



# Mutual intention and *Quistclose* trusts

Jamie Glister\*

*It is said that **Quistclose**-type trusts depend on the mutual intention of the parties. This article argues that no such requirement exists and that there are good reasons for treating the intentions of the transferor and recipient individually. By separating the first question of whether a trust was created (or would have been created) from the second question of whether the recipient took subject to a trust, we can also explain why and when **Barnes v Addy** personal liability will be available after breach of a **Quistclose** trust.*

## Introduction

The essential facts of *Barclays Bank Ltd v Quistclose Investments Ltd* are well-known.<sup>1</sup> Rolls Razor Ltd borrowed £210,000 from Quistclose Investments Ltd for the purpose of paying a share dividend that Rolls Razor had declared but did not have funds to meet. The money was paid into a separate account at Barclays Bank. It was still there when, a month after the dividend should have been paid, Rolls Razor entered voluntary liquidation. Quistclose Investments sought to recover the advanced money, whereas Barclays Bank sought to combine Rolls Razor's accounts. Quistclose Investments succeeded because the House of Lords held that the loan funds in Rolls Razor's hands had been impressed with a trust. Moreover, Barclays Bank had notice of that trust.

Since the case was decided there have been two parallel debates: one about the fairness of the super-priority that the trust effectively gives to the transferor; the other about the true juridical nature of the trust itself. The first issue will not be addressed here, except to note that *Quistclose* trusts are excluded from the personal property securities regimes in Australia, Canada and New Zealand.<sup>2</sup> Instead, this article examines the second question. It compares the express and resulting trust models, seeks to explain what is meant by 'mutual intention', and considers the availability of *Barnes v Addy* claims against third parties.<sup>3</sup> It argues that the mutual intention requirement is unnecessarily confusing and suggests that it is more useful to approach the intentions of the transferor and recipient separately. Doing so shows that there

\* Senior Lecturer, Faculty of Law, The University of Sydney. Thanks to Elise Bant, Michael Bryan and Adam Kramer for helpful comments on earlier drafts. All errors remain my own.

1 *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567; [1968] 3 All ER 651; [1968] 3 WLR 1097 (HL); *Quistclose Investments Ltd v Rolls Razor Ltd (in liq)* [1968] Ch 540; [1968] 1 All ER 613; [1968] 2 WLR 478 (CA); *Quistclose Investments Ltd v Rolls Razor Ltd (in liq)* [1967] 1 Ch 910 (Ch D).

2 Interestingly, they have been excluded in different ways. In Australia they are expressly excluded under s 8(1)(h) of the Personal Property Securities Act 2009 (Cth), whereas in Canada and New Zealand they are excluded on the grounds that they arise by operation of law. In respect of the latter two, it is far more persuasive to omit *Quistclose* trusts on the grounds that no obligation is secured by the existence of the trust interest. They then fall outside the general definitions of security interest: see J Glister, 'The Role of Trusts in the PPSA' (2011) 34 *UNSWLJ* 626 at 638–41.

3 *Barnes v Addy* (1874) LR 9 Ch App 244; 43 LJ Ch 513; 30 LT 4; 22 WR 505.

is no difference between express and resulting trust models in commercial loan cases, but that a distinction may exist in cases that involve voluntary transfers (that is, transfers not made for value). It also demonstrates that *Barnes v Addy* liability will be available in commercial cases that involve *Quistclose* trusts.

### Notice and knowledge

In *Re Montagu's Settlement Trusts*,<sup>4</sup> the Duke of Manchester had notice through his solicitor that certain items inherited from his father were in fact trust property. Megarry V-C held that any identifiable remaining items, or their substitutes, would have to be given up. However, he refused to make the Duke liable to account for dissipated trust property that had been received with notice but without knowledge. The Vice-Chancellor commented that 'there is more to being made a trustee than merely taking property subject to an equity',<sup>5</sup> and so drew a sharp distinction between notice and knowledge. Personal liability for receipt of trust property is based on imagining ('construing') the recipient to be a trustee with a duty not to disburse the trust property. The remedy is equitable compensation for breach of that duty. According to Megarry V-C, only *knowledge* of an earlier interest would be sufficient to fix a recipient with such a duty.<sup>6</sup>

Recently, the Full Federal Court of Australia took the same view in *Grimaldi v Chameleon Mining NL (No 2)*.<sup>7</sup> Finn, Stone and Perram JJ disagreed with Megarry V-C only on the level of knowledge that would be required before the law would construe the recipient to be a trustee. Megarry V-C would only have imposed liability on recipients with knowledge at level (iii) or above on the *Baden* scale;<sup>8</sup> that is, wilfully and recklessly failing to make such enquiries as an honest and reasonable person would make.<sup>9</sup> The Full Court, on the other hand, would extend liability to those at level (iv); that is, recipients with knowledge of circumstances which would indicate the facts to an honest and reasonable person.<sup>10</sup>

On this view, notice plays a very small part in this area of the law. It is irrelevant to voluntary transfers because, regardless of notice, a volunteer recipient is always susceptible to being given knowledge of the prior interest. If that knowledge is given while the original property or its substitutes remain, then the recipient will be fixed with a duty not to disburse the property.<sup>11</sup> If knowledge is given too late, then any earlier notice will be irrelevant because

4 *Re Montagu's ST* [1987] Ch 264; [1992] 4 All ER 308; [1987] 2 WLR 1192.

5 *Ibid.*, at Ch 278.

6 For the current position in England see *Bank of Credit & Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437; [2000] 4 All ER 221; [2000] 3 WLR 1423, but note *Criterion Properties plc v Stratford UK Properties LLC* [2004] All ER (D) 162 (Jun); [2004] UKHL 28; [2004] 1 WLR 1846.

7 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621.

8 *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161; [1993] 1 WLR 509 at 575–6.

9 *Re Montagu's ST* [1987] Ch 264 at 285; [1992] 4 All ER 308; [1987] 2 WLR 1192.

10 *Grimaldi* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [267]–[270].

11 McFarlane has noted that, in Hohfeldian terms, there is a power to give knowledge and

notice itself does not impose any duties on the recipient. It follows that all notice does is deny a for-value recipient the immunity that would otherwise protect them from receiving later knowledge of a prior interest. But even then it would be the *knowledge* that fixed the for-value recipient with a duty not to disburse. After all, a buying recipient with notice can hardly be in a worse position than a voluntary recipient with notice. On this view, then, a purchaser with notice would indeed take property subject to equities. However, the purchaser would not be liable for disbursing that property unless and until he or she had knowledge.

