Hilary Term
[2022] UKPC 8
Privy Council Appeal No 0001 of 2020

JUDGMENT

Prickly Bay Waterside Ltd (Appellant) *v* British American Insurance Company Ltd (Respondent) (Grenada)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Grenada)

before

Lord Hodge
Lady Arden
Lord Leggatt
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON
21 March 2022

Heard on 16 March 2021

Appellant
Lord Davidson of Glen Clova QC
(Instructed by Oury Clark Solicitors (London))

Respondent
Sydney A Bennett QC
James Bristol QC
(Instructed by Blake Morgan LLP (Oxford))

LADY ARDEN:

THE ISSUE ON THIS APPEAL CONCERNS A TRUST FOR A SPECIFIED PURPOSE

1. Trusts for the transfer of money or other property for a specified purpose, in this appeal for the payment of debts, may arise where, for instance, one person, A, establishes a trust for the payment of the debts of A or another person by providing property (often money), whether by gift or loan, to a recipient, B, who has either a power or a duty to pay those debts. If the specified purpose is or becomes incapable of being carried out, the purpose is said to fail, and (subject to any contrary provision) A may bring proceedings to ensure the money is repaid to him or her, or as he or she directs. A trust for the payment of debts of this kind may be established by an express trust, but to the extent that it is not an express trust, but it is shown that a fiduciary relationship between A and B was intended and that a beneficial interest in the property remains in A, a resulting trust may arise by operation of law. These trusts are not new but have come before the courts in several important cases in the last 50 years or so. Trusts of this kind are known as "Quistclose" trusts after the case from which the modern development of these trusts stems.

2. That case was *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567, in which a bank lent money to a company in financial difficulty so that it could pay a dividend that had already been declared. The money was paid into a separate account appropriated to that purpose. The company went into liquidation before the dividend was paid. The Appellate Committee of the House of Lords held that the moneys were held on trust, as a primary trust in favour of the creditors (ie the shareholders entitled to the dividend) and secondly, on failure of the purpose, for the lender, and so did not form part of the general assets of the borrower. But the development of the law in this field has not been linear and the precise analysis has been refined in later authority.

3. The nub of the present appeal case is that Mrs Rosa Lee ("Mrs Lee") paid to the respondent ("BAICO") a sum of money ("the Moneys") which on the case of the appellant ("Prickly Bay") was intended to be used for the purpose of payment in two years' time of an amount which would then have become due and payable to a Mr Steele. BAICO had given a guarantee ("the Guarantee") that this sum would be duly paid. Prickly Bay contends that, when the full context of the arrangements between the parties is considered, Mrs Lee retained the beneficial right and title to the Moneys and that BAICO, having failed to pay under the Guarantee, was liable to return the Moneys to her under the principles referred to above.

4. This case was tried by Henry J who accepted BAICO's argument that there was no Quistclose trust. Prickly Bay appealed to the Eastern Caribbean Court of Appeal ("the ECCA") (Baptiste, Thom JJA and Webster JA (Ag)), but its appeal was unsuccessful. It now appeals to the Board. At the hearing before the Board Lord Davidson of Glen Clova QC, who did not appear below, made ably and succinctly every submission that could be made on Prickly Bay's behalf, but the Board, having read the written cases from both parties, did not find it necessary to call on counsel for BAICO to reply to Lord Davidson's submissions.

MORE ABOUT THE RELEVANT TRANSACTIONS AND PROCEEDINGS

(a) Prickly Bay's development and litigation with Mr Steele

5. Prickly Bay was at all material times engaged in the development of houses and apartments at L'Ance Aux Epines, St George, Grenada (the "Development"). Its principal director was Mr Richard Lee, husband of Mrs Lee. The work commenced in 2004. At the material time, Mr Steele owned two properties adjacent to the Development (the "Adjacent Properties"). In 2005, Mr Steele alleged that the Development infringed certain rights in relation to the Adjacent Properties. He issued proceedings against Prickly Bay in April 2006. The dispute was initially settled by way of a consent order made by the High Court of Grenada on 18 May 2007 (the "Consent Order").

(b) Core terms of the Consent Order

6. Under the terms of the Consent Order, Prickly Bay agreed to purchase the Adjacent Properties from Mr Steele for US$5,000,000. The purchase was completed through PBW Ltd acting as a nominee for Prickly Bay. PBW Ltd plays no part in these proceedings, and so the Board will disregard its role. On the making of the Consent Order and signing of the sale agreements Prickly Bay had to pay the price of one of the properties of US$2,500,000, and a deposit of USD$250,000 for the other on the basis that completion of the second sale agreement was deferred until 19 May 2009, when the balance of the price of that property (US$2,250,000) with interest at 5% per annum (US$225,000) was to be paid.

