

QUISTCLOSE AND ROMALPA: AMBIVALENCE AND CONTRADICITON



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(*Prologue and Epilogue by Lusina Ho*)

Prologue

It is with great trepidation that I publish this joint paper with Philip. The paper was written for a workshop at our faculty in 1998; neither author considered it significant enough to deserve posterity in published form. Sadly, Philip's sudden and untimely death has provided a reason for publishing it, if only to provide another window to the mind of a genuine scholar and analytical writer one finds in him. To preserve the integrity of the paper, it is published in its original form, with an update in the Epilogue.

Introduction

At first glance, workshop participants may wonder what value there is in putting *Quistclose*¹ and *Romalpa*² side by side: for one involves a peculiar type of trust, and the other is principally concerned with retention of the legal title of goods sold. In fact, very rarely would the two lines of cases refer to each other. Notwithstanding these observations, in this paper, the authors seek to answer the following question: is there sufficient similarity between *Quistclose* and *Romalpa* that the courts should tackle the fiduciary relationship issues raised in such cases in a similar fashion?

The background to our inquiry is that we feel we may have identified some inconsistency underlying the courts' approach in these two lines of cases. In *Romalpa* cases, arguments by a supplier of goods that a fiduciary relationship exists between the parties are nowadays consistently rejected by reference to the "reality" or "substance" of the parties' transaction. This, moreover, is the situation even where the terms of the relevant contract

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¹ *Barclays Bank Ltd v Quistclose Investment Ltd* [1970] AC 567.

² *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676, [1976] 2 All ER 552.

make express reference to, and employ the language of, fiduciary obligations. In Quistclose cases, on the other hand, judges have at times appeared happy to “construct” a trust relationship out of what might normally and in substance be described as a commercial loan.

A Relevant Inquiry?

At the outset it must be stated that we recognise there may be those who feel that ours is not a relevant line of inquiry. It might be argued that any so-called “inconsistency” we identify is simply the inevitable consequence of the circumstance that the facts of and arguments raised in the *Romalpa* and Quistclose cases are very different: systematic differences in facts generate different results. Our response to any such argument is two-fold. First, it is not so much the results of the cases which interest us, but rather the approach of the courts – particularly whether or not the judge concentrates on the “substance” or “reality” of the transaction in question. Secondly, we feel we have weighty authority that supports our line of inquiry.

Although there is a large (and ever increasing) body of literature in the area, the article in 1980 by Goodhart and Jones in the *Modern Law Review* remains essential reading.³ Goodhart and Jones looked at the two lines of cases and a passage from their conclusion is worth recalling:⁴

“The common link between all the cases is the attempt of a person who has paid money or supplied goods to an insolvent company to escape from the normally fruitless position of unsecured creditor by claiming a beneficial interest in the money or goods supplied or in assets which in some way represent them. The court’s attitude to these attempts has been ambivalent. In some cases (explicitly in *Kayford*, and implicitly in *Romalpa*) the courts appear to have regarded the claim of the supplier as having the greater merits. In *Borden*, however, Templeman LJ strongly expressed the view that proprietary claims of this kind were objectionable ...”

Accordingly, 20 years ago - not so very long after the first cases were decided - the different attempts to employ fiduciary concepts, in circumstances where *either* goods or credit were supplied, in order to establish proprietary

³ W. Goodhart & G. Jones, “The Infiltration of Equitable Doctrine into English Commercial Law”, (1980) 43 *MLR* 489.

⁴ *Ibid*, p 511.

claims were looked at side by side. Parallels continued to be drawn for a few more years. Hence Mr Justice Priestley wrote in the mid-1980s:⁵

“The Romalpa clauses represent an attempt by suppliers to prevent goods supplied by them from becoming part of the assets of the buyer, available for all creditors in the event of insolvency, before they have been paid for. In their construction the courts have shown a readiness to acknowledge fiduciary ideas in ordinary sale of goods situations. Quistclose trusts demonstrate an analogous attempt by suppliers of credit in that (in most cases) they show an attempt by such suppliers to prevent moneys advanced by them becoming part of the recipient’s assets until some particular purpose for which the loan is made is accomplished. The courts in these cases too have been quite ready to use equitable ideas in commercial law.”

Over the last 10 or 15 years, however, *Romalpa* and *Quistclose* have normally been placed (certainly in many of the textbooks) in their own quite separate, distinct categories. Of course, everyone accepts that Quistclose and Romalpa are both forms of “quasi-security”, falling within the broad rubric of what may be called personal property securities law. But if one surveys the extensive literature in the journals, one is struck by the number of articles dealing with either the Romalpa or the Quistclose line of cases. Teasing out the similarities and differences between the two lines of cases appears somewhat to have gone out of fashion.⁶ This is, to us at least, perhaps a little surprising. For although, writing in 1980, Goodhart and Jones thought that the judges’ response to the two lines of cases was ambivalent, in the past 20 years, such ambivalence may have been replaced by a marked difference in approach. On the one hand, the Quistclose line of cases has continued to flourish - even recently recognised by the Law Lords as falling within conventional trust principles.⁷ On the other hand, the “fiduciary side” to retention of title has been to all intents and purposes obliterated: as Goode has recently commented, in this regard *Romalpa* has been explained away as based on inappropriate concessions by counsel.⁸

To sum up, the idea behind this paper is simply that, whilst in no way denying the very real and extensive differences between Quistclose cases and Romalpa cases, it is instructive to recall the approach of Goodhart and

⁵ Priestley LJ, “The Romalpa Clause and the Quistclose Trust” in PD Finn (ed), *Equity and Commercial Relationships* (Law Book Co, 1989) Ch 8, pp 229–300.

⁶ Although certain issues are touched upon in J. Ulph, “Equitable Proprietary Rights in Insolvency: the Ebbing Tide?”, (1996) JBL 482.

⁷ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at p 708, per Lord Browne-Wilkinson.

⁸ R. Goode, “Commercial Law in the Next Millenium” (Hamlyn Lectures, 1998), p 24.

