<u>Trusts & Equity</u>
Fall Term 2018

Lecture Notes – No. 10

‘PURCHASE MONEY’ RESULTING TRUSTS

As we considered in respect of gratuitous transfers, equity doesn’t concern itself as much with legal title as with beneficial interests and thereafter uses the resulting trust to force the title-holder to hold on trust for the transferor unless there is a good reason not to interfere with the beneficial interest following the legal interest – e.g. through proof of donative intention.

It is not unusual in commercial and even domestic arrangements for the purchaser of property to use another’s money to complete the transaction; the title may be put in the purchaser’s name, the name of the person who supplied the money, a third party with an interest in the money, a third party stranger, or some or all of them in joint tenancy or tenancy in common. Obviously the parties can structure arrangements to suit their interests and preferences.

Thus, A advances money to B to purchase property in B’s name. A would normally be considered the beneficiary of a resulting trust for the gratuitous transfer of the money to B which could be followed into the property (even if the property is land**; Neazor v Hoyle (1962), 32 DLR 92 (2d) 131 (Alta SC App Div).**

What if the situation was not truly a gratuitous transfer, but it was A and B’s common intention that A should be treated as having a beneficial interest in the property notwithstanding not having any part of the title to the property? A purchase money resulting trust can arise - **a ‘purchase money’ resulting trust means that A can claim an interest through a resulting trust where he or she supplied the purchase money ‘in the character as a purchaser’ meaning that there was a common intention between the A and B such that A would retain the beneficial interest in the purchase money and can claim a proprietary interest in the property.** How can the A’s claim be defeated? Simply by showing that he or she intended to benefit B or another and was content to have a debt owed to him or her by B (or not at all).

Thus, in **Dewar v Dewar [1975] 1 WLR 1532 (Ch)**, two sons argued as to the nature of rights in a house that was purchased through money obtained through a mortgage, contributions by their late mother, and contributions by one of the sons. Goff J held that the intention of the parties was the key to characterizing the expectations of the parties:

> ... where a person intends to make a gift and the donee receives the thing given, knows that he has got it and takes it, the fact that he says: "Well, I will only accept it as a loan, and you can have it back when you want it "does not prevent it from being an effective gift. Of course, it does not turn it into a loan unless the donor says:

> "Very well, let it be a loan." He could not force the donor to take it back, but the donor, having transferred it to him effectively and completely, intending to make a gift, and he - so far from repudiating it - having kept it, it seems to me that that is an effective gift and accordingly I hold that the defendant has established that the mother's contribution was a gift.'

Thus, (i) the plaintiff son was the beneficiary of a 'purchase money' resulting trust reflecting his own contributions to the purchase of the house (his £500 contribution to purchasing the house for £4250, which meant he could claim proprietary relief in the increased value of the house in proportion to his contribution to the purchase price); (ii) given that the mother had contributed without an expectation of retaining rights to the beneficial interest in the money but truly gifting it to the other son (the defendant), her Estate had no claim over that money or the house purchased with it.

THE 'QUISTCLOSE TRUST'

These types of trusts are very contentious indeed, and many would say that although they may be considered to be pragmatic, they undermine the certain application of insolvency law.

Using trust principles, we regard a person who would otherwise be considered a lender (and a lender who has acted quite unwisely) to be the beneficiary of a resulting trust. That is, the lender is regarded as the settlor of a resulting trust in his or her own favour that is coupled with the donation to the trustee of a power to appoint the money for a particular purpose – thus, the lender remains the beneficiary of a resulting trust *until such time the money advanced for a particular purpose is actually used for that purpose,* and, thereafter, a debt crystallizes. Magic.

Barclays Bank v Quistclose Investments Ltd
[1968] 3 All ER 651

Rolls Razor Limited was collapsing. Quistclose Investments Ltd. made a loan of money to Rolls Razor for the express purpose of making a dividend payment on the company's shares. Before the payment could be made, Rolls Razor went into liquidation. The money was in the company's bank account with Barclays Bank Ltd. The bank claimed to be able to set-off the money against Rolls Razor's debt to the bank. Lord Wilberforce held that the money was held under a resulting trust for Quistclose. The principle accepted was that **the payment of money from A to B in a commercial context for a particular purpose was held on a resulting trust until the purpose was complete, and thereafter a loan would be recognized as having arisen.** Thus B was trustee until such time as he became a debtor to A, at which point A's interest becomes a legal rather than an equitable one.

