EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2015/0026

BETWEEN:

PRICKLY BAY WATERSIDE LIMITED

Appellant

and

BRITISH AMERICAN INSURANCE COMPANY LIMITED
(UNDER JUDICIAL MANAGEMENT)

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Auld, QC, with him Mr. Ian Sandy and Ms. Claudette Joseph for the Appellant

Mr. Sydney Bennett, QC, with him Mr. James Bristol for the Respondent

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2018: February 2;
October 31.

Civil Appeal – Principles governing establishment of a Quistclose trust – Whether the learned judge erred by not finding that a Quistclose or other similar trust existed

The appellant, Prickly Bay Waterside Ltd., ("Prickly Bay") is a land development company operating in Grenada. Mr. Richard Lee is a director and majority shareholder of the company. Mrs. Rosa Lee is his wife. The respondent, British American Insurance Company Limited ("British American"), is an insurance company based in Trinidad and Tobago which is now under judicial management. Mr. Derick Steele ("Mr. Steele") owned developed property at L'Ance Aux Epines in St. George, Grenada. In 2004, Prickly Bay commenced a commercial real estate development at L'Ance Aux Epines on property

adjacent to Mr. Steele's properties. Disputes arose between Mr. Steele and the principals of Prickly Bay regarding the form of the development which resulted in the filing of a claim by Mr. Steele in the High Court for, inter alia, an injunction to stop the development. The injunction was refused by the High Court and the Court of Appeal, but on an application for special leave to appeal to the Privy Council, the Board granted a temporary injunction pending the trial of the action which was then scheduled to take place in the High Court in May 2007.

Before the trial, the parties entered into settlement discussions that resulted in a consent order dated 18th May 2007. The consent order provided, inter alia, that Mr. Steele would sell the property at L'Ance Aux Epines to Prickly Bay for $2.5 million. The terms of the agreement of sale included a provision for Prickly Bay to provide Mr. Steele with an irrevocable guarantee from British American guaranteeing payment of the balance of the purchase price plus interest totaling $2,475,000 ("the fund"). The trigger for payment by British American was the failure of Prickly Bay to pay the balance of the purchase money at completion followed by a demand for payment by Mr. Steele. Mr. Steele agreed to accept a guarantee from British American. In order to cause British American to issue the guarantee, Mrs. Lee agreed to deposit the amount of the fund with the company. The guarantee was duly executed by British American and Mr. Steele. An annuity was also agreed between Mrs. Lee and British American. The annuity took the form of the payment of a premium in the amount of the balance of the purchase price to British American, who agreed to pay interest on the premium monthly for the two-year term of the policy and to repay the premium on maturity.

British American was concerned about repaying the fund twice, that is, to Mrs. Lee or Prickly Bay and then be called upon by Mr. Steele to pay him under the guarantee. To address its concern, British American prepared a conditional assignment of the annuity from Mrs. Lee to Mr. Steele. The assignment would only become effective on 19th May 2009 if Mr. Steele did not receive the balance of the purchase price. The document was signed by Mrs. Lee in August 2007. All the documents, except the assignment, were signed by the parties as of 18th May 2007 and if everything had gone to plan, completion would have taken place in May 2009. However, during this period, British American went into judicial management and the judicial manager took the position that British American could not pay out on the guarantee because the premium paid by Mrs. Lee was a part of British American's general assets available to its creditors in the judicial management and could not be paid out to one creditor, Mr. Steele.

Prickly Bay disagreed asserting that it was agreed by all the parties that Mrs. Lee would deposit $2,475,000 with British American for the sole purpose of paying the same to Mr. Steele upon completion of the sale on 18th May 2009. Therefore, the fund was held on a Quistclose trust for the agreed purpose of paying Mr. Steele on completion, and it did not become a part of the general assets of British American.

Dissatisfied with the judicial manager's position, Mr. Steele filed an application in the court below seeking injunctive relief and the appointment of a receiver of the income and capital of Prickly Bay, and sequestration and contempt orders against the directors of Prickly Bay

in respect of their non-compliance with the terms of the consent order. Prickly Bay responded by applying for orders that it had complied with the terms of the consent order by securing the guarantee from British American and that Mr. Steele should transfer title to the property to Prickly Bay. Before the judgment was delivered, Prickly Bay applied for an order to join British American as a defendant so that the issue of whether the fund was subject to a Quistclose trust could be properly ventilated. Based on the evidence and the written submissions of the parties, the learned judge found that Prickly Bay had not complied with the consent order in that it had failed to pay the balance of the purchase price and complete the purchase of the property. She dismissed Prickly Bay's application and granted Mr. Steele's application to the extent of ordering an injunction restraining Prickly Bay from dealing with its properties and appointed a receiver of the income and capital of Prickly Bay to obtain payment of the balance of the purchase price. The judge also ordered that upon payment of the balance of the purchase price, Mr. Steele should comply with the agreement by transferring the property to Prickly Bay. Critically, the judge also found that the fund was not impressed with a Quistclose trust.

Prickly Bay, dissatisfied with the judge's finding that the fund was not subject to a Quistclose trust, appealed to this Court. Prickly Bay argued that the judge was wrong to find that the guarantee and the surrounding circumstances demonstrated that there was no mutual understanding, express or implied, that the fund could not be used by British American during the two-year period, that the fund did not form part of its assets, and that in the absence of such intention a Quistclose trust had not been established.

Held: dismissing the appeal; awarding costs to the respondent at the rate of two-thirds of the costs awarded in the lower court, that:

> An objective assessment of the evidence in this case does not disclose an intention to create a trust. The parties were involved in a commercial transaction where Mr. Steele wanted a secure method of paying the balance of the purchase price for his property and British American was prepared to provide that service in the form of an irrevocable guarantee supported by an annuity policy. There was no objective evidence that the parties did not intend that British American would be able to intermingle the fund with its general assets and be free to dispose of the fund in the normal course of its business. As such, Prickly Bay had failed to establish that the fund was impressed with a Quistclose or similar trust and the learned judge did not err in so finding.
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> Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567 applied; Twinsectra Ltd v Yardley and others [2002] 2 AC 164 applied; Bieber v Teathers Ltd (in liquidation) [2012] EWHC 190 (Ch) applied; Bellis and others v Challinor and others [2015] EWCA Civ 59 applied; Henry v Hammond [1913] 2 KB 515 applied; **Cooper v PRG Powerhouse Ltd (in creditors' voluntary** liquidation) and others [2008] EWHC 498 (Ch) distinguished.