Jones and take a broader view when considering developments over the last decade or so. If by the end of this paper participants feel that there is some value in looking at the two lines of cases side by side - rather than simply focusing on the latest *Quistclose* case or the latest *Romalpa* case – then the authors’ objective will have been met. But, in addition, we will try to go further and broach new ground, suggesting that *Quistclose* and *Romalpa* may be more closely linked than has hitherto been appreciated. Indeed, albeit only perhaps half-seriously, it might even be suggested that the next development will be the “RomQuist” clause.

Overview of the Substantive Law

The insolvency background against which *Quistclose* and *Romalpa* were decided is, in general terms, relatively straightforward. A liquidator is required to gather in and realise all the company’s property. Any disposition of the company’s property after the commencement of the winding up is *prima facie* void. The position was recently re-stated in *Re Polly Peck International plc (in Administration); Marangos Hotel Co Ltd v Stone*:⁹

“The essential characteristic of the statutory scheme is that the liquidator or administrator is bound to deal with the assets of the company as directed by statute for the benefit of all creditors who come in to prove a valid claim ... A question may arise whether a particular asset was or was not the beneficial property of the company at the date of the commencement of the winding up (or administration). If it is established in a dispute that it is not an asset of the company then it never becomes subject to the statutory insolvency scheme ... If, on the other hand, the asset is the absolute beneficial property of the company there is no general power in the liquidator, the administrators or the court to amend or modify the statutory scheme so as to transfer that asset or to declare it to be held for the benefit of another person.”

Thus, just as Goodhart and Jones noted (above), establishing beneficial ownership of the goods or money in question is the central issue.

Romalpa

S supplies goods on 30 days credit to B Ltd but, before B has paid for the goods, the company goes into liquidation. The contract between S and B contains a “*Romalpa*” or retention of title (“ROT”) clause. S may seek to

⁹ *Re Polly Peck International plc (in Administration); Marangos Hotel Co Ltd v Stone* [1998] 3 All ER 812.

rely upon the ROT clause in an attempt to recover one or more of the following:

- (1) the (unprocessed) goods themselves, i.e. as supplied (for example, leather);
- (2) processed goods (e.g. shoes made from the leather supplied by S); and
- (3) the proceeds of sale of (1) and / or (2) above.

In relation to (1) - the goods as supplied - a “simple” ROT clause will generally be enough for the seller to retain legal ownership of the goods: for the intention of the parties determines when title passes and that, of course, is not necessarily upon delivery. But where the liquidator holds (2) manufactured items - not leather, but shoes - or (3) the proceeds of sale (of the leather or of the shoes) then legal title to the goods as supplied will have been lost: as either the original goods no longer exist (in the case of manufactured items and their proceeds) or title over them has already passed to the sub-purchaser (in the case of the proceeds of the original goods), no title can be “retained” by the supplier.

Accordingly, when dealing with facts involving the proceeds of sale or “new” (manufactured) items, sellers have sought to rely upon equitable principles and doctrines (in a variety of guises) in an effort to avoid being left as an unsecured creditor for the outstanding contract price.¹⁰ Despite the circumstance that in *Romalpa* itself the Court of Appeal was prepared to accept that a seller could establish beneficial ownership of the proceeds of sub-sales (aluminium foil re-sold by buyer) on the basis that the agreement between buyer and seller had established a bailment or agency relationship,¹¹ subsequent cases have adopted a far more restricted approach.¹² *Romalpa* has, as Goode puts it, been treated as based on inappropriate concessions on the existence of the bailment relationship.¹³

¹⁰ It may be noted that, at the time *Romalpa* was decided, any attempt to rely upon *common law tracing* would have been bound to have failed. The recent expansion of common law tracing after *Lipkin Gorman v Karpnale Ltd* [1991] 3 WLR 10, and *Trustee of the Property of FC Jones and Sons v Jones* [1996] 3 WLR 70, seem to offer a ray of hope to sellers, in that common law tracing is now available against exchange products (such as proceeds of sale) and increase in value. However, this development is unlikely to be of any practical help to *Romalpa* sellers, for the claim following common law tracing is an *in personam* claim, and the sub-sale is always treated as authorised. See L. Smith, *The Law of Tracing* (Oxford: Clarendon, 1997), pp 370–2.

¹¹ The Court of Appeal did not clearly determine the nature of the fiduciary relationship between the parties, although Roskill LJ leant in favour of agency (see [1976] 1 WLR 676 at p 690).

¹² It has become “standard practice” for *Romalpa* to be distinguished on the basis of a (supposed) concession by counsel that on the facts the parties were in a bailment relationship: see W. Goodhart & G. Jones (n 3 above), p 501, and n 53 below.

¹³ See n 8 above.

The key point appears to be that, whatever the terminology found in the parties' contract, the reality or substance of their relationship is a contract for the sale of goods. If the buyer was indeed the agent of the supplier - or otherwise liable to account - it would follow that any profit made on a re-sale to a third party would accrue to the supplier. Yet, obviously, the buyer / manufacturer will be in business on its own behalf, not for the benefit of its suppliers. Moreover, the extent of any interest which a supplier is said to have in either manufactured goods or the proceeds of sale will be inextricably linked to the *debt* owing from the buyer to the supplier. It will be noted that in a *Romalpa* situation (unlike *Quistclose*, discussed below) there is no question but that there is a debt owing when the goods are supplied: there is a debtor / creditor relationship from the outset. In real terms, if the buyer pays in full for the goods, thereby extinguishing any and all debts,¹⁴ the supplier has no further involvement or interest. Thus, to take an illustration, if the value of the processed goods is \$100,000 but the outstanding debt is merely some \$20,000, then it is perhaps inevitable that such facts are viewed as giving rise to a charge over the processed goods to secure the amount of the debt.¹⁵ Such a charge, we all know, becomes void if not registered.¹⁶

Of course, no one is maintaining for a moment that all *Romalpa* cases are the same, or that all ROT clauses are drafted in identical terms. Nevertheless, we would suggest that it would be quite unrealistic to deny that, particularly since *Tatung*¹⁷ and *Compaq Computer*¹⁸, the tide has very much turned against fiduciary arguments in this particular context. It is surely inconceivable that if he were speaking today Priestley J would suggest that the courts have "shown a readiness to acknowledge fiduciary ideas in ordinary sale of goods situations".¹⁹ However hard the draftsman may have tried, and however much "fiduciary" terminology has been inserted into the contract, the courts will not be deflected from the substance of the parties' relationship.