Putting third party liability aside for a moment, and considering recipients who are actually intended by the transferor to take property as trustees, it is certainly true that on the rare occasions when the point is in question we examine the recipient's *knowledge*.<sup>12</sup> This seems to fit with knowledge as the basis of third party liability, where we construe the recipient receiving as trustee. However, there is another possible approach. In *Farah Constructions v Say-Dee*,<sup>13</sup> the High Court of Australia noted that in *Barnes v Addy* itself Lord Selborne LC had said 'receive and become chargeable'. The High Court noted that being 'chargeable' depended on notice, and then equated constructive notice with knowledge of circumstances which would put an honest and reasonable person on inquiry;<sup>14</sup> level (v) of the *Baden* scale of knowledge. It therefore seems that the High Court saw *notice* as the criterion that would subject the recipient to a duty not to disburse the received property, and to personal liability for breach of that duty.

In *Grimaldi*, the Full Federal Court interpreted these comments as applying only to the proprietary claim for the return of surviving trust property or substitutes, and not to the personal claim.<sup>15</sup> However, this is unlikely for several reasons. First, in *Barnes v Addy* Lord Selborne LC used the term 'chargeable' to mean 'personal liability to account'. Although this is not clear from the famous part of the judgment from where we get the 'two limbs', it is clear from later passages.<sup>16</sup> Second, an exchange between Gummow J and counsel for *Farah Constructions* during argument suggests that the High Court

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convert the trustee's liability into a duty: B McFarlane, 'Trusts and Knowledge: Lessons from Australia' in J Glistler and P Ridge (Eds), *Fault Lines in Equity*, Hart Publishing, Oxford, 2012, pp 169, 179.

12 Eg, *Doe d Chidgey v Harris* (1847) 16 M&W 517 at 520; 153 ER 1294 at 1296; D Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 18th ed, LexisNexis, London, 2010, Art 34.

13 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851.

14 *Ibid*, at [112]. See also at [115], [121], [129].

15 *Grimaldi* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [268]. See also *Horsman v MG Kailis Pty Ltd* [2009] WASC 166; BC200905082 at [112]; *Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3)* [2012] WASCA 157; BC201206001 at [2127]–[2130]; J Dietrich and P Ridge, "'The Receipt of What?': Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment' (2007) 31 *MULR* 47 at 60.

16 *Barnes v Addy* (1874) LR 9 Ch App 244 at 254–5; 43 LJ Ch 513; 30 LT 4; 22 WR 505: 'With respect to the receipt of the money, [Mr Duffield] received nothing except two sums . . . and it is said he is to be charged with that (though he did not retain or use for his own benefit a single shilling of that money)'.

did not intend the comments to be directed towards the proprietary claim.<sup>17</sup> There Gummow J referred to ‘being chargeable’ as connoting liability to render an account. Third, in the judgment itself (which was a joint judgment), ‘notice’ appears when it is plain that personal liability to account is being discussed.<sup>18</sup> Fourth, if the model outlined above is correct and notice alone does not prevent the recipient dissipating the property, or being liable for its dissipation, then it is difficult to see why beneficiaries of misdirected trust property should even compete with creditors of a bankrupt who received that misdirected property with notice alone. Much less should the beneficiaries have priority over those creditors.<sup>19</sup>

For these reasons the correct interpretation of the High Court’s judgment may be that *becoming chargeable* depends on notice, and that *being chargeable* means the recipient owes a duty to account in respect of the property. In other words, being chargeable is not only relevant to a priority dispute,<sup>20</sup> but it also involves the recipient becoming a notional bare trustee with the passive duty not to disburse trust property. Construing the recipient as a bare trustee is exactly what the personal claim is based upon,<sup>21</sup> so it is at least arguable that the personal claim was not ignored and that the High Court said it depended on notice.

That all said, the difference between notice and knowledge may not be so great. Bryan has recently argued that, outside the conveyancing context where notice has a discrete meaning, the distinction between notice and knowledge is often unnecessary.<sup>22</sup> Outside conveyancing, he argues, constructive notice is present when someone actually knows facts that require the person to enquire about the possibility of an adverse interest. Understood like this, the concepts of notice and knowledge cover much of the same ground, and there may be no

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17 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2006] HCATrans 682.

18 *Farah Constructions* (2007) 230 CLR 89; 236 ALR 209; [2007] HCA 22; BC200703851 at [121].

19 See n 86 below.

20 And even then, see the discussion in the text surrounding n 11 above.

21 It is puzzling that an account of profits is apparently available against a knowing recipient: see *Grimaldi* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6; BC201200621 at [253], and the sources cited. Such liability implies that the trustee has, or is imagined to have, a duty not to make an unauthorised profit. But bare trustees do not owe such a duty (cf M Conaglen, *Fiduciary Loyalty*, Hart Publishing, Oxford, 2010, p 200–1). Of course, if the trust property itself was used to make the profit then it would be a different matter but then the ‘profit’ would be part of the proprietary claim. At the very least, liability to account for unauthorised profits should be restricted to knowing recipients with very high levels of knowledge, and even then the point would be better dealt with under other heads of liability such as trusteeship *de son tort* or actual participation in the underlying breach. In his famous essay, Lord Nicholls thought that an account of profits was currently available against all knowing recipients but that it ought only to be available against dishonest ones: D Nicholls, ‘Knowing Receipt: The Need for a New Landmark’ in W Cornish et al (Eds), *Restitution Past, Present and Future*, Hart Publishing, Oxford, 1998, pp 231, 233, 237, 243–4. Perhaps this is another area where we see a tension in knowing receipt between the twin rationales of property protection and redress for wrongdoing: see Dietrich and Ridge, above n 15, at 58ff.

22 M Bryan, ‘Notice and knowledge in private law claims’ (2009) 3 *J Eq* 204; cf T Boyle, ‘Never “Say-Dee”: The ongoing relevance of the “first limb” of *Barnes v Addy* in modern Australian law’ (2011) 5 *J Eq* 123.

need to resort to the *Baden* scale of knowledge at all.<sup>23</sup> In both cases the defendant actually knows of relevant facts, and the law decides that such knowledge requires him or her to make further enquiries about the true situation.

This is relevant because I argue that the mutual intention aspect of *Quistclose* is better seen as two linked but discrete questions. First, we should look to the transferor. Did he or she declare a trust, manifest a qualified intention to transfer, or something else? Having established the position when the property leaves the transferor, we then look to how the property is received by the recipient. It is at this second point that questions of notice and knowledge become important. Despite the reservations outlined above, in the rest of the article I will assume that only knowledge of an inconsistent interest will be sufficient to bind the recipient. However, the points made would still apply, and in a more straightforward fashion, if the relevant criterion was found to be notice.

