'Once More Unto the Breach': The *Quistclose* Trust Revisited

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I. Introduction

The *Quistclose* trust is a legal quagmire, described as both 'the single most important application of equitable principles in commercial life' and 'an aberrant creation of common law'[1]. Despite recent efforts,[2] the area remains besieged with conceptual uncertainty. It sits unsatisfactorily amongst orthodox equitable principles—not (yet) declared *sui generis*, and repeatedly recast into different theoretical moulds.

This article seeks to add to the current discourse by examining Lord Millett's prevailing account of the *Quistclose* trust in *Twinsectra v Yardley*.[3] Two flaws will be pointed out: first, that it has unwarrantedly lowered the threshold for finding an intention to retain the beneficial interest; and secondly, that it also fails to coherently or accurately locate the beneficial interest in the resulting trust. Additionally, the model suggested by Robert Chambers will be supported as a more tenable alternative to the flawed orthodoxy of *Twinsectra*.

II. Lord Millett's Account

Lord Millett's account, which claims to have 'eliminated the impossible [analyses]' and uncovered the 'truth'[4], represents the theory of *Quistclose* trusts currently applied by the courts.[5] It classifies the *Quistclose* trust as a *single* resulting trust in the lender's favour—the lender transfers only the legal title to the borrower, while retaining the entirety of the beneficial interest. Specifically, a resulting trust arises as the beneficial interest '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'.[6] This is contrasted to Lord Wilberforce's theory of the *Quistclose* trust in the eponymous case, where he identifies a primary express trust for the creditors (the third party to which the purpose is to be applied) and a secondary resulting trust for the lender.[7]

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[1] Lord Millett, 'Foreword' in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Bloomsbury Publishing 2004) vii.

[2] cf William Swadling, *The Quistlcose Trust: Critical Essays* (Bloomsbury Publishing 2004); Thomas and Hudson, *The Law of Trusts* (1st edn, OUP 2004).

[3] *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164.

[4] ibid 192.

[5] Applied in, inter alia, *Templeton Insurance Ltd v Pennington Solicitors* [2006] EWHC 865; *Cooper v PRG Powerhouse* [2008] EWHC 498; *Eleftheriou v Costi* [2013] EWHC 2168.

[6] *Twinsectra* (n 4) 193.

[7] *Quistclose Investments v Barclays Bank plc* [1970] AC 567 (HL).

On this basis, Lord Millett suggests that the *Quistclose* trust is 'an entirely orthodox example of the kind of default trust known as resulting trust'.[8] He likens it to a 'retention of title' (or *Rompala*) clause in a contract, which 'enables the borrower to have recourse to the lender's money without entrenching on the lender's property rights more than necessary to enable the purpose to be achieved'.[9]

III. Questions left unanswered and difficulties posed

Lord Millett's account is flawed in two areas: first, it unwisely and unwarrantedly lowers the threshold for inferring an intention to retain the beneficial interest; and secondly, it fails to comprehensibly identify the location of the beneficial interest.

(A) Inferring intention from purpose: Lowering the standard

A primary criticism of Lord Millett's theory is that it results in courts *artificially imputing* to the lenders an intention to retain the beneficial interest. According to Lord Millett's theory, the *Quistclose* trust responds to a *negative* intention (i.e. the absence of an intention to pass the entire beneficial interest to the borrower) as opposed to a *positive* intention to retain the beneficial interest.[10]

In *Twinsectra,* Lord Millett states that 'a resulting trust arises whenever there is a transfer of property in circumstances in which the transferor *did not intend to benefit* the recipient. In other words, 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' [emphasis added].[11] This dictum is eventually narrowed down to the following test: 'the question in every case is whether the parties intended that the money be at the free disposal of the recipient', based on the construction of the relevant documents and the whole circumstances of the transaction.[12] If the money is not at the free disposal of the recipient, then the lender did not intend to benefit him, and a resulting trust in the lender's favour is established.