To sum up, a ROT clause is effective to the extent that legal title can be and is retained by a supplier of goods. This flows from the common law rule (now enshrined in legislation)²⁰ that title passes in accordance with the intention of the parties. On the side of equity, however, the supplier will come away empty-handed. The cases state plainly that fiduciary obligations will not

¹⁴ The presence of an "all-moneys" clause does not affect the principle involved here: see *passim Thyssen v Armour Edelstahlwerke AG* [1991] 2 AC 339.

¹⁵ See *Compaq Computers Ltd v Alercorn Group Ltd* [1991] BCC 484, [1993] BCLC 602.

¹⁶ Examples of typical registration provisions can be found in the Companies Act 1985, s399 or the Companies Ordinance (Cap 32), s80.

¹⁷ *Tatung (UK) Ltd v Galex Telesure Ltd* (1989) 5 BCC 325.

¹⁸ *Compaq Computer Ltd v Abercorn Group Ltd* [1991] BCC 484, [1993] BCLC 602.

¹⁹ See n 5 above, p 230.

²⁰ See for example, the Sale of Goods Act 1979, s 19.

readily be imported into what is essentially a contract for the sale of goods. Moreover, whilst it may be strictly speaking correct that a supplier may have some equitable interest in manufactured goods or the proceeds of sale - being the holder of a floating charge created by the buyer over the goods or money in question - that interest will almost always be worthless.²¹ More importantly, from the point of view of theory, the supplier only has a debt secured by a charge: so even if we assume that the charge has been registered (which, of course, does not happen) there is no *fiduciary* relationship between the parties. From the very outset the parties stand in a debtor / creditor relationship and the courts will not depart from that reality.

Quistclose

Suppose S supplies money (repayable in 3 months) to B Ltd to be held at a designated account for the specific purpose of paying C Ltd, a creditor of B, but, before B has done so, it goes into liquidation. S may seek to recover the money itself.

In the important decision of *Barclays Bank Ltd v Quistclose Investments Ltd*, Lord Wilberforce suggested that such an arrangement gave rise to “a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors [C], and secondarily, if the primary trust fails, of the third person [S]”.²² As his Lordship explained,²³

“when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose ... when this purpose has been carried out (ie... the debt paid) the lender has his remedy against the borrower in debt: 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: if it has, the remedies of equity may be invoked to give effect to it, if it has not (and the money is intended to fall within the general fund of the debtor’s assets) then there is the appropriate remedy for recovery of a loan.”

Accordingly, even though the lender may not have expressly invoked trust or equitable principles, the court is quite ready to infer both a primary and a secondary trust or fiduciary relationship from the facts; if the money loaned is meant to be used for a designated purpose and kept separate from the borrower’s general fund.

²¹ The charge will likely be void for non-registration and, even if (which is unlikely) the charge were registered, in practice there would in all probability be prior charges which covered the property in question.

²² [1970] AC 567 at 580.

²³ *Ibid*, at pp 581–2.

After almost thirty years since the “Quistclose trust” was established, there have been significant developments in both its scope and nature. As to its scope, while *Quistclose* itself involves the common intention of the parties at the time the “trust” is established, subsequent decisions suggest that the trust can be established unilaterally by the recipient and after the time of payment.²⁴ It is also clear that *Quistclose* is not limited to money supplied upon a loan, but is applicable to, say, purchase moneys,²⁵ subscription money for shares,²⁶ and membership fees.²⁷ Moreover, the money need not be kept in a separate account as such, as long as it is not intended to fall within the general fund of the recipient.²⁸ In any case, the subject matter of the Quistclose trust need not be money, but can be a chose in action or other property. (In fact, *Quistclose* itself involves the transfer of an amount to the borrower’s account at Barclays Bank, not the physical delivery of cash. Hence, the specific property at issue is the debt against the bank held in the form of a deposit, which is a chose in action.)

It is apparent from this brief survey that the potential scope for invoking the Quistclose trust is very wide. A Quistclose trust can arise upon any gratuitous or contractual transfer of property to another person for a designated purpose, as long as the property is meant to be kept separate from the recipient’s general assets. Of course, the courts have so far refused to relax the requirement of a separate fund. Thus, Lord Nicholls in *Re Goldcorp*²⁹ distinguished *Re Kayford*, which represents the high point of the Quistclose doctrine, on the basis that there was no constraint in *Re Goldcorp* on the recipient’s freedom to use the purchase money supplied. Similarly, in *Re ILG Travel Ltd*,³⁰ Parker J held that where an express agreement provided that pipeline moneys received by a travel agent on behalf of a package tour operator was to be held on trust, only a charge in equity was created. For the travel agent was allowed to mix pipelines moneys with moneys held in its hands.

While the scope of the Quistclose doctrine is pretty much established, the nature of the Quistclose trust has only been recently clarified (at least for the time being). In *Westdeutsche Landesbank Girozentrale v Islington LBC*, Lord Browne-Wilkinson treated the secondary trust in the Quistclose doctrine as a resulting trust which arose “where A transfers property to B on

²⁴ *Re Kayford Ltd* [1975] 1 All ER 604; *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74.

²⁵ *Re Kayford Ltd*, *ibid*; *Re Goldcorp Exchange Ltd (in receivership)*, *ibid*.

²⁶ *Re Nanwa Gold Mines Ltd* [1955] 1 WLR 1080.

²⁷ *Re Challoner Club Co Ltd*, Times, 4 November, 1997. Though the court held that a trust did not arise in this case, it was not because the property involved was membership fees as opposed to a loan.

²⁸ *Re Goldcorp Exchange Ltd (in receivership)* (see n 24 above).

²⁹ *Ibid*, pp 100–101.

