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THE RELEVANCE OF QUISTCLOSE TRUST IN CORPORATE INSOLVENCY FOR THE BENEFIT OF A NON-LENDING THIRD PARTY.

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ABSTRACT

Although the incidence of *Quistclose* trusts in case law is not a common occurrence, the interest it has spawned among judges and commentators in common law jurisdictions is legion and has been claimed 'to represent the single most single most important application of equitable principles in commercial life.'[79] The nature of the *Quistclose* trust raises a number of legal challenges: whether it is an express or a resulting trust, whether there is a combination of a primary and a secondary trust, does it comply with the beneficiary principle as an express trust and whether a third party designated by the payer-beneficiary can take advantage of the trust. Recently the Malaysian courts at all levels in *PECD Sdn Bhd v Amtrustees Bhd*[80] had the opportunity to consider the position of a designated third party and they have positively endorsed the view that he can benefit under the primary trust. The objective of this paper is to assess the legal principles in the application of *Quistclose* trusts, critically analyse the judgment of the Federal Court in *PECD Sdn Bhd* and offer alternative solutions to the issue raised by the case. The paper adopts a comparative study and doctrinal analysis of relevant decisions clarifying important issues in relation to the use of the *Quistclose* trust in commercial transactions. It clarifies the appropriateness of applying a *Quistclose* trust to the commercial arrangements inherent in *PECD Sdn Bhd* and suggests the availability of alternative remedies.

Keywords: *Quistclose trust, Primary and Secondary trust, Express trust*

1. INTRODUCTION

A *Quistclose* trust arises commonly in corporate rescues when A transfers money to B exclusively for a specific purpose, for example to pay C. If C becomes insolvent before receiving the earmarked funds, B will hold it on a *Quistclose* trust for A. The trust derives its name from the seminal case of *Barclays Bank Ltd v Quistclose Investments Ltd*[81] in which *Quistclose* loaned money to Rolls Razor for the specific purpose of paying

[79] See Lord Millet in his Foreward to *The Quistclose Trust: Critical Essays,* W. Swadling, ed., (Oxford, Hart Publishing, 2004)

[80] [2014] 1 MLJ 919(Federal Court); [2010] 5 MLJ 357(Court of Appeal); PECD Bhd &Anor v Merino-ODD Sdn Bhd & Ors [2009] 3 MLJ 362(High Court)

[81] [1970] AC 567)

dividends(which had been declared but remained unpaid) to its shareholders. The money was credited in Rolls Razor's separate account held at Barclays Bank. Before dividends were paid Rolls Razor went into voluntary liquidation. The bank claimed a right of set-off against Rolls Razor's debts and *Quistclose* insisted on a return of their funds on the basis that the bank was aware that it was holding the money on trust for the specific purpose of paying dividends and as such it was a constructive trustee of money belonging to *Quistclose* . The Court of Appeal and the House of Lords found in favour of *Quistclose* on the reasoning that non payment of dividends caused the money to be impressed with a trust and that the bank was bound by it.

This type of trust prevalent in bankruptcy cases had long been recognised before the *Quistclose* case in which Lord Wilberforce delivering the leading judgment referred to *Toovey v Milne*[82] in which Abbott C.J. was of the view that 'the fair inference from the facts proved was that this money was advanced for a special purpose, and that being so closed with a specific trust, no property in it passed to the assignee of the bankrupt.'[83] Cases in which the money loaned became the bankrupt payee's asset to be distributed *pari passu* to its creditors could be explained on the basis that there was no special arrangement concluded by the parties to create a trust.[84]

While the importance of the *Quistclose* trust in the field of commercial law[85], particularly corporate insolvency, cannot be overstated it has spawned rich academic debate and judicial analysis in an attempt to rationalise it in terms of traditional law of trusts.

2. Lord Wilberforce's primary and secondary trust.

In finding a *Quistclose* trust in *Barclays Bank Ltd v Quistclose Investments Ltd*[86] Lord Wilberforce opined that there was a primary trust in favour of the creditors for specified purpose (payment of dividends) and if the primary trust failed, a secondary resulting trust in favour of the lender and he explained the contemporaneous incidence of a debt and a contractual relationship 'because there was no difficulty in recognising the coexistence in one transaction of legal and equitable rights and remedies.'[87] If the loan is not subject to be used for a specified purpose, there is no question of an implied trust in favour of the lender, such an agreement being an ordinary loan contract where the borrower benefits absolutely from an outright transfer of money from the lender.[88] Lord Wilberforce's two trusts rationalisation can been subjected to criticism as it cannot be explained on orthodox trust principles.[89] It is an elementary principle of trust law that the intention is an important