### Hierarchy of interests

With this discussion in mind, it is useful to identify three levels of trust interest. The first arises when property is transferred on trust, or subject to existing trusts, to a volunteer recipient without knowledge of those other interests or to a for-value recipient with notice but without knowledge of them.<sup>24</sup> In such cases there is a kind of trust from the point of transfer, but it is an odd trust because the trustee owes no duties at all to the beneficiary. Indeed, the trust really only exists in the context of priority disputes. That is, if A holds property on trust for B, and A conveys that property to innocent volunteer C, and C declares a trust over the property for D, then B's interest will *prima facie* outrank D's.<sup>25</sup> But C will not owe any trust duties to B, and if C dissipates the property before she acquires knowledge of B's interest then there will be no liability in equity.<sup>26</sup>

The second level of interest arises when recipients take property with knowledge of another's interest. That interest may be one that already existed when the property was in A's hands, as in the example given above, or it may be an interest that was only created when the property was conveyed from A to C, as in the case of a resulting trust. Perhaps it may also be an interest that was only created when C became aware of the circumstances giving rise to it.<sup>27</sup> Either way, the key is knowledge. When C takes with knowledge of another interest, or when C later acquires knowledge when the relevant

23 See Bryan's discussion of why courts may have been reluctant to embrace notice as the governing concept, *ibid*, at 212–15.

24 As explained in the previous section, it is assumed that notice is irrelevant for volunteers (to whom knowledge may always be given), and that notice merely operates to make purchasing recipients susceptible to being given knowledge later on.

25 Similarly, if the innocent C later transfers to E, who knows of B's rights, E will hold on a level two trust for B. But if C had not initially held on a level one trust for B, E would receive a full title. Thanks to Adam Kramer for this point.

26 See *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] 3 All ER 310; [2012] EWCA Civ 195 at [84].

27 See *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429; 25 ACLC 809; [2007] NSWSC 589; BC200704438 at [37]; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 715; [1996] NLJR 877; [1996] 2 All ER 961; [1996] 2 WLR 802. In *Wambo* a

property is still identifiable,<sup>28</sup> then C becomes subject to the duty not to disburse the property. From that point C will be personally liable if she breaches that duty. But C is not subject to trust duties to invest or act fairly between beneficiaries, nor to the fiduciary duty not make an unauthorised profit, etc. Instead this is genuinely a bare trust,<sup>29</sup> and C's only positive duty is to convey the property on receipt of a *Saunders v Vautier* direction.<sup>30</sup>

The third level of interest is seen when a trustee is subjected to those extended duties. This normally happens when an express trust is created. Knowledge is the important criterion here because these much more onerous duties can only be imposed on someone who has consciously accepted the office,<sup>31</sup> albeit that acceptance can be inferred from conduct.<sup>32</sup> However, while it is true that the identification of this kind of actual knowledge is normally the relevant question in respect of express trusts, it is important to note that there is also a role for the lesser degrees of awareness. That is, an intended express trustee may be aware of another interest but not know that he or she is intended to be an express trustee. In that case it would be appropriate to apply the duty not to disburse the property (level two), but it would not be appropriate to apply the extended duties until the trustee knew about and accepted the office.<sup>33</sup> Similarly, if more controversially,<sup>34</sup> while resulting and constructive trustees will normally be subject to at most the level two duty not

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mistaken payment was held on trust from the moment the recipient knew about the mistake: see at [43], [72]. In fact it is submitted that a trust of the first level may exist on transfer, even before trustee awareness. This could be tested by considering *Wambo* on the hypothetical facts that the recipient declared a voluntary trust over the mistaken payment before it knew of the mistake. And see Matthews' explanation of *Westdeutsche*, where he notes that Lord Browne-Wilkinson's comments on trustee conscience have to be read in the context of compound interest, ie, the duty to invest: P Matthews, 'All about bare trusts' [2005] *Private Client Business* 266 & 271.

28 See C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in C Mitchell (Ed), *Constructive and Resulting Trusts*, Hart Publishing, Oxford, 2010, pp 115, 117–20.

29 See *Herdegen v FCT* (1988) 84 ALR 271 at 281–2; 88 ATC 4995; 20 ATR 24 per Gummow J, citing D W M Waters, *Law of Trusts in Canada*, 2nd ed, Carswell, Toronto, 1984, p 27 and putting it as a passive 'duty to guard' the property. Also see Matthews, above n 27; R Nolan, 'Equitable Property' (2006) 122 *LQR* 232; B McFarlane, 'The Centrality of Constructive and Resulting Trusts' in Mitchell, above n 28, pp 183, 197. Cf Mitchell and Watterson, *ibid*, p 132, arguing that a knowing recipient's retention of property is illegitimate and so, unlike an express bare trustee, the core duty is to restore the property immediately rather than on demand. The latter view was apparently taken in *Arthur v Attorney General of the Turks and Caicos Islands* [2012] UKPC 30 at [37] but the point was not argued and, with respect, the paragraph is ambiguous.

30 *Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282.

31 *Townson v Tickell* (1819) 3 B & Ald 31; 106 ER 575.

32 *Re Sharman's WT* [1942] Ch 311.

33 Moreover, we can note that trustee acceptance is necessary for the imposition of duties but is not a prerequisite for the validity of the trust itself: see A Scott, W Fratcher and M Ascher, *Scott and Ascher on Trusts*, 5th edn, Aspen Publishers, Boston, 2006 at [5.5], discussing *Mallott v Wilson* [1903] 2 Ch 494 and the effect of a disclaimer by the intended trustee. The authors conclude: 'Acceptance by the trustee is necessary to subject the trustee to duties to the beneficiaries and to liabilities to third persons as the owner of the trust property, but it is not a condition precedent to the creation of the trust. A disclaimer by the trustee relieves the trustee from such duties and liabilities but does not terminate the beneficiaries' interests in the trust property.'

34 See W Swadling, 'The Fiction of the Constructive Trust' (2011) 64 *Current Legal Problems* 399.

to disburse, there may be occasions when it is appropriate to fix them with some extended duties.<sup>35</sup>

Importantly, in the *Quistclose* context there is little difference between levels two and three. This is because, whatever type of trust it is, there will be no foundation for the extended duties. The borrower, if he takes on trust, will have no trust duties other than to guard the property. He will have a power to apply the funds in the agreed way, and he may even be contractually obliged to do so; but this is a power not a trust duty. If it was a trust duty then the beneficial interest would not be in the lender.

### ***Quistclose* in England and Australia**

It has become a truism to say that there is no such thing as a *Quistclose* trust, in the sense that there is nothing special about those devices.<sup>36</sup> In England the prevailing judicial view is that they are ‘orthodox’ resulting trusts. In *Twinsectra v Yardley*, Lord Millett said:

I would reject all the alternative analyses, which I find unconvincing for the reasons I have endeavoured to explain, and 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 insofar as he does not it is held on a resulting trust for the lender from the outset. . . . 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.<sup>37</sup>

It is worth highlighting the use of the word ‘default’. Lord Millett agrees with the ‘absence of intention’ theory of resulting trusts advocated by Birks and Chambers,<sup>38</sup> and he adopted that view in *Twinsectra v Yardley*.<sup>39</sup> For Lord Millett, the *Quistclose* trust, like all resulting trusts, is a default trust that responds to the absence of an intention on the part of the transferor to pass the entire beneficial interest, not to a positive intention on his part to retain it. In fact this model is controversial, as I will discuss below. But nonetheless, Lord

35 P Millett, ‘Restitution and Constructive Trusts’ (1998) 114 *LQR* 399 at 405. The article is also published in W Cornish et al (Eds), *Restitution Past, Present and Future*, Hart Publishing, Oxford, 1998, p 199. References below are to the *LQR* publication. Also see the discussion above n 21.

