

Liew, YK; Low, WT; (2014) The Quistclose Doctrine: Resurrection of the Primary Trust? **King's Law Journal** , 25 (1) 8 - 18. [10.5235/09615768.25.1.8](https://doi.org/10.5235/09615768.25.1.8). (Published). Downloaded from UCL Discovery <http://discovery.ucl.ac.uk/1460157/>

Article

The *Quistclose* Doctrine: Resurrection of the Primary Trust

Ying Khai Lie, The Dickson Poon School of Law, King's College London

Weng Tchung Low, Advocate & Solicitor, High Court of Malaya; Principal,

Messrs Weng & Co, Malaysia

I. INTRODUCTION

It is not uncommon for trusts cases decided in Commonwealth jurisdictions to affect the general development of the law of trusts. While as a matter of comparative law the jurisprudence of Malaysian courts have seldom received much attention, the recent decision in *PECD Berhad (In Liquidation) v AmTrustee Berhad*¹ served as an occasion for the highest court in Malaysia to consider the *Quistclose* doctrine. Unusually, this case followed and applied the primary-secondary trust analysis of Lord Wilberforce in *Barclays Bank Ltd v Quistclose Investments Ltd*² as the proper legal basis of the *Quistclose* trust in Malaysia. A careful inspection, however, reveals that the Federal Court's decision reflects a distortion both of the specific facts of the case and of legal principle.

II. FACTS

The appellant PECD Berhad ("B"), a public-listed company, was the parent company of one PECD Jaya Holdings Sdn Bhd, which had executed a Murabahah Notes Issuance Facility Agreement for the issuance of Islamic notes up to the value of RM200 million. These were subscribed by a syndicate of 14 noteholders. The respondent AmTrustee Berhad ("C") was the trustee appointed pursuant to a trust deed to act for and on behalf of the noteholders in respect of the Islamic notes.

PECD Jaya Holdings Sdn Bhd subsequently defaulted in its repayment obligations under the notes. At B's request, C refrained from commencing legal proceedings against PECD Jaya Holdings Sdn Bhd to enforce its rights under the trust deed. In consideration for the indulgence given by C, B agreed to earmark RM30 million out of the proceeds of a rights issue proposed to be undertaken by B, to be paid to C towards partial redemption of the Islamic notes. This was confirmed by way of a letter of undertaking issued by B to C. The relevant portions of the letter provided as follows:

¹ *PECD Berhad (In Liquidation) v AmTrustee Berhad* [2014] 1 MLJ 91 (Federal Court, Malaysia) www.kehakiman.gov.my/directory/judgment/file/02_f_%E2%80%9359-08-2012_W.pdf (accessed 21 February 2014).

² *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL).

[I]f the [monies owing under the notes] is not less than Ringgit Malaysia Thirty Million (RM30,000,000.00), we will pay or cause, and ensure the payment of at least Ringgit Malaysia Thirty Million (RM30,000,000.00) from the proceeds raised or to be raised from the proposed renounceable rights issue of new ordinary, shares of RM0.50 each in [B] together with warrants ... to you as the [trustee] towards payment or settlement of the [monies owing under the notes] or any part thereof for the benefit of the Noteholders ...

[W]e will not make any repayment and/or prepayment of all or any loan or advance obtained by [B] from any of its shareholders until and unless the [monies owing under the notes] shall have been fully settled ...

In notices, circulars and a prospectus issued by B in respect of the proposed right issue to B's shareholders ("A"), B had stipulated that part of the proceeds of the proposed rights issue would be utilised to pay C as partial redemption of the notes issued by PECD Jaya Holdings Sdn Bhd. This fact was also disclosed by B to the Securities Commission and Bursa Malaysia (formerly the Kuala Lumpur Stock Exchange) as required by the relevant securities legislation. B raised a sum in excess of RM104 million through the rights issue exercise, all of which was credited into a special 'PECD Rights Issue Account'. However, B failed to pay C the sum of RM30 million as agreed, and B soon thereafter became insolvent. B proposed several restructuring schemes in which the RM30 million was to be distributed to all of B's creditors including C, contrary to the agreement between B and C. The proposed schemes were rejected by B's creditors. C subsequently commenced proceedings against B seeking payment of the RM30 million on the ground that it was held on trust by B for C.