JUDGMENT

[1] WEBSTER JA [AG.]: This is an appeal against the decision of the learned trial judge contained in her written judgment dated 26th August 2015 by which she found that the sum of $4,750,000.00 paid by Mrs. Rosa Lee to the respondent, British American Insurance Co. Ltd. ("British American"), on 18th May 2007 which formed part of the general assets of British American, was not held by the company on a Quistclose trust.

Background

[2] The appellant, Prickly Bay Waterside Ltd., ("Prickly Bay") is a land development company operating in Grenada. Mr. Richard Lee is a director and majority shareholder of the company. His wife, Mrs. Rosa Lee, is a self-employed architect.

[3] The claimant in the proceedings in the court below and a former respondent in this appeal is Mr. Derick Steele ("Mr. Steele"). He owned developed property at L'Ance Aux Epines in St. George, Grenada which is indirectly the subject of this appeal and which I will refer to it in this judgment as "the property".

[4] British American Insurance Company Limited ("British American") is an insurance company based in Trinidad and Tobago that offered its insurance products throughout the Caribbean. It is now under judicial management.

[5] In 2004, Prickly Bay commenced a commercial real estate development at L'Ance Aux Epines, on property adjacent to Mr. Steele's properties. Disputes arose between Mr. Steele and the principals of Prickly Bay regarding the form of the development. The dispute escalated resulting in the filing of a claim by Mr. Steele

in the High Court[1] for, inter alia, an injunction to stop the development. The injunction was refused by the High Court and the Court of Appeal, but on an application for special leave to appeal to the Privy Council, the Board granted a temporary injunction pending the trial of the action which was then scheduled to take place in the High Court in May 2007.

[6] Prior to the scheduled commencement of the trial, the parties entered into settlement discussions that resulted in a consent order dated 18th May 2007. The consent order provided, inter alia, that Mr. Steele would sell the property at L'Ance Aux Epines to Prickly Bay for $2.5 million.[2] The terms of sale were set out in an agreement annexed to the consent order. The important terms of the sale agreement for the purposes of this appeal are that:

(a) Mr. Steele would continue to occupy the property under the terms of a licence.

(b) The purchase price for the property was $2,500,000 payable by a deposit of $250,000 on the signing of the agreement and the balance of $2,250,000 plus interest at the rate of 5% per annum for a period of two years commencing 18th May 2007.

(c) Completion was on 18th May 2007 when the balance of the purchase price plus interest would be paid to Mr. Steele.

(d) Prickly was Bay to provide Mr. Steele with an irrevocable guarantee from British American, guaranteeing payment of the balance of the purchase price plus interest totaling $2,475,000. I will refer to in this judgment to the $2,475,000 as "the fund".

[1] GDAHCV2006/0162.
[2] All references to dollars in this judgment are to dollars in the currency of the United States of America.

(e) Upon payment of the fund, Mr. Steele would transfer the property with vacant possession to Prickly Bay.

[7] In order to set the process in motion, Prickly Bay needed to cause British American to issue the irrevocable guarantee. The correspondence between the parties in May 2007, leading up to the signing of the various documents, discloses that Mr. Steele did not trust Mr. Lee and required a guarantee of payment from a reputable third party so that he would not have to look to Mr. Lee or Prickly Bay for payment at closing. This was the sole purpose of the guarantee and this is borne out by the contemporaneous correspondence between the parties.

[8] At the suggestion of Prickly Bay's lawyers, Mr. Steele agreed to accept a guarantee from British American. In order to cause British American to issue the guarantee, Mrs. Lee agreed to deposit the amount of the fund with the company. The guarantee was duly executed by British American and Mr. Steele. It provided that:

> "In consideration of the sum of Two Million Four Hundred and Seventy-five Thousand Dollars United States Currency (US$2,475,000) paid to the Guarantor on or before the execution of this deed by the Purchaser the receipt of which is now acknowledged the Guarantor undertakes that if Prickly Bay Waterside Limited fails to pay the Balance of the Purchase Price in accordance with the terms of the Purchase Agreement the Guarantor shall pay to the Principal the said sum of Two Million Four Hundred and Seventy-five Thousand Dollars United States Currency (US$2,475,000) on receipt of the Principal's first demand in writing. Such payment to the Principal shall be made in the manner stipulated by the Principal to the Guarantor in writing."

It is apparent from a plain reading of the document that the trigger for payment by British American was the failure of Prickly Bay to pay the balance of the purchase money at completion, followed by a demand for payment by Mr. Steele.

[9] The other important document that was needed to finalise the transaction was a document to confirm and record the payment of the balance of the purchase price by Mrs. Lee to British American. Mrs. Lee was in London at the time. Mr. Herleo

Eleazer, of British American telephoned, her and discussed the manner of paying the $2,475,000.00. The result of the discussion was that Mrs. Lee received an annuity application form which she signed and returned to British American on 17th May 2007. The application form did not have the annuity policy attached but it was later sent to Mrs. Lee. The application form set out the basic terms on which British American was receiving the fund. The form is headed "ANNUITY APPLICATION – POLICY No BGG 004571". It states that it is a basic EFPA[3] plan with a premium of $2,475,000, interest term of 2 years at 8.42% per annum. In response to a question "How do you wish to have your interest dispersed" Mrs. Lee ticked the box "Monthly". The named beneficiary was Mrs. Lee's estate. The premium for the annuity was duly paid by Mrs. Lee. On 18th May 2007, British American signed a receipt for the premium which stated that it was to be held "…under the guarantee".

