

FACV Nos. 9 and 10 of 2023
[2024] HKCFA 15

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

FINAL APPEAL NOS. 9 and 10 OF 2023 (CIVIL)
(ON APPEAL FROM CACV NOS. 346 and 337 OF 2022)

BETWEEN

CHINA LIFE TRUSTEES LIMITED **Plaintiff**
(Respondent)

and

**CHINA ENERGY RESERVE AND
CHEMICALS GROUP OVERSEAS
COMPANY LIMITED** **1st Defendant**
(1st Appellant)

**CHINA ENERGY RESERVE AND
CHEMICALS GROUP
COMPANY LIMITED** **2nd Defendant**
(中国国储能源化工集团股份有限公司)

and

**BANK OF COMMUNICATIONS
TRUSTEE LIMITED** **Interested**
Party

BANK OF COMMUNICATIONS **Garnishee**

AD HOC COMMITTEE **Intervener**
(comprising CMB Wing Lung Bank Ltd **(2nd Appellant)**
and The Export-Import Bank of China)

(HEARD TOGETHER)

Before: Chief Justice Cheung, Mr Justice Ribeiro PJ,
Mr Justice Fok PJ, Mr Justice Lam PJ and
Mr Justice Gummow NPJ

Date of Hearing: 3 May 2024

Date of Judgment: 14 June 2024

J U D G M E N T

Chief Justice Cheung:

1. I have had the advantage of reading in draft the judgment of Mr Justice Ribeiro PJ and that of Mr Justice Gummow NPJ, and agree that these appeals should be allowed for the detailed reasons they give. Since we are differing from a very careful judgment of the Court of Appeal on an important topic of some practical significance as is illustrated by the outcome of these appeals, I would add a few words of my own.

2. It is now firmly established that subject to any special agreement, where a transferor transfers property (usually money) to a transferee to be applied for a specific purpose *and that purpose only*, such that the same is *not* at the free disposal of the transferee, a trust of the property arises, with the transferee holding the same in favour of the transferor subject to the power or duty of the former to apply the property for the specific purpose.

3. This type of trust may arise under different factual situations but its essence remains that just described. A trust of this type is generally known as a *Quistclose* trust, following the House of Lords decision in *Barclays Bank Ltd v*

*Quistclose Investments Ltd*¹, although a generally accepted judicial analysis of its nature – a resulting trust arising upon the transfer of property – did not emerge until Lord Millett’s *locus classicus* in *Twinsectra v Yardley*² more than three decades later. It is fair to say that the true nature of a *Quistclose* trust and the attractions of and difficulties with different analyses of its nature have, from day one and even until now, generated much academic interest and debate.

4. The present appeals concern the requisite objective intention of the parties for such a trust to arise. In particular, Question 1 asks, in substance, whether the objective intention of the transferor, agreed to or acquiesced in by the transferee, must be for the transferor to retain some beneficial interest in the property subject to the fulfilment of the specific purpose, or whether it is simply that the property shall not be at the free disposal of the transferee but shall or may be applied for the specific purpose and no other.

5. As explained in Mr Justice Ribeiro’s judgment, this question has its genesis in certain paragraphs in the recent judgment of the Privy Council in *Prickly Bay Waterside Ltd v British American Insurance Company Ltd*³, which the Court of Appeal took to mean that it is not sufficient to intend that the property shall be used for the specific purpose only. Rather, the Court of Appeal read the paragraphs as requiring an intention, either express or objectively ascertainable from the relevant circumstances, that the transferor shall retain some beneficial interest in the property.

6. This had the unfortunate consequence of leading the Court of Appeal to search – in vain – for the latter intention from the documentary and other evidence as well as the intra-group relationships between the different corporate

¹ [1970] AC 567.

² [2002] 2 AC 164, [68] – [103].

³ [2022] 1 WLR 2087, [31] – [32].

vehicles involved in the present case. Indeed, this also gave rise to Question 2 concerning the ascertainment of the requisite objective intention in an intra-group setting.

7. Regardless of the correct reading of the relevant parts of the judgment in *Prickly Bay*, with respect, it seems to me that the essence of a *Quistclose* trust being a transfer of property for use for a specific purpose and that purpose only, such that it is not at the free disposal of the transferee, it is *this* which must be reflected by the intention of the parties, as is objectively ascertained. By definition, therefore, the intention requirement is satisfied by an objective intention that the property shall not be at the free disposal of the transferee but shall or may only be applied for the specific purpose. Where that is the case, the legal *consequence* is that the transferor retains a beneficial interest in the property by reason of the *Quistclose* trust so arising. However – and this is a point that bears emphasis – the transferor’s retention of a beneficial interest in the property is not something that the parties need to have intended⁴, whether subjectively or objectively, or even anticipated or foreseen, in order for the trust to arise in the first place.

8. Of course, if on the facts of a particular case, the parties did have and manifest an intention that the transferor should retain a beneficial interest in the property, this would make the case an *a fortiori* one for a *Quistclose* trust to arise. This is because such an intention must necessarily mean that the transferee was not intended to have the free use of the property but could only apply it for

⁴ I leave out from consideration here the general saying that one is taken to have “intended” the legal consequence of one’s acts. Plainly, the Court of Appeal regarded the intention for the transferor to retain some beneficial interest in the property as a substantive intention to be ascertained objectively from the evidence, rather than some legal consequence taken to have been intended by the parties when they intended that the property had to be used for a specific purpose and no other. This was also reflected by the wording of Question 1 which it certified.

the specific purpose, thereby giving rise to a *Quistclose* trust. Indeed, depending on how that intention was expressed or otherwise manifested, the trust so arising could well constitute an express trust⁵. However, it is *not* a necessary intention to have for a *Quistclose* trust to arise. What is required is, as mentioned, an objective intention that the property shall or may be applied for the specific purpose and that purpose only.

9. The Court of Appeal unfortunately fell into error in considering that it needed to look for an intention to retain some beneficial interest in the monies transferred in the present case. It was this error which led it to conclude that on the evidence available and given the intra-group setting, the requisite intention was wanting. Had it appreciated that the intention required was that as described above, it would no doubt have found that the objective evidence for such an intention was overwhelming and the monies were impressed with a *Quistclose* trust accordingly.

10. For these reasons and for those given by Mr Justice Ribeiro PJ and Mr Justice Gummow NPJ in their respective judgments, I would allow the appeals.

Mr Justice Ribeiro PJ:

11. These appeals concern competing claims for the sum of US\$120 million paid into a bank account (“the Account”) maintained in the name of the 1st appellant (“SPV1”). The respondent (“China Life”) claims those funds as judgment creditor on the basis of its judgment for HK\$2 billion plus interest and costs against SPV1. It seeks to execute that judgment and has obtained a garnishee order over the Account. The appellants, who consist of SPV1 and the

⁵ Whether one would still prefer to call the *express* trust a *Quistclose* trust is really a matter of nomenclature.

intervening parties (the “Ad Hoc Committee”) resist that claim and seek to set aside the garnishee order. They contend that the funds in the Account are subject to a Quistclose trust and are not the property of SPV1 and therefore not available to China Life by way of execution.

12. I respectfully agree with Mr Justice Gummow NPJ’s judgment upholding the Quistclose trust. I gratefully adopt his Lordship’s factual summary set out in paragraphs 124 to 139 below and the abbreviations there employed. I will make further reference to the facts only insofar as necessary for the purposes of the present discussion. This judgment focuses on the questions upon which leave to appeal was granted, concerning the issue of how the court should determine whether a Quistclose trust has arisen.

A. The background

13. The companies concerned are members of a corporate group (“the Group”) headed by the 2nd defendant (“D2”) which is engaged in oil and natural gas exploration and the production and marketing of related chemical products. The immediate background to the present litigation involves the bonds issued by two special purpose vehicles (“SPVs”) which were members of the Group. The first series of bonds (“the 2022 Bonds”), were issued on 27 April 2015 by SPV1 for HK\$2 billion, maturing in 2022. China Life was the only bondholder. The second series (“the 2018 Bonds”), issued by SPV2 on 11 May 2015 for US\$350 million, fell due on 11 May 2018. The bondholders of the 2018 Bonds included the members of the Ad Hoc Committee. All the bonds were guaranteed by D2.

14. Being SPVs created to issue and service their bonds, SPV1 and SPV2 had no other material operations or assets. The Account opened by SPV1 was divided into two sub-accounts denominated in HK\$ and US\$ respectively. The HK\$ sub-account was used exclusively for the 2022 Bonds with the bank designated as the paying agent. SPV2 did not open its own bank account but, for

convenience, designated SPV1's US\$ sub-account exclusively for the 2018 Bonds, similarly designating the bank as the paying agent. SPV2 and SPV1 were authorised joint signatories of the Account for the purpose of giving instructions regarding the US\$ sub-account.

15. In each case, funds invested by bondholders were paid into the respective sub-accounts and then transferred by each SPV to Trading, the Group's treasury company, to be used for the Group's operations. When interest payments fell due, Trading would transfer the needed funds from Group resources into the relevant SPV's sub-account for payment to the bondholders. Until May 2018, interest payments were punctually made.

16. However, on 11 May 2018, the 2018 Bonds matured but the Group lacked the funds to pay the US\$350 million principal plus interest falling due. Urgent efforts were made to assemble the funds needed and a total of US\$120 million was paid by Trading from the Group's resources in three tranches into the US\$ sub-account to that end. But the amounts raised fell short of the funds required by US\$230 million and on 25 May 2018, SPV2 and D2 declared the 2018 Bonds in default. That triggered cross-defaults and accelerated payment obligations in the other bonds, including the 2022 Bonds. The aforesaid sum of US\$120 million stayed in the bank and was placed on fixed deposit, accruing interest.