By equating lack of 'free disposal' with the intention to create a trust, Lord Millett's *Quistclose* trust applies an excessively lenient approach to the finding of an intention to retain a beneficial interest—it does so in the absence of words or actions that indicate a positive intention to do so; a simple stated purpose for the money is sufficient. Penner argues that by equating *the money not being at B's free disposal* to the *lack of beneficial ownership vested in B*, courts are able to infer a *Quistclose* trust whenever a condition is attached to a loan or a purpose is stated, despite parties having no positive intention to retain the beneficial interest.[13] This is quite accurate. There is a meaningful difference between the lender's act of transferring to the borrower the legal title to the money (for a purpose) and the lender having an intention to retain the beneficial interest. Swadling gives the example of ordering a new computer and making it a term

[8] *Twinsectra* (n 4) 192.
[9] ibid 187.
[10] The lender could only be said to have the positive intention that the beneficial interest should pass to the third party recipient, only if it was dealt with in accordance with its stated purpose.
[11] *Twinsectra* (n 4) 190.
[12] ibid 185.
[13] Penner, 'Lord Millett's Analysis' in Swadling (n 3) 61.

of the contract that it arrives by next Monday. It is absurd to say that this would thereby create a trust, for nothing was said about rights being held by one person on behalf of another.[14]

The court's failure to appreciate the correlative gap between attaching a purpose to a loan and creating a trust is emphasized in some *Quistclose* trust cases, where it was held that a trust existed where, on the facts, there was no mention of a trust or ownership of monies. In making the loan, the parties had simply failed to contemplate the location of the beneficial interest, or even the creation of an equitable interest at all. In *Twinsectra* and *Quistclose*, there was no mention of the ownership of monies or the creation of a trust in the undertaking or the resolution of the board respectively. In *Re EVTR*,[15] the Court of Appeal explicitly recognised that there was no conscious consideration that the borrower would ever be insolvent, much less the intention to create a trust upon such insolvency.

(B) A continuation of principle or and unwarranted deviation?

In *Twinsectra*, Lord Millett attempted to preempt possible criticism by arguing that his approach has not introduced anything novel; he has merely applied the pre-existing standards established in *Paul v Constance*[16] and *Re Kayford*.[17] According to this argument, there is no need for the parties to have subjectively intended to create a trust, as long as the arrangement itself objectively creates one. Drawing from *Kayford*, Lord Millett argues that: 'A settlor, must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them'.[18] This implies that a transfer for purpose is a situation that has the objective effect of indicating an intention to retain the beneficial interest, and hence, the certainty of intention requirement is not loosened.

Contrary to the arguments above, the requirements for certainty of intention in *Paul* and *Kayford* are *not* coterminous with that proposed by Lord Millett, and his argument above is neither founded on orthodox trusts theory nor a justifiable deviation from such.

(i) Examining Paul v Constance*: positive statements, the same as an absence of statement?*

First, on its facts, *Paul* provides no support for Lord Millett's account as it concerned a positive statement of ownership and inferred the intention to retain the beneficial interest at a *higher threshold* than that in Lord Millett's account. More precisely, the court in *Paul* infers an intention to retain the beneficial interest from positive statements about the *location of ownership*, which is acceptable, whilst Lord Millett does so merely at the utterance of a *purpose* related to the transaction (i.e. in the *absence* of such statements).

[14] Swadling, 'Orthodoxy' in Swadling (n 3) 14.
[15] *Re EVTR* [1987] BCLC 646.
[16] *Paul v Constance* [1977] 1 WLR 527.
[17] *Re Kayford* [1975] 1 WLR 279.
[18] *Twinsectra* (n 4) 185.

It is agreed that *Paul* affirmed that a trust can be created without reference to the word 'trust', or even without the settlor being aware that such a legal construct exists. The statement 'this money is yours as much as it is mine' was held to be sufficient to manifest an intention to create a trust.[19] In those situations, however, there was some explicit indication as to the location of the beneficial interest in the money—there was an ascertainable intention to 'split' the beneficial interest between Mr Constance and the claimant; the courts only stepped in to say that while the legal title continued to be vested in Mr. Constance, the beneficial interest had been vested in both himself and the claimant. In *Twinsectra*, however, the parties made no mention of the location of the beneficial interest. The courts did not step in to infer an intention as to the beneficial interest from a positive statement (as in *Paul*)—they stepped in to infer it from a statement about purpose (i.e. a condition indicating that the money was not at the borrower's free disposal).