36 See, eg, *Twinsectra Ltd v Yardley* [2002] 2 AC 164; [2002] 2 All ER 377; [2002] All ER (D) 321 (Mar); [2002] UKHL 12 at [99]; *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491; 102 ALR 681; 5 ACSR 587 at [37]–[38]; P Young, C Croft and M Smith, *On Equity*, LawBook Co, Sydney, 2009 at [6.1020].

37 *Twinsectra v Yardley* [2002] 2 AC 164; [2002] 2 All ER 377; [2002] All ER (D) 321 (Mar); [2002] UKHL 12 at [100].

38 P Birks, ‘Restitution and Resulting Trusts’ in S Goldstein (Ed), *Equity and Contemporary Legal Developments*, Hamaccabi Press, Jerusalem, 1992; R Chambers, *Resulting Trusts*, Clarendon Press, Oxford, 1997.

39 *Twinsectra v Yardley* [2002] 2 AC 164; [2002] 2 All ER 377; [2002] All ER (D) 321 (Mar); [2002] UKHL 12 at [92]. And elsewhere: Millett, above n 35, at 401, 413; P Millett, ‘The *Quistclose* trust — a reply’ (2011) 17 *Trusts & Trustees* 7.

Millett's analysis of *Quistclose* has been applied in England many times since.<sup>40</sup>

In contrast to the English position, Australian courts generally see *Quistclose* trusts as an example of an informally-expressed, express trust.<sup>41</sup> The difference between the English and Australian models has been thought to be one of terminology rather than substance,<sup>42</sup> and it is certainly true that the label rarely affects anything. The important question is normally whether or not there is a trust, not whether there is an express, resulting or constructive trust. So it is that Handley JA preferred a resulting trust model in *Salvo v New Tel Ltd*,<sup>43</sup> and McKechnie J thought *Quistclose* trusts were constructive in *Smith v Western Australia*.<sup>44</sup> In *McManus Re Pty Ltd v Ward*,<sup>45</sup> Palmer J suggested that a resulting trust could arise when the parties gave no thought to the matter and there was no express or implicit declaration of trust. The authors of *Jacobs* also apparently accept that the two models may coexist. After commenting that the difference between the English and Australian approaches may be explained by a greater readiness in Australia to discern an intention to create a trust,<sup>46</sup> the authors approve an article by Turner where he suggests that a resulting trust may be available in cases where the transferor expressed no intention in respect of beneficial ownership, and an express trust may be available in cases where the transferor positively intended to retain it.<sup>47</sup>

That said, there are occasions when the difference might matter. One relates to the question of enforcement while the purpose is still on foot. Objects of a power of appointment under the current English model may have weaker rights than beneficiaries of the first limb of an Australian express trust. Another involves *Barnes v Addy* liability. Third party liability is available in respect of breaches of express trusts but there is doubt over its application to resulting and constructive trusts. A third difference concerns the intentions of the recipient/trustee. As will be seen in the next section, it is said that the

40 See, eg, *Cooper v PRG Powerhouse Ltd* [2008] All ER (D) 211 (Mar); [2008] BPIR 492; [2008] 2 All ER (Comm) 964; [2008] 2 P & CR D9 at [14]–[18]; *Soutzos v Asombang* [2010] EWHC 842 (Ch) at [142]–[143]; *Pearson v Lehman Brothers Finance SA* [2010] EWHC 2914 (Ch) at [377]–[378]; *Bieber v Teathers Ltd* [2012] EWHC 190 (Ch) at [15]–[25].

41 See, eg, *Compass Resources Ltd v Sherman* (2010) 42 WAR 1; [2010] WASC 41; BC201001100 at [68]–[78]; *George v Webb* [2011] NSWSC 1608; BC201110449 at [210]; *Raulfs v Fishy Bite* [2012] NSWCA 135; BC201203076 at [44]–[52].

42 D Heydon and M Leeming, *Jacobs' Law of Trusts in Australia*, 7th ed, LexisNexis, Chatswood, 2006, at [215].

43 *Salvo v New Tel Ltd* [2005] NSWCA 281; BC200506365 at [76]–[78]. Handley JA emphasised that nothing in the case turned on the point.

44 *Smith v Western Australia* [2009] WASC 189; BC200905741 at [78]. McKechnie J found that an express trust did not exist and then dealt with a *Quistclose* trust in the alternative.

45 *McManus Re Pty Ltd v Ward* (2009) 74 NSWLR 662; 2 ASTLR 276; [2009] NSWSC 440; BC200904732 at [25]. No trust was found on the facts.

46 Heydon and Leeming, above n 42, at [215]. For a critical view on the inferring of such intention, see W Swadling, 'Orthodoxy' in W Swadling (Ed), *The Quistclose Trust: Critical Essays*, Hart Publishing, Oxford, 2004, pp 9, 13–15.

47 P Turner, 'Quistclose and Resulting Trusts' (2005) 33 *ABLR* 392. See also J McGhee (Ed), *Snell's Equity*, 32nd ed, Sweet & Maxwell, London, 2010, at [25-036]; R Chambers, 'Restrictions on the Use of Money' in Swadling, above n 46, pp 77, 82–6; J Glistler, 'The Nature of Quistclose Trusts: Classification and Reconciliation' (2004) 63 *CLJ* 632.

*mutual* intentions of the transferor and recipient are relevant to *Quistclose* scenarios. Yet this appears to sit equally uncomfortably with a characterisation of the trust as either express, where attention is normally focused on the settlor rather than the trustee, or as resulting, where the trust is said to respond solely to an absence of intention on the part of the settlor.