[10] An annuity is a contract by which a person pays a sum of money to the recipient, who agrees to pay the annuitant a certain amount annually. The annuitant parts with his or her beneficial interest in the money paid and his or her rights are to receive the annual payments.[4] In this case, the annuity took the form of the payment of a premium in the amount of the balance of the purchase price to British American who agreed to pay interest on the premium monthly for the two-year term of the policy and to repay the premium on maturity.

[11] British American was concerned that it could end up repaying the fund to Mrs. Lee or Prickly Bay and then be called upon by Mr. Steele to pay him under the guarantee. In other words, British American was concerned that it could be called upon to repay the fund twice. British American's concerns were outlined in an internal memorandum from Gabrielle Patrick to Glenn Otway on 18th May 2007. To address its concern, British American prepared a conditional assignment of the annuity from Mrs. Lee to Mr. Steele. The assignment would only become effective

[3] The acronym EFPA stands for Executive Flexible Premium Annuity.
[4] Per Sir Wilfred Greene in Southern Smith v Clancey (Inspector of Taxes) [1941] 1 KB 276 at p. 283.

on 19th May 2009 if Mr. Steele did not receive the balance of the purchase price. The document was signed by Mrs. Lee in August 2007. The assignment is exhibited to the first affidavit of Mr. Lee. It reads;

> "FOR VALUE RECEIVED, the undersigned, being of legal age hereby assigns and transfers onto Derek John Steele right and title to the annuity issued to Rosella Gladys Lee. Such right and title shall be to the value of $2,475,000 commencing 18 May 2007. Such assignment shall become effectual on 19 May 2009 should Derek John Steele remain without receipt of US $2,475,000 representing the balance of the purchase price by 18 May 2009 in accordance with the terms of a certain Consent Order in the Civil Suit No. GDAHCV 2006/016 between Derek John Steele and Prickly Bay Waterside Ltd dated 18th May, 2007 and a certain deed of guarantee dated the 18th day of May 2007.
> Dated at St George's, Grenada this 22nd day of August 2007".

[12] All the documents, except the assignment, were signed by the parties as of 18th May 2007 and if everything had gone to plan, completion would have taken place in May 2009, Prickly Bay would have paid the balance of the purchase price plus interest to Mr. Steele and the guarantee would have fallen away. Alternatively, if Prickly Bay did not pay the balance of the purchase price Mr. Steele would have demanded payment from British American which would have triggered payment under the guarantee. British American would have used the proceeds of the annuity, which had by then been assigned to Mr. Steele, to pay the balance due to him. Unfortunately, during the intervening period, British American went into judicial management, which is a form of insolvency, and the judicial manager took the position that British American could not pay out on the guarantee because the premium paid by Mrs. Lee was a part of British American's general assets available to its creditors in the judicial management and could not be paid out to one creditor – Mr. Steele. Prickly Bay disagreed. It asserted that it was agreed by all the parties that Mrs. Lee would deposit $2,475,000.00 with British American for the sole purpose of paying the same to Mr. Steele upon completion of the sale on 18th May 2009. Therefore, the $2,475,000.00 was held by British American on a Quistclose trust for the agreed purpose of paying Mr. Steele on completion, and it did not become a part of the general assets of British American. It should therefore have been paid to Mr. Steele.

[13] Mr. Steele was not satisfied with the standoff and on 16th December 2011 he filed an application in the court below in the extant proceedings seeking injunctive relief and the appointment of a receiver of the income and capital of Prickly Bay, and sequestration and contempt orders against the directors of Prickly Bay in respect of their non-compliance with the terms of the consent order. Prickly Bay responded by applying for orders that it had complied with the terms of the consent order by securing the guarantee from British American and that Mr. Steele should transfer title to the property to Prickly Bay. The judge conducted a trial of these issues on the 12th and 13th April 2012 and reserved her decision.

[14] Before the judgment was delivered Prickly Bay applied for an order to join British American as a defendant so that the issue of whether the fund was subject to a Quistclose trust could be properly ventilated. The application was granted by the judge in September 2012 and the parties, including British American, were directed to file evidence and submissions on the issue of a Quistclose trust. Prickly Bay, having previously filed the first affidavit of Mr. Lee on 17th February 2012, filed its submissions on 10th April 2013 and additional evidence in January 2015. British American filed an affidavit by its judicial manager, Mr. Reuben John, and its written submissions on 9th December 2014. Prickly Bay filed further submissions on 9th January 2015.

[15] Mr. John's affidavit does not dispute the facts in the Lee affidavits and sets out British American's position in one paragraph to the effect that the sum deposited by Mrs. Lee under the EFPA policy was placed in the general funds of British American, to be invested and pay interest to Mrs. Lee in accordance with the terms of the policy. The result is that the primary facts in the case are not disputed. The difference between the parties lies in the interpretation of those facts and the legal and factual inferences to be drawn from them.

[16] The judge proceeded to deal with the issue of the existence of a Quistclose trust on the basis of the filed evidence and the written submissions and disposed of both applications and the issue of the Quistclose Trust by delivering a written judgment dated 26th August 2015. She found that Prickly Bay had not complied with the consent order in that it had failed to pay the balance of the purchase price and complete the purchase of the property.[5] She dismissed Prickly Bay's application and granted Mr. Steele's application to the extent of ordering an injunction restraining Prickly Bay from dealing with its properties and appointed a receiver of the income and capital of Prickly Bay to obtain payment of the balance of the purchase price. The judge also ordered that upon payment of the balance of the purchase price, Mr. Steele should comply with paragraph 6 of agreement by transferring the property to Prickly Bay.

[17] In making these orders the judge found that the intention of the parties and the essence of their bargain, objectively ascertained from the circumstances of the transaction, was that the fund was to be paid by British American at a specific time (upon completion), for a specific purpose (to pay the balance of the purchase price), on the happening of a specific event (default by Prickly Bay in paying the outstanding balance).[6] However, there was no evidence that the money was not at the free disposal of British American in the intervening two-year period and nothing to indicate that it did not form part of the general assets of British American. She declined to find that the fund was impressed with a Quistclose trust.

