1970] A.C. 567; [1968] 3 W.L.R. 1097*; *Re Niagara Mechanical Services International Ltd (In Administration) [2001] B.C.C. 393; [2000] 2 B.C.L.C. 425*; *Re Australian Elizabethan Theatre Trust [1991] FCA 344*.

102 See, for example, *Quistclose [1970] A.C. 567; [1968] 3 W.L.R. 1097*; *Re Niagara Mechanical Services International Ltd (In Administration) [2001] B.C.C. 393; [2000] 2 B.C.L.C. 425*; *Re Northern Developments (Holdings) Ltd Unreported October 6, 1978*; *Carreras Rothmans [1985] Ch. 207; [1984] 3 W.L.R. 1016*.

103 P.J. Millett, "Equity's place in the law of commerce" (1998) 114 L.Q.R. 214.

104 Then Lord Justice Millett.

105 *Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 226*.

106 Millett, "Equity's place in the law of commerce" (1998) 114 L.Q.R. 214, 215.

107 *Hospital Products Ltd (1984) 156 CLR 226* at [74].

108 *Hospital Products (1984) 156 CLR 226* at [68].

109 *Norberg v Wynrib [1992] 2 SCR 226*.

110 *Norberg [1992] 2 SCR 226* at 312.

111 Millett, "Equity's place in the law of commerce" (1998) 114 L.Q.R. 214, 219.

112 *Bristol & West Building Society v Mothew [1998] Ch. 1*.

113 *Mothew [1998] Ch. 1* at 18.

114 P. Birks, "The content of fiduciary obligation." (2002) 16 Tru. L.I. 34.

115 Birks, "The content of fiduciary obligation." (2002) 16 Tru. L.I. 34, 41.

116 *Wollenberg v Casinos Austria International Holding GmbH [2011] EWHC 103 (Ch)* at [208] per Lewison J.

117 *Boardman v Phipps [1967] 2 A.C. 46; [1966] 3 W.L.R. 1009 HL*.

118 *Twinsectra [2002] UKHL 12; [2002] 2 A.C. 164* at [76] per Lord Millett.

119 *Hilton v Barker Booth & Eastwood [2005] UKHL 8; [2005] 1 W.L.R. 567; [2005] 1 All E.R. 651*.

120 *Boardman [1967] 2 A.C. 46; [1966] 3 W.L.R. 1009*.

121 *Boardman [1967] 2 A.C. 46; [1966] 3 W.L.R. 1009* at 123.

122 *Cook v Evatt (No.2) [1992] 1 NZLR 676*.

123 *Cook [1992] 1 NZLR 676* at 685.

124 See *Challinor [2013] EWHC 347 (Ch)*.

125 *Stevens, "Rolls Razor" in The Quistclose Trust: critical essays (2004), p.5*.

126 *J. Bloom, Full Bloom (Peterborough: Fastprint Publishing, 2013)*. Bloom also strongly suggests that one of the directors had been bribed to bring about the liquidation of Rolls Razor.

127 Quistclose's loan was, of course, repaid as a result of the House of Lords' decision.

128 See *Hunter v Mann [1974] Q.B. 767; [1974] 2 W.L.R. 742 DC*.

129 Insolvency Act 1986 s.124.

130 *Westdeutsche [1996] A.C. 669; [1996] 2 W.L.R. 802*.

131 *Westdeutsche [1996] A.C. 669; [1996] 2 W.L.R. 802* at 708 per Lord Browne-Wilkinson.

132 *Re Sharpe Ex p. Trustee of the Bankrupt's Property [1980] 1 W.L.R. 219; [1980] 1 All E.R. 198*.

133 *Re Sharpe [1980] 1 W.L.R. 219; [1980] 1 All E.R. 198* at 201 per Browne-Wilkinson J.

134 *W. Swadling, "Orthodoxy" in William Swadling (ed.), The Quistclose Trust: Critical Essays (Oxford: Hart Publishing, 2004), p.13*.

135 Income Tax (Earnings and Pensions) Act 2003 ss.174 –175.

136 Income Tax (Earnings and Pensions) Act 2003 s.188(1).

 

137 See, for example, *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669; [1996] 2 W.L.R. 802* at 708 per Lord Browne-Wilkinson; *Standing v Bowring (1885) 31 Ch. D. 282 CA* at 287 per Cotton LJ; *R v Vinogradoff [1935] W.N. 68* per Farwell J.

138 *Cook [1992] 1 NZLR 676* at 685 per Fisher J.

 