

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
 - o Note that it doesn't make a substantive difference and that money will return to L
- If there are some issues
 - o 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:
 - o Is the money still held by B? If so, proprietary remedies possible
 - o If money has been spent contrary to intention, equitable compensation for breach of trust available