17. On 29 October 2020, China Life obtained judgment against SPV1 on the basis of the 2022 Bonds' cross-default, and on 9 March 2021, it obtained a garnishee order nisi in respect of the funds in the Account. On 19 March 2021, the Ad Hoc Committee obtained their own judgment against SPV2 and D2 for the principal sum of US\$350 million on the 2018 Bonds' default and applied to set aside the garnishee order nisi, asserting the existence of a Quistclose trust, as mentioned above.

18. On 18 March 2022, Au-Yeung J, who had upheld the plaintiff's claim, granted the then plaintiff and trustee (for whom China Life was substituted as plaintiff and judgment creditor by her Ladyship's order) a garnishee order absolute.⁶ By its judgment dated 10 August 2023, the Court of Appeal⁷ dismissed the appeals of SPV1 and the Ad Hoc Committee, upholding the garnishee order absolute over the entire amount in the Account. However, the Court of Appeal granted the appellants leave to appeal to this Court.⁸

B. The Questions upon which leave to appeal was granted

19. Leave to appeal was granted on the following questions:

Question 1

What is the proper approach to assessing the issue of intention giving rise to a *Quistclose* trust, in particular whether the important intention is an intention for the transferor to retain some control of and/or beneficial interest in the assets *qua* transferor, or an intention for the transferee to not have free disposal and/or the whole beneficial interest in the assets.

Question 2

What is the proper approach to determining whether a *Quistclose* trust has arisen in the context of an intra-group transfer, in particular whether the fact or potential of common control being exercised over the transferor and the transferee (by virtue of the corporate chain or grouping) is a weighty or even crucial factor precluding, or indicating an absence of, any intention for the transferor to retain some control *qua* transferor or any intention for the transferee not to have free disposal and the whole beneficial interest in the assets.

C. Question 1: Determining when a Quistclose trust arises

C.1 Payment for a specific purpose and no other

20. The term "Quistclose trust" derives from the decision of the House of Lords in *Barclays Bank Ltd v Quistclose Investments Ltd*.⁹ Such a trust comes

⁶ [2022] HKCFI 795. The Court of Appeal later held that such Order had erroneously excluded the amount of US\$70 million.

⁷ Yuen, Au and G Lam JJA [2023] HKCA 966.

⁸ [2023] HKCA 1251.

⁹ [1970] AC 567.

into existence where X pays money (or transfers other property) to Y by way of loan or otherwise, with the parties objectively intending the money to be applied for a specific purpose (and no other). That clothes the transferred funds with a trust subject to their being properly applied by the recipient for the designated purpose. If for any reason that purpose fails to be achieved, the funds are simply held on such trust for the payer. Such restriction on the use of the funds is the key consideration: the payer must have intended, with the recipient's agreement or acquiescence, that the money should be used only for that specific purpose and should not to be at the recipient's free disposal.

21. Where, as a matter of objective fact, such restrictive intention has been established, certain consequences follow as a matter of logic and legal analysis. Since the money may only be applied for a specific purpose and no other, it follows logically that the money is not intended to become part of the recipient's general assets and that the recipient may not freely use it. It means, as a matter of legal analysis, that beneficial ownership of the money is not transferred to the recipient who takes it in a fiduciary capacity to apply it only for the aforesaid purpose. Equity will restrain mis-application of such funds. It furthermore follows that on an insolvency, the money, not being the recipient's property, does not pass to the recipient's trustee in bankruptcy. And to the extent that the specific purpose fails, the recipient holds the funds on a resulting trust to restore them to the payer.

22. Thus, in *Quistclose*, Lord Wilberforce noted that there was "no doubt that the loan was made only so as to enable Rolls Razor Ltd to pay the dividend and for no other purpose", as the company's letter to the bank had made clear.¹⁰ Accordingly, "[the] mutual intention of the respondents and of Rolls Razor Ltd., and the essence of the bargain, was that the sum advanced should not

¹⁰ *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 at 580.

become part of the assets of Rolls Razor Ltd, but should be used exclusively for payment of a particular class of its creditors, namely, those entitled to the dividend.”¹¹

23. His Lordship explained the legal consequences of such an arrangement as follows:

“... arrangements of this character for the payment of a person's creditors by a third person, give 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...”¹²

24. In the High Court of Australia, Gibbs ACJ noted that restricting use of the funds to a specific purpose was the key feature giving rise to such trusts. He held that the *Quistclose* decision:

“... is authority for the proposition that where money is advanced by A to B, with the mutual intention that it should not become part of the assets of B, but should be used exclusively for a specific purpose, there will be implied (at least in the absence of an indication of a contrary intention) a stipulation that if the purpose fails the money will be repaid, and the arrangement will give rise to a relationship of a fiduciary character, or trust.”¹³

25. In *Re Australian Elizabethan Theatre Trust*,¹⁴ rejecting the proposed existence of a Quistclose trust in relation to tax deductible donations made to an organisation set up to support the arts, Gummow J likewise emphasised the need for the recipient to be obliged to apply the money solely for designated purposes. His Honour pointed out that:

“In *Quistclose* Lord Wilberforce emphasised that the form of words used indicated that the loan moneys were to be used ‘exclusively’ or ‘only’ in a particular way. 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.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Australasian Conference Association Limited v Mainline Constructions Proprietary Limited (in liquidation) and Others* (1978) 141 CLR 335 at 353.

¹⁴ (1991) 102 ALR 681 at 697.

The most that was permissible if the deduction was not to be imperilled was a statement of ‘preference’. In the circumstances, this was to indicate motive or expectation, in the light perhaps of past experience of the handling of gifts by the AETT, but not to impose a legal or equitable obligation. Likewise, the phrase in the AETT standard form ‘it would be appreciated’ is precatory rather than imperative.”

26. Giving the judgment of the Privy Council on an appeal from New Zealand in a case involving payments made for the purchase of unallocated gold bullion, Lord Mustill adopted the same approach:

“That a sum of money paid by the purchaser under a contract for the sale of goods is capable in principle of being the subject of a trust in the hands of the vendor is clear. For this purpose it is necessary to show either a mutual intention that the moneys should not fall within the general fund of the company’s assets but should be applied for a special designated purpose, or that having originally been paid over without restriction the recipient has later constituted himself a trustee of the money.”¹⁵

27. *Twinsectra v Yardley*,¹⁶ is now widely regarded as the leading authority on the creation of such trusts. It was a case involving payment of monies to solicitors who expressly undertook to release the money solely for the purpose of Mr Yardley acquiring particular property. The House of Lords again treated the fact that the payment of money was to be applied only for a specific purpose as the touchstone for determining whether a Quistclose trust came into existence.

28. Lord Millett provided an extensive analysis and highlighted restricted use of the funds as the basic requirement:

“... it is well established that a loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce.”¹⁷

29. When such a restriction is established, equity will prevent the recipient from applying the money for any other purpose. In consequence:

¹⁵ *Re Goldcorp Exchange Ltd (In Receivership)* [1995] 1 AC 74 at 100, citing *Quistclose* at 581-582.

¹⁶ [2002] 2 AC 164.

¹⁷ *Ibid* at §68.

“This prevents the borrower from obtaining any beneficial interest in the money, at least while the designated purpose is still capable of being carried out. Once the purpose has been carried out, the lender has his normal remedy in debt. If for any reason the purpose cannot be carried out, the question arises whether the money falls within the general fund of the borrower's assets, in which case it passes to his trustee in bankruptcy in the event of his insolvency and the lender is merely a loan creditor; or whether it is held on a resulting trust for the lender. This depends on the intention of the parties collected from the terms of the arrangement and the circumstances of the case.”¹⁸

30. As his Lordship stressed:

“The question in every case is whether the parties intended the money to be at the free disposal of the recipient: *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 , 100 per Lord Mustill. His freedom to dispose of the money is necessarily excluded by an arrangement that the money shall be used exclusively for the stated purpose.”¹⁹

31. Lord Hoffmann similarly noted the basic importance of a restrictive intention:

“Clauses 1 and 2 of that undertaking made it clear that the money was not to be at the free disposal of Mr Yardley. [The solicitors’ firm] Sims were not to part with the money to Mr Yardley or anyone else except for the purpose of enabling him to acquire property.”²⁰

32. His Lordship explained the consequences thus:

“... 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.”²¹

C.2 *The restriction may be implied*

33. On the facts of *Quistclose* and *Twinsectra*, it was expressly stipulated that the monies paid were only to be used for a specific purpose and no

¹⁸ *Ibid* at §69.

¹⁹ *Ibid* at §74 (italics in the original).

²⁰ *Ibid* at §12.

²¹ *Ibid* at §13 (italics in the original).

other. No such statement was expressly made when Trading paid the sums into the Account. In his oral submissions, Mr Bankim Thanki KC²² sought to argue that such an express restriction is necessary for a Quistclose trust to come into existence. At least, he submitted, there was no reported case where a Quistclose trust had arisen without such an express stipulation. I am unable to accept either of those propositions.

34. A payment may of course be made subject to an express undertaking by Y to use it solely for a specific purpose and to return the money to X if that purpose fails. In such cases, the position is not in doubt. However, the authorities show that an express stipulation is not required. A Quistclose trust will arise if the payment is made in circumstances which, on the evidence, objectively justify the inference that the payment was intended to be subject to the aforesaid conditions. It would be surprising if the applicable equitable principles were held to eschew their usual flexibility in favour of a hard and fast rule requiring an express stipulation even where the circumstances make the parties' intentions obvious and deviation would be unconscionable.

35. When discussing *In re Rogers*²³ in *Quistclose*, Lord Wilberforce noted that “if the primary purpose cannot be carried out, the question arises if a secondary purpose (ie, repayment to the lender) has been agreed, expressly *or by implication*”, holding that if it has, the remedies of equity may be invoked to give effect to it. His Lordship saw “no reason why the *flexible interplay of law and equity* cannot let in these practical arrangements, and other variations if desired”, commenting that it would be to the discredit of both systems if they could not.²⁴

²² Appearing for the respondent with Mr Victor Dawes SC and Mr Joshua Chan.

