Does the intention required for a Quistclose trust differ onshore to offshore

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Does the intention required for a Quistclose trust differ onshore to offshore?

Recent English case law has served to emphasise the requisite levels of intention needed on the part of the transferor for the creation of a *Quistclose* trust or any other sort of analogous resulting trust. In both the cases of **Bellis & Ors v Challinor & Ors** [2015] EWCA Civ 59 and **Gore & Ors v Mishcon de Reya** [2015] EWHC 164 (Ch), the court found that monies held in a solicitor's client account were held on bare trust for that client. Clear intention would have been required on the part of the transferor that the monies be used for an express purpose for the outcome of either case to have been any different.

Bellis v Challinor

In this case, monies were paid by investors in to a solicitor's client account as part of an investment into a property scheme. A Guernsey company, the solicitor's client, had been set up specifically for the purpose of acquiring the land with the assistance of bank funding. The land had already been purchased by the time the investors invested, and the aim was that the investors would later receive an interest in an offshore unit trust which would be set up at a later stage, and that loan notes would be issued to each investor. In the event, much of the investment money was used to reduce the short-term borrowing from a bank, some was spent on solicitors' fees, and the company was placed in insolvent administration without having set up the unit trust or issued the loan notes.

The investors sought to recover their money from the solicitors claiming, among other things, that the firm held the funds on trust for the investors. The claim that monies were held in a *Quistclose*trust type arrangement was rejected by the court of appeal and the judge instead found that the monies paid into the solicitor's client account were provided as loans to the company.

The judge emphasised that there must be an intention to create a trust on the part of the transferor and, upon his review of the facts of the case, could find no evidence of such an intention on the part of the investors.

Gore & Ors v Mishcon de Reya

This was another case that involved monies being raised for a property investment, this time by procuring a bank guarantee which would be cashed (in the sense of procuring a loan facility to be secured by the bank guarantee). Monies were paid by investors to the solicitors to assist with obtaining the bank guarantee, but these were instead kept by the client in what the judge opined was almost certainly an 'advance fee fraud'.

This case was further complicated by various allegations of fraud, dishonest and conspiracy, and was further complicated by the fact that the relevant partner at the firm of solicitors had been convicted of conspiracy to commit fraud in conjunction with the same client.

The claimant investors claimed, among other things, a breach of fiduciary duty on the part of the solicitors in disposing of monies it held as trustee of a *Quistclose* trust on their behalf. Their case was that the monies were held for the specific purpose of obtaining bank funding and should have been transferred back to them upon the failure of that purpose and not transferred away on the instructions of the solicitor's client. In order for their claim to be successful, the claimants would have to have shown that the monies which were advanced to the solicitors were not intended to be at the client's free disposal, and that the solicitors were aware of this fact.

The Court decided that, on the facts, the relevant intention was not there to justify the finding of a *Quistclose* trust. For example, in relation to one of the investors, the monies had been passed through the accounts of two other firms of lawyers, and there was no evidence that the investor had had the intention that he should retain beneficial ownership of those monies – in fact, the judge held there was evidence to the contrary. This again serves to illustrate that the English courts are strict in their interpretation of this particular aspect of the law and unwilling to read intention into circumstances where there clearly was none.

The recent decision in the case of **Nolan v Minerva** [2014] JRC078A gave detailed consideration to the circumstances that might give rise to a *Quistclose* trust in Jersey. The case concerned a wealthy Irish family (the Nolan family) who employed Mr Walsh and his group of companies to provide investment advice. Between 2002 and 2009 the Nolan family entrusted in the region of £10,000,000 to investments recommended by Mr Walsh which subsequently failed. It is acknowledged in the judgement that by 2005 Mr Walsh was a fraudster and his business empire collapsed in 2009. The Nolan family sought recovery for losses from Minerva Trust Company Limited, on the basis that Professional Trust Company Limited (a business Minerva had purchased) had dishonestly assisted Mr Walsh in breaches of trusts including breaches of *Quistclose* trusts.

The Royal Court found, and it was accepted by the Nolan family, if the arrangements with Mr Walsh

constituted no more than simple bipartite contracts for sale and purchase, then there could be no *Quistclose* trust. The Nolan family argued that a breach of trust occurred when any part of the moneys transferred to the Buchanan Group was used other than for the purpose agreed with Mr Walsh. The Royal Court considered eight transactions and in each gave judgment as to whether a *Quistclose* trust existed. They can be broadly divided into three categories.

In the first, moneys were transferred by the Nolan family to buy specific shares with provisions attached, e.g. they were bought at cost price, they received all rights in the shares or the purchase price would be used for a particular use. The Court found these conditions on purchase constituted more than a simple contract and although the Nolan family did receive shares, to the extent any of the conditions attached to them were not met, a *Quistclose* trust existed.

The second category followed similar lines but concerned moneys being paid over as investments. Again, conditions were attached to these investments, examples being Mr Walsh agreeing to invest the same sum of money, the investment would be enhanced by bank borrowings in order to achieve a particular aim or the moneys would be applied to a particular purpose. Again the Court found, to the extent the conditions were not met, a *Quistclose* trust existed.

Finally, there were contracts for the purchase of shares where it was questionable as to whether the shares existed or not and while the Court found it was possible there were *Halley* trusts they were simple sale and purpose contracts thus not *Quistclose* trusts.

Given the nature of the business of the island of Jersey it is perhaps unsurprising that the Court here is more inclined to impose trust structures on professional trustees and hold them to a higher standard of care. While not particularly relevant to this article it is worth noting that Minerva, as the successor practice to Professional Trust Company Limited, was found guilty of dishonest assistance in respect of the various breaches of trust brought about by the existence of the *Quistclose* and *Halley* trusts.

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