The appeal

[18] Prickly Bay was dissatisfied with the judge's finding that the fund was not subject to a Quistclose trust and on 30th September 2015, filed a notice of appeal against the decision naming Mr. Steele and British American as respondents. Not long thereafter, on 4th December 2015, Prickly Bay and Mr. Steele agreed terms of

[5] Para. 60 of the judgment.
[6] Para. 46 of the judgment.

settlement and filed a consent order by which Prickly Bay agreed to pay the balance of the purchase price of $2,475,000.00 to Mr. Steele, who in turn agreed to transfer the property to Prickly Bay. The money was paid and the property transferred, and on 12th December 2015, Prickly Bay filed a notice of withdrawal and discontinuance of the appeal against Mr. Steele. The appeal continued against British American as the sole respondent.

[19] The notice of appeal lists eight grounds of appeal. The grounds of appeal in summary form are:

(1) The judge erred in law and in fact by not finding that a Quistclose or other similar trust existed and had been established on the facts of the case.

(2) The judge erred in law and on the facts in failing to take account of important and relevant evidence in the case.

(3) The judge erred in law and on the facts by finding that the main question in the case was whether Prickly Bay and British American intended that the money deposited was to be at the free disposal of British American.

(4) The judge erred in law and on the facts by finding that the relevant and agreed purpose of the payment to British American was to pay the balance of the purchase price to Mr. Steele on default by Prickly Bay.

(5) The judge erred in law and on the facts by the finding that there was no mutual understanding, express or implied, between Prickly Bay and British American to control British American's use of the funds, nor that the fund was not to form a part of British American's assets.

(6) The judge erred in law and on the facts by finding that if no trust existed Prickly Bay would have to pay the deposit monies twice.

(7) The judge erred in law and on the facts by finding that the relationship between Mr. Steele and British American is one of creditor and debtor when, on a proper analysis of the documents, British American's position on the facts had to be that there was a Quistclose or similar trust.

(8) The judge failed to ensure that, as a matter of justice and fairness, there was a further hearing of the applications after the joinder of British American thereby denying Prickly Bay the right to cross-examine British American's witness and to explore their failure in relation to the disclosure of documents.

[20] Before dealing with the grounds of appeal, I will make three general observations. Firstly, and this is obvious, the appeal is concerned with the issue of the trial judge's finding that a Quistclose trust was not established, and not the reliefs claimed in the applications by the parties. Secondly, the issues raised by the grounds overlap and I will not deal with them individually but under the general headings set out in paragraph 28 below. Thirdly, the appeal is largely against the findings of fact by the learned trial judge.

[21] The approach of appellate courts to dealing with findings of fact by the trial judge is well known and is illustrated by many cases in the courts of England and the Eastern Caribbean. Where the trial judge's findings of fact or the inferences drawn from those facts are based on the judge's assessment of the witnesses giving evidence, an appellate court will rarely interfere. However, where the findings are based on documentary evidence or written evidence that is not disputed, the appellant court is in as good a position as the trial judge to evaluate the

undisputed evidence and, if satisfied that the wrong conclusion was drawn by the trial judge, may be inclined to substitute its own findings.[7] In this case, although the parties gave oral evidence and were cross-examined at the April 2012 hearing, the factual evidence in relation to the Quistclose trust issue is written and, subject to what I said in paragraph 15 above, undisputed. In the circumstances, I am satisfied that this Court is in as good a position as the trial judge to evaluate the evidence and, if thought fit, make contrary or additional findings, bearing in mind at all stages that the trial judge managed the case and was far more intimate with the details than this court could be from reading the record of appeal, and I would depart from her findings only if I am satisfied that she came to the wrong conclusion.

The parties' positions

[22] The essence of Prickly Bay's position as articulated by its lead counsel, Mr. Stephen Auld, QC, in his written and oral submissions is that the arrangements in question were intended by the parties as a straightforward and specific transaction whereby the fund was to be held by British American for Prickly Bay for a period of two years and then paid to Mr. Steele at the end of the two years, on completion of the sale of the property. None of the parties intended that the fund would be used by British American or become a part of its general assets. The judge was therefore wrong to find that the guarantee and the surrounding circumstances demonstrate that there was no mutual understanding, express or implied, that the fund could not be used by British American during the two-year period, that the fund did not form part of its assets, and that in the absence of such intention, a Quistclose trust had not been established.

[23] Lead counsel for British American, Mr. Sydney Bennett, QC, submitted that the ascertainment of the parties' intention is an objective exercise and the judge was

[7] Dennis Browne v Nagico Insurance Limited SKBHCVAP2014/0001 (delivered 8th December 2017, unreported) para. 15 following Lord Hodge in the Privy Council decision in Beacon Insurance v Maharaj Bookstores Ltd. [2014] UKPC 21.

correct in finding that the contemporaneous documents that were signed by the parties and formally recorded, are the most cogent evidence of the terms of the arrangements entered into by the parties. Further, that the judge was correct in not using the parties' subjective evidence of the nature of the transaction to contradict the plain meaning of the documents.

[24] Further details of the submissions of counsel will be addressed later in this judgment. Before doing so I will give a brief outline of the law relating to Quistclose trusts.

Quistclose Trusts

[25] In its simplest form a Quistclose trust is one whereby A pays or transfers money or property to B for a specific purpose so that B holds the money or property in trust for A, subject to a power of B to apply the money or property for the stated purpose. A's beneficial interest in the money or property will remain unless and until the money or property is applied in accordance with the purpose. If the purpose fails, the money or property is held on a resulting trust for A and can be recovered by A by a proprietary claim whether or not B is solvent.[8] Applying the basic principles to the facts of this case, the intention of the parties was for Mrs. Lee to transfer a certain sum of money to British American, with the object or purpose of British American being paying it to a third party (Mr. Steele) upon the happening of a specific event (completion). The issue is whether this was sufficient to establish a trust in respect of the fund.