7. It was a term of the Consent Order that Prickly Bay would provide a bank guarantee for the balance of US$2,250,000. BAICO had agreed to give such a

guarantee on 10 May 2007 on the basis that a deposit of US$2,475,000 would be placed with it. BAICO had no pre-existing relationship with Prickly Bay or the Lees. BAICO duly executed its guarantee ("the Guarantee").

8. The arrangements for completion of the settlement included a licence for Mr Steele to occupy the second property pending completion.

9. The sale agreements, the Guarantee and licence were all duly signed and delivered after the Consent Order was made.

(c) Preparatory steps taken by Prickly Bay and implementation of the Consent Order

10. Mr and Mrs Lee and Prickly Bay took the following additional steps in anticipation of the Consent Order or to implement its terms:

(i) Mr and Mrs Lee and Prickly Bay entered into a Loan Agreement dated 10 May 2007 under which Mr and Mrs Lee agreed to lend Prickly Bay the sum of US$5,475,000. Part of this sum was to be provided by a guarantee and so under the Loan Agreement Mrs Lee agreed to "provide a guarantee or procure that a guarantee is provided in suitable terms such that there will be funds available to settle a further payment of US$2,475,000 due on 18 May 2009 …".

(ii) On 15 May 2007, Mr Eleazer of BAICO in Grenada spoke to Mrs Lee in London by telephone and based on that conversation, he completed a standard annuity form. This was emailed to Mrs Lee in London, and then signed and emailed back by her. As a result, the sum of US$2,475,000 deposited by Prickly Bay with BAICO was used as the premium to take up an annuity policy (the "Annuity") in Mrs Lee's name. The Annuity was described on the first page as "an investment product … which basically follows the traditional format of an annuity plan". It was "offered in one and two-year bands, which can be renewed at the option of the investor". So, it gave Mrs Lee the option to take either an annuity on retirement (stated to be 18 May 2012) or repayment of the whole of the accumulated amount invested at the end of a two-year period. It is common ground that there was no intention to make any annuity payments during the two-year period. Mrs Lee was concerned to maximise the payment of interest. Mrs Lee's evidence did not support the creation of a trust of any kind

and she understood that the transaction was structured as it was so that she would get interest (Henry J, judgment, para 40). The Annuity gave her monthly interest during that period at 8.42% per annum, which would exceed the amount that Prickly Bay had to pay to Mr Steele under the second sale agreement and would terminate immediately prior to the payment date for the completion moneys due under the second sale agreement.

(iii) On 17 May 2007, Prickly Bay's lawyers, Wilkinson, Wilkinson and Wilkinson confirmed payments under the arrangements as follows (1) US$2,750,000 to Mr Steele, (2) US$250,000 to Mr Steele's lawyers and (3) US$2,475,000 to BAICO (a total of US$5,475,000). The Lees and Prickly Bay undertook that "the parties will not file the Guarantee until the moneys are deposited into the account of [BAICO]".

(iv) In return, on 18 May 2007, BAICO provided a receipt for the sum of US$2,475,000 "being the sum to be held under the Deed of Guarantee made between [BAICO] and [Mr Steele]".

(d) BAICO's concern that it might have to pay twice

11. On 18 May 2007, there was an internal memorandum of BAICO expressing concern that "we do not pay out before verifying that Derrick Steele has received his funds ...". The internal memorandum proposed that the benefit of the deposited amount should be assigned to Mr Steele. A draft was attached to the memorandum which is not available to the Board but certainly the assignment as signed was of the Annuity, rather than the Moneys or anything else.

(e) BAICO requires Mrs Lee to assign her "right and title" to the Annuity to Mr Steele

12. On 22 August 2007, further to BAICO's request that she should sign an assignment prepared by it in favour of Mr Steele, Mrs Lee assigned to Mr Steele "right and title to the annuity ... Such right and title shall be to the value of US$2,475,000 commencing 18 May 2007." The assignment provided that it would become "effectual" [effective] on 19 May 2009, the day following the date for payment of the completion moneys due to Mr Steele in certain events: viz "should [Mr Steele] remain without

receipt of US$2,475,000 representing the balance of the purchase price by 18 May 2009 in accordance with the terms of [the Consent Order] and [the Guarantee]."

