

THE QUISTCLOSE TRUST: INTENTION AND THE EXPRESS PRIVATE TRUST

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INTRODUCTION

The trust and debt relationship encapsulated in the leading case of *Barclays Bank Limited v Quistclose Investments Limited* (hereinafter referred to as 'Quistclose')¹ is one of both academic and practical interest. The practical application of what has become known as the *Quistclose* trust has proved highly beneficial to lenders and, in some cases, third party creditors. The *Quistclose* trust may arise where a lender and borrower intend, in relation to moneys advanced to a borrower for a specific purpose, that:

- (a) the lender shall retain the beneficial interest in the moneys advanced; and
- (b) the moneys advanced shall constitute a fund separate from the assets of the borrower

until the purpose has been fulfilled. If such an intention can be proved, both the law of trusts and the law relating to debt will govern the relationship of the parties. There have been various and confused explanations of the *Quistclose* trust including analyses based on the illusory trust,² purpose trust³ and constructive trust.⁴ In the light of the *obiter dicta* of Gummow J in *Re Australian Elizabethan Theatre Trust*⁵ a re-evaluation of the law in this area is timely.

RE AUSTRALIAN ELIZABETHAN THEATRE TRUST

The Facts⁶

In *Re Australian Elizabethan Theatre Trust*, Gummow J was asked to consider the applicability of the *Quistclose* trust to the facts before him. The situation, though a complex one, can be summarised as follows.

The Australian Elizabethan Theatre Trust ('AETT') sponsored and promoted various Australian arts organisations. A donor would obtain certain taxation deductions if it could be shown that the donations to the AETT had

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¹ [1970] AC 567.

² P J Millet QC, 'The Quistclose Trust: Who can enforce it?' (1985) 101 *LQR* 269.

³ See generally, C E F Rickett, 'Different views on the scope of the *Quistclose* Analysis: English and Antipodean Insights', (1991) 107 *LQR* 608.

⁴ *Ibid*, 630-46, where Rickett discusses, *inter alia*, the constructive trust approach in New Zealand.

⁵ (1991) 102 ALR 681.

⁶ *Id*, 683-8.

been received by the AETT 'unconditionally'. Therefore, in order to best ensure that the donations would be deductible, a practice was developed whereby the donations were made to the AETT on a standard form stating expressly the unconditional nature of the donation. In addition, donors were invited to express their preference that the funds donated were passed on to a specific arts organisation. Funds had been donated under the programme with expressed preferences for the Australian Opera, the Australian Ballet Foundation and the Victorian Tapestry Workshop. The AETT had deposited these donations in a general account it held with the Commonwealth Bank of Australia. The funds were never specifically earmarked for the benefit of any arts organisation and prior to distribution taking place, a provisional liquidator was appointed in relation to the AETT.

The arts organisations argued, *inter alia*, that the AETT held the funds on trust and that the expressed preferences gave rise to equitable rights in their favour. In particular, it was argued that what had in fact arisen was an example of a trust similar to the type of trust found in *Quistclose*, whereby the various arts organisations would be entitled as beneficiaries to any funds which the donor had earmarked for their use and benefit.

The Judgment — an Overview

Gummow J declined to find a *Quistclose* trust because he considered that the requisite intention to create an express private trust was not present.⁷ Nevertheless, his discussion of the law in this area is very persuasive because it is a Federal Court decision⁸ by an eminent expert and commentator in the area.⁹ It is not intended at this stage simply to consider specific matters highlighted in the judgment. Rather, the reasoning will be integrated into a discussion of the perplexing issues which have arisen over the years.

At this stage what is important to note is the general thrust of judgment in relation to the law in this area. Gummow J did not dispute the results of the earlier cases, nor generally, the bases on which they were decided. Rather, Gummow J pointed out that the law in this area was testimony to the 'flexibility of the institution of the express trust'¹⁰ and concluded that:

⁷ Id, 694-8.

⁸ There have been other cases where *Quistclose* has been considered. In *Australasian Conference Association Limited v Mainline Constructions Proprietary Limited (In Liquidation) and others* (1978) 141 CLR 335, Gibbs ACJ (at 353) referred briefly to *Quistclose* apparently with approval, but held that it was not applicable to the facts before him. Again, in *Daly v Sydney Stock Exchange Ltd* (1986) ALJR 371 (at 374) the principles in *Quistclose* were approved but not applied by Gibbs CJ. The judgment of Gummow J in *Re Australian Elizabethan Theatre Trust* is the most thorough analysis at this time. The following cases should also be noted: *Re Groom (a bankrupt)*; *Ex parte The Bankrupt* (1977) 16 ALR 278; *Rose v Rose* (1986) 7 NSWLR 679; *Re Veli*; *Ex parte AE Developments Pty Ltd v Scott* (1988) 18 FCR 204; *Theiss Waikins White Limited v Equiticorp Australia Limited* [1991] 1 Qd R 82; *Re Miles and Another*; *Ex parte National Australia Bank Limited v The Official Receiver in Bankruptcy* (1988) 20 FCR 194.

⁹ Gummow J has co-authored a leading book in relation to trusts — see R P Meagher and W M C Gummow, *Jacob's Law of Trusts in Australia* (5th ed, Sydney, Butterworths, 1986).

¹⁰ *Supra* fn 5, 693.

'To speak of a *Quistclose* trust as if it were a new legal institution, rather than an example of the particular operation of principle upon the facts as found, is to set the listener or reader off on a false path.'¹¹

His identification of the orthodox nature of the legal device may appear deceptively simple but, as will be shown, it was an important observation. Some judicial and academic analyses have clouded and confused the operation of standard and orthodox principles.

It is the purpose of this article to explore the differing approaches and to proffer a framework in which one can understand the functioning of the *Quistclose* trust. In doing so, it is worthwhile to consider first the main features and intrinsic difficulties of *Quistclose* itself.

BARCLAYS BANK LTD v QUISTCLOSE

The Facts¹²

Rolls Razor Ltd ('Rolls') was experiencing financial problems. It had an overdraft with Barclays Bank in the sum of £484,000 whilst the agreed credit limit was £250,000. In addition, Rolls has declared a dividend of £209,719 but did not have the liquid assets to pay it. Rolls obtained a loan from a related company, Quistclose Investments Ltd ('Quistclose Investments') on the condition that the funds loaned would only be used for the purpose of paying the dividend. When a cheque from Quistclose Investments for the amount was forwarded to Barclays Bank for banking and clearance, it was accompanied by a letter to the manager of the relevant branch of the Bank, in which it was stated by an officer of Rolls:

'We would like to confirm the agreement reached with you this morning that this amount will only be used to meet the dividend due on July 24, 1964.'¹³

The loan funds were paid into a special and separate account for the purpose of paying the dividend. However, prior to the paying of the dividend, Rolls went into voluntary liquidation. Quistclose Investments brought an action against Barclays Bank and Rolls claiming that the funds had been lent for a specific purpose and were accordingly held on trust by Rolls to pay the dividend. As the purpose of the trust had failed, it was asserted that Quistclose Investments alone was entitled to the funds and that Barclays Bank, having notice of the trust, held the funds as constructive trustee for Quistclose Investments.

¹¹ Id, 694.

¹² Supra fn 1, 578-9.

¹³ Id, 579.