[26] The Quistclose trust derives its name from the decision of the House of Lords in Barclays Bank Ltd v Quistclose Investments Ltd.[9] The respondent made a loan to Rolls Razor Ltd for the agreed specific purpose of paying a dividend already declared by Rolls Razor. The cheque for the loan was paid into a separate account opened specially for the purpose at the appellant bank. The

[8] Lewin on Trusts 19th edn. (Sweet & Maxwell, 2017) at 8-046.
[9] [1970] AC 567.

bank was aware that the money was borrowed and agreed with the lender that the account would be used only for the purpose of paying the dividend. Rolls Razor went into liquidation before the money was used to pay the dividend. The House of Lords decided that the money in the account was impressed with a trust, did not form a part of the assets of Rolls Razor in the liquidation and should be returned to Rolls Razor. Of note in this case is the lender's instructions that the loaned funds were to be paid into a specific account and used only to pay the dividend.

[27] The principles governing the Quistclose trust were developed by their Lordships, in particular Lord Millett, in the House of Lords decision of Twinsectra Ltd v Yardley and others[10] and a helpful summary of the principles in Twinsectra was set out by Norris J in Bieber v Teathers Ltd (in liquidation).[11] The seven principles outlined in Norris J's judgment were repeated verbatim and approved by the Court of Appeal in the judgment of Patten LJ when the Bieber case went on appeal, and were set out and approved by the trial judge in her judgment this matter,[12] and by counsel on both sides in their written submissions. The principles, as summarised in the Bieber case, are:

> "16. First, the question in every case is whether the payer and the recipient intended that the money passing between them was to be at the free disposal of the recipient: *Re Goldcorp Exchange* [1995] 1 AC 74 and *Twinsectra* at 74.
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> 17. Second, the mere fact that the payer has paid the money to the recipient for the recipient to use it in a particular way is not of itself enough. The recipient may have represented or warranted that he intends to use it in a particular way or have promised to use it in a particular way. Such an arrangement would give rise to personal obligations but would not of itself necessarily create fiduciary obligations or a trust: *Twinsectra* at 73.
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> 18. So, thirdly, it must be clear from the express terms of the transaction (properly construed) or must be objectively ascertained from the circumstances of the transaction that the mutual intention of payer and recipient (and the essence of their bargain) is that the funds transferred

[10] [2002] 2 AC 164.
[11] [2012] EWHC 190 (Ch) at paras. 16 – 22.
[12] Para. 33 of the judgment.

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 cannot be so used then it is to be returned to the payer: *Toovey v Milne* (1819) 2 B & A 683 and *Quistclose Investments* at 580B.

19. Fourth, the mechanism by which this is achieved is a trust giving rise to fiduciary obligations on the part of the recipient which a court of equity will enforce: *Twinsectra* at 69. Equity intervenes because it is unconscionable for the recipient to obtain money on terms as to its application and then to disregard the terms on which he received it from a payer who had placed trust and confidence in the recipient to ensure the proper application of the money paid: *Twinsectra* at 76.

20. Fifth, such a trust is 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. It is not as such a 'purpose' trust of which the recipient is a trustee, the beneficial interest in the money reverting to the payer if the purpose is incapable of achievement. It is a resulting trust in favour of the payer with a mandate granted to the recipient to apply the money paid for the purpose stated. The key feature of the arrangement is that the recipient is precluded from misapplying the money paid to him. The recipient has no beneficial interest in the money: generally the beneficial interest remains vested in the payer subject only to the recipient's power to apply the money in accordance with the stated purpose. If the stated purpose cannot be achieved then the mandate ceases to be effective, the recipient simply holds the money paid on resulting trust for the payer, and the recipient must repay it: *Twinsectra* at 81, 87, 92 and 100.

21. Sixth, the subjective intentions of payer and recipient as to the creation of a trust are irrelevant. If the properly construed terms upon which (or the objectively ascertained circumstances in which) payer and recipient enter into an arrangement have the effect of creating a trust, then it is not necessary that either payer or recipient should intend to create a trust: it is sufficient that they intend to enter into the relevant arrangement: *Twinsectra* at 71.

22. Seventh, the particular purpose must be specified in terms which enable a court to say whether a given application of the money does or does not fall within its terms: *Twinsectra* at 16."

The trial judge also cited a passage from the judgment of the Court of Appeal in the Bieber case when Patten LJ, immediately after approving Norris J's summary of the principles, said:

> "Both sides accepted this as an accurate statement of the relevant principles. I would only add by way of emphasis that in deciding whether particular arrangements involve the creation of a trust and with it the retention by the paying party of beneficial control of the monies, proper account needs to be taken of the structure of the arrangements and the contractual mechanisms involved. As Lord Millett stressed in *Twinsectra* (at 73) and the judge repeated in 17 of his own judgment [*for which see above*], payments are routinely made in advance for particular goods and services but do not constitute trust monies in the recipient's hands. It is therefore necessary to be satisfied not merely that the money when paid was not at the free disposal of the payee but that, objectively examined, the contractual or other arrangements properly construed were intended to provide for the preservation of the payor's rights and the control of the use of the money through the medium of a trust. Critically this involves the court being satisfied that the intention of the parties was that the monies transferred by the investors should not become the absolute property of Teathers (subject only to a contractual restraint on their disposal) but should continue to belong beneficially to the investors unless and until the conditions attached to their release were complied with".[13]

[28] The references in the preceding paragraphs to some of the authorities on Quistclose trusts show that there are several principles to consider and each case must be considered on its facts to see which of the principles apply. However, the search in every case involving a Quistclose or similar trust is to determine the intention of the settlor and the recipient of the money – did they intend to establish a trust? I will carry out the search for the parties' intention in the case by reference to:

1. The documentary evidence and the objective assessment of the circumstances surrounding the transaction.

2. The purpose of paying the fund to British American.

3. Assessing the parties' intention.

4. Whether the fund became a part of the assets of British American.

[13] [2012] EWCA Civ 1466 at para. 15.