## Express trusts

Express trusts generally respond to the manifested intention of the settlor.<sup>48</sup> However, it has also been said that sometimes the intentions of both parties will be important in respect of the creation of a trust. In *Re Australian Elizabethan Theatre Trust*, Gummow J said:

The question as to the existence of any express trust will always have to be answered by reference to intention. . . . Ordinarily, the relevant intention is that of the alleged settlor, but where the subject matter of the trust is contractual rights against the settlor, conferred by the settlor upon the alleged trustee, the objective (or ‘purpose’) of the transaction being to benefit third parties, it may be appropriate to look to the mutual intention of settlor and trustee. This is consistent with the approach by Deane J to a similar question in *Trident General Insurance Co Limited v McNiece Bros Proprietary Limited* [1988] HCA 44; (1988) 165 CLR 107 at 149, but cf Mason CJ, Wilson J at 121. At all events, and as I have said, in *Quistclose*, supra at 580, Lord Wilberforce looked to ‘the mutual intention’ of Quistclose and Rolls Razor and to ‘the essence’ of their bargain.<sup>49</sup>

The origin of this mutual intention requirement is not easy to pin down. In *Quistclose* itself, the relevant reference was made in these terms:

The mutual intention of [Quistclose Investments] and of Rolls Razor Ltd, and the essence of the bargain, was that the sum advanced should not become part of the assets of Rolls Razor Ltd, but should be used exclusively for payment of a particular class of its creditors, namely, those entitled to the dividend. A necessary consequence from this, by process simply of interpretation, must be that if, for any reason, the dividend could not be paid, the money was to be returned to [Quistclose Investments]; the word ‘only’ or ‘exclusively’ can have no other meaning or effect.<sup>50</sup>

The notions of mutual intention and essence of bargain have become

48 *Byrnes v Kendle* (2011) 243 CLR 253; 279 ALR 212; [2011] HCA 26; BC201105711; *Twinspectra v Yardley* [2002] 2 AC 164; [2002] 2 All ER 377; [2002] All ER (D) 321 (Mar); [2002] UKHL 12 at [17] per Lord Hoffmann, [71] per Lord Millett.

49 *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491; 102 ALR 681; 5 ACSR 587 at [34]. See also *Salvo v New Tel* [2005] NSWCA 281; BC200506365 at [33] per Spigelman CJ: ‘There are cases in which it is pertinent to consider the mutual intention of the parties to a transaction.’ Cf the doubt expressed in *Marriner v Australian Super Developments Pty Ltd* [2012] VSCA 171; BC201205739 at [66]. Also see *Raulfs v Fishy Bite* [2012] NSWCA 135; BC201203076 at [48] where Campbell JA commented that, following *Byrnes v Kendle*, ‘the task of ascertaining whether there is an intention to create a trust and, if so, on what terms is a similar one to ascertaining the intention of parties to a contract for the purpose of deciding whether there is an intention to enter contractual relations and the terms of any contract that has been entered’.

50 *Quistclose* [1970] AC 567 at 580; [1968] 3 All ER 651; [1968] 3 WLR 1097 (HL).

mantras in the English law.<sup>51</sup> However, it should be remembered that Lord Wilberforce's original remarks were made in the context of one man, John Bloom, being both the chairman of Rolls Razor and the owner of Quistclose Investments.<sup>52</sup> All the relevant actors knew that the money was to be paid into a separate account and was only to be used for paying the declared dividend. In that respect it was clear that everyone's intentions were the same.<sup>53</sup> Moreover, the earlier cases applied by Lord Wilberforce do not mention an essence of bargain requirement at all, and the only references to mutual intention are really just passing comments on contractual conditions as the basis of a specific purpose.<sup>54</sup> But the presence of a specific purpose, together with the segregation of funds, is just evidence that the court can use to infer a declaration of trust.<sup>55</sup> The fact that a trustee can or does concur in a declaration of trust does not mean that such concurrence is necessary for the declaration of trust.

In *Re Australian Elizabethan Theatre Trust*, Gummow J referred to *Trident General Insurance v McNiece*.<sup>56</sup> There Deane J had said, in the context of trusts of insurance contracts, that it may be misleading to say that the insurance promisor is a stranger to the creation of the trust. Rather, it may be 'that the intention to create a trust which the contract manifests and carries into effect is a joint intention of both promisor and promisee who might both be regarded as settlors'.<sup>57</sup> Be that as it may, it is a long way from saying that a *Quistclose* borrower must concur in the intention to create a trust. Nothing in Deane J's judgment prevents a promisee from declaring a trust of the benefit of a contract *without* a concurrent intention from the promisor. Indeed, Deane J also thought that the promisee could create a trust unilaterally, as long as that intention appeared 'clearly'. His Honour then said that intention to

51 For a recent example see *Bieber v Teathers* [2012] EWHC 190 (Ch) at [18]; applied in *Brown v InnovatorOne Plc* [2009] All ER (D) 211 (Jun); [2010] 2 All ER (Comm) 80; [2009] EWHC 1376 (Comm) at [947].

52 See *Quistclose* [1967] 1 Ch 910 (Ch D) at 915; *Quistclose* [1968] Ch 540 at 549; [1968] 1 All ER 613; [1968] 2 WLR 478 (CA). Also see R Stevens, 'Rolls Razor Ltd' in Swadling, above n 46, pp 1, 5.

53 If Bloom could somehow put up the dividend money then further financing for Rolls Razor might have been forthcoming from Sir Isaac Wolfson. In fact there was disagreement between Quistclose and Rolls Razor, or at least confusion, over whether the Quistclose money could *only* be used *if* the extra Wolfson funding was agreed: see *Quistclose* [1968] Ch 540 at 550–1; [1968] 1 All ER 613; [1968] 2 WLR 478 (CA). It is interesting that this was not developed, because it may have informed the notoriously difficult point about when exactly the purpose failed.

54 See *Toovey v Milne* (1819) 2 B & A 683 at 684; 106 ER 514 at 515 ('implied stipulation'); *Edwards v Glyn* (1859) 2 El & El 29 at 48–9; 121 ER 12 at 19–20 ('joint understanding', but then Erle J gave an example that referred only to the lender); *Re Rogers; ex parte Holland & Hannen* (1891) 8 Morr 243 at 248 ('terms and conditions'). The other two cases, *Re Drucker (No 1)* [1902] 2 KB 55, aff'd [1902] 2 KB 237 and *Re Hooley* (1915) 84 LJKB 1415, are both completely neutral on the point.

55 Or, in the context of a resulting trust analysis, to establish a suitable qualification on the transferor's intention to benefit the recipient: see *Twinsectra v Yardley* [2002] 2 AC 164; [2002] 2 All ER 377; [2002] All ER (D) 321 (Mar); [2002] UKHL 12 at [74].

56 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107; 80 ALR 574; 62 ALJR 508; BC8802625.

57 *Ibid.*, at CLR 148.

create a trust would be found a fortiori if it was the joint intention of promisor and promisee.<sup>58</sup>

In *Re Goldcorp*, Lord Mustill said, in the context of a sale of goods, that a purchaser could be constituted a beneficiary of the purchase moneys in two ways: if there was a mutual intention (citing *Quistclose*), or if the vendors later constituted themselves trustees unilaterally (citing *Re Kayford*).<sup>59</sup> But this again is not an exhaustive statement. In a famous comment in *Re Kayford*, Megarry J said that purchasers could create a trust unilaterally too: ‘The sender may create a trust by using appropriate words when he sends the money (though I wonder how many do this, even if they are equity lawyers)’.<sup>60</sup>

If the references to mutual intention are taken strictly, they raise an interesting question about who actually declares the trust. A declaration of trust made solely by the borrower may be considered a voidable preference.<sup>61</sup> As long as the lender is involved somehow then the preference question will not arise, and a reference to mutual intentions suggests that the lender does still play a part. So the question is probably academic. But it is still analytically difficult to see what interest the borrower is declaring a trust over, if the lender has already declared a trust before the property has got into the borrower’s hands.