Lord Wilberforce:

(a) Precedent:

> That arrangements of this character for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person, has been recognised in a series of cases over some 150 years…

(b) Policy:

> The transaction, it was said, between the respondents and Rolls Razor Ltd., was one of loan, giving rise to a legal action of debt. This necessarily excluded the implication of any trust, enforceable in equity, in the respondents' favour: a transaction may attract one action or the other, it could not admit of both. My Lords, I must say that I find this argument unattractive. Let us see what it involves. It means that the law does not permit an arrangement to be made by which one person agrees to advance money to another, on terms that the money is to be used exclusively to pay debts of the latter, and if, and so far as not so used, rather than becoming a general asset of the latter available to his creditors at large, is to be returned to the lender. The lender is obliged, in such a case, because he is a lender, to accept, whatever the mutual wishes of lender and borrower may be, that the money he was willing to make available for one purpose only shall be freely available for others of the borrower's creditors for whom he has not the slightest desire to provide. I should be surprised if an argument of this kind - so conceptualist in character - had ever been accepted. In truth it has plainly been rejected by the eminent judges who from 1819 onwards have permitted arrangements of this type to be enforced, and have approved them as being for the benefit of creditors and all concerned. There is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies: when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose... I can appreciate no reason why the flexible interplay of law and equity cannot let in these practical arrangements, and other variations if desired: it would be to the discredit of both systems if they could not. In the present case the intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear and I can find no reason why the law should not give effect to it.

(c) The Effect on Third Parties:

> the bank had actual notice and was not prejudiced.

Quistclose has been accepted as a valid trusts device in Ontario, e.g. *Del Grande* *v.McCleery* (2000), 31 E.T.R. (2d) 50 (Ont. C.A.; *Niedner Ltd. v. Lloyd's Bank of Canada* (1990), 74 O.R. (2d) 574 (H.C.J.)]

Carreras Rothmans v Freeman Mathews Treasure [1985] Ch 207 (discussed in Twinsectra Ltd v Yardley)

The plaintiff manufactured cigarettes and tobacco which it advertised in newspapers and magazines. The defendant was an advertising agency employed by the plaintiff. The plaintiff paid the defendant an annual fee in monthly installments and amounts equivalent to invoices received from publishers for the advertisements it placed on behalf of the plaintiff. The plaintiff paid the money in time for the defendant to pay the publishers when the debts became due for payment, which was usually at the end of the month.

Like in Quistclose, the defendant was in financial difficulties. The plaintiff suggested that a special bank account should be opened into which the plaintiff would deposit the money to be paid to the publishers. This was set out in a letter in July; that the money would be placed in the account and the defendant would use the money to pay June invoices that were due at the end of July. The defendant drew the cheques necessary to pay the publishers on that account but before the cheques were cashed, the defendant went into liquidation (on August 3). The trustee in the liquidation stopped payment on the cheques.

The publishers threatened not to run the plaintiff's advertisements unless they were paid. The plaintiff agreed to pay the third parties and took assignments of the debts owed by the defendant to those third parties. After investigation, it was clear that the defendant had used funds that had been advanced to it as per the normal practice for its own purposes rather than pay the publishers. The plaintiff told the third parties that they should have enforced their rights in contract (recovered their debts) at that time and that it would not pay those debts (as it already advanced money for that purpose to the defendant. The plaintiff sought the money in the special account. The trustee argued that the July letter was unenforceable as a result of public policy.