On this argument, the threshold for inferring an intention as to the location of the beneficial interest in *Twinsectra* is significantly lower than that set out by *Paul*, and by the long history of cases establishing that the standard in *Paul* was to be considered the lowest threshold of the test for intentions.[20] Lord Millett's account is an unannounced deviation from authority.

However, one might make a counter-argument that this deviation from authority is otherwise justified: statements concerning purpose could be interpreted as equivalent to statements concerning the location of the beneficial ownership. If conditions are attached to the transfer (i.e. there is a stated purpose for it), it could be argued that that alone is sufficient to indicate an intention *not to transfer* the entire proprietary interest as a whole (i.e. to retain the beneficial interest).

This is alluded to in Lord Millett's judgment itself: he clarifies that 'a *Quistclose* trust does not necessarily arise merely because money is paid for a particular purpose'. Instead, the question is whether 'the parties intended the money to be at the free disposal of the recipient'. He reasons that a lender that 'inquires into the purpose of a loan in order to decide whether or not he would be justified in making it… may be said to lend the money for the purpose in question, but that is not enough to create a trust; once lent the money is at the free disposal of the borrower'.[21] In contrast, in *Quistclose* trust cases, the condition that the money be used 'solely… and for no other purpose' than the stated purpose is a strong indicator that there is an intention to retain the beneficial interest.

This is a salient argument. It is, in response, argued that inferring an intention to retain a beneficial interest from the borrower's lack of 'free disposal' is *still* a conceptual strain on the notion of intention. It requires the courts to go one step further in extending the logical bounds of the idea by treating the free disposal of the recipient as sufficient to infer the intention to retain the beneficial interest.

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[19] *Re EVTR* (n 16) 527.

[20] See, for example, Sir Geroge Jessel in *Richards v Delbridge* (1874) LR Eq 11, relied upon in *Paul v Constance* (n 17). He states, at page 14, that 'it is true that he need not use the words, 'I declare myself a trustee', but he must do something which is equivalent to it, and use expressions which have that meaning'.

[21] *Twinsectra* (n 4) 185, 186.

This is tenuous because the 'lack of a free disposal' element is liable to be interpreted in other, competing ways: it is indeterminate. For example, Chambers' account can be equally inferable from a lack of 'free disposal'. His account, briefly stated, highlights that the borrower has full beneficial ownership of the money (in addition to the legal title), and the lender only has an equitable right to prevent the use of the fund for any other purpose. This could be an equally valid inference from the borrower's lack of 'free disposal'—especially in cases where a large part of the beneficial interest (e.g. the right to revoke, the power to apply it to the purpose) passes onto the borrower, leaving the lender with, practically speaking, only the right to demand the return of the monies on failure of purpose.

In conclusion, the act in *Paul* is equivalent to a declaration of trust; it directly refers to the location of the beneficial interest and could thus amount to a conveyance of said proprietary interest. It is untenable to argue that statements concerning purpose, such as 'the loan is made for the acquisition of property'[22] or 'the loan is provided to ensure the continuance of advertising campaigns'[23] amount to a similar declaration of trust.

(ii) Examining Re Kayford*: a further lowering of the threshold?*

Secondly, *Kayford* (admittedly) presents an initial challenge to the argument made by Penner above. It affirmed that 'a sender may create a trust by using appropriate words when he sends the money… or the company may do it by taking suitable steps on or before receiving the money'.[24] There, the payment into a separate bank account was considered a circumstance that created a trust;[25] this is more similar to the factual matrix of the *Quistclose* trust than *Paul*. In both *Kayford* and *Quistclose* trust cases, the only available evidence courts had to infer intention from were certain indicative circumstances, such as the payment of monies into a segregated bank account, rather than positive statements.