### Discrete intentions

The most straightforward approach is to see the transferor as the putative settlor, but to recognise that the intentions of the recipient will be important at two different stages of the analysis. First, did the transferor declare a trust? While the intentions of the recipient are obviously relevant evidence here, that does not mean they are legally significant in their own right. Second, if the transferor did declare a trust, did the recipient receive on trust? What duties, if any, does the recipient owe? At this second stage the recipient’s intentions are vital.

In *George v Webb*, a case involving a voluntary transfer, Ward J said the voluntary nature of the transfer meant that only the intention of the transferor was relevant.<sup>62</sup> It is respectfully suggested that this is correct on the point of whether a level one interest has been created. Whether or not a recipient knows about a declaration is certainly relevant to which, if any, duties are imposed on that recipient. But a voluntary recipient’s state of mind is not relevant to the question of whether or not a trust exists at all.<sup>63</sup> This is shown simply by noting that a transferor’s equitable interest would take priority if the voluntary recipient, unaware of the trust, declared a further trust for a third party over the same property.

58 *Ibid*, at CLR 147.

59 *Re Goldcorp Exchange Ltd (in rec)* [1995] 1 AC 74 at 100; [1994] 2 All ER 806; [1994] 3 NZLR 385; [1994] 3 WLR 199.

60 *Re Kayford Ltd (in liq)* [1975] 1 All ER 604; [1975] 1 WLR 279 at 282.

61 See R Stevens, ‘Insolvency’ in Swadling, above n 46, pp 151, 159, on the declaration point and generally on *Quistclose* trusts and preferences.

62 *George v Webb* [2011] NSWSC 1608; BC201110449 at [210].

63 In fact the defendant in *George v Webb* was a solicitor and the transfer was made to the client account, so even though the case concerned a voluntary transfer there was no doubt that the recipient took on trust.

For-value transfers are more difficult, but it still helps to distinguish between what the lender *did* and what the borrower *knew*. The first question is whether or not the lender declared a trust, and from the lender's point of view it would be ideal if the contract simply included the word 'trust'. If not, then agreed provisions regarding a specific purpose and segregation of the advanced funds are useful evidence from which to infer a declaration. But, assuming a trust was declared, the second question is whether or not the borrower took subject to that trust; that is, whether the borrower was aware of the declaration. This is relevant because the borrower will have provided value.

In *General Communications v Development Finance Corp of New Zealand*, Hardie Boys J said in the *Quistclose* context that 'what one party is objectively seen to have intended must *ex hypothesi* have been appreciated by the other and accepted by him'.<sup>64</sup> Of course, if that is true there is no room to treat the minds of the lender and borrower separately. Any trust declared in the contract must have been known to the recipient. However, while the statement is undoubtedly applicable to cases with contracts contained in documents, it is harder to apply outside those examples. Discerning a declaration of trust in many *Quistclose* cases is already a rather nice exercise, if not indeed an artificial one. In the paradigm case the lender promises to transfer money to the borrower in return for repayment with interest. Yet we know that simply promising to transfer a sum of money does not of itself prevent the imposition of a trust over that money because otherwise very few *Quistclose* trusts would ever be found. That is, by promising to lend money you do not automatically promise to transfer full legal title to it. It is true that the trust is normally found by interpreting other parts of the same agreement that refer to segregation and specific purpose. However, some further points can be made.

First, in a case without relevant documents it may be a particularly artificial exercise to take a lender's desire for segregation and elevate that to a contractual term. And in such cases, given the commercial context, even if that is done there may be a legitimate distinction between what the borrower has agreed to as a matter of contract law and what they are aware of or even have notice of as a matter of trust law.<sup>65</sup> The borrower could then breach a contract but still take free of a declared trust.

Second, some cases suggest that courts are prepared to look to collateral arrangements outside the relevant contracts. In other words, it may be possible for a lender to declare a trust outside the contract.<sup>66</sup> The authority is certainly

64 *General Communications Ltd v Development Finance Corp of New Zealand Ltd* [1990] 3 NZLR 406 at 433 (Hardie Boys J delivering the judgment of the NZ Court of Appeal).

65 Cf K Barker, 'After Change of Position: Good Faith Exchange in the Modern Law of Restitution' in P Birks (Ed), *Laundering and Tracing*, Clarendon Press, Oxford, 1995, p 191, noting that the objective principle of contractual interpretation usually protects the purchaser from 'hidden' interests. See also the discussion in E Bant, *The Change of Position Defence*, Hart Publishing, Oxford, 2009, pp 241–3.

66 It is worth stating what this does *not* mean. While it is clear that circumstances surrounding a contract can be relevant to the task of construing that contract (see in this context *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491; 102 ALR 681; 5 ACSR 587; *Walker v Corboy* (1990) 19 NSWLR 382), these can only be shared circumstances between the lender and the borrower, and the purpose is still to construe the contract itself, not to construe the circumstances surrounding it. In *Byrnes v Kendle* (2011) 243 CLR 253; 279

not strong and many cases are, of course, content to look only to the contract.<sup>67</sup> However, others provide that a court may consider ‘the existence of discrete evidence pointing to the existence of a mutual intention of the parties to create a trust’.<sup>68</sup> In *Challenge Foundation of New South Wales Ltd v Windgap Foundation Ltd*,<sup>69</sup> a company transferred assets away and later sought to argue that the transfer had been conditional on the company’s eventual winding-up. In analysing the transfer, Bryson J could be read as prepared to consider subjective evidence in a way now impermissible after *Byrnes v Kendle*, or as prepared to consider a ‘collateral arrangement’ outside the relevant document.<sup>70</sup> In *Newington v Beneficial Finance Corp Ltd*, Lehane J referred to the terms of the contract, found that they did not create a trust, and concluded that ‘nor is any basis evident for finding, or imposing, a trust on any other basis’.<sup>71</sup>

In conclusion, it is argued that the bona fide purchase doctrine means that it is possible for the lender to declare a trust outside the contract,<sup>72</sup> or even within it, but for the borrower to have no notice of that declaration and so not be bound as a matter of trusts law. This would be a rare example of the doctrine applying in a two-party case and operating to prevent an equitable interest from arising (rather than extinguishing an existing one). In my view this possibility means it is helpful to treat the intentions of the transferor and recipient separately. Even if I am wrong about trusts being validly declared but not then binding for-value recipients, I have tried to show that treating the intentions discretely is still consistent with the general law on when voluntary recipients are subjected to trust duties. Moreover, the next section shows that treating the intentions separately also clarifies the role of the borrower’s intention in respect of resulting trusts.

