Revision Box Questions: Guidance for approach

Revision Box Chapter 18

1. In relation to Quistclose trusts, ensure that you can explain:
   • what the essence of a Quistclose arrangement appears to be; and
   • what the key requirements of a Quistclose trust appear to be, drawing on Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567 itself and subsequent cases.

   This is a special type of trust arising from a loan which is made, to ensure that where money advanced for a particular purpose cannot be used for this that it will be returned to the creditor. Here where an identifiable sum of money is advanced by its owner to another for a particular purpose, the obligations of trusteeship are imposed upon the latter. From Barclays Bank v Quistclose (1970) it is clear that this works by way of a primary trust attaching to the purpose underpinning the loan and a secondary trust arising for the original lender because this primary purpose could not be carried out.

   A central pre-condition seems to be that money is advanced for a specific purpose and for that purpose alone, and that this (purpose) is known to the recipient (focus is what is understood by the recipient rather than what is intended by the lender). It isn’t clear whether payment of money into a special account is necessary but there are many advantages associated with this gravitating around the claimant’s ability to identify the money as his. It does not appear to matter whether the money originates in a voluntary loan or payment under a contractual obligation.

2. In relation to the decision in Twinsectra v Yardley [2002] 2 WLR 802, ensure that you understand:
   • the spectrum of possible views advanced and the extensive analysis of why ultimately a resulting trust in favour of the lender was the one ultimately to be preferred;
   • how the resulting trust in favour of the lender operated subject to the mandate of the borrower to apply the sums advanced to the specified purposes and how this ultimately ensured that Sims did hold the money on (resulting) trust for Twinsectra; and
   • why, at that point, it did not matter that the money was advanced to be applied to a purpose rather than to benefit an identifiable individual.

   This requires you to understand that Twinsectra is a very important case and how although conventional analysis has gravitated around the secondary trust as one which is resulting (and included in Lord Browne-Wilkinson’s Westdeutsche Type B categorisation) and an alternative theory that an express rather than an implied trust arises. Here you will need to read carefully Lord Millett’s (1985) LQR article and also Jamie Glister’s one from 2004. In Twinsectra the House of Lords held that intention to create a trust (of the property held by Sims) could be found on the construction of the undertaking that the money was to be used for the acquisition of property and for no other purpose. In turn, this gave rise to a beneficial interest in the money to be held on resulting trust for the lender. This countermanded the argument made that there was no intention to create a trust and that
there was no obvious ‘specific purpose’, and so there was no bar on the money being applied to unspecified purchases of property.

3. In the light of questions 1 and 2, answer the following questions:

a) By way of a summary, what is the likely significance of key cases post Twinsectra?

b) What issues of law appear to arise from judicial recognition of Quistclose arrangements?

c) What issues of policy are associated with judicial recognition of Quistclose arrangements?

A number of cases post-Twinsectra have continued the quest to try to clarify the operation of Quistclose arrangements. Cooper v PRG Powerhouse Ltd (2008) appears to support its views on when a trust will arise, with Mundy v Brown (2011) continuing the interest taken in the importance of alongside purported need for segregation of a creditor’s assets, with this also evident in Bieber v Teathers (2012) which also considers the consequences of finding that no trust has arisen; this is that as stressed in Anglo Corporation v Peacock (1997) as being what was understood by the recipient rather than what was intended by the creditor. However it is also the case that Quistclose itself raises an interesting issue of law, inasmuch as it was not clear that the primary trust had actually failed when the secondary one was applied, with this seeming to reflect policy considerations highlighting the benefits of enforcing Quistclose arrangements associated with willingness of lenders to provide vital cash lifelines to struggling businesses. Alongside that, Quistclose arrangements are criticised for conferring preferences for some creditors at the expense of others, particularly where there is an insolvency and the purpose of insolvency law is to provide fairness between creditors as far as it is possible to do so.

4. Ensure that you are able to explain where trusts and equitable obligations are to be found in ‘commercial dealings’ and that you are able to identify the apparent attractions of these mechanisms for contracting parties.

This requires understanding that commercial dealings are not an obvious operating context for equity’s core ideas, given that the former are characteristically dealings ‘at arm’s length’ governed by contract, involving an exchange between parties for profit, and in which considerable freedom is given to the parties by ‘commercial law’ to determine relations between them. But also that there are some strong similarities subsisting between equity and commerce which help to highlight the attraction of equitable principles for commercial activity. Trust and confidence at the heart of equity’s jurisdiction are essential elements for contracting, because, notwithstanding all that has been said about commerce and its raison d’être, commercial parties will deal with only those whom they trust, even if this is at a ‘threshold’ level, and will equally want to be perceived as trustworthy, even if this is directed at profit maximization. This suggests that even very naked self-interest requires some fairness in contractual exchanges. The key difference between them is the binding character of fiduciary relationships, which are quite different from those arising from the ordinary governance of commercial relations by commercial law. Here much of the interesting development is occurring around how some contracting parties will be keen to import fiduciary obligations into their dealings with others, and reactions this generates amongst others who are profit-driven and contractually oriented. We know that some parties are very keen to show their relations with others are vested
with fiduciary duties, and also that others are often very keen to establish that they are not.