[82] (1819) 2 Barn. & Ald. 683
[83] The reasoning was repeatedly followed and applied, for example see: *Edwards* v. *Glynn* (1859) 2 E. & E. 29 ; *Re Rogers ex parte Holland and Hannen* (1891) 8 Morr. B.C. 243 ; *Re Drucker* [1902] 2 K.B. 237 C.A.; *Re Holley* [1915]1 Hansell 181
[84] See, for example, *Moseley* v. *Cressey's Co.* 1865 L.R.1 Eq. 405 ; *Stewart* v. *Austin* L.R. 3 Eq . 299; *The Nanwa Gold Mines Ltd* [1955] 1 W.L.R. 1080)
[85] Loans advanced for payment to a specific creditor: *Carreras Rothmans v Freeman Mathews Treasure*[1985] Ch 207; for a specific project: *Twinsectra v Yardley*[2002] A C 164; payment for specific goods*:Re Kayford (in liquidation)* [1975] 1 WLR 279 and *Re EVTR Ltd.* [1987] BCLC 647
[86] Note 3.
[87] Note 3 at 580
[88] See *Abou-Rahmah and Others v Abacha and Others* [2006] I Lloyds Rep 484
[89] See note 1 where Swadling is of the opinion that the Quistclose trust cannot be scrutinised with

requirement in the creation of a trust.[90] Certainty of intention can be determined by examining the words used by the settlor which must be imperative in nature. Although the term trust need not be present in the words used, the intention must be certain and courts are prepared to draw inferences from the behaviour of the parties in determining certainty[91]. Since Lord Wilberforce did not express any opinion on the type of the primary trust, the common understanding points to an express trust. The clear intention of the parties was the specific use of the money for paying dividends and as Swadling[92] opines, an intention to create a trust cannot be implied from a specific purpose for which the money advanced.

The trust doctrine is very clear on the issue that any other trust than a charitable trust must have human beneficiaries 'in whose favour the court can decree performance.'[93] If the primary trust is for the purpose of paying dividends it will fall foul of the human beneficiary principle. In one of his views against the construction of a *Quisclose* trust on the facts of the case, Swadling[94] argues since the clear purpose of the trust was payment of dividends, the trust is a disguised purpose trust infringing the beneficiary principle.

However, the beneficiary principle is not an absolute principle. Trusts of imperfect obligation or non charitable purpose trusts are a well established anomalous exception although they are not to be expanded.[95] A trust for the purpose of paying dividends or of all the other purposes in *Quistclose* trust cases do not fall within the recognised limited exceptions and are therefore to this extent even outside the anomalous category of recognised trusts.

If the primary trust is an express trust the other conceptual problem is the location of the beneficial interest. In particular what is the status of the beneficial interest between the failure of the primary trust and the activation of the resulting trust? The time gap leaves a vacuum, causing an unexplainable suspense of the beneficial interest and this issue leads to querying the dual trust structure advocated by Lord Wilberforce.[96]

3.1 Lord Millet's rationalisation of the Quistclose Trust

Lord Millet has made notable contribution to the subject matter on two main occasions, in an article[97] in1989 in which he scrutinised Lord Wilberforce's judgment in the *Quistclose* case and in his dissenting judgment in the House of Lords in *Twisectra v Yardley.*[98]

orthodox principles of trust law; see also Ho L and Smart P St J, "Re-interpreting the *Quistclose* Trust: A Critique of Chambers' Analysis" (2001) 21 *Oxford J. Leg. Stud*. 267 at 284, where the authors comment that 'no comfortable place has yet been found for the *Quistclose* line of cases in orthodox trust...principles.'

[90] *Wright v Atkins* [1823] Turn & R 143 at 147.

[91] *Paul v Constance* [1986] PCC 121

[92] Note 11.

[93] See Sir William Grant in *Morice v Bishop of Durham* [1805] 10 Ves 522

[94] Note 1

[95] See Lord Evershed M.R. in *Re Endacott* [1960] Ch. 232. Non-charitable purpose trusts enforceable by the courts include trusts for specific animal(s), for maintenance of specific tomb(s) and monument(s), for masses for the soul of named deceased individual(s) and for foxhunting.