(f) BAICO becomes insolvent and defaults on its Guarantee

13. On 4 May 2009, in advance of the completion deadline on 18 May 2009, BAICO wrote to both Prickly Bay and Mr Steele's lawyers referring to the Guarantee and "to our obligation thereunder to pay the amount of US$2,475,000 by 18 May 2009 *from the proceeds of policy no. BGU004571 in the name of* [*Mrs Lee*]" (emphasis added) and then, having referred to the financial difficulties in which BAICO found itself, offered to pay the amount to Mr Steele at a rate of EC$I0,000 per month from 15 May 2009. Mr Steele rejected this proposal.

14. Thereafter BAICO went into judicial management.

(g) Mr Steele begins proceedings against Prickly Bay and BAICO is joined

15. On BAICO's default, Mr Steele then applied to the High Court of Grenada to enforce the terms of the Consent Order. Prickly Bay applied for a declaration that the Moneys were held on trust by BAICO, and for an order joining BAICO, which was granted.

16. Following trial and the judgment of Henry J dated 26 August 2015, Prickly Bay paid the amount due to Mr Steele on completion of the second sale agreement and by deed dated 5 November 2015 Mr Steele assigned his right and interest in the Annuity to Prickly Bay.

JUDGMENTS OF HENRY J ON THE QUISTCLOSE TRUST AND OF THE ECCA

17. Following trial, Henry J gave judgment on 26 August 2015 in favour of Mr Steele and BAICO. The judge rejected Prickly Bay's case as to the existence of a Quistclose trust in respect of the Moneys and granted injunctive and receivership relief in favour of Mr Steele. She held:

> "46. The court finds that BAICO had a clear understanding that if there was a default by Prickly Bay in the payment of

> the balance of the purchase price, it was obligated under the Deed of Guarantee to make the payment. This is evident not only from the words of the Guarantee but also from BAICO's insistence that Mrs Lee execute an assignment to the claimant. It can be objectively ascertained from the circumstances of the transaction that the intention of the parties and the essence of the bargain was that the sum would be paid by BAICO at a specific time, for a specific purpose on the happening of a specific event.
>
> 47. However, the court can find no mutual understanding, expressed or implied, between the payer and BAICO, of an intention to control BAICO's use of the funds in the intervening two-year period. I find no expression of an understanding between them that the money deposited was not to form part of the general assets of BAICO and was not at its free disposal. Objectively examined, there is no indication that the intention was to provide for the preservation of Mrs Lee/Prickly Bay's rights and the control of the use of the money in the interim. The only provision made was for the payment of monthly interest to Mrs Lee. The status and use of the money during the life of the Annuity was not addressed. In the absence of a finding of the requisite clear intention, the court cannot conclude that a Quistclose trust has been established."

18. Prickly Bay appealed to the ECCA who dismissed the appeal on 31 October 2018. The ECCA rejected Prickly Bay's case that the Moneys were held on trust for it. The judgment was given by Webster JA (Ag) with whom Baptiste and Thom JJA agreed. Webster JA (Ag) in agreement with Henry J emphasised the point that the mere fact that a payment is made for a purpose does not mean that it is made on trust (para 36). The real question was the parties' intention as to the creation of a trust. On the question whether the moneys had to be segregated from other moneys of the recipient, Webster JA (Ag) summarised the case law as follows:

> "The conclusions that I draw from the cases are that if the money is paid into a segregated account with restrictions as to its use, the courts will likely find that a trust was intended. If the money is not segregated but the circumstances show that the parties intended that the recipient could not dispose of the money except in accordance with the terms of the

> arrangement, the court may still find a trust as in the Cooper case. However, if there are no instructions to segregate and the circumstances do not point objectively to restrictions on the use of the money by the recipient, the courts are not likely to find a trust." (para 42)

19. Webster JA (Ag) referred to the undesirability of introducing doctrines of equity into commercial transactions by citing at para 45 an observation of Channell J in *Henry v Hammond* [1913] 2 KB 515 at 521:

> "I agree with the observation of Bramwell LJ in *New Zealand and Australian Land Co v Watson* (7 QBD 374, at p 382) when he said that he would be very sorry to see the intricacies and doctrines connected with trusts introduced into commercial transactions."