It is argued that even when the courts infer intention from indicative circumstances, the threshold for success has been significantly lowered. This occurs with the gradual (and excessive) expansion of the range of indicative circumstances that courts can infer an intention to retain beneficial interest from. While the segregation of funds might be a reasonable circumstance to draw such an inference from, this has been relaxed in recent cases, such that any loan (into segregated bank accounts, or not) that stipulates a purpose can give rise to a *Quistclose* trust. Unlike the segregation of funds, this is not a reasonable basis for inferring an intention to retain the beneficial interest.

In both older and more recent cases, the requirement of a segregation of funds has been gradually weakened, and currently occupies a nugatory position. Two cases demonstrate this: first, in *Quistclose* itself, Quistclose Investments did not impose any duty of segregation over the

[22] As in *Twinsectra* (n 4).
[23] As in *Carreras Rothman Ltd v Freeman Mathews Treasure Ltd*, [1985] Ch 207.
[24] *Re Kayford* (n 18) 282.
[25] It is noted that the segregation of funds is an important, but not necessary, proof of intention. This was acknowledged in *Re Kayford* (n 18) 282.: 'Payment into a separate bank account is a useful (though by no means conclusive) indication of an intention to create a trust, but of course there is nothing to prevent the company from binding itself by a trust even if there are no effective banking arrangements.'

money. The bank was advised to keep the funds in a separate account but this stipulation *did not come from Quistclose Investments* (and hence could not be indicative of their intention to create a trust). Interestingly, Lord Millett in *Twinsectra* never retrospectively addressed the issue of why the requirement to segregate funds reveals the intention of Quistclose Investments rather than that of the bank, given that the stipulation came from the latter. This position was even more relaxed in the second case of *Cooper v Powerhouse PRG.*[26] In *Cooper*, the fact that the money when paid would be 'mingled with the company's funds'[27] did not detract from the finding of a *Quistclose* trust; Evans-Lombe J explicitly states that Lord Millett rejected the requirement of the monies being kept in a segregated fund.[28] Importantly, the intention to create a trust in *Cooper* was based on a stipulation of purpose *alone*. Evan-Lombes J states that 'the money paid was only to be used for the purposes of paying off his loan' and on that basis inferred an intention.

Cooper may be symptomatic of a wider judicial trend in *Quistclose* trust cases of discarding requirements previously thought to be strictly held and instead relying solely on the stipulation of a purpose to infer an intention. This is startling when one notes very recent *Quistclose* cases such as *Mundy v Brown*,[29] where *Cooper*'s disposal of the segregation of monies requirement is affirmed and applied, and cases such as *Bellis v Challinor*[30] and *Bieber v Teathers*[31] in which again, the court bases the inference of intention solely on whether a purpose has been attached to the loan, and not whether there has been a segregation of monies.

This demonstrates the broadness of the test for intention to retain a beneficial interest in *Twinsectra* and the problems associated with it—as observed, courts face no semantic or analytic difficulty with varying and *lowering* the threshold upon which an inference of intention to retain a beneficial interest is found. They give no reason for this finding other than the fact that the attachment of a purpose prevented the monies from being at the 'free disposal' of the borrower.[32]

Furthermore, the broadening of the test is normatively undesirable, as it disposes of a more concrete, orthodox test of certainty of intention to retain the beneficial interest and create a trust. While it is true that *Kayford* does not strictly enforce the segregation of bank funds as a requirement that courts can infer an intention to retain a benefit from, the converse situation—inferring it solely on the basis of an attached purpose—is too weak a requirement. It would increase the likelihood of courts inferring a resulting trust in favour of the lender in situations where it is far from likely that the true bargain was that the lender could demand the monies be returned to him where the purpose, in the widest sense of the word, fails (eg if it were applied to paying employees their salary instead of advertising). In such a case, this would amount to what Penner has described as 'a grossly unwarranted rearrangement by the court of the true bargain'.[33]

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[26] *Cooper v Powerhouse PRG* [2008] EWHC 498. Note, however, that the trust in *Cooper* might also be classified as a purpose trust, depending on how one views it.
[27] ibid 598.
[28] ibid 596.
[29] *Mundy v Brown* [2011] EWHC 377.
[30] *Bellis v Challinor* [2015] EWCA Civ 59.
[31] *Bieber v Teathers* [2012] EWCA Civ 1466.
[32] *Twinsectra* (n 4) 185.
[33] Penner (n 14).