[96] See Chap 22, Alastair Hudson, *Equity and Trusts*, 8Th Ed. 2014, Routledge

[97] Millet P, "The Quistclose Trust: Who Can Enforce It?" (1985) LQR 269

[98] Note 7.

In the 1985 article he mounted a spirited defence of the existence of *Quistclose* trusts against Swadling's orthodox argument that on such facts the proper construction is one of debtor-creditor relationship[99] and that there was no implied trust on the basis of money lent for a purpose. However he advocated his own theory on the issue of locating the beneficial interest. Unlike Lord Wilberforce's two trusts solution, Millet argued for a single trust analysis in that the beneficial title remained with the lender throughout subject to the borrower's promise to apply the money for the specific purpose as agreed.

More than two decades following the *Quistclose* case, Lord Millett had the opportunity of offering refinements and further explanation of his single trust theory in his dissenting judgment in *Twinsectra v Yardley*[100]. In this case money was loaned by Twinsectra to Yardley for a specific purpose. Yardley's solicitor who was unable to give an undertaking required by the lender as to the agreed application of the money was replaced by Leach who gave the undertaking but allowed Yardley to draw on the loan on Yardley's instructions which were in breach of the terms of the loan and the undertaking given. Yardley was unable to repay the loan. His Lordship undertook an exhaustive analysis of judicial and academic explanation of the Quistclose trust.[101] After rejecting all the analyses for reasons he provided, he reinforced his initial resulting trust theory with direction to apply the money for a stated purpose as follows[102]:

> *…[I] hold 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 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. Whether the borrower is obliged to apply the money for the stated purpose or merely at liberty to do so, and whether the lender can countermand the borrower's mandate while it is still capable of being carried out, must depend on the circumstances of the particular case*.

On the facts he concluded[103]:

In my opinion the Court of Appeal were correct to find that the terms … of the undertaking created a Quistclose trust. The money was never at Mr Yardley's free

[99] However Swadling rationalises the pre- Quistclose cases as forming 'an anomalous rule applicable only to the law of bankruptcy and, for that reason, cannot be applied outside that context. W. Swadling, "A New Role for Resulting Trusts?" (1996) 16 L S 110 at 122.
[100] Note 7.
[101] Ibid, [78] – [102]
[102] Ibid, [100]
[103] Ibid, [103]

disposal. It was never held to his order ... The money belonged throughout to Twinsectra, subject only to Mr Yardley's right to apply it for the acquisition of property. Twinsectra parted with the money …to ensure that the money was properly applied or returned to it.

Lord Millett's explanation of a resulting trust but the beneficial interest always vested in the lender subject to a power given to the borrower to apply the funds for a specific purpose has gained wide support, but in common with the other analyses of Quistclose trust, has been criticised.[104] Both the *Quistclose* case and *Twinsectra* rule out the relevance of the subjective awareness of the parties as relevant consideration in implying a trust.[105] The words of Lord Millett that the 'absence of an intention on the part of the transferor to pass the entire beneficial interest, not a positive intention to retain it'[106] would in the opinion of Penner[107] allow courts to impose 'trusts in commercial circumstances on flimsy evidence about what might have been absent [from the lender's] mind, as opposed to determining the true intentions of the parties.' Smolyanski trenchantly points out[108]:

With great respect to Lord Millett, this approach involves a contradiction in terms. In a two party loan transaction, if there is truly no intention that the lender retains a beneficial interest in the loan money, then this can only mean one thing - that the parties intended that the beneficial interest should pass to the borrower. It is impossible for there to be any intermediate state. The parties must have intended that the beneficial interest lie somewhere - it cannot be rationally assumed that they did not turn their minds to an issue so fundamental, thus requiring an order of a resulting trust to save the beneficial interest from limbo.

In addition to these two leading and popular interpretation of *Quistclose* trusts, several others have been advanced.[109] It is clear that this type of trust has achieved a foothold in commercial law, especially in the field of corporate insolvency. As resulting trust they it does not fall neatly within the traditional class although the case has been cited in Lord Browne-Wilkinson's classification in *Westdeutsche Landesbank v Council of London Borough of Islington*[110]*.* Recently in *Bieber v Teathers Ltd (in liquidation)*[111] Norris

[104] See for example, Hudson, note 18; M Smolyansky, "Reining in the Quistclose Trust: a Response to Twinsectra v Yardley" (2010) 16 OJ T&T 558; Barrie Lawrence Nathan, "In Defence of the Primary Trust: Quistclose Revisited" (2012) 18 OJ T&T 123; R. Chambers, Resulting Trusts (Oxford 1997), Chap 3

[105] Ibid, Smolyansky: 'The central flaw in *Twinsectra*, as in *Quistclose*, is the sheer artificiality of the assertion that courts, when implying the trust, are simply giving effect to the intention of the parties. In fact, the manner in which this intention is implied represents a radical departure from orthodoxy.'