## Resulting trusts

Trusts are commonly classified as express, resulting or constructive. Sometimes the labels presumed, implied and inferred are used too. There are many occasions when classification becomes difficult, with perhaps the most

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ALR 212; [2011] HCA 26; BC201105711 at [105], Heydon and Crennan JJ concluded that ‘in relation to trusts, as in relation to contracts, the search for ‘intention’ is only a search for the intention as revealed in the words the parties used, amplified by facts known to both parties’. In short, the fact that courts can consider surrounding evidence is not authority for the proposition I make.

67 Eg, *Re Global Finance Group Pty Ltd* (2002) 26 WAR 385; [2002] WASC 63; BC200201518 at [167]–[168]; *Legal Services Commissioner v Brereton* [2011] VSCA 241; BC201106248 at [102].

68 *Ying v Song* [2010] NSWSC 1500; BC201010034 at [256], Ward J approving a list of factors considered by O’Loughlin J in *Peter Cox Investments Pty Ltd (in liq) v International Air Transport Assoc* (1999) 161 ALR 105; [1999] FCA 27; BC9900067 at [49]. See also *George v Webb* [2011] NSWSC 1608; BC201110449 at [213], where Ward J approved the same list in a case decided after *Byrnes v Kendle*.

69 *Challenge Foundation of New South Wales Ltd v Windgap Foundation Ltd* [2002] NSWSC 1292; BC200202358.

70 *Ibid*, at [173]–[174].

71 *Newington v Beneficial Finance Corp Ltd* [1997] FCA 24; BC9701732.

72 Despite the declaration being ‘outside’ the contract, I acknowledge that it must still be possible to see the recipient as providing relevant value.

obvious example being declarations of trusts of land made without written evidence. Importantly for the *Quistclose* discussion, we must examine the use of the word ‘resulting’.

No-one would deny that A can transfer property to B on declared trust for A. Nowadays we would call that an express trust, since A is entitled as the intended beneficiary rather than as the settlor in default. But it would be historically accurate to call it a resulting trust too, because classically all the word ‘resulting’ did was identify the beneficiary. Putting the two together, it would also be correct to call the device an express resulting trust. Indeed, Lord Millett referred to an express resulting trust in *Latimer v IRC*.<sup>73</sup> As Turner has noted, while this might all be rather confusing, it is internally consistent.<sup>74</sup>

But the problem comes when A transfers legal title to B without an accompanying intention to pass beneficial title. According to Lord Millett, a trust for A is created. Lord Millett calls this a resulting trust, which itself is unproblematic, but crucially he also says it is *not* a constructive trust.<sup>75</sup> As such a trust is clearly not an express trust, Lord Millett evidently sees this type of resulting trust as something that is neither express nor constructive. In a 1996 lecture, later published as a very influential article, Lord Millett adopted Chambers’ words:

Whatever its origins, the resulting trust has evolved into a response to non-voluntary transfer<sup>76</sup> and arises when that event occurs, regardless of the resulting trustee’s notice of that event. The personal liability of the innocent trustee is a separate issue, but one which cannot be resolved by denying the existence of the trust.<sup>77</sup>

So the resulting trust arises whenever A does not form an intention to pass full beneficial title to B. That absence of intention must be manifested in the sense that the donor must establish a qualification that affects the transfer of an apparently full legal title.<sup>78</sup> But, while the qualification needs to be proved,<sup>79</sup> it does not need to be communicated to the recipient in order for a level one interest to arise. That trust arises automatically irrespective of B’s notice or knowledge, and for this reason it is not automatically accompanied by a duty to guard the property, much less extended trust duties.<sup>80</sup>

This model was applied in *Twinsectra v Yardley*, but in Australia it can be

73 *Re Crown Forestry Rental Trust; Latimer v Commissioner of Inland Revenue* [2004] All ER (D) 419 (Feb); [2004] UKPC 13; [2004] 4 All ER 558; [2004] 3 NZLR 157. There is evidence suggesting Lord Nottingham thought that trusts of land arising on rebuttal of a presumption of advancement would require written evidence under the Statute of Frauds 1677 (Imp), and yet he still called them resulting trusts: see the report of *Elliot v Elliot* (1677) in D E C Yale (Ed), *Lord Nottingham’s Chancery Cases Vol II*, Selden Society, London, 1961, case 751. Perhaps this would be the archetypal express resulting trust.

74 Turner, above n 47, at 393.

75 Lord Millett did not make this point in *Twinsectra v Yardley*, where the word ‘constructive’ is not mentioned in the *Quistclose* discussion, but in his extrajudicial writing: see references in nn 35 and 39.

76 ‘Non-voluntary transfer’ here means ‘transfer without intention to benefit’.

77 Chambers, above n 38, p 209, quoted in Millett, above n 35, at 413. Also see R Chambers, ‘Restitution, Trusts and Compound Interest’ (1995–6) 20 *MULR* 1192 at 1195.

78 See P Birks, *An Introduction to the Law of Restitution*, rev ed, Clarendon Press, Oxford, 1989, pp 220–6.

79 See Birks, *ibid*, p 287, quoted in Chambers, above n 38, p 144: ‘the truth is that failure of consideration always depends on a clear manifestation of that qualified intent’.

80 Millett, above n 35, at 405.

doubted whether a trust does, or ought to, arise merely on the basis of an absence of intention.<sup>81</sup> It might seem a weak foundation for equitable intervention, given that the legal requirements for the transfer of title have by definition been fulfilled. In *Black Uhlands Inc v NSW Crime Commission*, Campbell J approved the following passage from Bogert:

This resulting trust depends for its existence on the actual intent of the creator, expressed in acts other than writing or the spoken word. The conduct of the payor with reference to the price and deed lead the court to infer an intent to have a trust for himself. The theory of enforcement is that of carrying out the intent of the settlor, just as truly as if he had reduced his trust to writing and inserted it in the deed. Resulting trusts are 'intent enforcing' just as much as are the usual express trusts.<sup>82</sup>

Penner has argued that the absence of intention trust should not be recognised at all, calling it a 'recipe for a largely unfettered discretion in the court to find trusts in commercial circumstances on flimsy evidence about what might have been absent to [the lender's] mind, as opposed to the true intentions of the parties'.<sup>83</sup>

On the other hand, *Jacobs* suggests that an inferred express trust model and an absence of intention resulting trust model may both be available in the *Quistclose* context.<sup>84</sup> At first sight this seems surprising: how could a device that focuses solely on the transferor exist in the same legal system as a device that is said to depend upon the mutual intentions of the transferor and recipient? Why would transferors bother trying to establish the intentions of the recipient? The point of arguing for a *Quistclose* trust is usually to gain priority on insolvency,<sup>85</sup> so the transferor will not care if he wins by express trust or resulting trust. Yet if the express trust model requires a mutual intention then a transferor who positively intended to retain an interest might be in a worse position than one who merely lacked an intention to benefit the recipient. It could be said that a transferor who positively intends a trust for himself by definition has no intention to benefit the recipient. But that just

81 I have argued that a trust found on rebuttal of a presumption of advancement requires an actual, if informal, declaration of trust: J Glistler, 'Is There a Presumption of Advancement?' (2011) 33 *SydLR* 39; cf R Chambers, 'Is There a Presumption of Resulting Trust?' in Mitchell, above n 28, p 267.