(C) The mysterious location of the beneficial interest

Perhaps the most interesting conceptual conundrum posed by the *Quistclose* trust lies in the inability of courts to accurately pinpoint the location of the beneficial interest. Lord Millett, as explained, states that the beneficial interest is located throughout in the lender. This is untenable—in some cases, imputing a beneficial interest to the lender would be akin to legal fiction.

Two arguments will be made to this effect: that Lord Millett's account effectively 'hollows out' the content of the lender's beneficial interest; and that it fails to accommodate instances in which the borrower obtains factual benefit from the fund.

(i) 'Hollowing out' the content of the lender's beneficial interest

In insisting that the beneficial interest in the trust remains with the lender throughout, Lord Millett's account potentially empties the term 'beneficial interest' of meaningful content. The lender is artificially affixed with the label of 'beneficial owner', while not being able to exercise majority of the concomitant rights. This occurs on both a *wide* and *narrow* interpretation of the content of beneficial interest.

First, the lender cannot be said to have the beneficial interest if we employ a wide interpretation of the term as referring to the full range of rights associated with beneficial ownership. Examples of such are expressed in cases such as *Re Bowes*[34] (beneficiaries allowed to call for the funds reserved for the purpose of maintaining trees, to alleviate their financial problems), *Re Nelson*[35] (the beneficial interest 'cannot be fettered by prescribing a mode of enjoyment'),[36] and *Baker v Archer-Shee*[37] (beneficiary could direct the trustees how to deal with the trust property). Payne summarises the argument quite succinctly:

> 'If the lender takes full beneficial ownership of the property from the start then Quistclose ought to be able to wield all the rights normally attached to full beneficial ownership… such as the right to compel Rolls Razor to use the money for the payment of the dividend, or revoke the loan and requirement immediate repayment of the money, to prevent the payment of the dividend by Rolls Razor to the shareholders while the purpose remains capable of fulfillment or to require the borrower to use the money for some other purpose'[38]

However, it can be validly argued that the full range of rights constituting a beneficial interest, as outlined above, are only enjoyed by beneficiaries in an express trust. Instead, a more narrow interpretation of beneficial interest must be considered in a resulting trust. This makes sense in the context of a *Quistclose* trust, where the lender does not possess an indefeasible

[34] *Re Bowes* [1896] 1 Ch 507.
[35] *Re Nelson* [1928] Ch 920.
[36] ibid 921.
[37] *Baker v Archer-Shee* [1927] AC 844 (HL).
[38] Payne, 'Quistclose and Resulting Trusts' in P Birks and F Rose (eds.), *Restitution and Equity: Resulting Trusts and Equitable Compensation* (London, 2000), 162.

beneficial interest—as explained above, he cannot claim the property unless the power to apply the monies to the stated purpose fails.

There is, however, room to argue that the lender cannot be said to meaningfully possess the beneficial interest, even on the narrow interpretation of the term. This happens when the trust is irrevocable (i.e. the lender cannot revoke it), and also involves a duty to apply the money to the purpose (i.e. the lender cannot request the borrower to apply the monies to a different purpose). In such a circumstance, the lender loses all control over the enforcement of the trust once the money leaves his hands, leaving him with, in effect, a null beneficial interest. He can neither 'take back' the trust, nor prevent the borrower from passing it to the third-party beneficiary.[39]

This, admittedly, occurs in the limited circumstance of when the loan and its terms are conditions of the trust. Such situations do, however, continue to occur and demonstrate a conceptual lacuna in Lord Millett's theory. In *Carreras Rothman v Freeman Mathews Treasure*,[40] for example, Peter Gibson LJ (considering *Re Northern Developments Holdings Ltd*) held that the third party creditors had enforceable rights and that the lender could 'on no footing' revoke the trust unilaterally.[41] In such cases, the lender was held to be able to be compelled by a third party, and could not revoke the trust. Lord Millett's theory fails to explain how these judgments co-exist with the lender having even a minimal beneficial interest.