²³ 8 Morr 243 (italics supplied), cited in *Quistclose* at 581.

²⁴ *Quistclose* at 582 (italics supplied).

36. Nor is it true that authorities sustaining such a trust without an express stipulation do not exist. Again in *Quistclose* itself, Lord Wilberforce cited *Toovey v Milne*,²⁵ where money advanced was, on failure of the purpose for which it was lent, repaid to the lender by a bankrupt and held to be irrecoverable by his assignee in bankruptcy. Abbott CJ there stated:

“... that the fair inference from the facts proved was that this money was advanced for a special 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.”²⁶

37. In *Toovey*, the loan to the bankrupt by his brother-in-law was made without “any express stipulation, that if the object was not attained the money should be restored”.²⁷ As appears from the passage cited above, Abbott CJ nevertheless held that “the fair inference from the facts proved was that this money was advanced for a special purpose” clothing it with a trust, so that it did not pass to the bankrupt. Lord Wilberforce observed that “[the] basis for the decision was thus clearly stated, viz., that the money advanced for the specific purpose [to repay certain debts] did not become part of the bankrupt’s estate.”²⁸

38. As Mr Jonathan Hilliard KC²⁹ pointed out, a further example is provided by the Court of Appeal of Bermuda in *Kingate Global Fund Ltd v Knightsbridge (USD) Fund Ltd et al.*³⁰ The contest over the money in a bank account was between the liquidators of a failed investment fund and the respondent who had paid money to the credit of the fund’s account for the purpose of becoming a shareholder in the fund. It had become impossible to issue such

²⁵ (1819) 2 B & A 683.

²⁶ *Toovey* at 684, cited in *Quistclose* at 580.

²⁷ *Toovey* at 683-684.

²⁸ *Quistclose*, *ibid.* His Lordship cited a series of cases following *Toovey*.

²⁹ Appearing with Mr Laurence Li SC and Mr Sik Chee Ching for SPV1.

³⁰ [2009] CA (Bda) 17 Civ.

shares but there was no express stipulation as to the restricted purpose for which the respondent's payment could be applied. After construing voluminous offer documents, the Court concluded that the monies were paid solely for the purpose of the respondent becoming a shareholder. It agreed with the trial judge that:

“... on the true construction of the documents the answer is ‘ultimately obvious’. ‘Ultimately,’ because no conclusion can be reached until these lengthy and complex documents have been perused. ‘Obvious’, because as a matter of common sense there is no reason to suppose that either party, the subscribers or the Fund, expected the investment to be made, or the Subscribers to become shareholders, before the applications were accepted. There was never any intention that the money should be used for any other purpose.”³¹

C.3 *The nature of the trust arising*

39. At a more theoretical level, certain differences of opinion have been expressed regarding the precise nature of the trusts arising. Thus in *Quistclose*, Lord Wilberforce held that two successive trusts potentially came into being: a primary trust with the recipient holding the money for the designated creditors, and secondarily, if the primary trust fails, for the payer.³²

40. In *Re Australian Elizabethan Theatre Trust*,³³ Gummow J considered Lord Wilberforce's view, commenting:

“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. But on either characterisation, Quistclose had a beneficial interest (although not at all relevant times an exclusive beneficial interest) in the money in question. Thus, it was not merely in the position of a lender with the benefit of a promise to repay. Nor was Quistclose a settlor who had fully settled a fund upon other parties and did so not retain for itself a beneficial interest sufficient for it to ensure performance of the trust.”

³¹ *Ibid* at §37.

³² *Quistclose* at 580.

³³ (1991) 102 ALR 681 at 691.

41. As his Honour remarked, either theoretical approach would lead to the same result, observing that “... the effect of the transaction, on either footing, was that the only benefit Rolls Razor could obtain from the loan would be that received from the use of the funds lent to discharge the particular indebtedness of Rolls Razor to the shareholders in respect of the dividend.”³⁴ And that “... the essential reason the insolvency law did not strike at the transaction in question in *Quistclose* was that the moneys... never at any stage became the beneficial property of Rolls Razor.”³⁵

42. The essence of a *Quistclose* trust therefore involves the restricted purpose for which the money may be applied. However, Gummow J emphasised that “[the] use of the expression ‘purpose’ should not be read as heralding a new era for the non-charitable purpose trust”.³⁶ The relevant purpose is the product of the payer’s intention, agreed to or acquiesced in by the payee in accepting payment, and not an incident of some unknown type of trust.

43. In *Twinsectra*, Lord Millett regarded Lord Wilberforce’s view that there were two successive trusts as problematical.³⁷ His Lordship’s preference was to analyse a *Quistclose* trust “as a resulting trust for the transferor with a mandate to the transferee to apply the money for the stated purpose”.³⁸ Elaborating, he held:

“... 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

³⁴ *Ibid.*

³⁵ *Ibid* at 692.

³⁶ *Ibid.*

³⁷ [2002] 2 AC 164 at §§79-80.

³⁸ *Ibid* at §92.

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.”³⁹

44. Lord Hoffmann agreed with the analysis of a trust subject to a power. He viewed the Quistclose trust as involving the recipient, Sims, holding 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”.⁴⁰

45. That trust and power analysis is endorsed in Snell’s Equity⁴¹ where the learned editors also point out that “[the] categorisation of the trust as express or resulting would rarely be significant”. That observation appears to hold good for the purposes of the present discussion.

C.4 A dictum in the Prickly Bay decision

46. In *Prickly Bay Waterside Ltd v British American Insurance Company Ltd*,⁴² writing for the Privy Council on an appeal from Grenada, Lady Arden applied the principles set out in *Twinsectra* which she noted “has become accepted as the core analysis of Quistclose trusts”.⁴³ Her Ladyship cited Lord Millett’s judgment, pointing out that “[the] question in every case is whether the parties intended the money to be at the free disposition of the borrower... 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...”⁴⁴ On the facts of

³⁹ *Ibid* at §100.

⁴⁰ *Ibid* at §13 (italics in the original).

⁴¹ John McGhee QC and Steven Elliott QC, Snell’s Equity (34th Ed, Sweet & Maxwell, 2020) at §25-036.

⁴² [2022] 1 WLR 2087.

⁴³ *Ibid* at §29.

⁴⁴ *Ibid* at §27.

that case, Lady Arden held that there was nothing in the parties' arrangements "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" so that no trust was established.

47. However, a passage in paragraph 31 of Lady Arden's judgment has raised doubts. In the course of discussing *Twinsectra* and the summary in *Bieber v Teathers Ltd*⁴⁵ of what had there been decided, her Ladyship stated:

"... 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)."⁴⁶

48. That is a puzzling passage and the cited paragraph in Lord Millett's judgment does not dispel the doubts. It seems to me that an ambiguity is present in the statement that "X is not the minimum necessary to constitute Y". This may mean that X is not the minimum because something less than X would suffice to constitute Y (the "less suffices" meaning), or it may mean that X is not the minimum, because something more than X is required to constitute Y (the "more needed" meaning). X in this context is "an intention that the funds transferred should not form part of the general assets of the recipient". This calls for some discussion since the above-mentioned dictum appears to have had a significant influence on the Court of Appeal's judgment.

49. It may be thought that in the context of Lady Arden's judgment as a whole, the dictum is best understood as conveying the "less suffices" meaning. In other words, while (in line with the authorities examined above) the parties' intention "that the funds transferred should not form part of the general assets of

⁴⁵ [2012] 2 BCLC 585, per Norris J; (Arden, Sullivan and Patten LJJ) in *Bieber v Teathers Ltd* [2013] 1 BCLC 248.

⁴⁶ *Prickly Bay* at §31.

the recipient” would be enough to constitute a Quistclose trust, it is not the minimum requirement since something less may be sufficient.

50. This understanding may be considered preferable since, as noted above, Lady Arden was plainly not seeking to depart from Lord Millett’s exposition of the *Quistclose* principles in *Twinsectra*. It is also an approach which accords with Lady Arden’s emphasis on equity’s flexibility and how the principle should be “expressed more flexibly”. Thus, in paragraph 32 of that judgment, her Ladyship stated:

“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.”⁴⁷

51. However, the difficulty with accepting this “less suffices” reading of the dictum is that it introduces uncertainty as to what is the minimum needed to constitute a Quistclose trust. It would suggest that even where it cannot be shown that the parties intended to restrict use of the money solely to a specific purpose and thus should not become part of the general assets of the recipient, a Quistclose trust may nevertheless be constituted. If so, what would such lesser requirement consist of? If the basic requirement for constituting such a trust, accepted in all the authorities, is no longer the touchstone of the doctrine, what takes its place? If, as paragraph 32 of *Prickly Bay* cited above may be taken to suggest, her Ladyship had it in mind that a Quistclose trust could arise where there is shown to be some express statement “as to what is to happen on failure of the specified purpose” or a statement “express only as to that purpose”, uncertainty would in my view still remain as to whether or how this represents

⁴⁷ *Prickly Bay* at §32.

the proposed minimum requirement and how this relates to the touchstone requirement of an objective intention that the payment is to be for a specific purpose and no other, recognized in the established authorities.

52. The “more needed” reading is just as problematical. The suggestion that the aforesaid restrictive intention with its logical and legal consequences is not enough, but that something more is needed appears quite inconsistent with the established authorities. Such a reading would also be difficult to reconcile with Lady Arden’s adherence to the principles laid down by Lord Millett. Nevertheless, on its face the dictum may plausibly be read as meaning that in addition to the intention that the money should not form part of the recipient’s general assets, there must additionally be some flexibly expressed indication that the payer intends to retain a beneficial interest in those funds. Thus, the cited paragraph goes on to state:

“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.*”⁴⁸

53. At the hearing before this Court, both sides treated the aforesaid dictum with reserve. They both pointed out that it does not form part of the ratio of the decision since the Privy Council held that there was no intention in that case for the payer to retain any beneficial interest or for the recipient to apply the funds solely for a specific purpose.⁴⁹ The monies paid by Mrs Lee for the annuity were intended to be at the recipient’s free disposition.⁵⁰ The respondent went on to submit that to the extent that the dictum was an intended reformulation of the

⁴⁸ *Ibid* (italics supplied).