82 G Bogert and G Bogert, *The Law of Trusts and Trustees*, rev 2nd ed, Thomson, 1991, p 249, cited *Black Uhlands Inc v NSW Crime Commission* (2002) 12 BPR 22,421; [2002] NSWSC 1060; BC200206756 at [133]–[134]. This view was supported by Young CJ in Eq in *Salvo v New Tel* [2005] NSWCA 281; BC200506365 at [86]–[96], although he accepted that it was not necessary to decide the point. See also *Salvo v New Tel* [2005] NSWCA 281; BC200506365 at [47] per Spigelman CJ; *Wambo*, (2007) 63 ACSR 429; 25 ACLC 809; [2007] NSWSC 589; BC200704438, at [36]; *Compass Resources* (2010) 42 WAR 1; [2010] WASC 41; BC201001100 at [67]–[68]. Cf Heydon and Leeming, above n 42, at [307], 'the resulting trust responds to the whole or partial absence of A's intention to transfer beneficial interest to another', citing Lord Millett in *Air Jamaica v Charlton* [1999] 1 WLR 1399 at [45].

83 J Penner, 'Lord Millett's Analysis' in Swadling, above n 46, pp 41, 54; cited in *George v Webb* [2011] NSWSC 1608; BC201110449 at [275].

84 See text to n 47 above. Although not mentioning *Quistclose*, Edelman J has also recently commented that the absence of intention model explains at least some resulting trusts: *Anderson v McPherson (No 2)* [2012] WASC 19; BC201200151 at [88]–[105].

85 Not invariably: eg, in *Bieber v Teathers* [2012] EWHC 190 (Ch), the plaintiffs sought to establish a breach of trust in order to access the defendant's insurance.

brings us back to the question of how the two models could co-exist.

These points, and the Penner argument, are answered by remembering that the resulting trust will be defeated (or, more properly, will not actually arise) if the recipient provides value and is unaware of a trust. Although the position is difficult with express trusts, as discussed in the previous section, there is no doubt that the ingredients of a resulting trust could exist with the recipient being unaware. There remains a difference between express trusts and absence of intention resulting trusts in respect of transfers not made for value. Under the express model a declaration of trust is required, whereas under the resulting model a declaration is not required. Neither model would impose level two liability for failing to guard the property on a recipient who was unaware of the transferor's interest. However, the level one interest, which alone might be enough to take the property out of the hands of the recipient's creditors,<sup>86</sup> would be easier to acquire under the resulting trust model. For the reasons given, Australian law may well take the view that an absence of intention model is unattractive. But either way the situation in commercial situations would be the same, and would depend on the borrower's intention for the purpose of fixing knowledge.

### ***Barnes v Addy* liability**

If the absence of intention resulting trust was a constructive trust, then one implication could be an absence of *Barnes v Addy* personal liability. Such liability has been said to be inapplicable to constructive trusts,<sup>87</sup> and the correctness of this was assumed in *George v Webb* where the plaintiffs were seeking to bring a *Barnes v Addy* claim.<sup>88</sup> Ultimately the trust in that case was found to be express, and so a third party claim could be made. Interestingly, such claims are also available in respect of the resulting trusts in England,<sup>89</sup> even though resulting trusts do not automatically include fiduciary and trust duties.

It is submitted that, whatever the preferred *Quistclose* model might be, the *Barnes v Addy* claims are available if the trustee is subject to the basic level two duty not to disburse the trust property. This duty comes with knowledge of the trust,<sup>90</sup> whether express or resulting, and it is absent without it. This is the duty breached when property is misdirected, and it is the duty that third parties either receive property in breach of or assist the trustee in breaching. It follows that *Barnes v Addy* claims are not available when the trustee does not know that they are a trustee.

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86 Although see text following n 18 above, where I argue that priority of this kind should depend on the recipient having a duty to guard the property for the beneficiary. If that duty depends on knowledge and not notice, on policy grounds it should not be possible to give such knowledge once the recipient has become insolvent.

87 Swadling, above n 34, at 431.

88 *George v Webb* [2011] NSWSC 1608; BC201110449. Ultimately this point did not need to be decided because Ward J found that *Quistclose* trusts were express. See also *Sommerfeld v Dylcrew Pty Ltd* [2010] NSWSC 626; BC201003945, where a claim for knowing assistance failed on the 'knowing' point.

89 Eg, *Twinspectra v Yardley* [2002] 2 AC 164; [2002] 2 All ER 377; [2002] All ER (D) 321 (Mar); [2002] UKHL 12; *Soutzos v Asombang* [2010] EWHC 842 (Ch).

90 On the assumption made in this paper: see above n 24.

It is possible for a recipient to be an unaware trustee of a level one interest. The recipient might have received as a volunteer, or, much more rarely, have given value and taken with notice but not knowledge. But at this point there would be no level two duty not to disburse the property. If the property subject to a level one interest was transferred to a third party it might, depending on the details of that transfer, be possible to follow it into the hands of a new voluntary recipient or trace into the value that a new recipient provided. But, while the property itself could be followed to a third party, any claim over it by the original transferor would be a property claim and not a *Barnes v Addy* personal claim. To put it another way, the original recipient has not committed a breach of trust. (Of course, the new recipient could herself be subject to a personal claim for breach of trust if she dissipated the property after being given knowledge of the original transferor's interest.)

The vast majority of commercial *Quistclose* trusts will involve level two duties not to disburse. The duty comes with knowledge of the trust, and it will be rare for a trustee who has given value not to have knowledge but for the trust itself to exist. Apart from the narrow gap between notice and knowledge, the presence or otherwise of knowledge will usually mean the existence or otherwise of a trust. This means that a *Quistclose* borrower who is a *Quistclose* trustee, whether express or resulting, will be subject to at least the duty not to disburse the trust property. It follows that *Barnes v Addy* third party liability is possible.

## Conclusion

A *Quistclose* point will often arise in connection with a contract of escrow, or with a solicitor's undertaking, so it is understandable that courts focus attention on the 'mutual' intentions of the parties. However, this article has tried to show that it is helpful to separate the question of the creation of a trust from the question of the recipient's notice or knowledge of that trust. This explains the role of each party's intentions, properly confines the absence of intention resulting trust, and justifies the applicability of *Barnes v Addy* liability. The result is that, in normal *Quistclose* cases where the recipient provides value for the advance, there is no difference between an express and a resulting trust model. The point is worth making because the references to a resulting trust responding solely to an absence of intention, and the potential availability of that model in Australia, could otherwise be confusing. In short: an interest might arise automatically, but to take subject to that interest the paying recipient still needs to be aware of it.