(ii) Factual beneficial interest

Additionally, it would be disingenuous to argue that the lender has the beneficial interest in the monies where, in fact, the third party/borrower directly benefits from it. In other words, the lender cannot be said to have the beneficial interest without accruing any factual benefit. An example of a *Quistclose* trust whereby the benefit accrues to a third party is *Re EVTR*, where the claimant made it clear that he was to provide financial assistance to a friend (i.e. that a third party was to benefit). It is absurd to argue that the claimant obtained any benefit in the legal sense from doing so, and it is therefore counter-intuitive that he can be said to have the beneficial interest.[42]

However, a salient counter-argument is noted: there are cases which indeed reflect a factual benefit accrued to the lender. In particular, Lord Millett identifies *Carreras Rothman* as a case in which the lender had a 'separate and distinct' interest in the provision of a loan (the lender's benefit in that case was that their advertising campaign would be saved).[43] This was also the case in *Quistclose*, where the majority shareholder of Quistclose Investments was also the managing director of the Rolls Razor, and the loan was intended to keep the business going. Additionally, in *Cooper*, the lender was seeking to gain title to his car for personal use following the termination of his employment with the borrower.

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[39] cf Penner (n 14).
[40] *Carreras Rothman v Freeman Mathews Treasure* [1985] 1 Ch 207.
[41] ibid 223.
[42] *Re EVTR* (n 16).
[43] Peter Millett, 'The Quistclose Trust: Who can Enforce It?' (1985) 101 LQR 269, 279.

These criticisms are understandable and valid. However, the specific problem one may *continue* to have with Lord Millett's account is that, as a test, it is a faulty indicator of the location of the beneficial interest in a trust. Lord Millett's states in *Twinsectra*: 'When the money is advanced, the lender acquires a right, enforceable in equity, to see that it is applied for the stated purpose, or more accurately to prevent its application for any other purpose. This prevents the borrower from obtaining any beneficial interest in the money, at least while the designated purpose is still capable of being carried out'.[44] This is true, but it is not the case that *whenever* there is a purpose attached to a fund, the factual benefit lies with the lender throughout.

In cases such as *Cooper*, *Quistclose* and *Carreras Rothman*, the factual benefit does lie (in part, at least) with the borrower, while in some cases such as *Re EVTR* and *Twinsectra,* it does not. Hence, whether the theory 'fits' the case is fortuitous, and the test of whether there is a restriction on the use of money is tangential to the actual question of where the beneficial ownership lies.

Furthermore, as argued by Chambers, there are other situations in which the factual benefit is divorced from the location of the beneficial interest. He argues that, 'if the use of money cannot be restricted without creating a trust, then every restriction on the use of money must eliminate the benefit of having it'.[45] To support this, he gives the example of a condition, not for the money to be paid to the third party, but for the money *not to* be paid to the third party.[46] In such a case, the borrower is free to use the money for other purposes beneficial to him. Alternatively, he gives the example of his son asking for money to pay tuition fees, which is given or loaned on the condition that he uses it only to pay those fees—in such a case, the restriction reduces, but 'cannot be necessarily said to eliminate' his beneficial ownership.[47] His argument therefore furthers the point that, in most *Quistclose* trusts, the true location of the benefit should not hinge upon the restrictions attached to the loan; there is simply no factual correlation. To state that the lender retains the beneficial ownership in *all Quistclose* trust cases is stretching the bounds of legal fiction slightly too far.

IV. Alternative Solutions: Reconsidering Chambers

Chambers provides two different accounts of the *Quistclose* trust: he first discusses the idea in 1997,[48] and revises this in 2004.[49]

(i) Chambers' account in 1997

Chambers' central thesis is that the borrower acquires more than just the bare legal title and has the full beneficial use of the money at common law, subject only to the equitable right of the lender to prevent the loan from being employed for any other purpose, enforceable by an injunction.[50] He further contends that a resulting trust arises in favour of the lender when the purpose fails. In that situation, the lender's equitable interest (i.e. the right to prevent the