³⁰ *Re ILG Travel Ltd* [1996] BCC 21 at pp 43–47.

express trusts, but the trusts declared do not exhaust the whole beneficial interest ... ”.³¹ Such a ruling not only affirms the preponderant view that the secondary trust is a resulting trust, but also recognises the primary trust as an orthodox express trust. The logical consequence of this must be that any exchange products or profits of the original trust property, whether authorised or not, shall also be subject to the trust.³²

In concrete terms, suppose S supplies money to B upon a Quistclose trust for the specific purpose of providing funding for B to satisfy a profitable contract, and B exchanges the money for goods in order to manufacture certain products for such contract. B then goes into liquidation before the process has begun. The goods will then be subject to the (express and then resulting) trust. Alternatively, suppose the (Quistclose) money is loaned in HK dollars, but deposited by B in US dollars at an interest rate of 5 per cent per annum with a view of using the money to pay its US creditors. B then goes into liquidation before the payment is made, but after the Hong Kong Government has announced to break the peg between the two currencies and the value of HK dollars has dropped significantly. One would expect that S can recover the whole deposit in US currency together with interest, even though it may now be worth a lot more in HK dollars. The same consequences will ensue if the above situations occur without S's authorisation.

In sum, a supplier of credit under Quistclose terms is in a much better position than that of a seller of goods under a ROT clause, even though the latter, in effect, also supplies credit by deferring the buyer's obligation to pay for the goods. The lender under Quistclose terms can pursue the trust analysis to recover (1) the money itself; (2) profits made from the money; and (3) the proceeds or exchange products of the money and the profits.

The trust analysis is adopted even if the parties have not expressly invoked it, and where the underlying transaction is in substance a loan or payment for a specific purpose, the performance of which is secured by the payor's right to recover the amount supplied even in the event of the payee's insolvency. While a court that looks at the reality of the transaction might construe it as providing security for the payee's performance of

³¹ See n 7 above, p 708. See the contrary opinion in R. Chambers, *Resulting Trust* (Oxford: Clarendon, 1997) Ch 3. Chambers argues that (1) the supplier of credit only has an equitable right to restrain the recipient from using the money otherwise than for the specified purpose, but this equitable right can still be called a trust in a loose sense; and (2) upon failure of the specified purpose, there is a resulting trust in favour of the lender. It is difficult, however, to see why a right to obtain an injunction for a breach of contract should be called "trust", and in any case why breach of the contract would give rise to a resulting trust, and not just a right to damages (where the injunction is unavailable).

³² If the exchange products or profits result from a breach of trust, they would be subject to a constructive trust, accepting always the possibility of equitable allowance or apportionment of gain where appropriate.

the special purpose,³³ the English courts have thus far been content to fit it, albeit uncomfortably, into trust principles. As a result, the parties are seen not as in a debtor / creditor relationship, but a settlor (or beneficiary) / trustee relationship, with all the inappropriate consequences (at least theoretically) of the trust.³⁴

Points of Comparison

Both *Quistclose* and *Romalpa* were concerned with a supplier of credit or goods seeking to establish beneficial ownership of the property in question in an attempt to prevent that property being administered, as property of the company, in the course of insolvency proceedings. Thus, the common issue raised by both lines of cases is: should the courts characterise the relevant transaction according to the reality of the situation, and ignore the suppliers' attempt to use equitable devices to escape the consequences of insolvency, or should they respect the parties' intention to "contract out" of the insolvency net and accordingly give effect to these devices?

At the level of technical, legal analysis both lines of cases focus on ownership of the relevant property. Yet in practical, as well as economic terms, the courts are dealing with a (disguised) form of "security" - hence the calls for both lines of cases to be brought within a statutory regime for personal property securities registration. The extent to which *Quistclose* and *Romalpa* operate in a broadly similar fashion to a "true" security interest has been discussed elsewhere,³⁵ but these two forms of "quasi security" must also be considered in the light of modern insolvency law and practice.

When our two leading cases were decided, more than 20 years ago, winding up and receivership were the only formal options generally available to a company in financial difficulty. Informal workouts did take place but the legislative framework did little, if anything, to assist such arrangements. Over the last 20 years, however, there has been a move in many jurisdictions towards structured procedures to encourage and facilitate corporate rescues. Although *Quistclose* and *Romalpa* were decided before the advent of the current rescue culture, both devices impact upon corporate rescue in broadly similar ways. For both devices, it may be argued, can be employed to assist a company in its attempts to obtain either finance or essential raw

³³ For a similar view, see M. Bridge, "The Quistclose Trust in a World of Secured Transactions" (1992) 12 OJLS 333; J. Hackney, *Understanding Equity and Trusts* (London: Fontana, 1987), p 51.

³⁴ Such as windfalls on the part of the creditor arising from gains obtained from the amount supplied.

³⁵ See A. Belcher & R. Beglan "Jumping the Queue" [1997] JBL 1. Note also *Report of the Review Committee on Insolvency Law and Practice* (UK: Stationery Office Books, 9 June 1982) (Cmnd 8558), ("the Cork Report") para 1623: "... there is a considerable body of informed opinion which ... believes that the problems arising in relation to the impact of reservation of title clauses on insolvency are only part of more extensive problems deriving from the unsatisfactory law concerning security interests in personal property."

materials in order to carry on trading. If suppliers of credit or of goods could not look to the “security” offered by the Quistclose trust or the Romalpa clause then, it might be maintained, those suppliers might be unwilling to deal with a company in financial difficulty - or only deal with the company on unfavourable terms. On the other hand, both Quistclose and Romalpa may in certain instances *hinder* efforts to effect a rescue. As both forms of “security” are not registered, it may be quite difficult for a third party lender to ascertain the true financial state of the company. The lender will be aware that what may appear in the books of the company as its property, or its cash at bank, may not actually be so. This may operate as a disincentive to involvement in any corporate rescue plan.