Peter Gibson J held:

> The July agreement was plainly intended to vary the contractual position of the parties as to how, as the contract letter put it, payments made by the plaintiff to the defendant for purely onwards transmission, in effect, to the third party creditors, would be dealt with. If one looks objectively at the genesis of the variation, the plaintiff was concerned about the adverse effect on it if the defendant, which the plaintiff knew to have financial problems, ceased trading and the third party creditors of the defendant were not paid at a time when the defendant had been put in funds by the plaintiff. The objective was accurately described by Mr. Higgs in his informal letter of 19 July as to protect the interests of the plaintiff and the third parties. For this purpose a special account was to be

set up with a special designation. The moneys payable by the plaintiff were to be paid not to the defendant beneficially but directly into that account so that the defendant was never free to deal as it pleased with the moneys so paid. The moneys were to be used only for the specific purpose of paying the third parties and as the cheque letter indicated, the amount paid matched the specific invoices presented by the defendant to the plaintiff. The account was intended to be little more than a conduit pipe, but the intention was plain that whilst in the conduit pipe the moneys should be protected. There was even a provision covering the possibility (though what actual situation it was intended to meet it is hard to conceive) that there might be a balance left after payment and in that event the balance was to be paid to the plaintiff and not kept by the defendant. It was thus clearly intended that the moneys once paid would never become the property of the defendant. That was the last thing the plaintiff wanted in view of its concern about the defendant's financial position. As a further precaution the bank was to be put on notice of the conditions and purpose of the account. I infer that this was to prevent the bank attempting to exercise any rights of set off against the moneys in the account.

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It is of course true that there are factual differences between the Quistclose case and the present case. The transaction there was one of loan with no contractual obligation on the part of the lender to make payment prior to the agreement for the loan. In the present case there is no loan but there is an antecedent debt owed by the plaintiff. I doubt if it is helpful to analyse the *Quistclose* type of case in terms of the constituent parts of a conventional settlement, though it may of course be crucial to ascertain in whose favour the secondary trust operates (as in the *Quistclose* case itself) and who has an enforceable right. In my judgment **the principle in all these cases is that equity fastens on the conscience of the person who receives from another property transferred for a specific purpose only and not therefore for the recipient's own purposes, so that such person will not be permitted to treat the property as his own or to use it for other than the stated purpose.** Most of the cases in this line are cases where there has been an agreement for consideration so that in one sense each party has contributed to providing the property. **But if the common intention is that property is transferred for a specific purpose and not so as to become the property of the transferee, the transferee cannot keep the property if for any reason that purpose cannot be fulfilled.** I am left in no doubt that the provider of the moneys in the present case was the plaintiff. True it is that its own witnesses said that if the defendant had not agreed to the terms of the contract letter, the plaintiff would not have broken its contract but would have paid its debt to the

> defendant, but the fact remains that **the plaintiff made its payment on the terms of that letter and the defendant received the moneys only for the stipulated purpose. That purpose was expressed to relate only to the moneys in the account. In my judgment therefore the plaintiff can be equated with the lender in *Quistclose* as having an enforceable right to compel the carrying out of the primary trust.**

Given that the plaintiff had paid the third parties, they had no claim to the money. The plaintiff prevailed over the creditors based on the principle in Quistclose. However, it appears that the trust was not rationalized as a resulting trust but more as a constructive trust ('equity fastens on the conscience of the person...') and the beneficial interest in the money pending its use for the stated purpose was unclear. The matter was resolved in the following case.

Twinsectra Ltd v Yardley
[2002] AC 64

Here, a loan was provided by Twinsectra Ltd. to companies owned by Yardley for the acquisition of specific property. Yardley's solicitor was Leach who declined to give the undertaking required by Twinsectra that the loan funds would be released only for the purposes stipulated in the loan agreement. However, he was able to direct his client to another solicitor, Sims, who was prepared to give the undertaking. Relying on this, Twinsectra transferred the funds to the client account at Sims' firm. On Leach's instructions, Sims subsequently paid out the funds to the Yardley companies in the knowledge that they were not going to be used for the specific purpose stipulated by Twinsectra. Sims also used the fund to settle Leach's professional fees due from Yardley. When Twinsectra found out about the fraud they proceeded against Yardley in contract and deceit and also against Leach for breach of trust. Questions thus arose as to the position where a fiduciary misdirects property which is subject of a Quistclose trust.

Lord Hoffman said:

> **78** This has been the subject of much academic debate. The starting point is provided by two passages in Lord Wilberforce's speech in the Quistclose case [1970] AC 567...
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> **79** These passages suggest that there are two successive trusts, a primary trust for payment to identifiable beneficiaries, such as creditors or shareholders, and a secondary trust in favour of the lender arising on the failure of the primary trust. But there are formidable difficulties in this analysis, which has little academic support. What if the primary trust is not for identifiable persons, but as in the present case to carry out an abstract purpose? Where in

such a case is the beneficial interest pending the application of the money for the stated purpose or the failure of the purpose? There are four possibilities: (i) in the lender; (ii) in the borrower;
(iii) in the contemplated beneficiary; or (iv) in suspense.