20. Webster JA (Ag) concluded that BAICO was entitled to intermingle the Moneys with its own assets and to invest it in the course of its business and that was a strong indicator that no trust was intended (para 44). He concluded:

> "In my opinion, when Mrs Lee signed the annuity she parted with her beneficial interest in the fund and this is inconsistent with the creation of a trust. This was reinforced when she assigned the benefit of the annuity to Mr Steele, another act that was inconsistent with her retaining a beneficial interest in the fund. In addition, there is no indication in any of the documents, or the circumstances of the transaction objectively assessed, that it was the intention of the parties that [BAICO] was restrained in its use of the fund during the two-year period …
>
> The parties were involved in a commercial transaction where Mr Steele wanted a secure method of paying the balance of the purchase price for his property and [BAICO] was prepared to provide that service in the form of an irrevocable guarantee supported by an annuity policy." (paras 50 and 52)

THE BOARD'S ANALYSIS OF THE FEATURES OF A QUISTCLOSE TRUST AND APPLICATION TO THE FACTS AND SUBMISSIONS BEFORE IT

(a) The features of a Quistclose trust

21. On this appeal, Lord Davidson submits that the relevant principles are conveniently set out in the decision of the Court of Appeal of England and Wales in *First City Monument Bank Plc v Zumax Nigeria Ltd* [2019] EWCA Civ 294 (Lewison, Newey and Males LJJ). Unlike *Quistclose* or *Twinsectra Ltd v Yardley* [2002] 2 AC 164, this was a case where the claim to a Quistclose trust failed. The issue was whether a financial institution ("IMB") held on trust for Zumax Nigeria Ltd moneys credited to its bank account with Commerzbank by a nominee for Zumax from its account with a different bank and transmitted with instructions that the credits were for onward transmission to Zumax. Newey LJ gave the main judgment. He held that a trust was not established because (1) in so far as it was said that the trust was an express trust, there had to be certainty of intention, objects and subject-matter, (which was not shown in this case) and (2) in so far as a resulting trust was relied on, it was not enough to show that the moneys were paid for a purpose. More had to be shown. This could be demonstrated by showing that the money was not at the free disposition of the recipient but that could not be shown here because there was no segregated bank account for these credits and the parties would expect the moneys held by a bank to be used by the bank for its own purposes. Lewison LJ agreed with Newey LJ but gave an additional judgment of his own emphasising that it was well established in English law that in general the relationship between banker and customer was one of debtor and creditor and that this was part of the relevant context against which the parties' arrangements had to be interpreted. He also held that to hold that there was a trust where moneys were credited to another's account would paralyse the business of banking. Males LJ agreed with both judgments.

22. The appellant further relies on the decision of the Court of Appeal of England and Wales (Arden, Sullivan and Patten LJJ) in *Bieber v Teathers Ltd (In Liquidation)* [2012] EWCA Civ 1466. This involved a relationship which gave rise to a Quistclose trust at one point, but not at a later stage. It concerned individuals who paid subscription moneys to the promoter of a film tax relief scheme. The moneys were held in a client account before investment and for the purpose of investment. Patten LJ, giving the lead judgment with which the other members of the court agreed, held that this step involved the creation of a Quistclose trust. The funds were then used to contribute funds on the individual's behalf to a partnership. Patten LJ held that the mutual intention of the parties was that the funds should then become partnership property. They were then no longer held on a resulting trust for each individual. Lord

Davidson particularly relies on para 15 of the judgment of Patten LJ as demonstrating the breadth of the enquiry which the court must undertake when determining whether a Quistclose trust exists:

> "15. Both sides accepted this [the judge's summary of the law derived from Lord Millett's judgment in *Twinsectra*: see paras 29-31 of the Board's judgment] as an accurate statement of the relevant principles. I would only add by way of emphasis that in deciding whether particular arrangements involve the creation of a trust and with it the retention by the paying party of beneficial control of the moneys, proper account needs to be taken of the structure of the arrangements and the contractual mechanisms involved. As Lord Millett stressed in *Twinsectra* (at para 73) and the judge repeated in para 17 of his own judgment, payments are routinely made in advance for particular goods and services but do not constitute trust moneys in the recipient's hands. It is therefore necessary to be satisfied not merely that the money when paid was not at the free disposal of the payee but that, objectively examined, the contractual or other arrangements properly construed were intended to provide for the preservation of the payor's rights and the control of the use of the money through the medium of a trust. Critically this involves the court being satisfied that the intention of the parties was that the moneys transferred by the investors should not become the absolute property of Teathers (subject only to a contractual restraint on their disposal) but should continue to belong beneficially to the investors unless and until the conditions attached to their release were complied with. Although directed to a slightly different context, it is worth recalling what Mason J said in *Hospital Products Ltd v United States Surgical Corpn* (1984) 156 CLR 41, 97:
>
> > '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.'"