5. Restrictions on British American's use of the fund.

Interpretation of the documents and surrounding circumstances

[29] The Court plays a vital role in the interpretation of documents in a case where the search is for the objective intention of the parties and in no case is this more so than the present. Mr. Bennett, QC submitted, and I agree, that where the parties are in a contractual relationship and they intend the bargain to have a fiduciary element, the court should ignore the subjective views of the parties and analyse the documents and the relevant background. In the passage from the Court of Appeal decision in the Bieber case cited above, Patten LJ put the matter into perspective when he said that "… proper account needs to be taken of the structure of the arrangements and the contractual mechanisms involved."[14]

[30] In this case, there is no ambiguity in the documents and they are the most cogent evidence of what the parties intended when the transaction was consummated in May 2007. The parties' subjective interpretation of what they intended cannot supplant the clear meaning of the documents.

[31] The trial judge's finding regarding the meaning of the documents is set out at paragraph 46 of the judgment:

> "The court finds that BAICO had a clear understanding that if there was default by Prickly Bay in the payment of the balance of the purchase price, it was obligated under the Deed of Guarantee to make the payment. This is evident not only from the words of the guarantee but also from BAICO's insistence that Mrs. Lee execute an assignment (of the annuity) to the claimant. It can be objectively ascertained from the circumstances of the transaction that the intention of the parties and the essence of the bargain was that the sum would be paid by BAICO at a specific time, for a specific purpose on the happening of a specific event."

[14] [2012] EWCA Civ 1466 at para. 15.

The trial judge continued by setting out in the following paragraph 47 her overall finding that in the absence of the requisite clear intention a Quistclose trust had not been established. Paragraph 47 is set out in full in paragraph 48 below.

[32] The learned judge's approach to the interpretation of the documents and the parties' conduct will guide this court in its determination of the case. Very little if any regard will be had to the parties' subjective views of the meaning of the documents and the conduct of the parties.

The intention of the parties - purpose of the payment

[33] The purpose for which a payment is made is an important step in determining whether a Quistclose trust has been established. If the payment is not made for a specific purpose, a trust cannot be established. The undisputed evidence in this case is that Mr. Steele wanted a secure form of payment of the balance of the purchase price for the property and the parties agreed to a system whereby Mrs. Lee would pay the required funds to British American and British American would issue the irrevocable guarantee which could be used for payment of the balance on demand from Mr. Steele. That was the intention of the parties and the purpose for which the money was paid. This was found by the trial judge at paragraph 36 of the judgment where she said:

> "In the courts view, both the Deed of Guarantee and the surrounding circumstances demonstrate that the money paid to BAICO was to be used for a particular purpose, that is, payment of the balance of the purchase price to the claimant, on default by Prickly Bay. But as Lord Millett stated in Twinsectra, a Quistclose Trust does necessarily arise merely because money is paid for a particular purpose."

I agree with the judge's finding that the intended purpose of the deposit of the fund with British American was to pay the balance of the purchase price. The primary obligation to pay the balance of the purchase price under the terms of the sale agreement was on Prickly Bay and if it complied with that obligation the guarantee would not be triggered. If it did not and Mr. Steele demanded payment in writing

from British American, the company would be contractually bound to pay him the balance of the purchase price. That is what the documents say.

[34] Mr. Auld, QC agreed that the fund would be used to pay the balance of the purchase price but submitted that the trigger for payment was not a default by Prickly Bay. He submitted that the fund was payable to Mr. Steele once there was completion. I do not accept this submission for the simple reason that it ignores the plain language of the guarantee which says that payment is due "… if Prickly Bay Waterside Limited fails to pay…the Guarantor shall pay … on receipt of the Principal's first demand in writing."[15]

[35] Returning to the judge's finding on the purpose of the payment it is noted that she referred to Lord Millett's opinion in Twinsectra where his Lordship said payment for a specific purpose is not enough and "There must be something more, for example, a requirement that the money be paid into a segregated account, before it is appropriate to infer that a trust has been created."[16] The real issue in this case is not the purpose of the payment but whether the parties (Mrs. Lee and British American) intended that British American had to keep the fund, not use it in its business while paying monthly interest to Mrs Lee, and pay it out to Mr. Steele at completion of the sale of the property. If this was the parties' intention it could be the "something more" that Lord Millett referred to and it would make it more likely that the court would find that a Quistclose trust was intended and established.

Assessing the parties' intention

[36] The trial judge's reference to Lord Millett's judgment in Twinsectra is a reminder that a payment for a specific purpose is not per se sufficient to create a Quistclose trust. There must be an intention to create a trust. The courts go about determining that intention on an objective basis from the express terms or the

[15] Clause 1 of the guarantee set out at para. 8 above.
[16] supra at para. 70.

circumstances of the transaction. In Twinsectra Lord Millett said "A settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant."[17] In the more recent case of Bellis and others v Challinor and others,[18] Briggs LJ (as he then was) said:

> "57. There must be an intention to create a trust on the part of the transferor. This is an objective question. It means that the transferor must have intended to enter into arrangements which, viewed objectively, have the effect in law of creating a trust: see *Twinsectra* at paragraph 71.
> …
>
> 59. A person creates a trust by his words or conduct, not by his innermost thoughts. His subjective intentions are, as Lord Millett said, irrelevant. In the *Twinsectra* case, a *Quistclose* trust was established despite the transferor having no subjective intention to create a trust. But the objective principle works both ways. A person who does subjectively intend to create a trust may fail to do so if his words and conduct, viewed objectively, fall short of what is required. As with the interpretation of contracts, this process of interpretation is often called the ascertainment of objective intention. In the contractual context the court is looking for the objective common intention, whereas in the trust context the search is for the objective intention of the alleged settlor."