Moving on to more academic considerations, when we analyse *Quistclose* and *Romalpa*, it is plain that the arguments raised in those cases depend upon the co-existence in one transaction of contractual and fiduciary relationships. The following observation of Lord Wilberforce in *Quistclose* is always quoted:³⁶ “there is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies ... ” More particularly, one is dealing with: (1) a fiduciary relationship; and (2) a debtor / creditor relationship. In the cases that have come after *Romalpa* the judges have consistently rejected the argument that the company is, at one and the same time, both a debtor and a fiduciary. Whereas in *Quistclose* cases the corresponding argument has proven to be acceptable; and this is so, even though the argument in *Quistclose* cases is necessarily more complex and, it is suggested, appears to be just as much at odds with the reality of the parties’ dealings. For the very basis of *Quistclose* is that the company is not – at one and the same time – a fiduciary and a debtor. Rather, the company holds the money on trust until the “purpose” is carried out – only then does the company become a debtor.³⁷ Thus in *Quistclose* cases the fiduciary and debtor / creditor relationships do not co-exist (ie at one time), instead they follow one another: as if in series. It is suggested that, focusing on the substance of the transaction in a *Quistclose* situation, when the money is actually paid into the company’s bank account that would normally (and fairly) be called a loan – indeed even Lord Wilberforce uses the expression “the lender”.³⁸ But *Quistclose* itself requires us to conclude that at this stage there is no loan (no debtor / creditor relationship). Subsequently, the fulfilment of the purpose results in a process of “reverse alchemy”: the (precious) trust is somewhat mysteriously converted into a (base) debt.

³⁶ *Barclays Bank Ltd v Quistclose Investment Ltd*, see n 1 above, p 581.

³⁷ As Megarry J succinctly put it in *Re Kayford Ltd* [1975] 1 WLR 279 at p 281: “... One is concerned here with the question not of preferring creditors but of preventing those who pay money from becoming creditors, by making them beneficiaries under a trust.”

³⁸ [1970] AC 567 at pp 581–2, see text to n 23 above.

Whilst we would suggest that appeals to the “reality” or “substance” of a transaction are often more than justified, in relation to *Quistclose* it has to be stressed that the “lender” does not stand in a debtor / creditor relationship with the company, at least not until the process of reverse alchemy has been brought into operation upon the fulfilment of the specified purpose. The connection to the commercial reality of the parties’ transaction – a loan – is perhaps more than a little strained.

Fact Scenario: Drawing *Quistclose* and *Romalpa* Together

Having already pointed out certain broad similarities between *Quistclose* and *Romalpa*, we now propose to venture upon what we believe to be new ground. The objective in this section of the paper is to come up with a fact scenario where a *Quistclose* trust – suitably modified – can arguably be employed to “make good” the failings of the normal ROT clause. This is done not (merely) to be provocative, but rather to emphasise that a “substance” approach is just as appropriate in relation to *Quistclose* arguments as it is in relation to ROT clauses.

Before setting out the precise details of the fact scenario, a few brief points concerning the scope of *Quistclose* must be rehearsed. Although the so-called “*Quistclose* trust” has at times been said to be restricted to a trust of “money”, in actuality a great many of the cases have involved not money but a debt. (Hence, as mentioned above, in *Quistclose* itself the debt owing from Barclays Bank to Rolls Razor was the subject matter of the dispute.) It is submitted that just as there may be a *Quistclose* trust of an intangible movable (ie a debt), the trust can operate in respect of a tangible movable. As a matter of theory this must surely be conceivable, particularly as *Westdeutsche* tells us that *Quistclose* is (conceptually) an example of an orthodox resulting trust arising from non-exhaustion of the funds of an express trust. If the *Quistclose* trust involves an orthodox express trust then, always provided the necessary evidence is present, it is difficult to conceive

of any inherent reason why its subject matter cannot be movable property.³⁹ There is some measure of judicial authority to this end.⁴⁰

Of course, our fact scenario is being used primarily to illustrate a point of principle. In a real case evidence of the intention to create a trust in the Quistclose fashion might present some difficulty. You are asked to assume sufficient facts to establish a basis for the relevant intention. Nevertheless, if it can be accepted that *Quistclose* can apply as a matter of principle to movables, then it becomes fairly evident that Quistclose trust arguments may be used (in certain circumstances) where ROT clauses are bound to fail.⁴¹

Fact Scenario

Universal Coins Ltd (“UCL”) manufactures silver coins, medallions and memorabilia. The particular process of manufacture relevant for present purposes involves taking “blanks” – which are unpolished, rough disks of low silver content - polishing the blanks and then stamping them with an appropriate motif. (The more technologically minded may think of the motif being etched onto the blanks by a laser!) All the blanks are supplied to UCL by Queens Memorial Coins (“QMC”). UCL is in financial difficulty and has little ready finance. UCL has, however, negotiated some potentially profitable contracts with Purchaser to supply 10,000 Marilyn Monroe medallions (“the medallions”). The medallions are to be delivered to Purchaser on 20 September 1998, when UCL will receive payment. QMC has agreed to supply UCL with 10,000 blanks in order for UCL to carry out its contract with Purchaser. QMC is aware of all relevant facts and has insisted that the 10,000 blanks are not to be used by UCL for any other purpose and are to be stored separately

³⁹ To take an illustration (of the movable property point), let us say that a company is in the gold bullion and coins business. The company is bound to deliver 100 maples to each of four customers (A, B, C and D) by the end of the month. The company will receive payment from the customers upon delivery. X supplies all the company’s maple requirements and is fully aware of the above facts. X and the company enter into an agreement whereby X will provide the company with the necessary maples - which are to be kept in a separate safe at the company’s warehouse and are not to be used for any purpose other than meeting its obligations to A, B, C and D. In addition, the company’s obligation to pay X for the coins is expressly agreed only to arise after the purpose has been carried out - ie after the customers have taken delivery. (Let us further assume, just to make things as clear as possible, that the agreement specifies that its terms will not operate as a retention of legal title by X, but that the company will hold the maples on trust until the specified purpose has been carried through.) In other words, our facts follow the more usual type of case where X provides money to a company specifically to pay certain identified creditors and for no other purpose: the difference here being that we are dealing with gold coins, not cash or a debt.

⁴⁰ *Sopp v Goldcorp Refiners Ltd (in receivership)*, unrep., CP 21/88 (High Court of New Zealand, 17 October 1990), per Thorp J; discussed in C. E. F. Rickett, “Different Views on the Scope of the Quistclose Analysis: English and Antipodean. Insights”, (1991) 107 LQR 608 at p 642.