Central Issues

For our purpose the central issues were:

- (a) Whether a trust could be established in the light of the fact that there existed at the very least a debtor/creditor relationship between Roll and Quistclose Investments;
- (b) If a trust relationship could co-exist with a contractual relationship what, in these circumstances, were the necessary criteria for the establishment of the trust: AND
- (c) How does such a trust function? What is the structure of the trust? Arguably, the parties had not fully set out the precise terms of the arrangement.

These questions were answered with varying degrees of clarity.

The first issue can be dealt with quickly. Lord Wilberforce (delivering judgment for the House of Lords) put to rest any speculation that a trust and debt relationship could not co-exist within the confines of one factual situation. He stated forcefully:

'There is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies . . .'¹⁴

The second issue concerned the nature of the criteria for the establishment of an express private trust. The House of Lords addressed this issue by recourse to the intention of the parties and the specific purpose for which the monies were advanced. Lord Wilberforce stated:

'The mutual intention of the respondents and Rolls Razor Ltd, and the essence of the bargain, was that the sum advanced should not become part of the assets of Rolls Razor Ltd, but should be used exclusively for the payment of a particular class of its creditors, namely, those entitled to the dividend. A necessary consequence from this, by process simply of interpretation, must be that if, for any reason, the dividend could not be paid, the money was to be returned to the respondents: the word "only" or "exclusively" can have no other meaning or effect.'¹⁵

Thereafter, Lord Wilberforce gleaned a general principle from earlier authority:

'That arrangements of this character for the payment of a person's creditors by a third person, gives 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 recognised in a series of cases over some 150 years.'¹⁶

Unfortunately, the judgment of Lord Wilberforce and in particular, the above statement of principle, has proved misleading because there has not been an adequate understanding of the facts which arose in *Quistclose*. The judgment has been left open to an interpretation in which a trust arises on the

¹⁴ Id, 581.

¹⁵ Id, 580.

¹⁶ Ibid; cf Cairns LJ (dissenting) in *Hussey v Palmer* [1972] 1 WLR 1286, 1291-2.

basis of the specific purpose of the sum advanced.¹⁷ Indeed, the intention of the parties was that the monies would be used for a specific purpose. However, it is not sufficient to consider that a trust arose merely because the monies advanced were for a specific purpose. It is quite standard commercial practice for a lender to provide a loan with or without security for a specific purpose. Yet, a trust does not arise.

Two factors set the situation in *Quistclose* apart from a standard loan transaction. First, the intention of the parties was that the borrower would not obtain the beneficial interest in the monies advanced. In other words, the sum advanced did not become part of the assets of Rolls. In contrast, where an orthodox debtor/creditor relationship exists, the debtor obtains the beneficial interest in the sum advanced.¹⁸ Secondly, the intention of the parties was that the sum advanced constituted a separate fund from the assets of the borrower and accordingly, it was paid into a separate account. Indeed, Barclays Bank was informed of the separate nature of the funds and the specific purpose for which the funds were intended by both *Quistclose Investments* and *Rolls*.

The general underlying reason for such an arrangement is clear. It is a form of security device whereby the lender retains a beneficial interest in the funds and ultimate control over them.

Re Australian Elizabethan Theatre Trust provides an interesting contrast to *Quistclose*. Gummow J held that there was no express private trust in favour of the arts organisations in relation to the monies collected by the AETT. He was influenced by two major factors.

First, he considered that the nature of the transactions and, in particular, the form of words used in relation to the monies, was very different from the exclusive nature of the specific purpose of the trust in *Quistclose*. He stated:

'Here, the word "unconditionally" as used in the AETT standard form has a primary meaning calculated to lead to the opposite result. It suggests an absence of qualification or obligation. The promotion and use of the tax deductibility program was premised upon donors obtaining the income tax deduction and that required gifts to be made outright. The most that was permissible if the deduction was not to be imperilled was a statement of "preference".'¹⁹

The language of the standard form was not imperative. Rather, it was precatory and, accordingly, an express private trust was not created.²⁰

¹⁷ Two examples of cases where this interpretation has been given are *Re Miles and Another: Ex parte National Bank Limited v The Official Receiver in Bankruptcy* (1988) 20 FCR 194, per Pincus J at 199; *Re EVTR, Gilbert and Another v Barber* [1987] BCLC 646, per Dillon LJ at 650.

¹⁸ See generally *Cohen v Cohen* (1929) 42 CLR 91; [1929] ALR 204. In *Daly v Sydney Stock Exchange Ltd* (1986) ALJR 371 (at 374), Gibbs CJ pointed out that *Quistclose* was not applicable to the facts of that case because 'the loan in the present case was not made for any specified purpose and there was no agreement, express or implied, that the moneys lent should not form part of the borrower's general assets.'

¹⁹ *Supra* fn 5, 697.

²⁰ In relation to precatory trustees see *Re Williams* [1897] 2 Ch 12; [1897] All ER 1764; *Re Altson* [1955] VLR 281.

Secondly, Gummow J was influenced by the fact that the donations were not deposited in a separate account specifically earmarked for payment to any arts organisation, but rather in a general AETT operating account. He rejected any suggestion that, despite the absence of a such a separate account, the AETT constituted itself a trustee of the funds in the operating account and of any rights it may have against the Commonwealth Bank.²¹

In sum, it is submitted that the decision in *Re The Australian Elizabethan Theatre Trust* illustrates that the preferred purpose of funds will not be sufficient to give rise to a trust, particularly where the monies in question do not constitute a separate fund.

In *Quistclose*, there was a third issue which was linked to the question of intention — the nature of the trust established. Lord Wilberforce's description of the mechanics of the primary and secondary trusts was superficially attractive.²² However, it is clear that in this respect, the judgment of Lord Wilberforce again suffers from an over-emphasis on the purpose of the loan rather than the intention of the parties. The dual trust mechanism was constructed on the importance of the specific purpose which, in *Quistclose*, was the payment of the dividend. The primary trust would apply to enable the specific purpose to take place. Where the specific purpose was incapable of fulfilment, the secondary trust would arise in favour of the lender. Yet, certain problems come to mind. For example, where did the beneficial interest, as distinct from the legal interest, lie? What was actually meant by the failure of the primary trust and what sort of factors could give rise to a strong indication of its failure? Could the intention of the parties in this case have been satisfactorily fulfilled by the recognition of a single trust structure?

In short, it is submitted that the problem with *Quistclose* does not lie with the decision made in favour of the lender Quistclose Investments, but rather with the treatment of the legal issues. The emphasis on the specific purpose of the trust as both constituting the intention of the parties and the central factor giving rise to a trust has confused the nature of the trust and the principal issues involved. The major concern of the lender was to retain the beneficial interest in the funds as security against any default or insolvency by the borrower.

Recourse to earlier authority²³ is only of limited assistance. Courts in the nineteenth Century and early twentieth Century accepted the possible co-existence of a trust and a common law relationship such as debt where the

²¹ Supra fn 5, 696–8. It is worthwhile to note that in *Theiss Watkins White Limited v Equiticorp Australia Limited*, supra fn 8, de Jersey J (at 84) doubted whether the 'intention that funds be kept by the suggested trustee separately from his own assets' was 'essential to the creation of a trust'. Yet, a factual analysis of *Quistclose*, *Re Australian Elizabethan Theatre Trust* and *Theiss Watkins* itself indicates that such a factor is highly persuasive.

