

Quistclose Trusts

In some cases, the court will superimpose a trust relationship on top of a contractual or debt relationship. Here, X may have received the money as trustee to apply solely for the purpose specified by the lender.

A Quistclose trust will not be possible where it conflicts with a statute governing the parties relationship (*LSB v Gillepsie-Jones*).

1. Mutual Intention

- a. Purpose: must be mutual intention that the sum should be used exclusively for a particular purpose, and not become part of the lender's ordinary assets (*Quistclose*; *AETT*, Gummow J).
 - i. Can be inferred from nature of transaction and construction of words (*Salvo*)
 - ii. Examples: to pay dividend (*Quistclose*); to buy property (*Twinsectra*)
- b. In favour:
 - i. Words "exclusively" or "only" interpreted as intention to return if not applied for that purpose (*Quistclose*, Lord Wilberforce)
 - ii. Money paid into separate account (*Quistclose*; *Salvo*), best evidence (*Quince*)
 - iii. Borrower receives commission (*Quince*) not lender intention for B to have title
- c. Against:
 - i. Mere preference by lender for money to be used in a certain way (*AETT*)
 - ii. Money is mixed with other assets (*AETT*)
 - iii. Lender would have given money even if specific purpose failed (*AETT*)

2. Certain Subject Matter

- a. See analysis above

3. Certainty of Object: contentious in Australia as express trust analysis preferred. Cases never heard at a stage where the condition has not already failed.

- a. Express Trust Analysis
 - i. Primary express trust: held by the debtor as trustee for identifiable beneficiary
 1. Creates issues where trust is for a purpose- no certainty of object
 - ii. Secondary express trust: if condition fails, debtor holds the property on trust for the lender.
- b. Resulting Trust Analysis (English Approach; *Twinsectra* per Lord Millett)
 - i. Lender gives the money to debtor as trustee to apply for a purpose, and retains beneficial ownership until that purpose is fulfilled
 - ii. Certainty of Object satisfied because beneficiary is lender
 - iii. BUT: can lender call money at any time? RT inconsistent with deliberate character of the transaction

4. Consequences

- a. Purpose satisfied but no repayments: lender has action for breach of loan in contract.
- b. Purpose not satisfied: the lender has an action for breach of trust. In a better position than all other unsecured creditors as they have an equitable proprietary interest.

If there is a QT trust over land, then under the express trust analysis the trust will need comply with s 53 requirements. If over money, do not need to apply as no disposition of subsisting equitable interest.