⁴¹ Those circumstances will be where the goods supplied have been made into something else (i.e. processed items). The suggested device can have no application where one is dealing with proceeds of sale either of the goods as supplied or of the processed items. Because once the purpose has been achieved, it follows that the trust will end and the supplier will be left as a simple debtor.

from all other blanks. The contract between QMC and UCL specifically states that QMC has supplied the blanks to UCL for the sole purpose that, in the course of carrying on UCL's business in the ordinary way as a going concern, such blanks will be used to make the medallions that are to be sold on to Purchaser. (Again, one may have to assume other facts indicating evidence to create a Quistclose trust.)

In accordance with the contract between UCL and QMC, the blanks were delivered to UCL on 10 September 1998. On the following day the polishing and stamping process commences and by 14 September 1998 all the medallions are finished. However, on 15 September 1998 UCL goes into liquidation. The medallions are at that time separately stored in UCL's warehouse.

Romalpa

If there were a Romalpa clause in the contract between UCL and QMC it is extremely unlikely that QMC would get anything. Of course, QMC could retain (legal) title to the blanks, but the manufacturing process has created a new type of property in respect of which QMC never had a legal title to retain. In relation to the new items (the medallions) a claim by QMC would almost inevitably be categorised as a charge. For QMC's interest in the new items would only be present to the extent that - and as long as - a debtor/creditor relationship existed between QMC and UCL. If, let us say, the sale price was \$10,000 (for the blanks) but the value of the medallions was \$20,000, it would strongly be argued that the value added by the industrial process was not in reality done for the benefit of QMC. QMC was only concerned with being paid for the goods it had supplied. Accordingly, in the type of circumstances envisaged - a claim to processed goods - a ROT clause will be of little use to a supplier.

Quistclose

Our fact scenario, however, has been deliberately structured to avoid there being a ROT clause. We are working on the assumption that property was supplied to the company for a specified (and restricted) purpose. The liquidation has intervened and that purpose can no longer be carried out.

Starting from basic principles, UCL does not receive the property (the blanks) as beneficial owner but rather as a trustee under the Quistclose principle. Although the blanks have been turned into something else, i.e. the medallions, if UCL were a trustee of the blanks it cannot - by dealing with the trust property in an authorised and intended manner - become the beneficial owner of the medallions. At this stage, prior to the insolvency,

the specified purpose remains in operation: blanks were supplied to be made into medallions and subsequently sold to Purchaser.⁴²

Whilst there is no case law on Quistclose trusts involving movable property, let alone processed items, it is perhaps instructive to look at a more “traditional” Quistclose arrangement. A supplies cash to a company, it being intended by both parties that the cash will be paid into a separate account and thereafter the company will draw cheques on that account to pay off certain pressing creditors. Under the Quistclose line of cases the company is, first, a trustee of the cash it receives and, later, a trustee of the debt it is owed by the bank. The property as supplied (cash) has in accordance with the parties’ intention been converted into something else (a debt). Nevertheless, that process - if it can be so called - does not end the trust and make the company the beneficial owner. Recalling what has been suggested above, the same would be the case if A supplied the company with US dollars, which were to be converted into pounds sterling and French francs before paying different creditors. Here there might be an element of skill – and of profit – involved in the timing of the conversion from one currency to another.

Summary

It is suggested that there is no compelling reason why *Quistclose* – which after all involves an express trust – must be restricted to:

- (1) money or debts; or
- (2) property as originally supplied.

Theoretically speaking, we can see no reason why you cannot create a trust in the Quistclose fashion applying to items of movable property in general (including goods) and extending to whatever final items come into existence: whether the final item is exchange property or a “new” property, such as processed goods. (Such a trust would have a limited lifespan, existing for the period that the specified purpose remained unfulfilled. When the purpose was carried out, the trust would be determined and the supplier would become a debtor in the amount of the agreed value of the goods as originally supplied.)

In relation to processed good, such as blanks becoming medallions, the critical argument in ROT cases simply does not apply. In ROT cases the supplier is at once a creditor of the company upon delivery of the goods. The extent of the supplier’s interest in any processed goods will

⁴² One could even add additional facts to the effect that in their contract UCL and QMC agree that the medallions would not vest beneficially in UCL but fall under the trust.

in substance be inextricably linked to the debt between the parties; and this is so both in relation to the extent of the supplier's interest and in respect of the extinction of that interest (eg by payment of the debt). The strength of this charge argument has been clearly revealed by the case law over the last decade.

However, when it comes to our fact scenario (and our "RomQuist" clause), we have the authority of the House of Lords that – pending the carrying out of the Quistclose purpose – there is no debt: the parties do not stand in a debtor / creditor relationship. If there is no debtor / creditor relationship then any charge argument inevitably becomes irrelevant. If there is no debt – until the purpose has been carried out – then there can be no charge (securing that debt). At the time when the liquidation intervenes, there is simply no debt.

Practicalities

Our fact scenario is intended to be used as a way of focusing discussion on the theoretical issue of whether there can be a Quistclose trust in relation to goods and which extends to new products created (by the trustee's efforts) from those goods. We are trying to show that Quistclose and Romalpa are more closely linked than has perhaps hitherto been appreciated. In particular, the same fact scenario would yield different results depending on whether a ROT clause or the "Quistclose" trust is used. The response may perhaps be: "That may be all very well in theory, but it could not be of any practical relevance". Reference may here be made to the facts in *Chaigley Farms*.⁴³

A farmer supplied a company with sheep for slaughter, the sheep being supplied under a contract containing a more or less standard retention of title clause. By the time receivers were appointed, a number of sheep had been slaughtered but the carcasses (which had been processed in various ways) were still at the company's premises. It was held, in effect, that the ROT clause did not extend to the carcasses, since they were new items – different from the (live) animals which had been originally supplied.

Now one can look at these facts from a Quistclose perspective. (Although one needs to assume one additional fact, namely that the farmer supplied the sheep intending that the meat would be going to a purchaser – "Y" – and that the sheep should not be mixed with other sheep owned by the purchaser, if any.) If the transaction is re-cast in Quistclose terms, then the animals are supplied to the company for the sole purpose of being slaughtered so that the meat can be delivered to Y – no other purpose is contemplated. The company is expressly not allowed to re-sell the live

⁴³ *Chaigley Farms Ltd v Crawford, Kaye and Grayshire Ltd* [1996] BCC 957.

animals or sell the meat to any other purchaser. The argument now is that the company held the animals on a Quistclose trust and, therefore, did not become the beneficial owner of the carcasses – which are held on resulting trust for the farmer.