23. All the cases so far considered follow and apply the decision of the Appellate Committee of the House of Lords in the leading case of *Twinsectra Ltd v Yardley*. In this case, Y obtained a loan from T to buy a property. T asked for a solicitor's undertaking to secure the loan: the undertaking was to ensure that the moneys lent were not disbursed pending the acquisition of property and would only be used to acquire property. A solicitor, S, gave the undertaking, and the moneys lent were applied in breach of the undertaking. The Appellate Committee were unanimous that the solicitor's undertaking gave rise to a Quistclose trust. The majority agreed with Lord Hoffmann that:

> "The terms of the trust upon which Sims held the money must be found in the undertaking which they gave to Twinsectra as a condition of payment. Clauses 1 and 2 of that undertaking made it clear that the money was not to be at the free disposal of Mr Yardley. Sims were not to part with the money to Mr Yardley or anyone else except for the purpose of enabling him to acquire property.
>
> In my opinion the effect of the undertaking was to provide that the money in the Sims client account should remain Twinsectra's money until such time as it was applied for the acquisition of property in accordance with the undertaking. For example, if Mr Yardley went bankrupt before the money had been so applied, it would not have formed part of his estate, as it would have done if Sims had held it in trust for him absolutely. The undertaking would have ensured that Twinsectra could get it back. It follows that Sims held the money in *trust* for Twinsectra, but subject to a *power* to apply it by way of loan to Mr Yardley in accordance with the undertaking. No doubt Sims also owed fiduciary obligations to Mr Yardley in respect of the exercise of the power, but we need not concern ourselves with those obligations because in

> fact the money was applied wholly for Mr Yardley's benefit." (paras 12-13)

24. Lord Millett gave a separate judgment. He agreed with Lord Hoffmann that the beneficial interest remained in *Twinsectra* until such time as the money was used in accordance with the trust. He considered the Quistclose trust in great detail and provided a helpful account of his intellectual journey in reaching the conclusion that the Quistclose trust had the characteristics of a resulting trust. Having considered several alternatives, he placed the Quistclose trust wholly within the category of resulting trusts with the historical origins and characteristics of resulting trusts. His analysis shows that the ultimate question, therefore, is whether the payer was to retain a beneficial interest in the property transferred to the recipient:

> "As Sherlock Holmes reminded Dr Watson, when you have eliminated the impossible, whatever remains, however improbable, must be the truth. I would reject all the alternative analyses, which I find unconvincing for the reasons I have endeavoured to explain, and hold the Quistclose trust to be an entirely orthodox example of the kind of default trust known as a resulting trust. The lender pays the money to the borrower by way of loan, but he does not part with the entire beneficial interest in the money, and in so far as he does not it is held on a resulting trust for the lender from the outset. Contrary to the opinion of the Court of Appeal, it is the borrower who has a very limited use of the money, being obliged to apply it for the stated purpose or return it. He has no beneficial interest in the money, which remains throughout in the lender subject only to the borrower's power or duty to apply the money in accordance with the lender's instructions. When the purpose fails, the money is returnable to the lender, not under some new trust in his favour which only comes into being on the failure of the purpose, but because the resulting trust in his favour is no longer subject to any power on the part of the borrower to make use of the money. Whether the borrower is obliged to apply the money for the stated purpose or merely at liberty to do so, and whether the lender can countermand the borrower's mandate while it is still capable of being carried out, must depend on the circumstances of the particular case." (para 100)

25. Especially important for the present case, Lord Millett made it clear in that paragraph and at other points in his analysis that the Quistclose trust was a default trust. This means two things. Firstly, the resulting trust which characterises the Quistclose trust arises as a matter of law and becomes unconditional on failure of the specified purpose. Secondly, the resulting trust does not override any arrangement on which the parties may have agreed for the destination of the funds previously earmarked for the purpose but takes subject to it:

> "Like all resulting trusts, the trust in favour of the lender arises when the lender parts with the money on terms which do not exhaust the beneficial interest. It is not a contingent reversionary or future interest. It does not suddenly come into being like an 18th century use only when the stated purpose fails. It is a default trust which fills the gap when some part of the beneficial interest is undisposed of and prevents it from being 'in suspense'." (para 102)

26. Lord Millett reached this conclusion in stages. The Board traces in outline the material stages not already mentioned. Lord Millett pointed out that a Quistclose trust confers on a lender the right to prevent the use of the moneys other than in accordance with purpose imposed by the lender. As to whether the borrower holds any assets not so used beneficially, or must hold them on trust for the lender "depends on the intention of the parties collected from the terms of the arrangement and the circumstances of the case" (para 69). Intention is a matter of true construction of the arrangement.

