QUISTCLOSE TRUSTS

What is a Quistclose Trust?
- Normally if L lends money to B, B receives full beneficial interest and can apply the money as they please (even if contract envisages it be used for particular purpose)
  o Just have to pay back by due date
  o Misapplication may lead to damages for breach of K, but no prop consequences
- Under a Quistclose trust, B doesn’t become the beneficial owner of the money
  o Receives it as trustee to apply it solely for the purpose specified by L
  o In the event of B’s bankruptcy, creditors not entitled to any part of loan
- The Quistclose trust hasn’t been considered in detail in any High Court decision
- Classic Quistclose scenario:
  o A lends money to B
  o Express mutual intention that money will not be part of B’s assets but will be used for specific purpose => Creates primary trust
  o If purpose fails, then secondary trust in favour of A

Is there mutual intention?
“Question in every case is whether parties intended money to be at free disposal of B (Twinsectra per Millet LJ)” << this is really the most important Q, look at the following to evidence it:

Terms of Loan
- Objectively construed (Twinsectra per Millet LJ)
- Mutual intention/purpose (Re AETT per Gummow J)
  o But not just existence of purpose, more than desire.
  o Intention that money for purpose and for B not to get unconditional beneficial interest
- Language (Re AETT per Gummow J; Salvo per Spigelman CJ)
  o Quistclose: the money was ‘only be used for’ the payment of the dividend
  o Twinsectra: solely for the acquisition of property… and no other purpose
  o Re AETT: words of preference used and gifts unconditional
- Quince: commission agreement, L to get most of commission clear that intention was for her to retain beneficial interest. B only to benefit when loan used for purpose
Nature of Transaction

Cite Gummow J in Re AETT; Salvo per Spigelman CJ as authority for this indicator
- Money paid into a separate account, and not mixed with B’s own funds = strong but not conclusive evidence that the loan isn’t intended to be at B’s free disposal
  o Quistclose; Twinsectra: money in separate accounts and trust found
  o Salvo per Spigelman CJ: purpose of keeping funds separate was to ensure return if transaction didn’t go ahead
  o Re AETT: money in general operating account, no trust
  o Quince: money in borrower’s family trust, trust found

Circumstances of Relationship

Cite Gummow J in Re AETT as authority for this indicator
- Includes rights and obligations under statute arising from relationship (LSB per Bell, Gageler and Keane JJ)
- Donations (Re AETT) – Theatre Trust was not bound to give effect to preferences

THEREFORE, “There appears to be a mutual intention that the loan would be used for [purpose] and that B wouldn’t get an unconditional beneficial interest”

Which Doctrinal Approach?

1) Analyse in terms of a two-limbed express trust

“In Australia, the preferred view is that these circumstances are indicative of an express trust with two limbs (Gummow J in Re AETT; Salvo per Spigelman CJ; LSB)”

- Primary trust for the stated purpose – if this fails, then:
- Secondary trust in favour of L
- Both limbs require the 3 certainties
  o If issue of certainty => Bell, Gageler and Keane JJ in LSB a two-limbed ET wouldn’t fail for certainty of object or intention if that was indeed the intention of parties
  o But note, RT may be more convincing where absence of identified beneficiaries

2) Briefly state that UK approach exists

- The UK approach is to hold that a single resulting trust in which the beneficial interest lies with L is created (Twinsectra per Millet LJ)
- Some Australian support from Handley JA in Salvo

3) Result/affect

- Usually won’t matter, in most cases it will go back to L either way
- If there’s no issues with the express trust
  - Note that it doesn’t make a substantive difference and that money will return to L

- If there are some issues
  - Note that there may be some difference and while there is lower court authority for the express trust approach the High Court has yet to consider QTs in detail

**Remedies**

- There is always a CL remedy for breach of K
- The question is whether there is also an equitable remedy
- If the Q purpose has been performed, L restricted to CL action for failure to repay loan
- If the Q purpose has not been performed:
  - Is the money still held by B? If so, proprietary remedies possible
  - If money has been spent contrary to intention, equitable compensation for breach of trust available