III. DECISION

In the High Court C's claim was allowed. The judge held that on the facts, the RM30 million from the proceeds received by B from the rights issue exercise was specifically advanced for the purpose of paying the noteholders, and accordingly was held on a *Quistclose* trust by B in favour of C. B's appeal to the Court of Appeal was unanimously dismissed. Curiously, the Court of Appeal in upholding the High Court judge's finding of the *Quistclose* trust observed that A, the subscribers of B's rights issue, did not envisage a return of their share subscription because they had received their rights shares; and as such the RM30 million was held on trust for C, the intended recipient of the monies.³

The Federal Court granted B leave to appeal on a sole question of law, namely 'whether the beneficiary of a *Quistclose* [trust] can in law be a person who is not a provider or payor of the money' ("the leave question"). The Federal Court held that on the facts of the case, as B had earmarked the RM30 million to be paid to C with the express knowledge of A, C had acquired a beneficial interest in the RM30 million for and on behalf of the noteholders. Applying Lord Wilberforce's primary-secondary trust analysis in *Barclays Bank Ltd v Quistclose Investments Ltd*, the Federal Court held that these facts gave rise to a primary trust in favour of C that was still capable of being enforced against B, notwithstanding the fact that C did not provide the funds itself.

It should be noted that there was a second, separate originating summons ("the second OS") that involved the same parties and the same subject matter. There, a differently constituted panel of the Court of Appeal had held, by way of a majority decision, that although the RM30 million was raised by B from A and was intended to be used to pay the noteholders, C and the noteholders were not beneficiaries of the RM30 million under a *Quistclose* trust as the provider of the funds was A and not the noteholders. A had paid the money to subscribe the

³ Noted in *PECD Berhad (In Liquidation) v AmTrustee Berhad* [2014] 1 MLJ 91 [27]. The judgments of the High Court and the Court of Appeal are not reported.

rights issue shares from B, instead of paying the noteholders the sum due under the notes. Therefore, C and the noteholders stood in the same position as any unsecured creditor in the event of B's insolvency.⁴

As such, when B's appeal came before the Federal Court of Malaysia, there were in fact two conflicting and irreconcilable decisions of the Court of Appeal arising from the same set of facts on the issue of whether the RM30 million was held on a *Quistclose* trust by B in favour of C. Interestingly, the Federal Court's attention was in fact drawn to the two conflicting decisions. Instead of addressing the confusion, however, the Federal Court simply brushed aside the Court of Appeal's decision in the second OS by observing as follows:⁵

In respect of the leave question we find that it accepted, albeit impliedly, as a fact or at least presupposes, that the [notices, circulars, prospectus and letter of undertaking issued by B] had created a trust, in particular a *Quistclose*-type of trust. Otherwise the obvious question should have been whether the various documents created a trust in favour of [C]. Hence, we find no merit in the submission of learned counsel for [B] that the combined effect of the letter of undertaking and the circular 'cannot support any case for the creation of a trust fund of RM30 million to be held by [B] as trustee on a primary trust for [C]'.

Accordingly we are left to consider whether [C], which did not provide the said monies but identified to receive it, could enforce the trust. In other words, can the respondent claim the said monies?

... as indicated above, the leave question accepted, albeit impliedly as a fact or at least presupposes, the existence of a *Quistclose* trust based on the given facts and circumstances. As such the said monies would not be a subject in the winding up proceeding of [B]. Further, it is therefore not necessary for us to deal with the view expressed by the majority in the Court of Appeal in the second OS on the issue of *Quistclose* trust. Thus, the remaining issue is whether [C] can claim the said monies.

The Federal Court observed that the Court of Appeal in the appeal before it 'seemed to say' that the requirements or elements of a *Quistclose* trust had been satisfied despite the fact that C was not the provider of the monies.⁶ Yet, the majority of the Court of Appeal in the second OS had expressly held that a *Quistclose* trust was *precluded* from arising because C and the noteholders were not the provider of the RM30 million. It is respectfully submitted that it was unsafe for the Federal Court to decide the appeal before it in the way that it did, especially when no concession was made by B on the point concerning the second OS. The Federal Court should have addressed the issue of whether a *Quistclose* trust arose on the facts at all, which was clearly a live issue between the parties, instead of manipulating the leave question to sidestep this crucial issue altogether.