⁴⁹ Appellants’ Joint Case §§142-144; Respondent’s Case §§72-76.

⁵⁰ *Prickly Bay* at §42.

Quistclose principle it “should not be adopted in Hong Kong”.⁵¹ It certainly appears that the dictum is difficult to reconcile with established authority.

C.5 Answer to Question 1

54. Question 1 postulates a contrast between (i) “an intention for the transferor to retain some control of and/or beneficial interest in the assets qua transferor” and (ii) “an intention for the transferee to not have free disposal and/or the whole beneficial interest in the assets”. It suggests that the answer must be either (i) or (ii). That is a confused dichotomy.

55. This judgment has been at pains to distinguish between inferring the intention of the parties to restrict use of the transferred funds to specific purposes as a matter of fact and the consequences which flow as a matter of logic and legal analysis from such an inference. The proposed dichotomy in Question 1 elides the factual inferences with their legal consequences.

56. Thus, proposition (i) elides the inference of “an intention for the transferor to retain some control of the assets” which is a question of fact to be derived from the objective evidence, with the legal consequence of the transferor retaining a beneficial interest in the assets. Similarly, proposition (ii) elides the factual intention that the transferee should not have free disposal of the assets with the legal consequence that the transferee does not have the “whole”⁵² beneficial interest in the assets”.

57. If, as a matter of fact, the evidence objectively establishes that the payer intended to pay the money to the recipient to be used for a specific purpose and no other, with the recipient agreeing to or acquiescing in that restriction, such finding carries with it the logical consequence that the money was not to be added

⁵¹ Respondent’s Case §74.

⁵² More appropriately “does not have *any* beneficial interest”.

to the recipient's general assets or to be at the recipient's free disposal. It would follow as a matter of legal consequence that the transferee did not acquire a beneficial interest in the funds and that the transferor retained a beneficial interest throughout, so that on failure of the specific purpose, the money would be held on resulting trust for the payer.

58. The difficulty that has arisen – in the Court of Appeal's judgment, as discussed below – is that an approach has been adopted requiring not only an intention that the money paid would only be used for restricted purposes, but also some express stipulation or indication that the payer intends to reserve such a beneficial interest. That does not represent the law as it stands.

D. Applying the Question 1 principles in the present case

59. When Trading paid the US\$120 million into the Account in three tranches, there was no express stipulation that such payments were to be used only for a specific purpose or that upon failure of such purpose, the funds should revert to Trading and the Group. However, as discussed above, the authorities establish that such an express stipulation is not needed provided that on the evidence, it is clear that payment was made in circumstances justifying the inference that such was the intention with which the payment was made, with the recipient's agreement or acquiescence.

60. The uncontroverted evidence, reviewed in the Sections which follow, clearly establishes that in the present case (i) the money was paid into the US\$ sub-account solely to be used to meet SPV2's obligations under the 2018 Bonds; (ii) the money was not intended to become part of SPV1's general assets or to be freely at SPV1's disposal; and (iii) that the funds were assets of the Group, and on failure of the designated purpose, reverted, as a matter of legal consequence, to be used for the Group's purposes, particularly as part of its efforts at restructuring its debt.

D.1 Payments for the purpose of meeting SPV2's obligations under the 2018 Bonds

61. The 2018 Bonds fell due in the capital sum of US\$350 million plus interest on 11 May 2018. SPV2, the issuer was unable to pay those amounts on that date. Seeking to keep the bondholders at bay, on 14 May 2018, the Group, through its treasury company Trading, paid the interest due in the sum of US\$9.19 million into the Account. Onward payment to the holders of the 2018 Bonds was made by SPV2 on 16 May 2018.

62. During this period, the Group were trying hard to assemble the funds needed to meet the 2018 obligations. Trading transferred into the Account US\$20 million on 15 May and a further US\$30 million on 16 May.

63. Concerned about a possible default affecting the 2022 Bonds, China Life pressed the Group inter alia to provide a funding plan towards meeting the 2018 Bond obligations. The Group replied that it intended to provide US\$70 million by 21 May, US\$100 million by 23 May and US\$130 million by 24 May to cover the principal due. In the event, on 21 May 2018, Trading duly paid the US\$70 million tranche into the Account, but the remaining US\$230 million required could not be raised. Thus it is clear that the total of US\$120 million (US\$20 million + US\$30 million + US\$70 million) paid into the Account by Trading were all sums paid for the specific purpose of redeeming the 2018 Bonds. That purpose could not be fulfilled because the funds raised fell short by US\$230 million.

D.2 Not paid to SPV1

64. It is not sufficient merely to show that the parties knew the purpose for which payments were made. For a Quistclose trust to arise, the payments must have been made for a specific purpose and no other, with the intention that

the money should not become part of the general assets of the recipient and should not be at the recipient's free disposal. These requirements are clearly established on the present facts: the payments into the Account were obviously not made to benefit SPV1 or intended to form part of its general assets to be at its free disposal. They were funds assembled solely for the specific purpose of attempting to meet SPV2's obligations under the 2018 Bonds.

65. The 2022 Bonds, denominated in HK\$, were not due until 2022, so that SPV1 had no need for any funding in 2018. Such funding needs would be in HK\$ and not US\$. The US\$ payments were made into the US\$ sub-account which was used by SPV2 and de facto segregated from funds available to SPV1 in the HK\$ sub-account. There was no reason to treat the US\$120 million paid into the US\$ sub-account as payments to SPV1 for its own purposes. There was no accounting entry treating those sums as having been made in reduction of Trading's inter-company debt to SPV1.

66. It would have defied commonsense to suggest that in the crisis situation faced by the Group, the US\$120 million was paid into the Account for any purpose other than the specific and urgent purpose of seeking to avoid default and cross-defaults on the bonds issued. The suggestion that the payments were made into SPV1's Account to be freely disposed of by SPV1 would rightly have been regarded as absurd.

D.3 Reverting to the Group on failure of the purpose

67. The financial arrangements described above were orchestrated by the Group's senior management whose acts and intentions are attributable to every member of the Group concerned. Everyone obviously understood that the Group was faced with a major crisis. That included the bondholders. When, alarmed at a potential cross-default on the 2022 Bonds, China Life demanded disclosure of the Group's assets and liabilities, Mr Norman Lin, the CEO of an

intermediate holding company, responded with details and a funding plan. China Life pressed for attendance by the Group's "key leaders, including chairman Yihe Chen, president Ning Zhu and CFO Huanlan Yang" at a meeting in Beijing to deal with the crisis. The efforts to avoid a default were therefore a Group endeavour, mobilising Group resources. Payment of the US\$20 million tranche was specifically approved by the Group chairman Chen Yihe "to alleviate the pressure".⁵³ That sum was obviously not intended to be paid to SPV1 to be at its free disposition. It is evident from the contemporaneous correspondence, including China Life's repeated inquiries as to when the US\$70 million sum would be paid into the bank, that the other tranches were also made for that specific purpose. It would be bizarre to suggest that, faced with such a pressing Group-wide crisis, the payments into the Account were somehow intended to be paid to SPV1, to be freely dealt with as it might wish and thus available for execution by a garnishee when SPV1 had no need for those funds.

68. When it was clear that the sums amassed fell short by US\$230 million, the US\$120 million balance was placed on fixed deposit to earn interest pending restructuring attempts. On 6 June 2018, the Group appointed FTI Consulting as independent financial advisers to formulate a restructuring plan. As appears from the first such plan published, restructuring was likely to require funding to keep interest repayments current while non-core assets were sold off, cash flow generated by business operations and further investments attracted. There was obviously a need for the US\$120 million to be applied for such Group purposes.

69. In my view, the evidence makes it clear that the US\$120 million was clothed with a Quistclose trust and, since the intended purpose of meeting the 2018 Bond obligations failed, that sum is held by SPV1 on trust for Trading as

⁵³ Yuen, Au and G Lam JJA [2023] HKCA 966 at §42.

the Group treasurer for the purposes of the Group. The funds are thus not available to China Life as garnishee.

E. Question 2

70. In granting leave to appeal on this question, the Court of Appeal commented that “the fact that the payments in question were intra-group transfers between two sister companies provides a novel context for the application of the principles found in previous authorities.”⁵⁴

71. Question 2 accordingly asks whether any difference of approach is needed where one is concerned with transfers between fellow subsidiaries subject to common management control. It postulates that such circumstances may constitute a weighty or crucial indication that there is “an absence of[,] any intention for the transferor to retain some control qua transferor or any intention for the transferee not to have free disposal and the whole beneficial interest in the assets” and thus negate the existence of a Quistclose trust.

72. The premise appears to be that since such an intra-Group transfer is likely to be made without the transferor expressing an intention “to retain some control qua transferor or any intention for the transferee not to have free disposal and the whole beneficial interest in the assets” no Quistclose trust arises.

73. That premise is misplaced. As already noted, an express stipulation restricting the use of the money to a specific purpose is not required to constitute such a trust. It is sufficient if the evidence objectively establishes the necessary intention, with the logical and legal consequences which that entails, including the consequence that the property does not pass beneficially to the transferee and the transferor retains a beneficial interest.

⁵⁴ [2023] HKCA 1251 at §3.