[44] *Twinsectra* (n 4) 184.
[45] Robert Chambers, 'Restrictions on the Use of Money' in Swadling (n 3) 89.
[46] ibid 90.
[47] ibid.
[48] Chambers, *Resulting Trusts* (OUP 1997).
[49] Chambers (n 46).
[50] Chambers, *Resulting Trusts* (n 49) 86.

borrower's misuse of the fund) 'continues in full force, becoming merged into the greater equitable ownership under the resulting trust'.[51]

The validity of this approach will now be considered: first, it is agreed that this account provides a less contrived explanation of the location of the beneficial interest than Lord Millett's account. Chambers supports the argument in Part C(i) and (ii) that the problem with orthodox accounts of the *Quistclose* trust is that they have been overly insistent on a 'search for the location of the equitable interest as a key to understanding the *Quistclose* trust'.[52] His account neatly evades the criticism levied against Lord Millett's account; the beneficial interest is passed onto the borrower subject to the equitable right of the lender, and is not wholly retained by lender.

Secondly, it is noted that Chambers' account, by virtue of the lender not retaining a beneficial interest, does not implore the same questions regarding the lowering of the threshold for inferring an intention to retain a beneficial interest as discussed in Part B. Instead, it (correctly) fails to impute any intention to the lender to retain beneficial interest; it imputes only an intention to the lender to have an equitable right to enforce the application of the monies to the purpose. Therefore, and to some extent, Chambers' account solves some of the problems encountered by Lord Millett's account. It is, however, far from perfect.

It is noted that the exact nature of the lender's right is unclear—it is described as both contractual and equitable. This might lead to several competing interpretations of Chambers' account and add to the conceptual disarray posed by the *Quistclose* trust.

In addition, and more significantly, Chambers' 1997 account has received both judicial[53] and academic criticism.[54] Such criticism is extensive and varied and, due to exigencies of space, will not be fully outlined here. One such critique, for example, dismisses Chambers' theory as 'it provides no solution to cases of non-contractual payment'.[55] This is fully explained by Ho and Smart (cited by Lord Millett in *Twinsectra* as having successfully countered Chambers' thesis).[56] Other significant counter-arguments given by Lord Millett in *Twinsectra* include the fact that Chambers' account, being partly based on contract, cannot be reconciled with the availability of remedies against third parties.[57]

Lastly, although it generally acts as a better compass for the true location of the beneficial interest, Chambers' account still leaves us with several conceptual gaps. It does not explain situations in which third parties are capable of enforcing the trust (e.g. *Carreras* and *Re Northern Developments Holdings Ltd*, as discussed above). In such a case, Chambers' account fails in equal measure to Lord Millett's—it fails to account for the beneficial interest *viz.* the right to enforce the trust is present in the third party instead of the borrower.

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[51] ibid 85.
[52] ibid 76.
[53] *Twinsectra* (n 4) 190.
[54] Ho and Smart, 'Re-interpreting the Quistclose Trust: A Critique of Chambers' Analysis' (2001) 21(2) OJLS 267.
[55] *Twinsectra* (n 4) 191.
[56] Ho and Smart (n 55).
[57] *Twinsectra* (n 4) 191.

In conclusion, although Chambers' account as given in 1997 fails, it can be said to have 'failed better'[58] than Lord Millett's – though not completely accurate, it still provides a better compass for locating the beneficial interest, and inferring an intention to retain the beneficial interest.

(ii) Chambers' account in 2004: worth reconsidering?

Chambers' account, as given in 2004, will now be considered: essentially, Chambers posits that the *Quistclose* trust is 'not a particular relationship, but a range of possible relationships'.[59] There are two possible versions of resulting trust that can arise, depending on the nature of the restriction that produces it; both mirror (more accurately than on Lord Millett's account) the location of the beneficial interest.