Furthermore, in approaching the leave question as it did, the Federal Court appears to have overlooked an earlier binding decision of its own that held that an appellant may argue a ground of appeal that falls outside the scope of the questions regarding which leave to appeal had been granted in order to avoid a miscarriage of justice.⁷ Quite apart from the

⁴ *PECD Bhd & Anor v AmTrustee Bhd and other appeals* [2010] 5 MLJ 35 (CA, Malaysia) at [75]– [76]. The minority was of the view that a *Quistclose* trust arose in favour of C on the ground that 'a contractual promise to apply earmarked monies for a specific purpose create [*sic*] an equitable trust in those monies by way of trust based on the proposition that it is unconscionable for a man to give an undertaking and obtain money on terms as to its application and then to totally disregard the terms on which the monies were to be applied': see [2010] 5 MLJ 35 [38]. B's application for leave to appeal to the Federal Court in the second OS was dismissed.

⁵ *PECD Berhad (In Liquidation) v AmTrustee Berhad* [2014] 1 MLJ 91 [35]–[36], [56].

⁶ *PECD Berhad (In Liquidation) v AmTrustee Berhad* [2014] 1 MLJ 91 [29].

⁷ *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337 (Federal Court, Malaysia). See also *Attorney-General for Northern Ireland v Gallagher* [1963] AC 349 (HL) 367: 'It is

obvious difficulties with the reasoning of the Federal Court, discussed below, it is clear that B would legitimately be entitled to feel a real sense of injustice and be aggrieved at the manner in which the Federal Court dealt with the appeal before it.

IV. ANALYSIS

IV.1. The *Quistclose* Doctrine: General Principles

When A loans money to B, the default position is that a purely personal contractual relationship is created between the parties.⁸ A *Quistclose* trust arises exceptionally in a specific fact situation, where A loans money to B to be used exclusively for a particular purpose, for instance that of repaying a particular creditor, C. If B performs the purpose, the beneficial interest in the money vests absolutely in C, and the relationship between A and B is one of debtor-creditor. Conversely, if the purpose is not performed, A can demand the return of the money under a trust. It is the parties' intention that determines whether a loan of money from A to B is a *Quistclose* arrangement. The *Quistclose* doctrine thus aims to give effect to the intention of the parties.

Certainly, it is not only the creation of a *Quistclose* arrangement that turns on the intention of the parties; it is likewise pivotal in the creation of an express trust. Thus, if A, as settlor, wishes to transfer property to B to hold on trust for C's benefit, it is trite law that A must manifest a certain enough intention to create a trust.⁹

The difference between an intention to create a *Quistclose* trust and an express trust is fine but crucial. Whereas in the creation of an express trust the parties intend for C to obtain the beneficial interest in the property once it is constituted to B, a *Quistclose* arrangement does not. Instead, a *purpose* is involved: the parties contemplate that the purpose for which A advances the money to B *may not be carried out*—therefore, C (that is, the person or persons who would benefit from B's carrying out of the exclusive purpose) does not obtain an immediate beneficial interest upon B's receipt of A's money. B's trust obligation in a *Quistclose* arrangement is not to hold the money on trust for C; instead, it arises because B's use of the money is constrained by the stated exclusive purpose. This explains why the purpose for which B may use the money must be an *exclusive* purpose: it ensures that the money loaned to B is not at B's free disposal, thus giving rise to a *trust* relationship between A and B instead of a purely personal debtor-creditor relationship.¹⁰

IV.2. A Loan?

As earlier discussed, in *PECD* the Federal Court approached the appeal before it on the presupposition that a *Quistclose* trust arose in respect of the RM30 million that was part of the proceeds from the rights issue exercise carried out by B. This is regrettable. The Federal Court had noted, and did not disagree with, the Court of Appeal's finding that A could not be described as lenders of the RM30 million.¹¹ The Federal Court also accepted that A did not envisage a return of their subscription monies because they had received their rights shares.¹² Furthermore, as the Court of Appeal in the second OS pointed out, A had paid the

familiar and well known that one thing which this House considers in deciding whether to give leave in a civil case is whether the case involves a point of law which ought to be considered by this House. But, once leave is given, this House can and does consider other points as well' (*per* Lord Reid).

⁸ See *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL) 580; *Re Holiday Promotions (Europe) Ltd* [1996] BCC 671 (Ch) 674; *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [69].