74. It is natural that, faced with a pressing financial crisis in a situation like the present, senior management will mobilise Group resources wherever they can be found, transferring available assets amongst Group companies as needed. Such “fire-fighting” measures are taken by senior management as the directing mind and will of all the Group companies concerned so that each company may be taken to be fully aware of and acquiescent in the rescue objective as the urgent and sole purpose for which each transfer is made. One would obviously not expect fellow subsidiaries in such circumstances to act as if they were conducting arm’s length transactions. They would not be expected to spell out *inter se* the intended purpose of a transfer or legalistically to stipulate that the transferor reserves a beneficial interest in the amount transferred, even if such a stipulation was required. The common corporate control makes such stipulations otiose.

F. What the Court of Appeal decided

75. In a careful and meticulous judgment for the Court of Appeal,⁵⁵ G Lam JA recounted in detail, the events leading to payment of the US\$120 million into the Account and the garnishee proceedings which are the basis of these appeals. Such events included the issue of the relevant bonds by SPV1 and SPV2 incorporated as SPVs with no other operations or assets;⁵⁶ the Account and sub-accounts maintained;⁵⁷ the Group treasury function of Trading;⁵⁸ the inability of SPV2 to redeem the 2018 Bonds when due;⁵⁹ efforts by the Group to gather sufficient funds to meet those obligations in the face of pressure from the

⁵⁵ Yuen, Au and G Lam JJA [2023] HKCA 966.

⁵⁶ CA§6.

⁵⁷ CA§§38-39.

⁵⁸ CA§37.

⁵⁹ CA§41

bondholders;⁶⁰ the funding plan and its failure;⁶¹ the declaration of default in the 2018 Bonds and the cross-defaults;⁶² and the restructuring discussions involving use of the US\$120 million while paying interest to all bondholders up to 20 December 2018.⁶³

76. In the light of the evidence, G Lam JA reached a conclusion that one might have thought was crucial for the establishment of a Quistclose trust and defeating the garnishee order. His Lordship stated:

*“The evidence in my view demonstrates that the US\$120 million was derived from the proceeds of the eighth series of bonds. The proceeds were on-lent by that bond issuer to Trading. The US\$120 million was remitted by Trading to the D1 Account in May 2018 for the purpose and in anticipation of the payment (together with another US\$100 million and US\$130 million expected on 23 and 24 May 2018 respectively) of the principal of the 2018 Bonds in the total sum of US\$350 million. That was the burning issue the Group was faced with at the time. If the 2018 Bonds could be repaid, even though slightly late, immediate cross-defaults on the remaining seven bonds could be avoided as they had not yet matured.”*⁶⁴

77. One might thus have expected the Court of Appeal to hold that all the Group companies concerned, in particular, Trading as the Group treasurer, SPV2 as the issuer of the 2018 Bonds and SPV1 as the holder of the Account (and co-signatory with SPV2 of the US\$ sub-account) plainly intended that the US\$120 million should be applied solely for the specific purpose of avoiding the default and cross-defaults – addressing the “burning issue”. Any other purpose for such payments was clearly excluded. Certainly, it was plain and obvious that the payments were not intended to become part of SPV1’s general assets to be at its free disposition. While SPV2 was in desperate need for funds, SPV1 had no funding needs until 2022.

⁶⁰ CA§§40, 42-51.

⁶¹ CA§49.

⁶² CA§52.

⁶³ CA§§52, 54.

⁶⁴ CA§58 (italics supplied).

F.1 Errors in the Court of Appeal's reasoning

78. Surprisingly, the Court of Appeal held that the appellants had failed to establish a Quistclose trust and that China Life was entitled to a garnishee order absolute. This was especially unexpected since G Lam JA, relying principally on *Twinsectra*, accurately identified the orthodox principles on which such trusts are based.

79. Thus, his Lordship noted the central requirement that the transferred money should be used for a specific purpose and should not be at the recipient's free disposal:

“The law recognises that where property (usually money) is transferred on terms which require it to be applied for a purpose without leaving it at the free disposal of the recipient, a trust may arise over the property in favour of the transferor. Such a trust is often referred to as a *Quistclose* trust...”⁶⁵

80. Significantly, he acknowledged that the trust may be impliedly and not expressly constituted:

“The parties need not have used language expressly setting up a trust. Equity intervenes because it is unconscionable for a person to obtain money on terms as to its application and then disregard the terms on which he received it. The duty imposed is fiduciary in character because the person who advances money for a particular purpose only and not for any other purpose places his trust and confidence in the recipient to ensure that the money is properly applied.”⁶⁶

Elaborating:

“The approach to the ascertainment of intention is objective. The parties' subjective thoughts hidden in their own minds are irrelevant. What is material is the outward manifestations of their intention. Such intention is to be collected objectively from the terms of the arrangement and the circumstances of the case.”⁶⁷

⁶⁵ CA§23.

⁶⁶ CA§24.

⁶⁷ CA§27

81. His Lordship noted that it is not enough that the money is paid for a particular purpose but that:

“The question in every case is whether the parties intended the money to be at the free disposal of the recipient. His freedom to dispose of the money is necessarily excluded by an arrangement that the money shall be used *exclusively* for the stated purpose.”⁶⁸

F.2 The influence of Prickly Bay

82. Where the Court of Appeal’s judgment appears to have taken a wrong turn was when it stated:

“What is required as a minimum 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 an intention that the payer should retain some beneficial interest in the funds or, in other words, a sufficient indication that the payer did not intend to dispose of the entire beneficial interest in the funds.”⁶⁹

83. As the footnoted reference indicates, that was a proposition closely based on paragraphs 31 and 32 of Lady Arden’s judgment in *Prickly Bay*, discussed above in Section C.4 above. I have suggested that the dictum is ambiguous and it appears that G Lam JA applied it, adopting what I have called the “more needed” reading, holding that it was not enough that the evidence showed “an intention that the funds transferred should not form part of the general assets of the recipient”. More was needed, namely, that there had to be shown to be “an intention that the payer should retain some beneficial interest in the funds”. That “something more” had to involve some “sufficient indication that the payer did not intend to dispose of the entire beneficial interest in the funds”.

84. This led the Court of Appeal to search for some express indication that the payer intended to retain a beneficial interest in the funds. It in effect held that even if it might have been thought obvious that the funds were intended to

⁶⁸ CA§25 (italics in original).

⁶⁹ CA§28.

be used for the specific purpose of redeeming the 2018 Bonds and no other purpose, and were not intended to be placed at SPV1's free disposal, that would be insufficient in the absence of an express reservation of a beneficial interest by the payer.

85. In support of that approach, the Court of Appeal cited Patten LJ in *Bieber v Teathers Ltd*,⁷⁰ a decision in which Lady Arden had participated in the English Court of Appeal, where his Lordship stated:

“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 payer's rights and the control of the use of the money through the medium of a trust.”

86. It should however be noted that in *Bieber*, whether a Quistclose trust existed turned on the construction of the Information Memorandum and other documents on which that issue turned.⁷¹ Hence, his Lordship referred to the need to construe the relevant documents. He should not be taken to be suggesting that there must always be some express stipulation to be construed. The cited passage continued with Patten LJ emphasising, in orthodox terms, that the object of such construction was to ascertain whether the intention was that the monies should not become the absolute property of the recipient, with the consequence that the payer would retain a beneficial interest until the purpose was achieved:

“Critically this involves the court being satisfied that the intention of the parties was that the monies 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.”⁷²

⁷⁰ [2013] 1 BCLC 248 at §15.

⁷¹ *Ibid* at §17.

⁷² *Ibid* at §15.

87. The Court of Appeal also cited Briggs LJ in *Bellis v Challinor*,⁷³ who stated:

“There must be an intention to create a trust on the part of the transferor. This is an objective question. It means that the transferor must have intended to enter into arrangements which, viewed objectively, have the effect in law of creating a trust ...”

88. That formed part of Briggs LJ’s orthodox approach based on Lord Millett’s judgment in *Twinsectra*, stressing the need to consider objectively the effect of the arrangements entered into by the parties.⁷⁴ The intended arrangements have the effect in law of creating a trust. His Lordship’s judgment provides no support for the view that an express reservation of the beneficial interest is required.

89. Applying the “more needed” approach, the Court of Appeal pointed out that in *Quistclose* “a letter was sent by the borrower, with the concurrence of the lender, to the borrower’s bank referring to an agreement already reached that the money ‘will *only* be used to meet the dividend due on July 24, 1964’”.⁷⁵ *Twinsectra* was also referred to, the Court of Appeal drawing attention to the undertaking given by the solicitor that the funds would be solely used for the acquisition of the relevant property and for no other purpose.⁷⁶

90. The Court was at pains to point out that payment of each tranche into the Account was not accompanied by any restrictive stipulation.⁷⁷ It also noted

⁷³ [2015] EWCA Civ 59 at §57.

⁷⁴ *Ibid* at §§54-64.

⁷⁵ CA§59,

⁷⁶ CA§60.

⁷⁷ CA§§67-69.

that no express restrictive communication could be found in the accounting entries.⁷⁸

91. That approach was erroneous. As already explained, the authorities establish that the parties' restrictive intention, with the logical and legal consequences which that entails, may be implied from an objective assessment of the circumstances. For the reasons given in Section D above, the circumstances propelling the payment of the US\$120 million into the Account compellingly justify the inference that the Group, acting through Trading, intended that it was to be used solely for the purpose of funding redemption of the 2018 Bonds and, upon failure of that purpose, the consequence as a matter of law was that the funds were held by SPV1 in the Account on trust for Trading to be used for Group purposes, particularly, as part of a restructuring plan.

F.3 Question 2 and fellow subsidiaries

92. The second main error made by the Court of Appeal relates to the significance it placed on the fact that the payment of US\$120 million was made between fellow subsidiaries in the Group. It held that since, as between Trading and its sister companies, SPV1 and SPV2, there was no express stipulation restricting use of the funds transferred, a Quistclose trust could not be made out. It reasoned as follows:

“The crucial and, as far as counsel’s research has shown, unique feature in this case is that the payer and the payee were not parties at arm’s length, but wholly owned sister companies within the same group. Although there is no evidence on the directorship of the 1st defendant, the reality is that the 1st defendant would be expected to act and would act in accordance with the Group’s plans, at any rate without the intervention of external interests. As counsel for the Committee themselves submit, it was the Group, not the 1st defendant, that was ‘calling the shots’; there was ‘no need for an express statement’ that the 1st defendant could not apply the funds freely and it was

⁷⁸ CA§64.