²² Supra fn 1, 580.

²³ See *Edwards v Glyn* (1859) 2 E & E 29; *In re Rogers; Ex parte Holland & Hannen* (1891) 8 Morrell's Reports of Cases under the Bankruptcy Acts, 1883 & 1890, 243; *In re Drucker (No 1)*, *Ex parte Basden* [1902] 2 KB 237; *Re Watson; Ex parte Schipper* (1912) 107 LT 783.

loan was for a specific purpose. The earlier authority, *Toovey v Milne*,²⁴ encapsulates the general attitude. In that case Abbott CJ stated:

'I thought at the trial and still think, that the fair inference from the facts proved was that this money was advanced for a specific purpose, and that being so clothed with a specific trust, no property in it passed to the assignee of the bankrupt. Then the purpose having failed, there is an implied stipulation that the money shall be repaid. That has been done in the present case; and I am of the opinion that repayment was lawful, and that the non-suit was right.'²⁵

The courts were influenced by the clear and specific object of the loan. In addition, they were unwilling to allow monies advanced in such circumstances to fall into the hands of the assignee in bankruptcy. However, the factual situations in the earlier cases were so similar that there was no need to consider the issues raised later in *Quistclose*. Therefore, in the light of the limited nature of earlier authority, an accurate reading of *Quistclose* is essential.

Major Difficulties with Quistclose

The emphasis on the central importance of the purpose of the loan has created, to varying degrees, three main problems²⁶ with the *Quistclose* trust:

- (a) What is the nature of the trust relationship which is established between the debtor and the creditor?
- (b) In the light of the standard requirement that there must be an intention evinced to create a trust, which party/parties is/are required to show such an intention before a trust will be established?
- (c) Which party — the lender or the third party creditor — holds the beneficial interest?

Each of the above questions will be addressed in turn.

THE NATURE OF THE TRUST RELATIONSHIP ESTABLISHED

There are two problems which emerge from a consideration of this issue, namely, whether a definitive trust model is possible and the characterisation of *Quistclose*.

²⁴ (1819) 2 B & Ald 683; 106 ER 514.

²⁵ *Ibid*, 684; 515.

²⁶ An additional area of concern relates to the possible impact of the *Quistclose* trust on bankruptcy and insolvency law, particularly s 122 *Bankruptcy Act*, 1966 (Cth) and s 565 *Corporations Law*, 1990 (Cth). For some discussion of this issue see *infra* fn 59, Mr Justice Priestley, 'The Romalpa Clause and the Quistclose Trust', 235-6; H A J Ford, and W A Lee, *Principles of the Law of Trusts* (2nd ed, Sydney, Law Book Co Limited, 1990) at para.[128]. The insolvency and bankruptcy issue was in the mind of Pincus J in *Re Miles and Another; Ex parte National Australia Bank Limited v The Official Receiver in Bankruptcy* (1988) 20 FCR 194 where he stated (at 199): 'In my opinion, however, it would not be right to apply the *Quistclose* principle beyond the field defined by the House of Lords that is actual payment of money, by the party claiming to be the beneficiary of a resulting trust, for the purposes of discharge of debts by the payee, that purpose having failed.'

In *Re Australian Elizabethan Theatre Trust*,²⁷ Gummow J forcefully stated:

'In this field, the legal system in truth teems with established norms, a there is scarcely the need for another, dignified as the *Quistclose* trust.

Thus, in his view the *Quistclose* trust should not be seen as a *sui generis* legal creature. So too, it is important to realise that the intention of parties must provide a primary focus. To attempt to describe definitively the structure of the *Quistclose* trust could run counter to the inherent flexibility of the trust. Again, Gummow J provided words of wisdom:

'So it is that one sees what in truth are pointless debates in some of the commentaries as to whether a *Quistclose* trust may arise where the money is lent not to pay the borrower's debts, but to buy equipment (as in *Re ETVI* [1987] BCLC 646), or not lent but paid to subscribe for shares, as in *Re Associated Securities Ltd and the Companies Act* . . .'²⁹

Lord Wilberforce came close to sharing the same view in *Quistclose* itself where he suggested that cases concerned with the payment of monies for the allotment of shares could be distinguished simply on the basis that the requisite intention to create a trust was absent.³⁰

However, subject to these provisos, it is suggested that a general characterisation of the processes at work in the *Quistclose* trust is worthwhile. There are a few fundamental characteristics which do recur in the *Quistclose* trust.

The second problem, namely, the characterisation of *Quistclose*, has drawn a number of substantively differing responses. Various explanations have been given for the nature of the trust established in *Quistclose* and it is worth considering them as well as stating a preferred choice.

The Illusory Trust

Millet³¹ has suggested that the *Quistclose* device 'is simply an example of what is sometimes called an "illusory trust"³² where the 'apparent beneficiaries' (in *Quistclose* itself, the creditors) take no beneficial interest at all. The debtor puts the funds in the hands of the trustee for the purposes of paying his debts but the debtor never intends the creditors to obtain a beneficial interest in those funds. The 'illusory trust' is created by the single intention of the settlor or lender and is revocable at any time.

There are two main problems with Millet's explanation. First, the under-

²⁷ *Supra* fn 5.

²⁸ *Id.*, 694.

²⁹ *Ibid.*; *Re Associated Securities Ltd and the Companies Act* [1981] 1 NSWLR 742.

³⁰ *Supra* fn 1, 581. In particular, Lord Wilberforce distinguished *In re Nanwa Gold Mines Ltd* [1955] 1 WLR 1080; [1955] 3 All ER 219. In this respect, reference should be made to a suggestion by Pincus J in *Re Miles and Another; Ex parte National Bank Limited v The Official Receiver in Bankruptcy* (1988) 20 FCR 194 (at 198-9) that the operation of *Quistclose* trust should be limited to analogous fact situations.

³¹ *Supra* fn 2.

³² *Id.*, 288.

lying facts in *Quistclose* were different than those factors giving rise to an illusory trust. Quistclose Investments did not place funds in Rolls' hands for the purpose of paying Quistclose Investments' debts. Rather, the funds were lent to Rolls for the specific purpose of paying its own debts. For a lender in Quistclose Investments' position, the existence of a single trust in its favour has the obvious benefit of giving the lender control over the funds and the beneficial interest in them. Secondly, Millet's characterisation fails to take into account the mutual intention of the parties and the possibility of the existence of an underlying contract. Nevertheless, Millet's identification of a single trust³³ is in keeping with the tendencies of authority prior to *Quistclose*.³⁴

The Purpose Trust

Rickett, in a recent article,³⁵ has suggested that the complex and inconsistent nature of the case-law in this area can be explained by reference to a philosophical dichotomy between the 'pure trusts philosophy' on the one hand and the 'remedial trusts law philosophy' on the other.³⁶ According to Rickett, the former attitude is exemplified by such writers as Millet who seek to explain the *Quistclose* trust in terms of traditional trust principles.³⁷ The latter view simply interprets and applies the *Quistclose* trust as another example of the constructive trust.³⁸ Rickett has argued that the decision in *Quistclose* cannot be explained on the basis of traditional trust principles, nor on the basis of the constructive trust. Instead, in an attempt to circumvent the clash of two irreconcilable positions, Rickett has proposed that the primary trust in *Quistclose* trust should be characterised as a non-charitable purpose trust followed by a secondary resulting trust in favour of the lender.³⁹ This interpretation stems from certain statements made by Peter Gibson J in *Carreras Rothmans Ltd. v Freeman Mathews Treasure Ltd (Carreras)*.⁴⁰ In that case Peter Gibson J discussed and supported the earlier unreported judgment of *In Re Northern Developments (Holdings) Ltd (Northern Developments)*⁴¹ in which Megarry VC suggested that the primary trust was a purpose trust. However, it is submitted that an analysis of the *Quistclose* trust based on the purposive trust is flawed.