80 (i) *The lender.* In "The Quistclose Trust: Who Can Enforce It?" (1985) 101 LQR, 269, I argued that the beneficial interest remained throughout in the lender. This analysis has received considerable though not universal academic support...

81 On this analysis, the Quistclose trust is a simple commercial arrangement akin (as Professor Bridge observes) to a retention of title clause (though with a different object) which enables the borrower to have recourse to the lender's money for a particular purpose without entrenching on the lender's property rights more than necessary to enable the purpose to be achieved. The money remains the property of the lender unless and until it is applied in accordance with his directions, and insofar as it is not so applied it must be returned to him. I am disposed, perhaps pre- disposed, to think that this is the only analysis which is consistent both with orthodox trust law and with commercial reality. Before reaching a concluded view that it should be adopted, however, I must consider the alternatives.

82 (ii) *The borrower.* It is plain that the beneficial interest is not vested unconditionally in the borrower so as to leave the money at his free disposal. That would defeat the whole purpose of the arrangements, which is to prevent the money from passing to the borrower's trustee in bankruptcy in the event of his insolvency. It would also be inconsistent with all the decided cases where the contest was between the lender and the borrower's trustee in bankruptcy, as well as with the Quistclose case itself...

83 The borrower's interest pending the application of the money for the stated purpose or its return to the lender is minimal. He must keep the money separate; he cannot apply it except for the stated purpose; unless the terms of the loan otherwise provide he must return it to the lender if demanded; he cannot refuse to return it if the stated purpose cannot be achieved; and if he becomes bankrupt it does not vest in his trustee in bankruptcy. If there is any content to beneficial ownership at all, the lender is the beneficial owner and the borrower is not.

84 In the present case the Court of Appeal adopted a variant, locating the beneficial interest in the borrower but subject to restrictions. I shall have to return to this analysis later.

85 (iii) *In the contemplated beneficiary.* In the Quistclose case itself [1970] AC 567, as in all the reported cases which preceded it, either the primary purpose had been carried out and the contest was between the borrower's trustee in bankruptcy or liquidator and the person or persons to whom the borrower had paid the money; or it was treated as having failed, and the contest was between the borrower's trustee-in- bankruptcy and the lender. It was not necessary to explore the position while the primary purpose was still capable of being carried out and Lord Wilberforce's observations must be read in that light.

86 The question whether the primary trust is accurately described as a trust for the creditors first arose in In re Northern Developments (Holdings) Ltd (unreported) 6 October 1978, where the contest was between the lender and the creditors. The borrower, which was not in liquidation and made no claim to the money, was the parent company of a group one of whose subsidiaries was in financial difficulty. There was a danger that if it were wound up or ceased trading it would bring down the whole group. A consortium of the group's banks agreed to put up a fund of more than £500,000 in an attempt to rescue the subsidiary. They paid the money into a special account in the name of the parent company for the express purpose of "providing money for the subsidiary's unsecured creditors over the ensuing weeks" and for no other purpose. The banks' object was to enable the subsidiary to continue trading, though on a reduced scale; it failed when the subsidiary was put into receivership at a time when some £350,000 remained unexpended. Relying on Lord Wilberforce's observations in the passages cited above, Sir Robert Megarry V- C held that the primary trust was a purpose trust enforceable (inter alios) by the subsidiaries' creditors as the persons for whose benefit the trust was created.

87 There are several difficulties with this analysis. In the first place, Lord Wilberforce's reference to In re Rogers 8 Morr 243 makes it plain that the equitable right he had in mind was not a mandatory order to compel performance, but a negative injunction to restrain improper application of the money; for neither Lindley LJ nor Kay LJ recognised more than this. In the second place, the object of the arrangements was to enable the subsidiary to continue trading, and this would necessarily involve it in incurring further liabilities to trade creditors. Accordingly the application of the fund was not confined to existing creditors at the date when the fund was established. The company secretary was given to understand that the purpose of the arrangements was to keep the subsidiary trading, and that the fund was "as good as share capital". Thus the purpose of the arrangements was not, as in other cases, to enable the debtor to avoid bankruptcy by paying off existing creditors, but to enable the debtor to continue trading by providing it with working capital with which to incur fresh liabilities. There is a powerful argument for saying that the result of the arrangements was to vest a beneficial interest in the subsidiary from the start. If so, then this was not a Quistclose trust at all.

