

= Quistclose trusts in English law =

A Quistclose trust is a trust created where a creditor has lent money to a debtor for a particular purpose . In the event that the debtor uses the money for any other purpose , it is held on trust for the creditor . Any inappropriately spent money can then be traced , and returned to the creditors . The name and trust comes from the House of Lords decision in Barclays Bank Ltd v Quistclose Investments Ltd (1970) , although the underlying principles can be traced back further . There has been much academic debate over the classification of Quistclose trusts in existing trusts law : whether they are resulting trusts , express trusts , constructive trusts or , as Lord Millett said in Twinsectra Ltd v Yardley , illusory trusts .

= = Definition = =

A Quistclose trust is a method by which a moneylender can hold a security interest in loans , through inserting a clause into the contract which limits the purposes for which the borrower can use the money . If the funds are used for a different purpose , a trust is created around the money for the benefit of the moneylender . This allows the moneylender to trace any inappropriately spent funds , and , in the case of the borrower 's insolvency , prevents the money from being taken by creditors . The name and trust comes from the House of Lords decision in Barclays Bank Ltd v Quistclose Investments Ltd , in which Lord Wilberforce maintained that in Quistclose situations , the intention must be to create a secondary trust for the benefit of the moneylender , arising if the " primary trust " (the appropriate use of the money) is not fulfilled . The idea of a primary and secondary trust comes from Toovey v Milne , where money was lent by A to B , to pay off his debts . When B went bankrupt and returned the money to A , the courts held that the creditors could not recover this money , as it was held in a form comparable to a trust . Most situations in which a trust will arise require that a specific use of the money is identified by the contract .

= = Categorisation = =

The primary problem with Quistclose trusts is their categorisation within the accepted types of trust . The two @-@ part trust structure (primary and secondary trusts) explained by Lord Wilberforce in Quistclose does not appear elsewhere in English trusts law , and the type of trust used affects the rights available to the parties . Quistclose trusts have variously been considered resulting , express or constructive in nature . An alternate explanation is given by Lord Millett in Twinsectra Ltd v Yardley ; this is that the Quistclose trust is an " illusory trust " , where the apparent beneficiary (the moneylender , for example) takes no active role . This trust is created by the intention of either party , and is revocable at any time . The problems with this idea are that the facts in Quistclose are not those of a normal illusory trust , and Millett failed to consider the mutual intention of the parties and any underlying contracts .

= = = Resulting trust = = =

Lord Wilberforce , in Quistclose , stated that the contract gives the moneylender an equitable interest in the loan . Under Wilberforce 's two @-@ stage trust , the interest in the money first goes from the lender to the borrower (the primary trust) and then , when the trust 's purpose fails , reverses (the secondary trust) . In Twinsectra Lord Millett also explained that a Quistclose trust is a resulting trust , but held that the lender retains the interest throughout the transaction , with no need for this interest to reverse if the purpose of the loan fails . The problem with Wilberforce 's analysis , as explained by Alastair Hudson , Professor of Equity and Law at Queen Mary , University of London , is that because the resulting trust only comes into existence after the misuse of the loan , it may come too late ; if the money is not available when the claim is brought , there is no remedy . The borrower may already have spent the money , or already be insolvent and the subject of claims by creditors .

Another flaw with both Wilberforce 's and Millett 's explanations is that if the interest is retained by the lender from the outset of the contract , it is not a resulting trust at all ; the complete transfer of money should end the lender 's equitable interest . It could be argued that the creation of a Quistclose trust is not based on the recovery of the original interest , but the creation of a new one . Doubts have also been raised about the Twinsectra case in general , in that the facts of the case did not create a stereotypical Quistclose trust ; this causes problems with applying Millett 's analysis .

= = = Express trust = = =

The second possibility is that Quistclose trusts are express trusts . If the contract included a provision that the money was to only be used for certain purposes , it could be interpreted that this money is held on trust until it is used for those purposes . The borrower would be a trustee ; using the money for any other purpose would be in violation of the trustee 's duties , and so void . This trust would be created as soon as the contract is agreed , with the normal requirement for it to be validly created . Two problems with this are that it has not been upheld by the English courts , and that the courts would require those explicit terms to be part of the contract ; Hudson considers it the most advantageous however , because it would offer the simplest protection of the money by not requiring the contract to be breached for the trust to come into existence . In *Swiss Bank Corporation v Lloyds Bank Ltd* , the courts considered a situation similar to Quistclose , in that a loan agreement was made where the borrowers explicitly agreed to follow guidelines on the use of the money , something they failed to do . The Court of Appeal and the House of Lords refused to constitute any kind of trust or return the money however , applying Lord Wrenbury 's judgment in *Palmer v Carey* , when he said that " such a stipulation will not amount to an equitable assignment " .

= = = Constructive trust = = =

The third main theory is that Quistclose trusts could be constructive trusts , which are created when the future trustee uses the money in an " unconscionable " manner . In Quistclose situations , the requirement of " unconscionableness " could be met by the borrower using the money for a purpose other than the one for which it was lent , allowing the lender to claim an equitable interest in it . In *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* , the Quistclose trust principle was said by Peter Gibson J. to be that " equity fastens on the conscience of the person who receives from another property transferred for a specific purpose only and not therefore for the recipient 's own purposes , so that such person will not be permitted to treat the property as his own or to use it for other than the stated purpose " ; this reference to " conscience " could make Quistclose trusts constructive in nature . However , no constructive trust could be created until the money is misused , which may be too late for an effective remedy .