Of course, you may not particularly like this argument and you may think of many reasons why a court would not accept that in reality the parties intended to create a trust. We very much hope so. For our point is not that a Quistclose trust will definitely succeed in these circumstances. Our contention is that such examples show that Quistclose and Romalpa can operate – or at least be argued to operate – in very similar factual circumstances. The “substance” or “reality” approach should be even-handedly applied to both lines of cases.

Conclusion

Not too many years after *Quistclose* and *Romalpa* had been decided, Goodhart and Jones had no difficulty in looking at the two cases side by side; seeing both as examples of the “infiltration” of equity into commercial transactions. Although the authors of this paper would not use the term “infiltration”, there is no doubt that both *Quistclose* and *Romalpa* challenged existing notions and were seen by many as distorting established doctrine. Indeed, in certain ways *Quistclose* could be seen as the greater “culprit” in this regard. For essentially in *Romalpa* the court interpreted or re-cast the facts to permit of an agency (or bailment) relationship between the parties⁴⁴. Whereas the absolute heresy lurking in *Quistclose* was the permissibility of a private purpose trust: a potentially radical departure from decades, if not centuries, of judicial wisdom.

The last 20 years, however, has seen *Romalpa* distinguished out of existence, whilst *Quistclose* has appeared to remain quite vibrant. The nemesis of the fiduciary side of *Romalpa* has been “reality”: the substance of the parties’ transaction. Reality, it would seem, has not yet sharply focused its gaze upon the Quistclose trust. If it were to do so, it would uncover: (1) a “loan” which is not a loan; and (2) the (surely more than a little unusual) concept of fiduciary and debtor / creditor relationships not co-existing but following one another as if in series. But whether these two considerations fit with the substance of the parties’ transaction – often, in effect, a commercial loan – must be very much open to question. Nor, in our opinion, is it

⁴⁴ The Court of Appeal did not suggest that a conceptually new and distinct type of agency had to be created; their Lordships were instead allowing the facts to be “distorted” so as to be brought within existing agency principles. The substance approach will not permit of such distortion.

wholly satisfactory to maintain that *Quistclose* and *Romalpa* deal with such very different situations that developments in one area can have no possible bearing upon the other line of cases. In the discussion above we have sought to show that *Quistclose* and *Romalpa* may in fact operate in circumstances that are far more similar than have hitherto been appreciated.

In short, we are not arguing that the recent judgments dealing with the fiduciary arguments raised in *Romalpa* cases are wrong, nor that a *Quistclose* trust may never be found to have been created by the parties. Rather it is our contention that the “substance” approach developed in relation to the fiduciary side of retention of title should, in the future, be just as strictly applied to suppliers of credit as it is currently applied to suppliers of goods. After all, “equality is equity”.

Epilogue

In the decade that has lapsed since the paper was written, judicial attitude with respect to these two authorities has remained broadly unchanged, even though Lord Millett has explicitly observed, in *Twinsectra Ltd v Yardley*, that the *Quistclose* arrangement was “akin ... to a retention of title clause (though with a different object)”.⁴⁵ Nonetheless, there are a few developments that might be seen as providing support for the parity of treatment argued in this paper.

In the *Romalpa* context, the High Court of Australia had the occasion to consider a proceeds clause in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd*, which sought to declare a trust over a *proportion* of the proceeds of products made from steel supplied by the seller on an ROT clause, and identified by reference to the amount owed by the buyer to the seller from time to time.⁴⁶ The majority endorsed, albeit obiter,⁴⁷ such a clause as creating a trust – as opposed to a charge – on the ground that the parties’ express indication of their intention (to establish a trust) should be respected. Significantly, the majority drew support from Lord Wilberforce’s exhortation in *Quistclose* to allow a flexible interplay of law and equity, in order to give effect to practical commercial arrangements, even if it means recognising the co-existence of legal and equitable rights in one transaction.⁴⁸ Thus far, *Associated Alloys* is the only decision of the highest level of court that shows a greater willingness to give effect to the

⁴⁵ *Twinsectra Ltd v Yardley* [2002] UKHL 12 (HL), [2002] 2 AC 164 at p 81.

⁴⁶ *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* [2000] HCA 25; (2000) 202 CLR 588.

⁴⁷ The seller failed to prove that the buyer had received any proceeds relating to the relevant steel, and so was unable to show that the intended trust was constituted.

⁴⁸ *Ibid.*, at p 26 and p 32.

parties' express intention to establish a trust in the *Romalpa* context. Sealy and Hooley doubt if the English courts will reach a similar conclusion.⁴⁹ This view is justified in light of past decisions in England. However, most recently, in *re BA Peters plc*, Deputy Judge Strauss of the English High Court relied on the controversial view of Roskill LJ in *Romalpa* to imply an agency relationship between the manufacturer and dealer of a vessel,⁵⁰ thus leaving open the possibility for the manufacturer to establish a trust over the proceeds of the (authorised) sub-sale. His Lordship did admit that this was "no easy point".⁵¹

In the *Quistclose* context, much has happened that bears on the argument made in this paper. In *Twinsectra Ltd v Yardley*, Lord Millett held that the *Quistclose* trust is a resulting trust right from the start, subject only to a power or duty on the part of the borrower to use the money for a specific purpose. In particular, his Lordship repeatedly emphasized that the lender has never parted with any of his beneficial interest in the money.⁵² Lord Millett explains, extra-judicially, that on the transfer of the money upon a resulting trust, the lender's equitable interest arises for the first time.⁵³ The readiness of the House of Lords in accepting the *Quistclose* trust as well-established and the effort put into providing an orthodox basis for such an arrangement provide a stark contrast to the judicial hostility to invoking the trust in *Romalpa* arrangements.⁵⁴ In light of Lord Millett's observation that the *Quistclose* trust is akin to a *Romalpa* arrangement, it seems imprudent to dismiss outright the use of the trust in a commercial contract for the sale and purchase of goods.