[37] The guidance from Lord Millett and Briggs LJ is apposite. The ascertainment of the intention of the settlor, Mrs. Lee, and the recipient, British American, must be done on an objective basis having regard to the documents used by the parties and the circumstances of the transaction objectively viewed, and not on what Mrs. Lee or any of the other relevant party said about what was intended at the material time. For example, one of the important criteria for determining whether a trust relationship was created is whether the relevant parties intended that the fund should be used for the sole purpose of paying the balance of the purchase money at completion, or whether the recipient (British American) could use the funds in the ordinary course of its business and pay the agreed amount to the third party (Mr. Steele) on the happening of the stipulated event. I call this the use of the funds test.

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[17] ibid at para. 71.
[18] [2015] EWCA Civ 59.

[38] A sub-category of the use of the funds test and a way of determining how the recipient was intended to use the funds, is whether the recipient was required to segregate the fund from its other assets. I will deal firstly with the segregation of the fund and then move on to its use.

Segregating the fund

[39] A good, though not decisive indication of whether the parties to a transaction intend the transferred money to be at the free disposal of the recipient is how the recipient is directed to hold the money. If the recipient is expressly directed or the objective circumstances show that he is to hold the fund in a segregated account, that is a good indication that the parties do not intend that the fund should become a part of the recipient's assets and is not to be used in any way other than for the agreed purpose of the transfer. A good example of this is the Quistclose case itself, where the lender, Quistclose Investments Ltd., made a loan to Rolls Razor Ltd., for the express purpose of paying a previously declared dividend to Rolls Razor's ordinary shareholders. The written instructions from Quistclose was that the loaned money should be kept in a separate account created for the purpose at Barclays Bank, and would only be used for the intended purpose of paying the dividend. Before the dividend was paid, Rolls Razor went into voluntary liquidation and the ensuing court proceedings concerned the status of the money in the account. The unanimous opinion of their Lordships was delivered by Lord Wilberforce. Their Lordships found that there was no intention that the loan would form a part of the bank's general assets and that a Quistclose trust had been established. The money was therefore repayable to Quistclose.

[40] Conversely, the absence of instructions by the settlor to segregate the fund generally means that the parties do not intend to create a trust. However, as Mr. Auld, QC submitted, it does not necessarily follow that in all cases where there is no segregation and the funds are intermingled with the recipient's other assets, that no trust was intended. In the Twinsectra case, Lord Millett referred to the

requirement that the money be paid into a separate account as being of "evidential significance"[19] and in R v Clowes and another,[20] a criminal appeal involving a trust, Watkins LJ said:

> "As to segregation of funds, the effect of the authorities seems to be that a requirement to keep moneys separate is normally an indicator that they are impressed with a trust, and that the absence of such requirement, if there are no other indicators of a trust, normally negatives it. The fact that the transaction contemplates the mingling of funds is, therefore, not necessarily fatal to a trust."

This passage was cited by Evans-Lombe J in Cooper v PRG Powerhouse Ltd **(in creditors' voluntary liquidation) and others**[21] where the learned judge was considering a payment made by the claimant, a recently retired employee of the defendant company, to the company on 7th July 2006 for the express purpose of forwarding the payment to a finance company in settlement of the claimant's debt to the finance company. The payment was being made through the company purely as a matter of convenience because the company was accustomed to dealing with the finance company on behalf of the claimant when he was one of its employees. There was no restriction against intermingling and the money was in fact paid into the defendant's payroll account which meant that it was intermingled with the defendant's own funds. The defendant acknowledged receipt of the money on those terms on 27th July 2006 and confirmed that the payment "was now being forwarded" to the finance company. The defendant went into liquidation on 1st August 2006 and its cheque for the payment to the finance company was dishonoured and the claimant's debt to the finance company remained outstanding. Evans-Lombe J held that the payment was impressed with a trust to pay to the finance company and therefore was not available to the defendant's creditors in the liquidation. At paragraph 24 he found that:

> "If not express there was clearly to be implied into the arrangement that neither Mr. Cooper nor the Company regarded the amount of the payment

[19] [2002] 2 AC 164 At para. 95.
[20] [1994] 2 All ER 316 at p. 325.
[21] [2008] EWHC 498 (Ch).

> as part of the assets of the company at its "free disposal" and available, in particular, as working capital or for the payment of its creditors."

[41] The effect of the learned judge's decision in the Cooper case is that even though there was no segregation of the money, the parties did not intend that the money would be a part of the company's assets at its free disposal and therefore it was impressed with a trust.

[42] The conclusions that I draw from the cases are that if the money is paid into a segregated account with restrictions as to its use, the courts will likely find that a trust was intended. If the money is not segregated but the circumstances show that the parties intended that the recipient could not dispose of the money except in accordance with the terms of the arrangement, the court may still find a trust as in the Cooper case. However, if there are no instructions to segregate and the circumstances do not point objectively to restrictions on the use of the money by the recipient, the courts are not likely to find a trust.

[43] The evidence in the instant appeal is very different from the facts in the Cooper case. British American was not a mere conduit for passing money to Mr. Steele. There was no prior relationship between the parties and British American was contractually bound to pay interest on the annuity to Mrs. Lee monthly and pay the fund to Mr. Steele on completion two years later. The term of the annuity and the payment of interest during the term are indicators that the objective intention of the parties was that there was no restriction on British American intermingling the fund with its general assets and investing it over the two-year period in order to generate income from which it would pay interest to Mrs. Lee. There is no evidence in the case that British American was to receive any fees or other remuneration for providing the guarantee. Mr. John's evidence is that "...the sum deposited by Mrs. Lee under the EFPA was placed in the general funds of BAICO to be invested so as to pay interest to Mrs. Lee in accordance with the EFPA." This seems quite reasonable and the transaction would make no commercial sense if British American could not invest the fund.