Traditionally, a trust for non-charitable purposes, rather than persons has been held invalid by the courts because there has been no certainty as to the

³³ Id, 290. See Millet's concluding remarks about the structure of the *Quistclose* trust which focus on the workings of a single trust.

³⁴ *Infra* fn 76.

³⁵ *Supra* fn 3.

³⁶ Id, 646-8.

³⁷ Id, 646-7.

³⁸ Id, 630-48.

³⁹ See generally Rickett's article *supra* fn 3.

⁴⁰ [1985] Ch 207. See my discussion of this case at pp 165-7 of this Article.

⁴¹ Unreported (6 October, 1978).

object of the trust.⁴² So, for example, in the celebrated case *Re Shaw*⁴³ the Court found that George Bernard Shaw's testamentary disposition for the reform of the English alphabet was not a charitable trust and, therefore, it was invalid. The glaring problem in this sort of case is the lack of a readily identifiable beneficiary.

It seems possible that this strict requirement has been watered down. In *Re Denley's Trust Deed*,⁴⁴ Goff J suggested that the correct criterion of validity was whether the trust directly and tangibly benefited a group of individuals.⁴⁵ Indeed, Rickett has relied on this case to support his view that the primary trust in *Quistclose* was a non-charitable purpose trust.⁴⁶ It is submitted that two factors have given rise to the erroneous interpretation that the primary *Quistclose* trust is a non-charitable purpose trust.

First, in *Quistclose*, Lord Wilberforce over-emphasised the purpose of the loan in order to ascertain the existence of a trust and its structure.

Secondly, the confusion of the *Quistclose* trust with a non-charitable purpose trust is also due to semantics. The *Quistclose* trust, which may be created to a loan for a specific purpose, has been confused with a purposive trust.

Nevertheless, it is clear that the trust which arose in *Quistclose* was not a non-charitable purpose trust. In *Re Australian Elizabethan Theatre Trust*,⁴⁷ Gummow J explained this fundamental difference:

'There was, on Lord Wilberforce's analysis of the facts, a trust fund held by a trustee on certain terms for a class of ascertained beneficiaries, with a limitation (whether as an express or resulting trust) back to the settlor in specified circumstances. The expression "purpose" was apt to describe the end sought to be achieved by the settlor, Quistclose, and accepted by the trustee, Rolls Razor. This was formulated in the terms stipulating the conditions upon which the shareholders might take a beneficial interest in the fund. The use of the expression "purpose" should not be read as heralding a new era for the non-charitable purpose trust.'⁴⁸

Therefore, the trust which is brought into existence is an express private trust in favour of beneficiaries. The trust is subject to certain conditions or purposes. For example, a trust for the education for a testator's children is an express private trust in favour of the testator's children for a specific purpose. It is not a non-charitable purpose trust. So too, as will be seen, the trust in *Quistclose* was one in favour of Quistclose Investments, as beneficiary, subject to the condition that if Rolls used the funds, it would use the funds to pay dividends to its shareholders.

⁴² See *Morice v The Bishop of Durham* (1804) 9 Ves 399 at 405; *Re Astors Settlement Trusts* [1952] Ch 534; [1952] 1 All ER 1067. *Leahy v AG (NSW)* (1959) 101 CLR 611. For a discussion of the legal issues in this area see generally see H A J Ford, 'Dispositions for Purposes', in P D Finn (ed), *Essays in Equity*, (Sydney, Law Book Co Limited, 1985), 159.

⁴³ *Re Shaw* [1957] 1 All ER 745.

⁴⁴ [1969] 1 Ch 373; [1968] 3 All ER 65.

⁴⁵ *Ibid*, 383-6; 69-71.

⁴⁶ *Supra* fn 3, 610-1.

⁴⁷ *Supra* fn 5.

⁴⁸ *Id*, 692; See also *supra* fn 2, 281-2 where Millet proffers the same view.

The Constructive Trust

In New Zealand there has been some suggestion that the *Quistclose* trust is simply one example of the far-reaching operation of the constructive trust.⁴⁹ However, it should be noted that there is authority which follows more orthodox approaches.⁵⁰ In Canada, on the other hand, the *Quistclose* trust has remained underdeveloped⁵¹ because the courts have had recourse to the constructive trust as a broad remedy based on the principles of unjust enrichment.⁵² These jurisdictional differences mean that the Canadian and, to a lesser extent, New Zealand case-law may prove interesting but not authoritative.

The scope of the constructive trust has been more limited in Australia. In particular, one should note that the requirement that a fiduciary relationship should exist or be found on the relevant facts is fundamental in Australian case-law.⁵³ Certainly, it is difficult to envisage that the characterisation of *Quistclose* trust as an example of a constructive trust could be correct in the Australian context. Deane J has stated that:

⁴⁹ See Rickett's article supra fn 3, 630-46 where he discusses the constructive trust in New Zealand. In *Dines Construction Limited v Perry Dines Corporation & Ors* (1989) 4 NZCLC 65,298 Ellis J found a constructive trust in relation to money paid for the allotment of shares where the share issue was not made.

⁵⁰ In *General Communications Ltd v Development Finance Corporation of New Zealand* [1990] 3 NZLR 406 Hardie Boys J of the Court of Appeal of the High Court of New Zealand (delivering judgment for the Full Court at 432-3) pointed out that the Court had adopted Millet's orthodox approach.

⁵¹ See the less than sophisticated approach to *Quistclose* in *Mercantile Bank and Trust Company Limited, Liquidators of, and Mercantile Bank and Trust Company Limited v Credit Europeen SA* (1981) 32 NBR (2d) 239; *Re Winnipeg Mortgage Exchange Ltd and Winnipeg Mortgage Holdings Ltd* 43 CBR NS 119.

⁵² A constructive trust will be imposed to prevent unjust enrichment. In *Pettkus v Becker* (1981) 117 DLR (3d) 257 Dickson J with whom the majority of the Supreme Court of Canada agreed, pointed out (at 274) that there were three requirements necessary to establish a constructive trust: 'an enrichment, a corresponding deprivation and the absence of any juristic reason for the enrichment'. These criteria have been considered in commercial contexts which have been the subject of some interesting cases. Certain relevant cases include; *Re Ontario Egg Producers' Marketing Board and Clarkson Co. Ltd et al* (1982) 125 DLR (3d) 714; *Waselenko and Waselenko v Touche Ross Limited, Swertz Bros Construction Ltd and Canadian Imperial Bank of Commerce* [1983] 2 WWR 352; *Royal Bank of Canada v Touche Ross Limited (Liquidator of Pioneer Trust Company)* [1988] 4 WWR 175; *National Trust Co v Atlas Cabinets & Furniture Ltd et al* [1990] 38 CLR 106.

⁵³ An important case in this regard is *Hospital Products Ltd v United States Surgical Corporation* [1983] 2 NSWLR 157 (Court of Appeal); (1984) 156 CLR 41 (High Court of Australia) where a majority of the High Court confirmed that a fiduciary relationship was an important prerequisite for finding a constructive trust in commercial transactions. A fiduciary relationship can be found in two ways. The relationship in question may be one which the courts automatically recognise as constituting a fiduciary relationship such as a director of a company or solicitor/client relationship. Alternatively, the surrounding circumstances may conform to the criteria for a fiduciary relationship set out by the High Court in *Hospital Products* and give rise to a fiduciary relationship. The important point to note is that a fiduciary relationship must exist before a court will impose a constructive trust. Deane J suggested a contrary proposition when he stated (at 124) that 'the constructive trust pursuant to which HPI is liable to account . . . should properly be seen as imposed as equitable relief appropriate to the particular circumstances of the case rather than arising from a breach of some fiduciary duty flowing from an identified relationship.'

'Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes *regardless of actual or presumed agreement or intention* . . . (My emphasis)⁵⁴

In contrast, in *Quistclose* Lord Wilberforce was most concerned to find and give legal expression to the mutual intention of the parties.⁵⁵ There was no need to impose a constructive trust in the circumstances because the intention to create an express trust was found.

A New Approach Embracing Unorthodox Principles

In accord with Rickett's general endorsement of the judgments in *Carreras* and *Northern Developments* some eminent commentators have noted that it may be 'better for equity to take the more flexible approach advocated' by the judges in those decisions.⁵⁶ Whilst acknowledging the controversial interpretation of the *Quistclose* trust as a non-charitable purpose trust, these commentators have been attracted to the 'flexibility as to the allocation of equitable interests'⁵⁷ endorsed by the judgments in *Carreras* and *Northern*. However, in the light of the unorthodox and complex treatment of the nature and allocation of the equitable interests involved in these cases, one is left wondering whether a satisfactory solution can be found within a simpler framework. As will be shown, the judgments in *Carreras* and *Northern Developments* contain considerable difficulties in this regard.⁵⁸

The Single Express Private Trust

In an article in P D Finn (ed), *Equity and Commercial Relationships*⁵⁹ Mr Justice Priestley commented on criticisms of *Quistclose* made by Professor P D Finn which Mr Justice Priestley noted were different from other criticisms he had heard.⁶⁰ Finn had said that whilst the result in *Quistclose* was satisfactory, the decision could be better explained. He quoted Finn thus:

'A. The contractual arrangement between lender and borrower was intended to accomplish (1) a debtor-creditor relationship at law; (2) a contractual obligation by the borrower only to use the moneys advanced for the payment of certain creditors; (3) a contractual obligation on the borrower that the moneys advanced would be kept separate from its own and that the only benefit it would obtain from their advance to it would be the benefit it would receive from their use in the discharge of the particular debts.

B. As the lender's intention was to benefit the borrower in a particular way and not to benefit the particular creditors directly there was no contractual

⁵⁴ *Muschinski v Dodds* (1985) 160 CLR 583, 614.

⁵⁵ *Supra* fn 1, 580.

⁵⁶ J D Heydon, W M C Gummow and R P Austin, *Cases and Materials on Equity and Trusts* (3rd ed, Sydney, Butterworths, 1989), 486.

⁵⁷ *Ibid.*

⁵⁸ See my discussion at pp 165-7 of this Article.

⁵⁹ The Hon Mr Justice L J Priestley, 'The Romalpa Clause and the Quistclose Trust', in P D Finn (ed), *Equity and Commercial Relationships* (Sydney, Law Book Co Limited, 1987), 217.

⁶⁰ *Id.*, 237.

obligation as between the lender and the borrower that the borrower would pay the creditors.

On the foregoing analysis there would arise in equity, particularly from A(3) above, an express private trust. There being, on his view no contractual intention that the loan be for the benefit of the creditors, the trust could not be one for them. Rather, it would be security device for the benefit of the lender safeguarding his position unless and until the money was applied as authorised. There would be only one trust not two.⁶¹

Mr Justice Priestley has criticised this explanation on the basis of an internal inconsistency, namely, that a real debtor/creditor relationship could not be said to exist so long as the so-called debtor did not obtain the beneficial interest in the funds.⁶² As will be shown, it is an unsustainable criticism.⁶³ Consistent with Millet's approach,⁶⁴ Finn's characterisation of the process is one involving the establishment of a single trust. Finn's views are also in accord with the general description of the express private trust by Gummow J set out below.

An Express Trust with Two Limbs

Consistent with Finn's view that the *Quistclose Trust* is actually a single express trust, Gummow J suggested in *Re Australian Elizabethan Theatre Trust* a reconciliation of the apparent inconsistency between the single trust and Lord Wilberforce's description of a dual trust mechanism. Gummow J stated:

'This characterisation of what occurred is indicative of an express trust with two limbs rather than an express trust in favour of the shareholders and a resulting trust in favour of Quistclose which arose by reason of an incomplete disposition by Quistclose of the whole of its interest in the money lent to Rolls Razor.'⁶⁵

Unfortunately, the two limbs are not further elaborated and a major purpose of the remaining part of this article will be to attempt to sketch the process which Gummow J suggested.

It is no accident that *Quistclose* and the previous case-law did not characterise the trust as an illusory trust or a constructive trust. In addition, the above discussion indicates that it is erroneous to interpret the primary trust as a trust for purposes.

It is submitted that a workable framework lies in a combination of Gummow J's suggestion that the trust in *Quistclose* was an express private trust

⁶¹ *Ibid.* It should be noted that the penultimate sentence in paragraph B of the original text of Mr Justice Priestley's exposition of Professor Finn's theory contains an error. The sentence reads: 'Rather it would be a security device for the benefit of the borrower safeguarding his position unless and until the money was applied as authorised'. It is clear that the word 'borrower' should be replaced with the word 'lender'. Gummow J also noted this error in *Re Australian Elizabethan Theatre Trust*, supra fn 5, 691.

⁶² *Ibid.*

⁶³ See my discussion at p 164 of this Article.

⁶⁴ Supra fn 2, 290.

⁶⁵ Supra fn 5, 691.

with two limbs and Finn's approach. In order to demonstrate this view, it is necessary to answer questions (b) and (c) set out above.⁶⁶

THE CONCEPT OF INTENTION TO CREATE A TRUST

Fundamental to the concept of an express private trust is the requirement that an intention to create a trust must be shown. Gummow J has stated:

'The question as to the existence of any express trust will always have to be answered by reference to intention.'⁶⁷

Whilst in many cases the intention will be readily evident because it will have been expressed by a settlor in clear language, the court will consider the transaction involved and the surrounding circumstances.⁶⁸

In *Re Armstrong*⁶⁹ the Court was willing to find that a testator has constituted himself a trustee of certain bank deposits for the benefit of his two sons. Herring CJ noted:

'True it is that he did not use the words "trust" or "trustee", but what he said does show an intention to hold the investment he was making upon trust. He was using expressions which I think may with propriety be treated as declarations of trust, and proper to be enforced in appropriate circumstances.'⁷⁰

It can be said that, what the Court was undertaking was a recognition of an intention on the part of the testator to set up circumstances which, he may not have described as a trust, but which the Court recognised could be best approximated and fulfilled by the confirmation of a trust relationship.⁷¹

Consistent with earlier authority, Lord Wilberforce confirmed in *Quistclose* that the intention to create a trust need not be expressed as such. Certainly, in *Quistclose* the confirmation of a trust relationship ensured that the intention of the parties was fulfilled.

Lord Wilberforce was influenced in *Quistclose* by the unequivocal evidence of the *mutual* intention of Quistclose Investments and Rolls.⁷² However, what the judgment did not decide, and perhaps cannot categorically decide, is whether the mutual intention of the lender and the borrower is required in

⁶⁶ See my discussion at p 153 of this Article.

⁶⁷ *Supra* fn 5, 693.

⁶⁸ *Ibid.*

⁶⁹ [1960] VR 202.

⁷⁰ *Id.*, 206.

⁷¹ See also in this regard, *Paul v Constance* [1977] 1 All ER 195. It should be noted that the courts will not automatically find an express trust. In *Re Multi Guarantee Co Ltd* [1987] BCLC 257, Nourse J was unwilling to find a *Quistclose* trust because in his view, the circumstances of the case did not disclose an intention by the parties to create such a trust although the monies in question were placed in a special account. For an appraisal of the decision see I M Hardcastle, "Purpose Trusts" how close to *Quistclose*?" (1988) *LS Gaz* 14.

⁷² *Supra* fn 1, 580.

every case. Gummow J had also left this point open in *Re Australian Elizabethan Theatre Trust*.⁷³

Where the loan for a specific purpose is governed by an express written contract and the contractual provisions evidence that it was the intention of the parties that a trust would arise, it would appear difficult to argue that there was no mutual intention of the parties in this regard.⁷⁴

However, earlier authority and *Quistclose* did not prescribe that a formal written contract must exist before a trust can arise in relation to loan monies. Therefore, where the intention of the parties has not been expressed in writing or where the mode of expression is vague or uncertain, nice questions arise. Should either party (and most likely the borrower) dispute the conditions upon which the loan was given, will the intention of one party be sufficient to give rise to a trust? It is quite likely that a situation could arise whereby a lender considers that a loan advanced constitutes a fund separate from the assets of the borrower and ascertains that not only is the borrower in financial difficulties, but also that the funds are unlikely to be used for the purpose the lender envisaged. So far, there has been no breach of the underlying loan contract and the lender is not otherwise entitled to the early repayment of the funds. The lender then seeks the return of the loan accommodation on the basis of a trust relationship. The borrower disputes that the funds are intended to constitute a separate fund and denies the creation of a trust relationship. The problem is, will the intention of the lender be sufficient to constitute a valid trust? If mutuality is a requirement in principle, then the court would be unable to confirm the existence of a trust. However, if mutual intention is merely an evidentiary factor to be considered, then there may be scope for the court to confirm the existence of a trust.⁷⁵ In addition, a possible trust relationship may be important where contractual terms other than terms setting out the specific nature of the funds, may be in dispute. Unfortunately, the status of mutual intention remains uncertain.

⁷³ *Supra* fn 5, 693. It should be noted that in relation to third party contracts, the situation is unresolved. In *Trident General Insurance Co Ltd v McNeice* (1988) 80 ALR 574; 165 CLR 107, Mason CJ and Wilson J (in their joint judgment at 583;121) suggested that the intention of the promisee to create a contract would be sufficient. Deane J considered (at 603;149) that: 'The intention so manifested will commonly be a joint intention of promisor and promisee. It would suffice, however, that it be the intention of the promisee alone.'

⁷⁴ See *supra* fn 2 where Millet has argued that it is the intention of the lender which is important. In *General Communications Ltd v Development Finance Corporation of New Zealand Ltd*, *supra* fn 50, Hardie Boys J commented in relation to Millet's views (at 433): 'This formulation, which with respect we are content to adopt, suggests that it is the lender's intention that is relevant. In *Quistclose* the emphasis was on mutual intention. Intention being ascertained objectively, there is really no difference: what one party is objectively seen to have intended must *ex hypothesi* have been appreciated by the other and accepted by him when he participated in the arrangement.'

⁷⁵ In this regard, an interesting question arises as to whether subjective intention or objective intention to create a trust is the relevant test. In this regard see H A J Ford and W A Lee, *Principles of the Law of Trusts*, *supra* fn 26, paras [202-5].

INTENTION AND THE TRUST STRUCTURE

The attempt by Lord Wilberforce to analyse the trust mechanism has simultaneously assisted our understanding of it and left it open to varied and confused interpretation. The structure of the dual trust was not suggested in the case-law prior to *Quistclose*. In the context of these cases, it could be well argued that there was a single trust under which the lender was a beneficiary.⁷⁶ The dual trust mechanism described by Lord Wilberforce suggests that, initially, a party other than the lender or the borrower holds the beneficial interest. When the purpose of the primary trust can no longer be fulfilled, the secondary trust comes into operation and then the lender acquires a beneficial interest.

In the light of the earlier authority and the situation in *Quistclose* itself, was recourse to the dual trust necessary? The answer lies in the Court's desire to fulfil what was the true intention of the parties. It is important to reiterate that the intention of the parties in *Quistclose* was not only that Rolls would use the monies advanced for the payment of the dividend. Rather, the parties also intended that the sum advanced would constitute a fund separate from Rolls' assets. The sum advanced would not form part of the assets of Rolls. The confirmation of a trust relationship cannot be disputed. However, it is submitted that the Court could have easily found a single trust with two limbs under which Quistclose Investments was a lender and beneficiary at all times; and Rolls Razor as trustee had limited powers to use the funds.⁷⁷ The finding of such a single trust in favour of Quistclose Investments would have amply fulfilled the intention of the parties in this case. The lender would have retained control over and an interest in the monies lent whether the purpose was fulfilled or not. Also, such a trust would have obviated the need to evaluate whether the purpose for which the funds had been lent had or could have been fulfilled before the lender could claim the beneficial interest.⁷⁸ Indeed,

⁷⁶ See supra fn 2, 270-4. There is nothing in Millet's analysis of the earlier authority which would suggest that anything other than that a single trust arose.

⁷⁷ Id, 284-90 where, *inter alia*, Millet has discussed trustee powers and revocability of trusts.

⁷⁸ This was precisely the issue in *Re EVTR Gilbert and Another v Barber*, supra fn 17, where funds had been lent to a company for 'the sole purpose of buying new equipment'. The funds had been partially paid over for the equipment, but the equipment had not been delivered. The company then went into liquidation. Dillon LJ had to decide the issue on a question of fact and commented (at 650-1): 'On *Quistclose* principles, a resulting trust in favour of the provider of the money arises when money is provided for a particular purpose only, and that purpose fails. In the present case, the purpose for which the £60,000 was provided by the appellant to the company was, as appears from the authority to Knapp-Fishers, the purpose of [the company] buying new equipment. But in any realistic sense of the words that purpose has failed in that the company has never acquired any new equipment, whether the Encore System which was then in mind or anything else. True it is that the £60,000 was paid out by the company with a view to the acquisition of equipment, but that was only at half-time, and I do not see why the final whistle should be blown at half-time. . . . It is irrelevant in my judgment that, if the Encore System for which the £60,000 was paid had been delivered and accepted by the company, the company's interest in that equipment would have been a general asset of the company held by the company free of any proprietary or equitable interest of the appellant by way of trust or otherwise. If that had happened, the purpose of the appellant, and any trust attaching to

some commentators have questioned whether the purpose of the primary trust in *Quistclose* itself was no longer capable of fulfilment.⁷⁹ It is submitted that for these reasons the single trust as described will generally carry out the intention of the lender. Where factual situations materially similar to *Quistclose* exist, the single trust will arise.

A final and important matter needs treatment in this context — the role of any underlying contract.

It is noteworthy that the earlier authority lacked any discussion of a contractual or common law relationship between the lender and the borrower. It is also clear that earlier authority and *Quistclose* itself did not prescribe that an express written contract must govern the debtor/creditor relationship before a trust can arise in relation to a specific purpose loan.

In *Toovey v Milne*,⁸⁰ for example, the Court referred to an implied stipulation that the money would be repaid, if the purpose failed. Presumably, a debtor and creditor relationship existed in relation to the money. However, the precise inter-relationship of debt and trust was not determined. So too, the existence of any express and written contractual relationship was neither considered nor prescribed.

Nevertheless, in the modern commercial age, it is unlikely that an astute lender would lend funds otherwise than under a written express contract as a primary determinant of the relationship between the parties. Finn characterised such a contract as intending to establish a creditor/debtor relationship and a loan. The loan is to be used for a specific purpose but otherwise is to remain outside the assets of the borrower.⁸¹ Finn's analysis showed that what has occurred is not merely a juxtaposition of two separate legal relationships. Rather, there has been an integration of them *via* the function of common intention giving rise to both. By the mutual acts and intentions of the parties, a contract and a trust have been set up together. This integration is neither new nor unorthodox.⁸² So too, the integration of these legal relationships ultimately assists both to identify and achieve the intention of the parties. Whilst the trust effectuates the intention of the parties that the funds will not form

the money because of that purpose, would indeed have been satisfied, but that did not happen.'

⁷⁹ See for example William Goodhart and Gareth Jones, 'The Infiltration of Equitable Doctrine into English Commercial Law' (1980) 43 *Mod L Rev* 489, 494; H A J Ford, and W A Lee, *Principles of the Law of Trusts*, supra fn 26, para [127].

⁸⁰ Supra fn 24.

⁸¹ Supra fn 59, 237.

⁸² See for example *Hospital Products Ltd v United States Surgical Corporation*, supra fn 53 (at 97) where Mason J (as he then was) discussed the relationship between contract and another equitable doctrine — the fiduciary relationship. It is submitted that the general principles elaborated equally apply to contract and the *Quistclose* Trust: 'That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.'

part of the assets of the borrower, the nature and terms of the underlying contract may provide answers to various trust issues.⁸³

A real problem is — can a debtor/creditor relationship be said to be created when the debtor does not acquire the beneficial interest in the funds lent?⁸⁴ In order to answer this question it is necessary to turn Finn's hypothesis around.

The loan contract, the terms of which have been described by Finn, evidences not only an intention of the parties to pursue the loan, but also the intention that the relationship be governed *vis a vis* the loan monies, by an express private trust. Prior to the expenditure of the funds by the borrower for the purpose for which they were lent, the first limb of the single trust is the primary relationship and incorporates the written terms of the express contract. Thereafter, matters can be resolved in three ways. If the funds are properly used for the specific purpose, then the trust comes to an end and the only remedy for the lender will lie in contract. If the purpose can no longer be fulfilled, then the second limb of the single express trust comes into operation. If the funds are used for a purpose other than the specific purpose, then the trust remains on foot and the lender, as creditor and beneficiary may seek remedies in either contract or equity or both.

It will be seen that the debtor/creditor relationship (usually created within the confines of an express written contract) has a more effective operation after the funds have been properly or improperly used. Thus, in terms of the characterisation of the process, although the parties have expressed the primary relationship as one of debtor/creditor (and would obtain remedies from a common law court on the basis of that relationship), the predominant initial relationship is one based on the single trust with two limbs. This relationship is followed by the predominance of the creditor/debtor relationship after proper expenditure of the funds. Again this proposition is not unorthodox because it gives effect to the intention of the parties and is consistent with standard principles. The fact that the debtor does not obtain a beneficial interest in the funds is not incongruous because analogous situations do exist. For example, as a matter of general principle, a guarantor under a loan will not obtain a beneficial interest in a loan, yet he/she may become a secondary debtor and ultimately liable for it.⁸⁵

⁸³ Note supra fn 2 where Millet (at 291) points out, referring to 'A' as the lender, that: 'Prima facie, A's [the lender's] directions will be regarded as revocable by him: but he may contract with B not to revoke them without B's consent.' It is submitted that the inter-relationship of contract and the *Quistclose* trust could have been more widely put — although the trust may be revocable by the lender, the right to revoke the trust must be linked to the intention of the parties, special consideration of the express contractual terms and surrounding circumstances.

⁸⁴ Supra fn 59, 237.

⁸⁵ See generally, James O'Donovan and John C Phillips, *The Modern Contract of Guarantee*, (Sydney, The Law Book Co Limited, 1985), Ch 5 which deals with the scope and extent of a guarantor's liability.

INTENTION AND THE CREATION OF A REAL DUAL TRUST:
CARRERAS ROTHMANS v FREEMAN MATHEWS
TREASURE LTD

An analysis of the *Quistclose* trust would be incomplete without a discussion of how the varied intentions of parties can give rise to complex and far-reaching arrangements such as the dual trusts in *Carreras*.⁸⁶ Nevertheless, *Carreras* can be seen as a case applying the principles evident in *Quistclose*.

The Facts⁸⁷

Freeman Mathews Treasure Ltd ('Freeman Mathews') was an advertising agency which had undertaken advertising services for Carreras Rothmans Ltd ('Carreras Rothmans') for many years. The advertising agency spent funds on advertising campaigns for Carreras Rothmans which involved third parties providing services in these campaigns. Each month Carreras Rothmans paid Freeman Mathews an amount equivalent to the sum of the invoices received from the third parties for the previous month. Freeman Mathews began to have financial difficulties. In July 1983, Carreras Rothmans and Freeman Mathews agreed that in the light of these difficulties, a special account would be opened in which Carreras Rothmans would deposit the funds due to third parties. The special account was opened and Carreras Rothmans deposited funds to meet the June liabilities. Freeman Mathews drew cheques on the account to pay the creditors, but soon after went into voluntary liquidation. The liquidator ensured that the cheques were frozen prior to clearance. Carreras Rothmans was threatened by the third parties that unless the monies owing were promptly paid, no further advertisements would be published. Carreras Rothmans paid the third parties in order to ensure continuance of the advertising campaign. It then sought the return of the funds paid into the special account.

The Judgment

Peter Gibson J found that the funds involved were monies to be used for a special purpose and clearly matched the invoices received. The common intention of Carreras Rothmans and Freeman Mathews was that the funds were to be used for the sole purpose of paying Carreras Rothmans' debts. The fact that the monies involved were not loan funds was not fundamentally important:

'The account was intended to be little more than a conduit pipe, but the intention was plain that whilst in the conduit pipe the moneys should be protected.'⁸⁸

⁸⁶ *Supra* fn 40.

⁸⁷ *Id.*, 218-20.

⁸⁸ *Id.*, 220.

However, the weaknesses of the judgement are twofold.⁸⁹

First, His Honour assumed that a dual trust applied in the terms envisaged by Lord Wilberforce in *Quistclose*. Accordingly, he expressly held that in relation to the *Quistclose* trust (of which this case was an example) the primary trust was in favour of the creditors and if the primary trust failed then a secondary resulting trust arose in favour of the lender. As previously pointed out, it is unlikely that the lender would envisage parting with some sort of interest or control over the funds in question particularly when the funds are to be used to pay third party creditors of the borrower. Accordingly, in most cases one would have to contemplate that the intention of the parties in a situation similar to that in *Quistclose* would be that the lender retain the beneficial interest. As will be shown, the facts in *Carreras* were exceptional. In particular, two trusts operated and the third party creditor initially obtained the beneficial interest under the primary trust.

Secondly, having accepted the dual trust analysis posited by Lord Wilberforce, Peter Gibson J (with the assistance of Megarry VC in the judgment in *Northern Developments*⁹⁰) propounded a rather unorthodox view concerning the status of the third party creditor under the primary trust. Rather than finding that the third party holds a beneficial interest — a position which may conflict with the understandable intention of lenders — he held that under the primary trust the third party holds an enforceable right to ensure the proper administration of the primary trust. This enforceable right constitutes something less than a beneficial interest. On the other hand, the lender no longer holds the beneficial interest. Peter Gibson J commented:

'... I cannot accept ... that the third party creditors for the payment of whose debts the plaintiff had paid the moneys into the special account had no enforceable rights. In any event I do not comprehend how a trust, which on no footing could the plaintiff revoke unilaterally, and which was expressed as a trust to pay third parties and was still capable of performance, could nevertheless leave the beneficial interest in the plaintiff which had parted with the moneys. On Sir Robert Megarry V-C's analysis the beneficial interest is in suspense until the payment is made.'⁹¹

The position enunciated by Peter Gibson J is clearly unsatisfactory. The lender is in a position analogous to a settlor of an irrevocable trust and the beneficial interest floats unconnected, until the purpose of the trust has been fulfilled.

In *Carreras* a simpler and soundly orthodox trust would have fulfilled the

⁸⁹ Despite the weaknesses discussed below, it should be noted that some eminent commentators have suggested that the analyses of Megarry VC which Peter Gibson J follows may be preferable — see JD Heydon, WMC Gummow, and RP Austin, *Cases and Materials on Equity and Trusts* supra fn 56. Rickett unequivocally agrees with the judgment — see supra fn 3, 647. In *General Communications Ltd v Development Finance Corporation of New Zealand Ltd* supra fn 50, Tomkins J (High Court of New Zealand at 414–9) also endorsed the views of Megarry VC. However, the Court of Appeal (at 432–3) preferred Millet's view that the *Quistclose* trust was no more than an example of a revocable illusory trust intended by the lender.

⁹⁰ Supra fn 41.

⁹¹ Supra fn 40, 223. In relation to the revocability of trusts see *Mallott v Wilson* [1903] 2 Ch 494.

intentions of the parties. The facts in *Carreras* were similar to *Quistclose* in so far that the intention of the parties was that the monies advanced to Freeman Mathews to pay the June liabilities would constitute a fund separate from the assets of Freeman Mathews. However, the single fact which materially differentiated *Carreras* from *Quistclose* was that the funds in question were set aside for the purpose of the payment of Carreras Rothmans' debt.⁹² Finn has pointed out that in cases like *Quistclose*, the lender's intention was to provide an opportunity for the borrower rather than benefit the third party creditor.⁹³ However, Carreras Rothman's relationship to the third party creditor in *Carreras* was direct and consequently different. A dual trust analysis can be used to explain the situation.

When Carreras received the invoices and subsequently deposited the funds in the special account, it parted with the beneficial interest in those funds subject to those funds being used for the specific purpose for which they were deposited. Freeman Mathews held the funds as trustee in favour of the third party creditors subject to a trust power to pay those funds to the creditors. When payment to creditors was rendered impossible by the actions of the liquidator, the beneficial interest in the funds reverted to Carreras Rothmans under a resulting trust. It was clearly the intention of the parties that Freeman Mathews would not incorporate the funds in the special account with its own assets. So too, in accord with the intention of the parties, Freeman Mathews never held the beneficial interest. It was clear that Carreras Rothmans intended that the trust would not be revocable unless the purpose of the primary trust became incapable of fulfilment within a reasonable time. Whether or not the trust was irrevocable depended, in particular, on the intention of Carreras Rothmans.⁹⁴

CONCLUSION

General Characteristics of the *Quistclose* Trust

It is impossible to describe definitively the *Quistclose* trust. This is due to the fact that it is a good example of the interplay between contracts and trusts.

Nevertheless, there are three undeniable characteristics of the *Quistclose* trust which are generally evident both in *Quistclose* and *Carreras*.⁹⁵

⁹² See supra fn 2, 285-6 where Millet discusses the situation where a lender may wish to benefit a third party. It is submitted that *Carreras* is not an example of an illusory trust because Carreras Rothmans intended to part with the beneficial interest in the funds.

⁹³ Supra fn 59, 237.

⁹⁴ Note also the suggestion by Millet supra fn 2, 291 (which has been endorsed by the New Zealand Court of Appeal in *General Communications Ltd v Development Finance Corporation of New Zealand Ltd* supra fn 50 (at 432-3): 'Communication to C of the arrangements prior to A's revocation will effect an assignment of A's equitable interest to C, and convert A's revocable mandate into an irrevocable trust for C.'

⁹⁵ In the summation of the general characteristics of the *Quistclose* Trust common in both *Quistclose* and *Carreras*, the term 'lender' refers to Quistclose Investments and Carreras Rothmans and the term 'borrower' refers to Rolls and Freeman Mathews.

First, in both cases it was the intention of both the lender and the borrower that the funds advanced were not available for distribution amongst the borrower's general creditors.

Secondly, it was the intention of both the lender and the borrower that the borrower was obliged to keep the money separate from its own.

Thirdly, the relationship was based upon an intention between the parties in the terms as outlined. The intention of the parties *inter alia*, expressly created a trust.

The Quistclose Trust and Contract

A *Quistclose* trust may exist whether or not the debtor/creditor relationship between the parties is governed by a formal express written contract. However, it is likely, particularly in the light of modern commercial attitudes, that any substantial loan would be governed by an express written contract. The following points should be noted:

First, under the terms of the loan, the borrower is contractually obliged to use the funds for a specific purpose and keep the monies separate from its own assets.

Secondly, the contract gives rise to a trust relationship which, in turn, gives full effect to the contractual intention of the parties until the monies are properly expended.

Thirdly, until the monies have been properly used, the trust relationship is the predominant one in relation to the loan monies.

The Single Express Trust — the Preferred View

The general characteristics outlined above will, on most occasions, give rise to the single trust approach endorsed earlier. The single trust is composed of two limbs.

The first limb gives effect to the intentions of the parties in so far that the borrower holds the funds as trustee. The trustee has the power to expend the funds in the manner specifically prescribed.

If the funds are used properly, the trust relationship falls away and the lender has remedies in common law. If the funds are used for a purpose for which they were not advanced, the lender retains rights both in equity and common law to obtain the return of the funds.

The second limb arises where the purpose for which the funds have been advanced can no longer be fulfilled. At that time, the lender as beneficiary is entitled to the return of the funds.