‘commercially unrealistic and unnecessary for there to be a contract setting out the restrictions’ on how the 1st defendant could apply the money.’⁷⁹

“Viewed against the parties’ relationship and the structure of the transactions envisaged, it is in my view equally unrealistic to suggest there was a trust established to limit the 1st defendant’s freedom to deal with the money. Any desired control could be effected through the corporate chain of command. Since the Group was in full control of the 1st defendant, there was no need to preserve control through the retention by Trading of beneficial interest in the money as against the 1st defendant. There is nothing to show that the Group intended to retain control of the money through Trading (as submitted for the Committee) rather than through the 1st defendant, both of which were wholly owned subsidiaries. From the Group’s perspective in 2018, the money was as much ‘immediately available cash’ when owned by the 1st defendant as when it was in the ownership of Trading. To speak of Trading placing ‘trust and confidence’ in the 1st defendant to ensure that the money was applied for the purpose for which it was transferred, thereby occasioning the intervention of equity, seems to me to be unreal.”⁸⁰

93. It was indeed senior management of the Group that were “calling the shots”, transferring available funds to the US\$ sub-account for the urgent purpose of trying to avoid a default. It was also true that there was no need for express restrictive stipulations. However, I would regard the implications flowing from those facts to be the opposite of those drawn by the Court of Appeal. As discussed in Section E of this judgment, such asset allocations are properly treated as involving decisions taken by senior management with agreement or acquiescence to be attributed to the affected companies, recognizing the rescue objective as the pressing and cardinal purpose for each such transfer. One would not expect sister companies in such circumstances to spell out the specific purpose *inter se* or legalistically to stipulate that the transferor reserves a beneficial interest in the sum transferred (even if such a stipulation is ever required). The absence of express stipulation evidences the obvious commonality of the parties’ intentions regarding the specific purpose for which the money was to be used, and no other. It also supports the conclusion that in the event of the purpose failing, the funds

⁷⁹ CA§68 (footnotes omitted).

⁸⁰ CA§69 (footnotes omitted).

would, as a legal consequence, revert to be used for Group purposes, particularly, its restructuring efforts.

94. On any view, it is impossible to see any basis for contending that the payment was intended beneficially to become part of SPV1's assets at its free disposal. The Court of Appeal evidently lost sight of this key consideration. Responding to the argument that allowing China Life to seize the funds would give it an unjustified windfall, the Court of Appeal stated:

“... the Group could have moved the money elsewhere. If a group decides to ‘park’ money in a subsidiary simply via inter-company payables and receivables, it takes the risk of exposure to action by that subsidiary’s creditors. If it wishes to insulate money transferred to a subsidiary from that subsidiary’s creditors on the ground that the money belongs to some other group company, it is incumbent on the group to make that clear.”⁸¹

“Thus examined, the so-called windfall arises not so much from the court’s rejection of the Quistclose trust case as from the omission by the Group either properly and clearly to set up a trust over the US\$120 million or to move the money out of the 1st defendant at an earlier time.”⁸²

95. Instead of questioning the existence of any intention to transfer the money to SPV1 for its own purposes, the cited passages pre-suppose that the funds belong to SPV1 and suggest that if the Group had wanted to insulate them against execution by a creditor, it ought to have taken steps to remove the money from SPV1's ownership. That begs the question and is obviously a flawed approach.

G. Conclusion

96. I would accordingly Order that the appeals be allowed and that the garnishee order be discharged. The parties should be at liberty to lodge written

⁸¹ CA§75.

⁸² CA§76.

submissions as to costs within 14 days of the date of this judgment, to be dealt with by the Court on the papers.

Mr Justice Fok PJ:

97. Like the Chief Justice, I agree with the judgments of Mr Justice Ribeiro PJ and Mr Justice Gummow NPJ and, for the reasons they give, I too would allow the appeal and discharge the garnishee order.

Mr Justice Lam PJ:

98. As with the Chief Justice and Mr Justice Fok PJ, I also agree with the judgments of Mr Justice Ribeiro PJ and Mr Justice Gummow NPJ and, for the reasons they give, I too would allow the appeal and discharge the garnishee order.

Mr Justice Gummow NPJ:

99. These appeals present the first occasion for the Court of Final Appeal to consider that variety of trust associated with the speech of Lord Wilberforce (with whom the other Law Lords agreed) in *Barclays Bank Ltd v Quistclose Investments Ltd*⁸³. The term “Quistclose trust” is used to identify that trust.

100. What is a “Quistclose trust”? In general terms, the expression describes the situation where X pays money (or transfers other personal property) to Y and as a matter of intention, objectively discerned, the money is to be applied solely for a specific purpose; if that purpose fails Y is subject to an undertaking, express or as a matter of inference, to return the money to X. The essential issue is whether, on the evidence, X and Y intended that the money should be applied by Y only for a specific purpose and, if that fails, returned by Y to X.

⁸³ [1970] AC 567.

101. The appeals to this Court should be allowed but there are several steps to reach that outcome. First, the dispute concerns personal not real property and no question arises of the operation of the Land Registration Ordinance⁸⁴ considered by the Privy Council in *Chu Yam On v Li Tam Toi Hing*⁸⁵.

102. Secondly, the issues concerning Quistclose trusts arise here somewhat indirectly. If certain funds were subject to the garnishee order sought by the respondent, China Life, they could not be used for other purposes pursuant to a Quistclose trust. But, as the appellants contend, if the funds were beneficially owned by a third party, under a Quistclose trust, the garnishee order could not reach them.

103. Thirdly, a difficulty in considering the “Quistclose trust” is found in the very ambiguity involved in the use of the title of a case to identify a legal institution. Edelman J recently observed⁸⁶: “It can be a sign of lack of clarity of principle when a legal principle or rule comes to be known by reference to the case in which it was first set out rather than by reference to any point of principle.”

104. In Chapter 6 of his book “The Laws of Restitution”, published in 2023, Professor Stevens⁸⁷ refers to the use of labels to disguise the lack of understanding of new doctrine. He instances the use of “the name of the case that is said to have originated it” and refers to “the rule in *Rylands v Fletcher*”. For a modern example Professor Stevens cites the “*Woolwich* Principle” in the law of unjust enrichment affecting repayments by the Revenue, derived from *Woolwich*

⁸⁴ ss 2 and 3, Cap 128.

⁸⁵ (1956) 40 HKLR 250.

⁸⁶ *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* [2024] HCA 16 at [120].

⁸⁷ Professor of English Private Law at the University of Oxford.

*Equitable Building Society v I.R.C.*⁸⁸. He might have added the “Quistclose trust”.⁸⁹

105. Fourthly, as late as 1996 Lord Browne-Wilkinson observed:⁹⁰

“wise judges have often warned against the wholesale importation into commercial law of equitable principles [given] the certainty and speed which are essential requirements for the orderly conduct of business affairs”.

106. That caution has appeared in decisions subsequent to *Quistclose* itself. For example, in *Twinsectra Ltd v Yardley* Lord Millett stressed that payments are routinely made in advance for particular goods and services but they do not constitute trust moneys in the recipient’s hands.⁹¹ In *First City Monument Bank Plc v Zumax Nigeria Ltd* Lewison LJ warned that to hold there was a trust where moneys were credited to the bank account of another would “paralyse the business of banking”.⁹²

The Quistclose Case

107. Mr John Bloom was the entrepreneur behind Rolls Razor Ltd (“RR”).⁹³ It obtained a loan from one of Bloom’s companies, Quistclose Investments, on express terms that the money would “only” and “exclusively” be used by RR to pay a dividend. The money was paid into a special account with Barclays Bank, with which RR had a large overdraft. RR went into voluntary liquidation before the dividend had been paid. Quistclose Investments then sued RR and the Bank and successfully claimed that the money had been held by RR

⁸⁸ [1993] AC 70.

⁸⁹ Robert Stevens, *The Laws of Restitution* (Oxford University Press, 2023) at 98.

⁹⁰ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 704.

⁹¹ [2002] 2 AC 164 at [73].

⁹² [2019] EWCA Civ 294 at [81].

⁹³ Roberts Stevens, “Rolls Razor Ltd” in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart Publishing, 2004) at 1-7

on trust to pay the dividend and, the trust having failed, there was in operation a secondary trust for the benefit of Quistclose Investments. Lord Wilberforce declared that a “necessary consequence” of a “process simply of interpretation” was that there was a “primary trust” and a secondary trust “if the primary trust fails”⁹⁴.

108. Had the primary trust been performed and the dividend paid before the liquidation of RR the liability of that payment to attack as a preference would have turned on the applicable preference provisions in the relevant legislation.⁹⁵

109. In *Quistclose*, Lord Wilberforce declared that there was “surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies” and in giving effect to “practical arrangements” by “the flexible interplay of law and equity”.⁹⁶ Subsequently Mason and Deane JJ observed that there is “no dichotomy” between contract and trust, the latter providing “one of the most important means of protecting parties in a contractual relationship and of vindicating contractual rights.”⁹⁷

110. In discussing *In re Rogers*,⁹⁸ Lord Wilberforce noted that “if the primary purpose cannot be carried out, the question arises if a secondary purpose (i.e., repayment to the lender) has been agreed, expressly *or by implication*”, holding that “if it has, the remedies of equity may be invoked to give effect to it”.

⁹⁴ [1970] AC 567 at 580.