[44] In the circumstances, I find that British American was entitled to intermingle the fund with its own assets and was free to dispose of the fund by investing it in the course of its business. The ability to intermingle the fund, though not decisive against the finding of a Quistclose or similar trust, is a strong indicator in this case that no trust was intended. As Rimer J said in Shalson and others v Russo and others on the issue of segregation:

> "There was no express agreement to this effect (segregation), and nor is there any basis for regarding the parties as having impliedly so agreed. Further, the fact that his money was not to be kept in a separate account, but was (as I find Mr. Mimran understood) liable to be mixed with other Westland money, in particular with any loans which Mr Russo made in accordance with the initial agreement, points away from any intention to create a trust."[22]

[45] I would also mention a passage from the judgment of Channell J in Henry v Hammond[23] when the learned judge compared the two situations of segregation and intermingling and concluded:

> "It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor. All the authorities seem to me to be consistent with that statement of the law. I agree with the observation of Bramwell L.J. in New Zealand and Australian Land Co. v. Watson (2) when he said that he would be very sorry to see the intricacies and doctrines connected with trusts introduced into commercial transactions."

The facts of the instant appeal fall into the second situation outlined by Channell J and the inevitable conclusion is that British American was entitled to intermingle the fund with its other assets.

Use of the fund

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[22] [2005] 2 WLR 1213 at para. 129.
[23] [1913] 2 KB 515 at para. 521.

[46] As stated above where there are no restrictions on the recipient being able to intermingle the fund with his general assets and he is also free to use the fund in his own business it is likely that a trust was not intended.

[47] The subjective evidence of Mr. and Mrs. Lee is that the fund was paid to British American for the sole purpose of paying the balance of the purchase money and that, in effect, it could not be used by British American in the meantime. However, the annuity and the guarantee do not support the Lees' subjective views. The annuity is a contract between Mrs. Lee and British American by which both parties agreed that the fund was the premium for the issue of the annuity which would yield to Mrs. Lee a return of 8.42% interest per annum for two years payable monthly. The benefit of the annuity was conditionally assigned to Mr. Steele in August 2007 to take effect at closing in May 2009.

[48] The trial judge dealt with the parties' intention regarding the use of the fund by British American in two stages. At paragraph 35 of the judgment she posited:

> "Having regard to the above legal principles, the main question in this case is whether the payer (Mrs. Lee/Prickly Bay) and the recipient (BAICO) intended that the money deposited was to be at the free disposal of BAICO."

Her conclusion on the point is at paragraph 47 of the judgment where she found:

> "However, the court can find no mutual understanding, express or implied, between the payer and BAICO, of an intention to control BAICO's use of funds in the intervening two year period. I find no expression of an understanding between them that the money deposited was not to form part of the general assets of BAICO and was not at its free disposal. Objectively examined, there is no indication that the intention was to provide for the preservation of Mrs Lee/Prickly Bay's rights and the control of the use of the money in the interim. The only provision made was for the payment of monthly interest to Mrs Lee. The status and use of the money during the life of the Annuity was not addressed. In the absence of a finding of the requisite clear intention, the court cannot conclude that a Quistclose trust has been established."

[49] Mr. Auld, QC submitted that the judge erred in treating the issue of whether the fund was at the free disposal of British American as the main question in the case.

He submitted that this was not the crucial, let alone determinative issue in the case. However, when I read the judgment as a whole, and having regard to the law as outlined above, I find that the judge was correct in treating the issue of British American's ability to deal with the fund as the main question in the case. This follows from the speech of Lord Millett in Twinsectra where he said that "The question in every case is whether the payer and the recipient intended that the money passing between them was to be at the free disposal of the recipient."[24] This passage was treated by Norris J as the first principle in determining whether a Quistclose trust has been created[25] and was cited by both sides with approval in their written submissions, and by the trial judge in her judgment. The judge did not err in treating British American's ability to deal with the fund as the main question in the case. The use of the money or property transferred is an important consideration in every case where a Quistclose or similar trust is claimed.

[50] In my opinion, when Mrs. Lee signed the annuity she parted with her beneficial interest in the fund and this is inconsistent with the creation of a trust. This was reinforced when she assigned the benefit of the annuity to Mr. Steele, another act that was inconsistent with her retaining a beneficial interest in the fund. In addition, there is no indication in any of the documents, or the circumstances of the transaction objectively assessed, that it was the intention of the parties that British American was restrained in its use of the fund during the two-year period.

[51] Mr. Auld's further submission is that the trial judge treated the finding that the fund was at the free disposal of British American as determinative of the case. It can be said that the judge treated this finding as determinative in the sense that she reviewed the relevant evidence and law and came to the conclusion that the parties intended that the fund would be used to cause British American to issue the irrevocable guarantee and there was no intention, express or implied, that British American could not dispose of the fund in the meantime. Therefore, a

[24] At para. 74.
[25] See para. 27 above.

Quistclose trust was not established. In coming to this conclusion, the judge was not laying down a rule that a finding that if there is no evidence of an intention to restrain disposition of the money deposited, means that a trust was not intended. She was simply making a finding of fact, as she was required to do, applying the relevant law to the facts of the case. The fact that British American's ability to deal with the fund was decisive in this case is a finding of fact by the trial judge with which the court should not interfere.

Conclusion

[52] I agree with the learned trial judge's conclusion that an objective assessment of the evidence in this case does not disclose an intention to create a trust. The parties were involved in a commercial transaction where Mr. Steele wanted a secure method of paying the balance of the purchase price for his property and British American was prepared to provide that service in the form of an irrevocable guarantee supported by an annuity policy. There was no objective evidence that the parties did not intend that British American would be able to intermingle the fund with its general assets and be free to dispose of the fund in the normal course of its business. As such, Prickly Bay had failed to establish that the fund was impressed with a Quistclose or similar trust and the learned judge did not err in so finding.

[53] The foregoing analysis disposes of grounds 1 to 5 and ground 7 of the notice of appeal in favour of the British American. Prickly Bay did not pursue grounds 6 and 8.

[54] In the circumstances, I would dismiss the appeal with costs to British American at the rate of two-thirds of the amount assessed for the proceedings in the lower court.

Order

[55] The appeal is dismissed with costs to the respondent at the rate of two-thirds of the costs awarded in the lower court.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar