Categorising a quistclose trust

Mark must find out whether the transaction between himself and Dave is to be regarded as a pure loan or a *Quistclose* trust. [1] If it is the former, the beneficial interest in the funds passes to Inchester Football Club and Dave has his remedy against the Club in debt, as would the Club's other ordinary creditors. If, however the transaction is to be regarded as a *Quistclose* trust, authoritative opinion suggests that the beneficial interest remains with Dave throughout, [2] and thus in the event of a failed trust purpose, the trust funds revert back to Dave on resulting trust.

Mark is advised that the £5m loan received from Dave, should be properly categorised as a *Quistclose* trust. The leading authorities governing *Quistclose* trusts are *Barclays Bank v Quistclose Investments Ltd* [3] and *Twinsectra v Yardley* . [4] The chief facts in both authorities are analogous to this case and thus do not need to be restated. In *Quistclose,* Lord Wilberforce makes it clear that since the loan " *was made only so as to enable* [the borrowers] *to pay a dividend and for no other purpose* ... the mutual intention of the lender and the borrower " *was that the sum advanced should not become part of the assets of* [the borrower] *but should be used exclusively for payment of the dividend* ." Lord Wilberforce maintains that ' if, for any reason, the purpose could not be met, the money was to be returned to the lender.' [5] Mark should note that Dave's insistence that the money be placed in a separate bank (regardless of it being in the Club's name) implies his intention that the money was not to form part of the Club's general assets. [6]

One advises Mark that Lord Wilberforce's interpretation applies to his case. Dave clearly imposes conditions on the loan stipulating that it is to be ' *used only to buy Gary Sparrow* .' The word ' only' suggests that the loan was advanced ' exclusively' for this purpose. [7] Dave thus has an equitable right in the funds to see that is applied for its primary designated purpose. [8] As a result, Mark, as Chairman of the club, is *" not free to apply the money for any other purpose"* and the nature of this transaction *" gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce."* [9] Dave has placed his trust and confidence in Mark to ensure that the money is properly applied, [10] and it would be unconscionable of Mark not to properly apply it. Since Mark has agreed to the conditions of the loan, he is bound by them and owes a fiduciary obligation to Dave, to see that those conditions are met. Gary's decision to sign with another Club means that the purpose of trust has been defeated and the money should therefore be returned to Dave.

The loan advanced to Mark is to be regarded as a Quistclose trust since, as highlighted by Oakley, " *an intention that the money should be segregated is …likely to lead the court to infer that the parties intended to create a trust, even if that word was never actually used by anyone."* [11] This fact, in addition to the conditions imposed by Dave, negates any possibility of the courts regarding the £5m as being a pure loan. As a business entrepreneur, it is clear that Dave was not making a gesture of goodwill in advancing the loan, but a business decision. Conclusively, unless Mark can find a way to persuade Gary to sign with Inchester Football Club, the £5m must be returned to Dave.

Mark has validly declared a trust in favour of Gary. First, by declaring himself as trustee of the shares, the court will regard Mark has having done *“ everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him.”* [12]

Second, in the case of *Comiskey* , [13] the court held that the testator’s direction to his wife, that his nieces should acquire an interest in his property was to be construed as a mandatory, not just a mere moral obligation. The ‘ substance’ and ‘ effect’ [14] of the words used, denoted an intention on the testators’ part to create a separate trust in favour of his nieces. One must advise that, Mark *does not* fall within the ambit of this case. The substance and effect of Mark’s words were such that he intended to create a trust in favour of Gary regardless of whether or not he joined the club. The fact that Mark made the trust declaration in front of the Board of Directors suggests further that his offer was a genuine one. Thus, the court would regard his words as being neither precatory [15] nor said in loose conversation. [16] His underlying intention might have been to gently pressure Gary into signing with Inchester, by making this statement in front of the directors, however one cannot escape the fact that it was his intention for Gary to receive the shares. His words *‘ I hope that this gives you a good reason to join the club, ’* will not be regarded by the court as a necessary prerequisite or *mandatory* obligation in order for Gary to receive the shares, but rather; a *moral* obligation, which Gary could choose to regard or disregard.