⁹⁵ Jamie A Glister “The nature of Quistclose trusts: classification and reconciliation” (2004) 63(3) Cambridge Law Journal 632, at fn 15; Robert Stevens, “Insolvency” in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart Publishing, 2004) at 157-165. In Hong Kong, Companies (Winding Up and Miscellaneous Provisions) Ordinance, s.266, Cap. 32.

⁹⁶ [1970] AC 567 at 581-582.

⁹⁷ *Gosper v Sawyer* (1985) 160 CLR 548 at 568-569.

⁹⁸ *In re Rogers, Ex parte Holland and Hannen* (1891) 8 Morr 243, cited in *Quistclose* at 581 (italics supplied).

His Lordship saw “no reason why the flexible interplay of law and equity cannot let in these practical arrangements, and other variations if desired”, commenting that “it would be to the discredit of both systems if they could not.”⁹⁹ In the present appeals, where there was no express undertaking as to repayment, the possibility of inferring the requisite intention to restrict use of the funds bears on the issues between the present parties.

Three Possible Meanings

111. There are at least three possible meanings of the term “Quistclose trust”. The first is that it identifies a new species of trust. This in their written submissions the present parties correctly deny.

112. In *Legal Services Board v Gillespie-Jones Bell, Gageler and Keane JJ* said:¹⁰⁰

“The terminology of a ‘*Quistclose* trust’ is helpful as a reminder that legal and equitable remedies may co-exist. The terminology is not helpful if taken to suggest the possibility apart from statute of a non-express trust for non-charitable purposes.”

Their Honours cited the statement in *Re Australian Elizabethan Theatre Trust* that to speak of a Quistclose trust as if it were more “than an example of the particular operation of principle upon the facts as found is to set [one] off on a false path.”¹⁰¹ They also referred to passages to the same effect by Lord Millett in the 2002 decision in *Twinsectra*.¹⁰² Then in 2004 Lord Millett wrote that a Quistclose trust may be any one of the categories of trust, “depending on the facts

⁹⁹ [1970] AC 567 at 582.

¹⁰⁰ (2013) 249 CLR 493 at [112].

¹⁰¹ (1991) 30 FCR 491 at 503.

¹⁰² [2002] 2 AC 164 at [80]-[81], [100].

of the particular case and the boundaries between these various forms of trust ...”¹⁰³ Further, in *Raulfs v Fishy Bite Pty Ltd* Campbell JA said:¹⁰⁴

“*Quistclose* recognises that sometimes there can be a trust whose terms are that the trust property is to be paid to particular people, and if it is not paid to those people, it is to be held for someone else. That is a matter arising from analysis of the facts of the particular case in accordance with well established principles for identifying when there is a trust, not because there is any separate legal institution known as a ‘*Quistclose* trust’.”

113. One now turns to the second and third use of the term *Quistclose* trust. The second sees this as an instance of co-existence and interaction of legal and equitable institutions, in *Quistclose* those of contract of loan and express trust. The third was recently expressed as follows by Lady Arden in *Prickly Bay Waterside Ltd v British American Insurance Company Ltd*¹⁰⁵. This is 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 ...”¹⁰⁶

114. While the judgment of Lord Wilberforce was primarily directed to the second use referred to above, the co-existence and interaction of legal and equitable institutions, that interaction also involved a trust of the kind identified by Lady Arden.

115. Counsel for *Quistclose* Investments successfully submitted that the whole of the case against it was based on a “false premise ... that a trust and a loan cannot co-exist.”¹⁰⁷ As noted above at [109] Lord Wilberforce said there was no difficulty in recognising “practical arrangements” involving the “flexible

¹⁰³ Foreword to the collection of essays referred to above in footnote 93.

¹⁰⁴ [2012] NSWCA 135 at [51].

¹⁰⁵ [2022] UKPC 8, [2022]1 WLR 2087, [2022] 2 All ER (Comm) 189.

¹⁰⁶ [2022] UKPC 8 at [32].

¹⁰⁷ [1970] AC 567 at 573.

interplay of law and equity.”¹⁰⁸ He added that the Court should give effect to “the intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out”.¹⁰⁹

116. Thus there was no new species of trust here, the significance of the decision being a striking illustration of the interaction between an express trust and a contract of loan. No such interaction is in dispute in the present appeal. What is in dispute is the existence here of a trust of the kind identified in *Prickly Bay*.

Lord Wilberforce and Lord Millett

117. In *Twinsectra* Lord Millett said:¹¹⁰

“I do not think that subtle distinctions should be made between ‘true’ *Quistclose* trusts and trusts which are merely analogous to them. It depends on how widely or narrowly you choose to define the *Quistclose* trust. There is clearly a wide range of situations in which the parties enter into a commercial arrangement which permits one party to have a limited use of the other’s money for a stated purpose, is not free to apply it for any other purpose, and must return it if for any reason the purpose cannot be carried out. ... All such arrangements should if possible be susceptible to the same analysis.”

However, in an article published in 1985¹¹¹ Mr Peter Millett QC had argued that the beneficial interest remained throughout in the lender. Later, in *Twinsectra*¹¹² Lord Millett declared that the *Quistclose* trust was “an entirely orthodox example of the kind of default trust known as a resulting trust” where the “lender pays the money to the borrower by way of loan, but he does not part with the entire beneficial interest” and the money is “held on a resulting trust for the lender from the outset” subject to “the borrower’s power or duty to apply the money in

¹⁰⁸ [1970] AC 567 at 581-582.

¹⁰⁹ [1970] AC 567 at 582.

¹¹⁰ [2002] 2 AC 164 at [99].

¹¹¹ Peter J Millett, “The *Quistclose* Trust: Who Can Enforce It?” (1985) 101 Law Quarterly Review 269.

¹¹² [2002] 2 AC 164 at [100].

accordance with the lender's instructions"; if that "purpose fails, the money is returnable to the lender... because the resulting trust in his favour is no longer subject to any power ... of the borrower to make use of the money."

118. This emphasis upon a resulting trust is not the characterisation given by Lord Wilberforce to the facts before the House of Lords in *Quistclose*. The "primary trust" and "secondary trust" which his Lordship held to have existed were express rather than resulting trusts. As French CJ has noted, the term "trust" is used at a level of abstraction to distinguish express trusts from resulting or constructive trusts.¹¹³ However, confusion may arise if the facts in a case do not involve the explicit use of the term "express trust". This seems to have been the approach of the Court of Appeal in the present case in denying the existence of a *Quistclose* trust. But as explained at [110] and [145] that is not how the issue of intention to create an express trust is resolved.

119. In *Twinsectra*¹¹⁴ Lord Millett said that there were "formidable difficulties" in the analysis by Lord Wilberforce in *Quistclose*. "What if the primary trust is not for identifiable persons, but ... to carry out an abstract purpose?" In the present case the "identifiable persons" were, as appears below at [130]-[132], the holders of a particular series of bonds which had matured. Lord Millett also referred to difficulties in the location of the beneficial interest. The answer Lord Wilberforce may have given is that if A transfers assets to B to hold as trustee for C and D, the "beneficial interest" follows the terms on which B becomes trustee.

¹¹³ *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62 at [5].

¹¹⁴ [2002] 2 AC 164 at [79].

Prickly Bay

120. It may be a fine question of construction to determine whether this is a resulting or express trust and it has been said that the categorisation may “rarely be significant.”¹¹⁵ Indeed, in 2015 Lord Millett responded as follows to a student enquiry respecting his analysis in *Twinsectra*: “Terminology is the great trap in equity – there is often no single agreed meaning even of the commonest terms” (e.g. constructive trust)”, and he added that neither description of a Quistclose trust, as an express or a resulting trust, was “wrong”.¹¹⁶

121. Nevertheless, any apparent contradiction involved was resolved by the Privy Council in *Prickly Bay*. After considering various authorities, Lady Arden declared:¹¹⁷

“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 [in *Twinsectra*] 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.”

122. Her Ladyship went on to note that the development of Quistclose trust “has not been linear” and continued:¹¹⁸

“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

¹¹⁵ John McGhee QC and Steven Elliott QC (eds), *Snell’s Equity* (34th Ed, Sweet & Maxwell, 2020), §25-036, contributed by Professor David Fox.

¹¹⁶ The Hon William Gummow, “Lord Millett in Hong Kong” (2021) 51 Hong Kong Law Journal 845 at 852.

¹¹⁷ [2022] UKPC 8 at [32].

¹¹⁸ [2022] UKPC 8 at [33].

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 Torts* (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 Twinsectra. 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.*” (Emphasis supplied)

123. Do the salient facts in the present litigation show a Quistclose trust in the sense described above?

The Facts

124. China Energy Reserve and Chemicals Group Company Limited (“the Parent”) is listed in Hong Kong. It heads a group of companies known as the China Energy Reserve and Chemicals Group (“the Group”), which develops natural gas, oil and related chemical products marketed throughout China.

125. Between 2015 and 2018 each of eight members of the Group, which are incorporated in the British Virgin Islands and may be identified as special purpose finance vehicles (“SPV”), issued a series of bonds to finance the operations of the Group. The SPVs had no other material operations or assets. Default on one series of bonds would trigger cross-defaults on the other series issued by the SPVs. The Parent guaranteed each bond issue.

126. The benefit of the covenants by the SPVs that the SPVs would pay principal and interest to bond holders was held on trust for the bond holders by Bank of Communications Trustee Ltd, (“the Trustee”), an Interested Party in the present litigation.

127. Another Group member, China Energy Reserve and Chemicals Trading Co Ltd (“Trading”) operated as “treasury subsidiary” of the Group. The funds raised from the issue by the SPVs of the bonds were transferred to a bank account of Trading which distributed them for operation of the business of the Group. When interest payments were due on a series of bonds Trading would remit to the designated bank the funds to make the payments.

128. This litigation stems from the issue of bond series by two of the SPVs, which may be identified as SPV1 and SPV2.

129. On 27 April 2015 SPV1 (China Energy Reserve and Chemicals Group Overseas Co Ltd), the first appellant, issued a series of bonds to mature in 2022 and denominated in HKD (“the 2022 Bonds”). The respondent, China Life Trustees Ltd (“China Life”) holds all the 2022 Bonds. SPV1 opened an account (“the Account”) with Bank of Communications (Hong Kong) Ltd (“the Bank”) as payment agent for the 2022 Bonds. A point of significance for this appeal is that the Account included a US\$ sub-account for which SPV1 would have no use.

130. Then on 11 May 2015, SPV2 (China Energy Reserve and Chemicals Groups Overseas Capital Co Ltd) issued a series of bonds denominated in US\$ which were to mature on 11 May 2018 (“the 2018 Bonds”). This series would be the first series to mature. The investors in the 2018 Bonds included the second appellant, the Ad Hoc Committee, comprising CMB Wing Lung Bank Ltd and The Export-Import Bank of China.

131. SPV2 did not open a bank account. Rather, “for convenience” it designated the Account, which included the US\$ sub-account, for transactions relating to the 2018 Bonds. The US\$ sub-account was a segregated account not used for the purposes of SPV1; SPV2 was authorised as a joint signatory to give instructions relating to the sub-account.

132. Thus, the Bank was paying agent for the 2018 Bonds issued by SPV2 as well as for the 2022 Bonds issued by SPV1. Up to May 2018 the half yearly interest payments on both bonds series were paid from the Account.

133. However, on 11 May 2018, the 2018 Bonds matured, the first series to do so, but the Group did not have the funds to pay the due principal and interest.

134. On 16 May 2018 the Trustee, with respect to the 2018 Bonds, published a notice to bondholders in which it referred to the default and indicated that the issuer expected to make full payment of principal and any outstanding interest “on or around” 25 May 2018.

135. Between 17-22 May 2018 there was correspondence between Dr He Xuanlai of China Life Franklin Asset Management Co Ltd, the investment manager of China Life, and Mr Norman Lin of the Group. The Group responded with a plan forthwith to apply US\$350 million for repayment of the 2018 Bonds and so arrest the adverse impact on the market confidence in the Group.

136. This was partly implemented as follows. On 8 May 2018 the eighth and last series of Bonds had been issued by China Energy Reserve and Chemicals Group Capital Ltd. The Offering Circular stated that the bond proceeds of US\$150 million would be used for the “general corporate purposes” of the Group. The proceeds were paid into the bank account of Trading and “booked” as a loan to Trading.

137. From its bank account Trading remitted to the Account a total of US\$120 million. This was booked in the account ledger of SPV1 as a specific entry indicating it did not form part of the general assets of SPV1. But there was still outstanding US\$230 million to arrive at the total of US\$350 million needed to repay the 2018 Bonds. The Group was unable to procure the transfer of that US\$230 million.

138. Thus the Group's plan failed. On 25 May the Parent and SPV2 declared default in the 2018 Bonds and cross defaults on the other bonds ensued.

139. The US\$120 million with interest earned on it ("the Funds") stayed in the Account with the Bank. On 9 March 2021, the Trustee obtained a garnishee order *nisi* in respect of the Funds, being the balances in the Account representing the US\$120 million plus US\$3 million being interest accrued thereon. SPV1 applied to set aside the garnishee order. China Life was substituted as plaintiff in place of the Trustee. If the Funds were impressed with a Quistclose trust in favour of Trading they could not be garnisheed by China Life. However, on 10 August 2023, the Court of Appeal made the garnishee order absolute. In this Court China Life, the respondent, would have that order upheld, while the appellants would have it set aside.

The Issues

140. The essential dispute the subject of this appeal is whether (a) as the respondent China Life contends, the Funds belong to SPV1, in whose name the Account stands, or (b) as the appellants contend, the Funds are held on trust for and belong to Trading which had remitted the US\$120 million to the Account. If the latter, the Funds would be available to the Parent for restructuring of the Group. If the former, China Life, the holder of the 2022 Bonds, would benefit exclusively.

141. At first instance it was held that the Funds belonged to SPV1 and there was no trust. The Court of Appeal dismissed the appeal¹¹⁹.

¹¹⁹ [2023] HKCA 966.

142. On 27 October 2023 the Court of Appeal granted leave to appeal to this Court and certified two questions (a) and (b) as being of great general or public importance.

143. Question (a) raised “the proper approach to assessing the issue of intention giving rise to a *Quistclose* trust”; in particular, (i) “whether the important intention is an intention for the transferor to retain some control of and/or beneficial interest in the assets *qua* transferor” or (ii) “an intention for the transferee not to have free disposal and/or the whole beneficial interest in the assets.”

144. The Court of Appeal appears to have required evidence of a positive statement in the nature of (i) above, which it did not find and it thus denied the existence of a trust.

145. However, the general proposition as to the intention to create an express trust asks whether there is language or conduct showing a sufficiently clear intention to create the trust. No formal or technical words are required and the conclusion may be drawn as an inference from the nature of the transaction and the available evidence as to the whole of the circumstances including (importantly for the present appeal) commercial necessity.¹²⁰ This reflects the principle that the presence of the intention is assessed objectively rather than subjectively.¹²¹

¹²⁰ *Swain v The Law Society* [1983] 1 AC 598 at 621-622, per Lord Brightman; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 618-619 per Mason CJ, Dawson J; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 121, per Mason CJ, Wilson J.

¹²¹ John McGhee QC and Steven Elliott QC (eds), *Snell's Equity* (34th Ed, Sweet and Maxwell, 2020), §22-013, contributed by Professor David Fox.

146. In *Twinsectra* Lord Millett referred to “the intention of the parties collected from the terms of the arrangement and the circumstances of the case.”¹²² In *Prickly Bay* the Privy Council, with reference to Lord Millett’s judgment in *Twinsectra*¹²³, indicated that the intention of the parties need not be “mutual” in the sense of being “shared or reciprocated”, it being sufficient “if one party imposed it on the other who acquiesced in it”.¹²⁴ This reference to the sufficiency of “imposition” has been criticised.¹²⁵

147. The essence of a Quistclose trust involves the restricted purpose for which the money may be applied. However, as was emphasised in *Re Australian Elizabethan Theatre Trust* “[the] use of the expression ‘purpose’ should not be read as heralding a new era for the non-charitable purpose trust”.¹²⁶ The relevant purpose was the product of the payer’s intention, acquiesced in by the payee in accepting payment, and not an incident of some unknown type of trust.

148. In answering Question (a), the court examines the evidence asking whether it establishes that A paid money to B, with the intention accepted or acquiesced in by B, that it was to be applied only for a specific purpose. If so, it follows as a matter of logic that the money was not intended to form part of B’s general assets or to be at B’s free disposal. The authorities elucidate the legal effect or consequences of a finding that such an arrangement exists: the recipient comes under a fiduciary duty to adhere to the restriction and equity will restrain him or her from applying the money for some other purpose. And to the extent that the specific purpose fails, the recipient holds the money on trust to return it

¹²² [2002] 2 AC 164 at [69].

¹²³ [2002] 2 AC 164 at [76].

¹²⁴ [2022] UKPC 8 at [31].

¹²⁵ Ada Leung and Samuel Leung, “Whither Quistclose trusts? A non-linear development of the doctrine” (2023) 29(2) *Trusts & Trustees* 158 at 166-167.

¹²⁶ (1991) 30 FCR 491 at 502.

to the payer. It follows that the money is never beneficially owned by the recipient and, on an insolvency, does not form part of the bankrupt estate and so is recoverable by the payer.

149. Question (b) certified by the Court of Appeal fixed upon the significance of “an intra-group transfer”; does the fact or potential of common control being exercised over both transferor and transferee as members of the Group indicate an absence of “any intention for the transferee not to have free disposal and the whole beneficial interest in the assets.” The second question may be adjusted by asking whether the potential for common control militates against a finding on the evidence that there is to be attributed to Trading an intention that the transferee hold the funds on trust.

150. This reflects the view expressed in [69] of the Court of Appeal judgment that:

“Any desired control could be effected through the corporate chain of command. Since the Group was in full control of [SPV1], there was no need to preserve control through the retention by Trading of beneficial interest in the money as against [SPV1]... To speak of Trading placing ‘trust and confidence’ in [SPV1] to ensure that the money was applied for the purpose for which it was transferred, thereby occasioning the intervention of equity, seems to me to be unreal.”

151. However, the appellants stress that this case is far from a typical intra-group transaction. SPV1 had not used the USD sub-account; rather it had been used by SPV2 which had designated to the Bank the sub-account for transactions relating to the 2018 Bonds. There was a sense of urgency as the 2018 Bonds matured on 11 May 2018 but the Group did not have the funds to pay the due principal and interest.

152. The plan of the Group to meet the crisis involved Trading transferring a total of US\$120 million, but the plan failed and on 25 May SPV2 and the Parent declared default.

153. To hold that the Funds in the Account, US\$120 million plus interest, were beneficially owned by China Life and liable to the garnishee, would be contrary to the nature of the transaction between Trading and SPV2 and the available evidence as to the whole of the circumstances. The trust having failed the Funds reverted to Trading.

154. It is because of that state of affairs that the appeals to this Court should be allowed and the garnishee order dated 10 August 2023 should be discharged. Within 14 days of the date of this judgment the parties may lodge written submissions as to costs; these will be dealt with by the Court on the papers.

Chief Justice Cheung:

155. The Court unanimously allows the appeals and discharges the garnishee order. The parties are at liberty to lodge written submission on costs within 14 days of the date of this judgment, to be dealt with by the Court on the papers.

(Andrew Cheung)
Chief Justice

(R A V Ribeiro)
Permanent Judge

(Joseph Fok)
Permanent Judge

(M H Lam)
Permanent Judge

(William Gummow)
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