Understandably, there will be more practical and evidential hurdles in establishing a trust in the context of sale of goods than in loans. Whereas the *Quistclose* trust arises from the outset when the money is transferred to the borrower for a specific purpose that entails segregation of the assets,

⁴⁹ L. S. Sealy & R. J. A. Hooley, *Commercial Law: Text, Cases and Materials*, 4th edn, 2009 (London: Oxford University Press) p 469. Attempts in England to create a trust over the proceeds of goods supplied on an ROT clause has been treated as creating a registrable charge in substance: *Re Bond Worth Ltd* [1980] Ch 228. *Associated Alloys* has also been criticized as a "jurisprudential dead end": P. M. Spink & C. A. Ong, "Substance versus Form: Anglo-Australian Perspectives on Title Financing Transactions" [2004] CLJ 199 at p 223.

⁵⁰ *re BA Peters plc* [2008] EWHC 2205, [2008] BPIR at p 85.

⁵¹ See n 50 above, p 87 and p 92.

⁵² See n 45 above, pp 96–97 and p100.

⁵³ See P. Millett, "Proprietary Restitution" in J. Edelman & S. Degeling (eds), *Equity in Commercial Law* (Pyrmont, NSW: Law Book Co., 2005) Ch 12 at p 320, n 30 above, referring to *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL). The lender does not retain the beneficial title while passing the legal title, for an absolute owner does not possess an equitable interest to be retained.

⁵⁴ For the view that Lord Millett has shown a willingness to depart from traditional principles of trust to justify the *Quistclose* trust, see J. Penner, "Lord Millett's Analysis" in W. Swadling (ed.) *The Quistclose Trust*, 2004 (Oxford: Hart Publishing Ltd) Ch 3.

a seller in an ROT arrangement typically retains title (both legal and equitable) to the goods until full payment of the relevant sums. At this stage, no trust is involved; the buyer is free to deal with the goods in the ordinary course of business, including to destroy them in the manufacturing process or to sell them. In seeking to attach a trust – at a later stage – to the sub-sale proceeds, there needs to be sufficient evidence that a buyer is in fact intended to sell as a fiduciary agent or bailee and thus receives the proceeds on account of the seller,⁵⁵ or is intended to hold the proceeds on trust.⁵⁶ Moreover, given the lack of initial segregation of the goods in an ROT arrangement, and the invocation of the trust over the proceeds rather than the original goods, the need to overcome difficulties of tracing will be much greater as compared to a typical Quistclose arrangement.⁵⁷ The authors accept that, as a result of these practical constraints, the availability of the trust will be much more limited in the ROT context; rather, they submit that, as a matter of doctrinal consistency, the courts should not desist from recognising the trust where sufficient evidence is found on the facts.

Conversely, if the court prefers the ‘substance’ approach it holds in relation to proceeds or products of goods supplied in an ROT arrangement, parity suggests that a similar approach should be applied in the *Quistclose* context. This would involve limiting the Quistclose trust to money or debts originally supplied, but clearly not its exchange products. At first glance, it might seem heretical to conceive of a trust – whether express, resulting or constructive – that only comprises of the original settled sum, but not also substituted assets from time to time representing the original assets.

Whether a Quistclose trust limited in this way will be accepted by the courts depends on two questions: first, whether the facts of a particular case as interpreted upon a “substance” approach support the finding of a common intention to limit the trust mechanism to the original settled sum only; secondly, and more importantly, whether the courts consider such a restriction repugnant to the nature of the trust. It is submitted that the answer to the first question should depend primarily on the terms of the loan contract as interpreted by the court.⁵⁸ If the contract unequivocally indicates an attempt to create a trust in substance, the arrangement may even be properly classified as an express trust. In contrast, if: (a) the parties had only intended the recipient to hold and segregate the money from his general assets pending its application for the specified purpose;

⁵⁵ As in *In re BA Peters plc*, see n 50 above.

⁵⁶ As in *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd*, see n 46 above.

⁵⁷ For a compelling argument that not even a fiduciary relationship is needed to trace into the proceeds, see K. Loi, “Tracing the Future of Romalpa Cases” [2008] RLR 76.

⁵⁸ For support of this approach, see J. A. Glistler, “The Nature of Quistclose Trusts: Classification and Reconciliation” [2004] *CLJ* 632.

(b) the parties had no intention to invest the money in the meantime; and (c) they had not intended to afford the transferor trust – as opposed to contractual – remedies in the event of misapplication of the money by the recipient, then a trust that is restricted to the initial settled sum appropriately reflects the parties' arrangement. It is even conceivable that some Quistclose lenders only have such a limited arrangement in mind. Of course, a cynic would say that such a trust, if it is one at all, can easily be defeated by the recipient-trustee's misapplication of the trust fund. Be that as it may, as most of the Quistclose cases show, insolvency is likely to have intervened before the occurrence of any breach of trust. The risk of abuse may be much less substantial in reality.

As to the second question about repugnancy, it raises wider issues that cannot be fully addressed in the present article. As a preliminary thought, at the stage where the recipient-trustee still maintains the original assets in a segregated fund as agreed and has not expended it, this is still in line with the primary trust of the Quistclose trust. This is because if the recipient-trustee becomes insolvent at this stage, the assets will not be available to his general creditors just as in a traditional Quistclose trust. The objection rather, is as to its vulnerable nature, namely that it ceases to bind the trustee once he misapplies the trust assets. Ironically, while such vulnerability may render the trust unorthodox, it may provide a good fit with the nature of the Quistclose arrangement. After all, it avoids the proprietary overkill (for example, of tracing into third-party transferees) that comes with the imposition of trust; instead, it gives the transferor-settlor just what he bargains for, namely priority against the trustee's creditor in the event of the latter's untimely insolvency before the expenditure of the original assets for the specified purpose.

Admittedly, a Quistclose trust in the limited form discussed above involves an even greater departure from orthodox trust principles than its well-established version. Nor do the authors advocate such a development, at least not in the present article. But the fact that either form is controversial underscores the point made in this article, that the lack of symmetry of treatment between Quistclose and Romalpa arrangements calls for a thorough examination of the policies at play and the current approaches of the courts.