Both arise because the lender's restriction on the borrower's use of money prevents the borrower from obtaining the full beneficial interest. In the first type of resulting trust, the restriction wholly *eliminates* the benefit of having the money, and B will hold it entirely on resulting trust for the lender. In the second type of resulting trust, the restriction merely *reduces* that benefit, and the beneficial ownership is shared by both the lender and the borrower. Chambers envisages various 'sharing arrangements', such as 'if the permitted uses of the money are for B's benefit and B has the right to use it for these purposes, B must have at least some beneficial interest in the money' and 'if the restriction on B's use is minor, then B should be regarded as its sole beneficial ownership, subject only to A's right to restrain its misuse'[60] (i.e. his account of the trust in 1997).

First, the account clearly benefits from flexibility and comprehensiveness in accommodating varying locations of the beneficial interest under the structural 'umbrella' of a *Quistclose* trust. This solves a majority of the problems discussed above: the type of resulting trust (and if relevant, the particular 'sharing arrangement') that the transaction is classified as is entirely commensurate with the restrictions imposed on each of them. This belies the theory's sensitivity to 'what parties want… the relationship they have chosen', and its intention 'to give effect to their intentions if they are known'.[61] Ultimately, it acknowledges the problem with Lord Millett's thesis in attempting to constrict what is in fact a *range* of relationships within a single theory.

Secondly, that this effect is achieved through introducing the idea of 'sharing arrangements' for beneficial interest is both justified and normatively valuable – the beneficial interest can, and should, be described as shared. Chambers argues this succinctly: 'If the arrangement is primarily for B's benefit or for the mutual benefit of A and B and the permitted use of the money will benefit B, then B probably has a beneficial interest in the money. If A's right to restrain B's misuse of the money is regarded as a beneficial interest, then beneficial ownership is

[58] Samuel Beckett, *Worstward Ho* (Grove Pr 1984). Here, I kindly draw on the description used by Dr Ciara Kennefick in a university tutorial (Oxford, 30 February 2016).
[59] Chambers (n 46) 118.
[60] ibid 120.
[61] ibid 119.

shared'.[62] Usefully, he cites Isaacs J's dicta in *Hoystead v Federal Commission of Taxation* as support for the proposition that beneficial ownership can be shared or split: a beneficiary's 'interest in the trust estate at any given moment is measured by the relief which equity is then prepared to give him, that is, by the rights which the due execution of the trusts as framed by the creator of the trusts will at that moment give him'.[63] Academic support for the notion that beneficial interest can be shared can be derived elsewhere, and it is widely accepted that it represents the normatively desirable way to conceptualise equitable interest.[64]

However, there may be some room to criticize his account as failing (though, as this article argues, 'failing better' than Lord Millett's account) as it is methodologically flawed. Designating the *Quistclose* trust as a range of relationships rather than a specific one risks emptying the trust of any specific definition or conceptual boundaries, making it difficult to tell where the concept ends and begins and hindering legal certainty. This is apparent as the effect of Chambers' account is to create two types of resulting trusts with three possible locations of beneficial interest (i.e. in the lender, shared, or in the borrower). Chambers' account may need some fine-tuning in terms of providing us with essential features of the trust, instead of simply accommodating most features under its varying schema of 'resulting trust' type relationships.

V. Conclusion

This article highlights the sluggishness of Lord Millett's theory in responding to changing factual matrixes. Specifically, the near-disposal of any serious requirements for inferring an intention to retain the beneficial interest, and the inability to cope with pinpointing varying locations of beneficial interest make his thesis untenable. Instead, it would be useful to consider, as Chambers does, the *Quistclose* trust as a range of relationships.

[62] ibid 99.
[63] *Hoystead v Federal Commission of Taxation* (1920) 27 CLR 400, 425.
[64] cf Robert Nolan, 'Equitable Property' (2006) LQR 232, 233: '…very different quanta of benefit from trust assets can be allocated by a settlor to different beneficiaries, very largely as he pleases, while allowing each such beneficiary the security of a proprietary claim on the trust assets, a claim which survives a trustee's insolvency'; Patrick Parkinson, 'Reconceptualising the Express Trust' 2002 CLJ 657, 663: 'Consequently, it is incorrect to think of trusts always in terms of legal and equitable ownership. Rather, the core idea of the private express trust lies in the notion of equitable obligations in relation to property, which in most cases will also give to beneficiaries commensurate property rights in equity.'