88 In the third place, it seems unlikely that the banks' object was to benefit the creditors (who included the Inland Revenue) except indirectly. The banks had their own commercial interests to protect by enabling the subsidiary to trade out of its difficulties. If so, then the primary trust cannot be supported as a valid non- charitable purpose trust: see In re Grant's Will Trusts, Harris v Anderson [1980] 1 WLR 360 and cf In re Denley's Trust Deed [1969] 1 Ch 373.

89 The most serious objection to this approach is exemplified by the facts of the present case. In several of the cases the primary trust was for an abstract purpose with no one but the lender to enforce performance or restrain misapplication of the money. In Edwards v Glyn (1859) 2 E & E 29 the money was advanced to a bank to enable the bank to meet a run. In In re EVTR, Gilbert v Barber [1987] BCLC 646 it was advanced "for the sole purpose of buying new equipment". In General Communications Ltd v Development Finance Corpn of New Zealand Ltd [1990] 3 NZLR 406 the money was paid to the borrower's solicitors for the express purpose of purchasing new equipment. The present case is another example. **It is simply not possible to hold money on trust to acquire unspecified property from an unspecified vendor at an unspecified time. There is no reason to make an arbitrary distinction between money paid for an abstract purpose and money paid for a purpose which can be said to benefit an ascertained class of beneficiaries, and the cases rightly draw no such distinction. Any analysis of the Quistclose trust must be able to accommodate gifts and loans for an abstract purpose.**

90 *(iv) In suspense.* As Peter Gibson J pointed out in Carreras Rothmans Ltd v Freeman Matthews Treasure Ltd [1985] Ch 207, 223 the effect of adopting Sir Robert Megarry V-C's analysis is to leave the beneficial interest in suspense until the stated purpose is carried out or fails. The difficulty with this (apart from its unorthodoxy) is that it fails to have regard to the role which the resulting trust plays in equity's scheme of things, or to explain why the money is not simply held on a resulting trust for the lender.

91 Lord Browne-Wilkinson gave an authoritative explanation of the resulting trust in Westdeutsche Landesbank Girocentrale v Islington Borough Council [1996] AC 669, 708c and its basis has been further illuminated by Dr Robert Chambers in his book Resulting Trusts published in 1997. Lord Browne- Wilkinson explained that a resulting trust arises in two sets of circumstances. He described the second as follows: "Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest. " The Quistclose case [1970] AC 567 was among the cases he cited as examples. He rejected the argument that there was a resulting trust in the case before him because, unlike the situation in the present case, there was no transfer of money on express trusts. But he also rejected the argument on a wider and, in my respectful opinion, surer ground that the money was paid and received with the intention that it should become the absolute property of the recipient.

92 The central thesis of Dr Chambers's book is that a resulting trust arises whenever there is a transfer of property in circumstances in which the transferor (or more accurately the person at whose expense the property was provided) did not intend to benefit the recipient. It responds to the absence of an intention on the part of the transferor to pass the entire beneficial interest, not to a positive intention to retain it. Insofar as the transfer does not exhaust the entire beneficial interest, the resulting trust is a default trust which fills the gap and leaves no room for any part to be in suspense. An analysis of the Quistclose trust as a resulting trust for the transferor with a mandate to the transferee to apply the money for the stated purpose sits comfortably with Dr Chambers' thesis, and it might be thought surprising that he does not adopt it.

93 *(v) The Court of Appeal's analysis.* The Court of Appeal were content to treat the beneficial interest as in suspense, or (following Dr Chambers's analysis) to hold that it was in the borrower, the lender having merely a contractual right enforceable by injunction to prevent misapplication. Potter LJ put it in these terms [1999] Lloyd's Rep Bank 438, 456, para 75:

"The purpose imposed at the time of the advance creates an enforceable restriction on the borrower's use of the money. Although the lender's right to enforce the restriction is treated as arising on the basis of a 'trust', the use of that word does not enlarge the lender's interest in the fund. The borrower is entitled to the beneficial use of the money, subject to the lender's right to prevent its misuse; the lender's limited interest in the fund is sufficient to prevent its use for other than the special purpose for which it was advanced."