[106] [92]

[107] James Penner, 'Lord Millett's Analysis' in William Swadling (ed),*The Quistclose Trust: Critical Essays* (Hart Publishing, Oxford 2004),

[108] Note 26

[109] For example, see Hudson, note 18; Mcbrides: http://mcbridesguides.com/category/equity/quistclose-trust/

[110] [1996] AC 669, Lord Browne Wilkinson: "Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. …. (B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest: *ibid* and *Barclays Bank Ltd v Quistclose Investments Ltd* [1968] 3 All ER 651; [1970] AC 567.

[111]2012] All ER (D) 117

J put forward seven underlying principles[112] to be considered in determining the existence of a *Quistclose* trust. He opined that following the *Quistclose* case and *Twinsectra* these principles were clear and they have been adopted by subsequent cases[113] although they do not offer any assistance in resolving the classification of *Quistclose* trusts.

Whether it is express, resulting, constructive or some other type of trust it cannot be denied that it is an instrument crafted by judges through the use of equitable principles to enforce an agreed purpose between two contracting parties.

3. *Quistclose* Trusts in Malaysia

The history of Quistclose trust in Malaysia is recent and its incidence fairly sparse with less than a half a dozen reported cases where it is considered as one of the substantive issues. It was discussed in *Saipem(M) Sdn Bhd & Anor v AG &P(M) Sdn Bhd &Ors*[114] but on the facts the judge found that money advanced for the payment of identified creditors was not impressed with any trust. In *Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor*[115] money advanced for the purchase of shares was in fact used for such purchase was initially held on a *Quistclose* trust but once the primary purpose was executed, no issue resulting arose[116]:

Here, Raja Zainal was advanced the RM150,000 for the specific purpose of using it to acquire the Fimaly shares. So he was a trustee of the money. This is called a 'Quistclose' trust, taking its name from the leading case on the point, Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567… The RM150,000 was in fact used for the very purpose for which it was paid over to Raja Zainal. That brings me to the rider to the Quistclose principle. It is that once the purpose for which the money was advanced is achieved, the beneficial ownership in the money vests absolutely in the intended recipient, in this case, the first defendant.

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[112] He summarised them as follows: (i) in every case the question would be whether the payer and the recipient had intended that the money passing between them was to be at the free disposal of the recipient; (ii) the mere fact that the payer had paid the money to the recipient for the recipient to use it in a particular way would not of itself be enough to create such a trust; (iii) it had to be clear from the express terms of the transaction or be objectively ascertained from the circumstances of the transaction that the mutual intention of payer and recipient (and the essence of the bargain) was that the funds transferred should not be part of the general assets of the recipient but should be used exclusively to effect particular identified payments, so that if the money could not be so used it would be returned to the payer; (iv) the mechanism by which that was achieved was a trust giving rise to fiduciary obligations on the part of the recipient which a court of equity would enforce; (v) such a trust was akin to a 'retention of title' clause, enabling the recipient to have recourse to the payer's money for the particular purpose specified but without entrenching on the payer's property rights more than necessary to enable the purpose to be achieved; (vi) the subjective intentions of payer and recipient as to the creation of a trust were irrelevant, for if the properly construed terms upon which payer and recipient entered into an arrangement had the effect of creating a trust, then it would not be necessary that either payer or recipient ought to intend to create a trust; (vii) the particular purpose had to be specified in terms which enabled a court to say whether a given application of the money did or did not fall within its terms. *Ibid*, [16]-[23]

[113] *Gore and another v Mishcon de Reya* [2015] All ER (D) 57; *Challinor v Juliet Bellis & Co and another* [2013] All ER (D) 06

[114] [1996] 1 MLJ 239

[115] [2006] 1 MLJ 97

[116] *Ibid*, at 108

PECD Sdn Bhd v Amtrustees Bhd[117] is the only local case which discusses *Quistclose* trust in great detail, having received the attention of our courts at all levels. Although in common with most cases in this area the context is corporate insolvency, it has been correctly argued[118] that the case based on *Quistclose* principles has been decided *per incuriam* and ought to be revisited by the Supreme Court, soonest the opportunity arises.

PECD, the appellants were the holding company of a subsidiary which had executed a mudarabah note issuance facility, up to RM 200m. Fourteen noteholders were represented by the respondent trustees, acting for them. When the subsidiary defaulted on the notes, court action was avoided by PECD agreeing to raise money via a rights issue, out of which RM 30m would be transferred to the respondents as a partial settlement of the note facility. All the legal formalities for rights issue was completed and shareholders were informed at meetings and in the relevant documents that Rm 30m out tht rights issue exercise would be paid to the respondents trustees for the noteholders. An amount in excess of RM 104m was raised and kept in a special PECD Rights Issue Account but the appellants refused to pay the respondents the agreed sum of RM 30m within seven days of receiving the proceeds of the rights issue as promise in the letter of undertaking. A month later the appellant became insolvent and refused to pay the respondents the agreed sum of RM 30m but wrote to them regarding debt restructuring proposals to which was the respondents objected and commenced an action in the High Court. The judge ruled in favour of the respondents, that there was merit in the submission of learned counsel that the money raised was trust money. Without discussing the mechanics of a Quistclose trust he went on to quote Lord Wilberforce's dictum of primary and secondary trusts and drawing support from the Court of Appeal's judgment in *Malaysia Discounts Bhd v Pesaka Astana (M) Sdn Bhd* [119] where it was held that the issuer of bonds had undertaken that proceeds from government contracts will be utilised to settle that bonds, the trustee for the bondholders had a proprietary claim to such monies.[120]

On appeal to the Court of Appeal the respondents' right to the RM 30m was affirmed, albeit on the strength of the *Quistclose* case notwithstanding the differentiation of facts in the two cases:[121]

> *In my judgment the principle in the Quistclose line of cases is that equity fastens on the conscience of the person who receives monies for a specific purpose, and not for the recipient's own purposes, so that such a person will not be permitted to treat the property as his own or to use it for other than for the stated purpose. I am of the view that the High Court judge was right in finding that a contractual promise to apply earmarked monies for a specific purpose create an equitable trust in those monies by way of trust based on the proposition that it is unconscionable for a man to give an undertaking and obtain money on terms as to its application and then to totally disregard the terms on which the monies were to be applied. The High Court*

[117] Note 2.
[118] See Ying Khai Liew, "The Quistclose Doctrine: Resurrection of the Primary Trust" [2014] 6 MLJ cxxvi
[119] [2008] 5 CLJ 130 (at p 158)
[120] [19] – [22]
[121] [2010] 5 MLJ 357 [37],[38]

judge was therefore right in finding that the sum of RM30m out of the rights issue was held by the first appellant on a trust.

A further appeal to the Supreme Court also failed. Richard Malanjum CJ giving the judgment of the court relied on three strong sources to reject the appeal. He held that *Twinsectra* has expressly departed from the two trusts structure propounded by Lord Wilberforce in the *Quistclose* case. Therefore on the facts the primary trust was enforceable in favour of the respondents. He quoted copiously from Barrie Lawrence Nathan's article[122], *In defence of the primary trust: Quistclose revisited* and relied on *Northern Development (Holdings) Ltd* [123] an unreported decision of Megarry VC to reach the following conclusion:[124]

…we are of the view that the respondent has acquired the beneficial interest in the said monies. The 'primary trust was a purpose trust enforceable' by the respondent as the trustee of the noteholders, the actual creditors, 'for whose benefit the trust was created'. The respondent is therefore 'capable of enforcing the trust on *Re Denley's Trust Deed; Holman v H H Martyn & Co Ltd* [1969] 1 Ch 373 ' (The beneficiary principle, that is, the trust would be valid so long as there is a person benefitting from the trust who can be described as having a direct and tangible interest, so as to have the locus standi to enforce the trust). Indeed Lord Millett in *Twinsectra Ltd v Yardley* at p 826 said that it was not necessary to explore the position…

3.1 Critical Analysis of the PECD Judgments

Unlike the facts of almost all decided cases based on the *Quistclose* case a lender provides loan for a specific purpose or a financier provides money for an agreed purpose. This single fact is glaringly absent in the case as indicated by the Supreme Court but without any convincing explanation[125]:

It is interesting to note that in most, if not all, of the cases relied upon by the learned High Court judge in finding that the said monies was subject to a Quistclose trust, the claimants were either the lenders or providers of the moneys…But such situation should not be taken to indicate that it must be the current law.

Unless we accept PECD as having extended the doctrine of *Quistclose* trust far beyond the presently recognised borders it is submitted that the analysis is unacceptable. Linked to this issue is the leave question as to 'whether the beneficiary of a *Quistclose* trust can in law be a person who is not a provider or payor of money.' Although the question is not drafted correctly to cover the facts[126] in consonance with the usual cases on *Quistclose* trusts, its treatment is elusive[127] although it could have formed the basis of a solution other than the imposition of a *Quistclose* trust.

The other major difference on the facts is the position of the beneficiary and the purpose of payment. In the *Quistclose* case the beneficiaries of the loan advanced by the financier were the shareholders of Rolls Razor Ltd. In PECD the beneficiaries are the

[122] Note 26
[123] Chancery Division, 6 Oct (1978) (unreported)
[124] [59]
[125] [47]
[126] Ying Khai Liew, note 40.
[127] [35]

noteholders represented by their trustee. The purpose of payment in *Quistclose* and cases following is more in the nature of a loan as in *Quistclose* itself it was a loan made to Rolls Razor Ltd to pay dividends. On the facts of PECD no issue of loan arises. The noteholders as beneficiaries were owed money and the parent company stepped in to settle the debt of its subsidiary, failing which the whole corporate structure would have been jeopardised. These differences make PECD far removed from the recurrent factual situation normally calling for the imposition of *Quistclose* trusts.

With these differences in mind we venture to suggest alternative strategies as suitable solutions which can be rationalised on established legal principles.

3.2 Express Trust

The agreement between the appellants and the noteholders is firmly grounded in contract as can be evidenced from the documents and there is clear breach of contract on the part of the appellant of its obligation to pay RM 30m to the noteholders within seven days of receiving the proceeds of the rights issue. However since it refused to honour its binding promise and went into insolvency the most appropriate solution would be equity's imposition of an express trust, clearly discernible on the facts: the intention, the action and the behaviour of the parties.

To create a valid binding trust, it must comply with the three certainties[128] (intention, subject matter and object) and it must be completely constituted[129]. On the facts of PECD, the intention of the parties is evident from the agreement, the object is the noteholders and the subject matter is RM 30 m to be raised from the rights issue. The fact that the subject matter was not in existence at the time of the agreement is not fatal. It can be construed as a trust for a future promise supported by valuable consideration. The consideration on the facts is the indulgence granted by the noteholders not to pursue the appellant's subsidiary and the promise is a binding agreement to raise the subject matter through a rights issue. Thus once the money is raised, it is impressed with a trust.[130] As for constitution of the trust it would fall within the second mode in *Milroy v Lord*[131], that is the appellant constituting itself as trustee for the noteholhers.

In fact the High Court judge intimated the presence of a trust when he said[132]:

[128] See Lord Langdale in *Knight v Knight* (1840) 49 ER 58: 'As a general rule, it has been laid down, that …

First, if the words are so used, that upon the whole, they ought to be construed as imperative;

Secondly, if the subject of the recommendation or wish be certain; and,

Thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain.'

[129] See Turner LJ in *Milroy v Lord* (1862) 45 E.R. 1185: 'in order to render a voluntary settlement valid and effectual, the settlor must have 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. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes…

[130] *Re Bowden* [1936] Ch 71

[131] Note 50

[132] [24]

In my view the RM30m proceeds received by the first applicant from the rights issue exercise were expressly for the purpose of paying the third intervener and are therefore monies held on trust by the first applicant in favour of the third intervener as the sole or exclusive beneficiary of the same.

It is humbly suggested that the learned judge was clouded by counsel's submission of a *Quistclose* trust and without delving into its relevance to the facts of the case, proceeded to adopting its reasoning as part of his judgment. This misapplication of the Quistclose doctrine found its way undisturbed to the Court of Appeal and the Supreme Court, culminating as the main ground of the eventual decision.

The imposition of an express trust would have avoided the unnecessary trap of artificially fitting the facts of the case to suit a primary trust of the *Quistclose* type which on the facts are totally unwarranted.

4. Conclusion

The Malaysian courts were misguided in arbitrarily imposing a *Quistclose* trust by unnecessarily extending its boundaries to fit atypical facts to the doctrine of the controversial primary trust in the *Quistclose* case. Although the result of the case was just and fair in favour of the respondents, this could have been easily achieved by the instrument of an express, constituted trust.