In the case of *Re Adams* [17] the court held that the purpose of the testator's words was to merely to call to his widow's attention the moral obligations [18] , which had weighed upon his mind and to make express his motivation in making an absolute gift to her. [19] The same can be said of Mark's declaration to Gary. His words have resulted in an absolute gift to Gary, with the ' hope' or ' confidence' that it would encourage Gary to join the club. Therefore, although Gary chose not to sign with Inchester, the trust remains valid.

Third, Mark cannot rely on the fact that he has not segregated the shares to evince a lack of certainty of subject matter and thus an inconstituted trust. As clearly established in *Hunter v Moss,* [20] with regards to a declaration of trust of personality " *the requirement of certainty of subject matter does not necessarily entail segregation of the property which was to form the subject matter of the trust* ." [21] As long as the shares held by Mark are indistinguishable from one another, they will be capable of satisfying the trust without need for appropriation. It must be acknowledged however, that if Mark's shares are distinguishable from one another, the trust will fail for uncertainty of subject matter since, as neatly surmised by Sir Hobhouse in the case of *Mussoorie Bank Ltd v. Raynor, ' uncertainty in the subject of the gift has a reflex action upon the previous words and throws doubts upon the intention of the testator, and seems to show that he could not have possibly intended his words... to be imperative. '* [22]

BIBLIOGRAPHY

Books

- A. J Oakley *Parker and Mellows* : *The Modern Law of Trusts* Ninth Edition (Sweet & Maxwell 2008)
- G. Watt *Trusts* Fifth Edition (Oxford University Press 2005)
- N Stockwell and R Edwards *Trusts and Equity* Seventh Edition (Pearson Longman 2005)

Cases

- *Barclays Bank v Quistclose Investments Ltd* [1970] AC 567
- *Comiskey v Bowring-Hanbury* [1905] AC 84 HL
- *Hunter v Moss* [1994] 1 WLR 452
- *Jones v Lock* (1865) 1 Ch App 25
- *Milroy v. Lord* (1862) 4 De G. F. & J. 264
- *Mussoorie Bank Ltd v Raynor* (1882) 7 App Cas 321
- *Paul v Constance* [1977] 1 WLR 527
- *Re Adams and Kensington Vestry* (1884) 27 Ch D394
- *Re Snowden* [1979] 2 All ERM 172
- *Twinsectra v Yardley* [2002] 2 AC 164

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Footnotes

[1] [1970] AC 567

[2] [2002] 2 AC 164 per Lord Millett and A. J Oakley *The Modern Law of Trusts* (2008) p. 322

[3] *n.* 1

[4] *n.* 2

[5] *n.* 1 per Lord Wilberforce at 580

[6] N Stockwell and R Edwards, *Trusts and Equity* (2005) p. 20

[7] *n.* 1 per Lord Wilberforce at 580

[8] *Ibid.*

[9] *n.* 2 per Lord Millett at 184

[10] *Ibid* para. 99

[11] Oakley *n. 2* p. 317 –18

[12] *Milroy v. Lord* (1862) 4 De G. F. & J. 264 per Turner L. J at 274–275

[13] [1905] AC 84 HL

[14] *Paul v Constance* [1977] 1 WLR 527 per Scarman L. J

[15] *Ibid.*

[16] *Jones v Lock* (1865) 1 Ch App 25

[17] (1884) 27 Ch D394

[18] See *Re Snowden* [1979] 2 All ERM 172

[19] G. Watt *Trusts* (2005) at p. 71

[20] [1994] 1 WLR 452

[21] *Ibid* per Dillon L. J

[22] (1882) 7 App Cas 321 at 331