This analysis, with respect, is difficult to reconcile with the court's actual decision in so far as it granted Twinsectra a proprietary remedy against Mr Yardley's companies as recipients of the misapplied funds. Unless the money belonged to Twinsectra immediately before its misapplication, there is no basis on which a proprietary remedy against third party recipients can be justified.

94 Dr Chambers's "novel view" (as it has been described) is that the arrangements do not create a trust at all; the borrower receives the entire beneficial ownership in the money subject only to a contractual right in the lender to prevent the money being used otherwise than for the stated purpose. If the purpose fails, a resulting trust in the lender springs into being. In fact, he argues for a kind of restrictive covenant enforceable by negative injunction yet creating property rights in the money. But restrictive covenants, which began life as negative easements, are part of our land law. Contractual obligations do not run with money or a chose in action like money in a bank account.

95 Dr Chambers's analysis has attracted academic comment, both favourable and unfavourable. For my own part, I do not think that it can survive the criticism levelled against it by Lusina Ho and P St J Smart: "Reinterpreting the Quistclose Trust: A Critique of Chambers' Analysis" (2001) 21 OJLS 267. It provides no solution to cases of non- contractual payment; is inconsistent with Lord Wilberforce's description of the borrower's obligation as fiduciary and not merely contractual; fails to explain the evidential significance of a requirement that the money should be kept in a separate account; cannot easily be reconciled with the availability of proprietary remedies against third parties; and while the existence of a mere equity to prevent misapplication would be sufficient to prevent the money from being available for distribution to the creditors on the borrower's insolvency (because the trustee in bankruptcy has no greater rights than his bankrupt) it would not prevail over secured creditors. If the bank in the Quistclose case [1970] AC 567 had held a floating charge (as it probably did) and had appointed a receiver, the adoption of Dr Chambers's analysis should have led to a different outcome.

96 Thus all the alternative solutions have their difficulties. But there are two problems which they fail to solve, but which are easily solved if the beneficial interest remains throughout in the lender. One arises from the fact, well established by the authorities, that the primary trust is enforceable by the lender. But on what basis can he enforce it? He cannot do so as the beneficiary under the secondary trust, for if the primary purpose is fulfilled there is no secondary trust: the precondition of his claim is destructive of his standing to make it. He cannot do so as settlor, for a settlor who retains no beneficial interest cannot enforce the trust which he has created.

97 Dr Chambers insists that the lender has merely a right to prevent the misapplication of the money, and attributes this to his contractual right to specific performance of a condition of the contract of loan. As I have already pointed out, this provides no solution where the arrangement is non- contractual. But Lord Wilberforce clearly based the borrower's obligation on an equitable or fiduciary basis and not a contractual one. He was concerned to justify the co-existence of equity's exclusive jurisdiction with the common law action for debt. Basing equity's intervention on its auxiliary jurisdiction to restrain a breach of contract would not have enabled the lender to succeed against the bank, which was a third party to the contract. There is only one explanation of the lender's fiduciary right to enforce the primary trust which can be reconciled with basic principle: he can do so because he is the beneficiary.

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100 As Sherlock Holmes reminded Dr Watson, when you have eliminated the impossible, whatever remains, however improbable, must be the truth. 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 in so far as he does not it is held on a resulting trust for the lender from the outset. Contrary to the opinion of the Court of Appeal, it is the borrower who has a very limited use of the money, being obliged to apply it for the stated purpose or return it. He has no beneficial interest in the money, which remains throughout in the lender subject only to the borrower's power or duty to apply the money in accordance with the lender's instructions. When the purpose fails, the money is returnable to the lender, not under some new trust in his favour which only comes into being on the failure of the purpose, but because the resulting trust in his favour is no longer subject to any power on the part of the borrower to make use of the money. Whether the borrower is obliged to apply the money for the stated purpose or merely at liberty to do so, and whether the lender can countermand the borrower's mandate while it is still capable of being carried out, must depend on the circumstances of the particular case.