27. Furthermore, Lord Millett held, it was not enough that the money is lent for a particular purpose because the money so lent is without more at the free disposition of the borrower (para 73). The question in every case is whether the parties intended the money to be at the free disposition of the borrower (*In re Goldcorp Exchange Ltd* [1995] 1 AC 74, 100 per Lord Mustill) (para 74). So, there would be a trust if the money was to be used exclusively for a particular purpose. The recipient becomes a fiduciary in respect of that money (para 76).

28. Lord Millett considered that subtle distinctions should not be made between true Quistclose trusts and other trusts which are merely analogous to them (para 99).

29. Lord Millett's judgment has become accepted as the core analysis of Quistclose trusts. At first instance in *Bieber v Teathers*, Norris J analysed the holdings of Lord Millett into seven principles and those principles were common ground in the Court of

Appeal in *Bieber v Teathers* (see para 22 above). Webster JA (Ag) set these principles out in para 27 of his judgment. In the opinion of the Board, a summary of the principles of this kind provides useful guidance and is a valuable way of making this complex area of law accessible - the Board would not discourage judges from taking this often-difficult course, but those who use them must remain aware that it is not a substitute for the judgment of Lord Millett itself. There is a risk that summarised statements lose the subtlety of the original text.

30. The Board does not intend to go through all the summarised principles but will set out the third principle to support the points just made. This principle reads (*Bieber*, [2012] EWHC 190 (Ch), para 18 per Norris J):

> "… thirdly, it must be clear from the express terms of the transaction (properly construed) or must be objectively ascertained from the circumstances of the transaction that the mutual intention of payer and recipient (and the essence of their bargain) is that the funds transferred should not be part of the general assets of the recipient but should be used *exclusively* to effect particular identified payments, so that if the money cannot be so used then it is to be returned to the payer: *Toovey v Milne* (1819) 2 B & A 683 and *Quistclose Investments* at 580B …"

31. The third summarised principle states that there must be a "mutual intention" of the payer and recipient that the funds transferred "should not be part of the general assets of the recipient but should be used *exclusively* to effect particular identified payments". It is clear the Lord Millett did not consider that the intention had to be "mutual" in the sense of being shared or reciprocated. It would be enough if one party imposed it on the other who acquiesced in it (see his citation at para 76 of his judgment from the judgment of North J in *Gibert v Gonard* (1884) 54 LJ Ch 439, 440). Moreover, the minimum necessary to constitute a Quistclose trust is not an intention that the funds transferred should not form part of the general assets of the recipient but is expressed more flexibly as an intention that the payer should retain some beneficial interest in the funds (see para 100 per Lord Millett). It is also possible that the trust does not require that the property should be "exclusively" used for the purposes of the Quistclose trust. The payer or other transferor may have given other directions, or the parties may have agreed to other terms, since, as emphasised above, the Quistclose trust is only a default trust. As explained in para 25 above, that means that a resulting trust arises by operation of law only if and to the extent that the parties have not agreed what should happen to the trust property if the trust fails.

32. In the opinion of the Board, it follows from Lord Millett's injunction that subtle distinctions should not be drawn between different species of trusts for the payment of creditors that the term Quistclose trust may commonly be used whenever a person provides assets to another for the purpose of paying debts under arrangements which create a trust (see per Lord Millett at paras 68 and 69). A Quistclose trust can take many forms. It may be express as to what is to happen on failure of the specified purpose, or express only as to that purpose, or it may simply be a resulting trust arising by operation of law: such is the flexibility of equity. That flexibility makes an important and beneficial contribution to the legal system of the jurisdiction in question because it enables equity to respond to the need for different sorts of transactions, and also because in that way it contributes to the development of society and to the growth of its economy. However, to be a trust which enables the provider of the assets to enforce the return of those assets in specie in the event of exhaustion or failure to execute the purpose, and thus to obtain priority over other creditors of the recipient if insolvent, there must be a sufficient indication that the provider did not intend to dispose of the entire beneficial interest in the trust funds. Normally, that indication will be a mutual intention that there should be a trust, but it can also be an acceptance that the provider of the assets retains a partial beneficial interest by virtue of the resulting trust.

33. As mentioned above, the development of the law of Quistclose trusts has not been linear. As explained, in *Quistclose*, Lord Wilberforce considered that there was a primary trust for the benefit of those who were to be paid and a secondary trust once the purpose failed or was exhausted in favour of the provider. But there followed an intense debate among scholars about the implications of this form of trust: for instance, it prevented the provider from enforcing the terms of the trust until the resulting trust arose. The debate was one of the beneficial "reflexive" kind described by Professor Stapleton in which scholars identified "weaknesses, tensions, and anomalies in judicial reasoning, terminology, and doctrinal outcomes" (J Stapleton, *Three Essays on Tort* (2021), p 18). It is now generally accepted that unless, or to the extent that there is no express trust as to what is to happen on failure of the specified purpose, there is a resulting trust for the provider throughout the period of the trust as explained by Lord Millett in *Twinsectr*a. This avoids some of the difficulties identified by scholars and ensures that there is at all times a person who is in the position to enforce the trust. The scholarly debate continues, but on other issues: see generally G Virgo, *The Principles of Equity and Trusts*, 4th ed (2020), section 8.4.4.

34. The putative Quistclose trust will fail to be established if it is not shown that the provider retained a partial beneficial interest in the property transferred. As Lord Millett explained and was quoted by Henry J and ECCA in this case, the mere provision of money or property for a purpose is not enough.

35. The Quistclose trust may fail to be established on other grounds. In particular, a Quistclose trust is a default trust, and it can be moulded or excluded by the terms of the parties' agreements. So, a resulting trust, which arises by operation of law, does not arise if it is inconsistent with the instrument or contractual arrangements under which it is said to be created, or with the applicable context.

(b) The application of the principles to the facts of this case

36. Lord Davidson submits that the parties intended that the amount due to Mr Steele should be paid out of the proceeds of the Annuity. That was the reason why the Annuity was assigned to Mr Steele. The Annuity had to be considered with the assignment by Mrs Lee. On his submission, the conditions for payment in the Annuity were tailored to meet the obligations of Prickly Bay to Mr Steele and therefore the clear inference was that the parties intended that at the end of the period BAICO would use the capital to pay the amount due to Mr Steele from Prickly Bay. The courts below fell into error in their approach to determining the intentions of the parties. It was necessary to look at all the circumstances in context. The judge only made brief mention of the assignment in her judgment. The ECCA were in error in holding that the assignment was "another act that was inconsistent with her retaining a beneficial interest in the fund" (para 50, cited above). The assignment was crucial for two reasons. First, it referred to Mrs Lee having right and title to the Annuity and was conditional on default: until that point, right and title to the Moneys remained with Mrs Lee, consistently with a Quistclose trust. Secondly, the assignment formed an integral part of a series of transactions whose effect was that BAICO would not pay under its Guarantee but out of the proceeds of the Annuity which had been provided by Mrs Lee.

37. The Board agrees with Lord Davidson that whether the borrower holds any assets not so used beneficially, or must hold them on trust for the lenders "depends on the intention of the parties collected from the terms of the arrangement and the circumstances of the case" (per Lord Millett in *Twinsectra*, para 69; see also per Patten LJ in *Bieber v Teathers*). The court is not necessarily constrained, as it would be where it was undertaking the task of construing a written contract, where there are some limitations on the matters that can be taken into account. So, in determining whether a Quistclose trust had been created, the court could take into account events and documents, such as the assignment, which postdate the date on which the Quistclose trust was said to be created. On the other hand, the court may decide that little weight should be given to such matters. As indicated by Webster JA (Ag), little if any weight can be given to what parties say was the nature of the transaction at a subsequent point in time. The Board considers that the assignment should be given some weight

because it was clearly part and parcel of the whole transaction, but on examination the Board does not, for the reasons given in the next two paragraphs, conclude that the assignment is sufficient to lead to the conclusion that there was a Quistclose trust. The Board would further attach minimal weight to what BAICO subsequently said about the whole transaction.

38. The conditions of the Annuity and the assignment were equally consistent with Prickly Bay providing collateral to BAICO as security for its Guarantee. Webster JA (Ag) so concluded in his final paragraph. Prickly Bay would be under an implied obligation to reimburse BAICO for moneys expended under the Guarantee. The assignment expressly contemplates the possibility that Mr Steele might be paid under the Guarantee.

39. Moreover, the assignment has no real weight for a more fundamental reason. As the courts below pointed out, it is clear from the authorities that it is not enough that there is a purpose: there must be something more to indicate that the Moneys are subject to a trust. Lord Davidson is wrong to criticise para 35 of the judgment of the ECCA where this point is made. In this case, the deposit of the Moneys and the assignment cannot be considered as establishing that something more in the absence of the Annuity.

40. For the reasons given below, the issue of the Annuity is inconsistent with the Quistclose trust relied on.

41. Firstly, when Mrs Lee paid the premium for the Annuity, she paid for an investment product with an agreed rate of return. The Annuity provided therefore for investment of the premium at the discretion of BAICO, and for payment of a fixed sum to her on maturity. If the fixed sum was not available from investment of the premium it would have to be found by BAICO from its other funds. All this is normal commercial practice.

42. Secondly, under a Quistclose trust, as already discussed, the subject-matter of the trust will normally be segregated from other assets of the recipient. The recipient here was BAICO but there was no express requirement that it should keep the premium separate from its other funds. The Board recognises, as did Webster JA (Ag), that segregation is not always required but it is conspicuous by its absence. The absence of a provision for segregation is a powerful factor which indicates that there is no Quistclose trust. It followed that the Moneys were, subject to the contract flowing from the Annuity, at the free disposition of BAICO to invest. There was no restriction

on what BAICO could do with the Moneys. Its only obligation was to pay the agreed sums on maturity of the Annuity.

43. Lord Davidson's submission that there was a Quistclose trust must proceed on the basis that the assignment is to be interpreted as applying to the Annuity subject to Mrs Lee's partial beneficial interest, and not to the whole of the "right and title to the" Annuity. This is because she (or Prickly Bay) would retain a partial beneficial interest if there was a Quistclose trust. Lord Davidson must submit that BAICO made an error when it assumed that Mrs Lee could assign the full ownership of the Annuity. But this is not a significant point. In reality, BAICO was entitled to seek the widest protection against the risks of double payment, and the Assignment was correctly seen as a sensible safeguard to prevent this.

44. There was nothing to indicate that Prickly Bay retained any beneficial interest in the Moneys or that the Moneys did not form part of the general assets of the payee apart from the "tailoring" of the Annuity and the assignment to meet the obligations owed to Mr Steele. As explained, that was equivocal (para 42 above).

45. Lord Davidson also submits that, where one of the three certainties necessary for the creation of a trust is absent, a Quistclose trust will fail to be established and that this works to the *benefit* of the person who provides the funds. The Board agrees. This is because on the failure of the trusts for want of certainty the subject-matter is held on resulting trust for the settlor (see *Twinsectra*, para 101 per Lord Millett). But, if there was a Quistclose trust in this case, the powers enjoyed by BAICO would have clearly included a power to ensure that Mr Steele was duly paid the amounts due to him. The subject-matter and objects of the trust are also clear. So, this argument cannot aid Prickly Bay.

CONCLUSION

46. For the reasons given above, the arrangements in this case did not amount to a Quistclose trust. Mrs Lee simply wanted to maximise the return on the Moneys in terms of a higher rate of interest than that which is normally available on moneys lodged by an individual with a financial institution, so the Annuity was interposed as explained above. This gave her remedies in contract against BAICO but did not require BAICO to act as a fiduciary or to keep her subscription moneys separate from any of its own moneys. Those aspects of the parties' arrangements are inconsistent with the retention by Prickly Bay (or Mrs Lee on its behalf) of any partial beneficial interest under a Quistclose trust to enforce the performance of the purpose of the trust or

alternatively the return of the Moneys, even when the circumstances are examined in their totality.

47. Claims in contract and for breach of trust can co-exist. The Board recognises that a lender who can establish a trust is not prevented from exercising remedies in contract as well (see *Quistclose* at pp 581-582 and see the passage from the judgment of Mason J in the High Court of Australia cited by Patten LJ in *Bieber v Teathers*: para 22 above). However, Mrs Lee opted for a contractual arrangement and not a trust. In a commercial setting, there must be clear evidence that parties intended a trust to arise in circumstances where a trust would not normally exist and particularly if a trust would be contrary to settled commercial practice.

48. Accordingly the Board will humbly advise her Majesty that the appeal be dismissed.