⁹ *Knight v Knight* (1840) 3 Beavan 148, 172–3; 49 ER 58, 67–68; *Richards v Delbridge* (1874) LR 18 Eq 11, 14–15.

¹⁰ *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [73]–[74].

¹¹ *PECD Berhad (In Liquidation) v AmTrustee Berhad* [2014] 1 MLJ 91 [29].

¹² *PECD Berhad (In Liquidation) v AmTrustee Berhad* [2014] 1 MLJ 91 [29].

money to subscribe the rights issue shares from B as opposed to paying the noteholders the sum due under the notes.¹³ The absence of a loan by A to B on the facts would have been fatal to the claim that the RM30 million was impressed with a *Quistclose* trust, since there was no evidence that A intended for the money to be returned to them under any circumstance.

Short of an advance of the monies as a loan, the proceeds of the rights issue by B became the working capital of B and fell to be dealt with by B's directors in the best interests of B, and was not subject to the control or direction of either A or C. In any event, and tellingly, A did not at any point in time insist that B should pay the RM30 million to C. There was nothing in B's letter of undertaking or the subscription agreements for B's new shares that provided for the preservation of A's rights and the control either by A or C of the use of the proceeds of the rights issue, let alone the RM30 million, through the medium of a trust.¹⁴

IV.3. An Exclusive Purpose?

Even assuming that the RM30 million could be treated as a 'loan' or 'advance' by A, the Federal Court did not in any event consider the question of whether the RM30 million could be regarded as having been advanced for an 'exclusive' purpose. The highly unusual manner in which the appeal was decided meant that this crucial factor was overlooked altogether. The RM30 million, claimed by C to be subject to a *Quistclose* trust, in reality formed *part* of the proceeds of the rights issue exercise in excess of RM104 million, which was intended to be utilised for *several* purposes. Only *one* of those purposes was the proposed payment to C as partial redemption of the notes. It is not possible to interpret the facts such that A subscribed for the new shares on the condition that the monies paid by them was to be utilised *solely* for the purpose of repayment to C and none other. Unlike the facts of *Quistclose*, where the parties went to the lengths of placing the money in a separate account opened specifically for the purpose of the payment, in *PECD* the whole of the proceeds of RM104 million was credited into a special 'PECD Rights Issue Account', and the RM30 million was not specifically placed in a separate account to be operated solely for the purpose of paying C. The fact that the RM30 million was mixed with the rest of the proceeds of the rights issue clearly points away from any intention to create a trust.¹⁵

IV.4. Enforcing the 'Primary Trust'?

Suppose the Federal Court was correct in deciding on the facts that A had advanced the money to B exclusively for the purpose of repaying C. The question then arises: was the court correct to enforce the 'primary trust' in favour of C? It is highly significant that there is not one English case that purports to enforce the 'primary trust': the courts have never compelled B, the recipient of loan money, to apply the property for the exclusive purpose as agreed between the parties. Indeed, it would be impossible to do so in some cases such as *Twinsectra*,¹⁶ where the purpose is expressed in vague terms. To insist that the 'primary trust' is a *trust* in the strict sense of the word contradicts two core tenets of orthodox trust principles. The first is the beneficiary principle: 'a trust may [not] be created ... for a purpose or object unless the purpose or object be charitable, for a purpose or object cannot sue'.¹⁷

¹³ Noted in *PECD Berhad (In Liquidation) v AmTrustee Berhad* [2014] 1 MLJ 91 [27].

¹⁴ *Bieber and others v Teathers Ltd (in liquidation)* [2012] EWCA Civ 1466, [2013] 1 BCLC 248. See also *Challinor v Juliet Bellis & Co* [2013] EWHC 347 (Ch).

¹⁵ *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [129]. See also *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [71].

¹⁶ The purpose in that case was for the 'acquisition of property': *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [9].

¹⁷ *Leahy v AG for New South Wales* [1959] AC 457 (HL) 479.

The second is the rule that the settlor drops out of the picture once a trust is properly created and constituted. If a *Quistclose* arrangement creates a trust for C's benefit, what remaining interest does A have by which he can demand the return of the money in any circumstance? This is why the House of Lords held in *Twinsectra v Yardley*¹⁸ that, when B receives A's money, B holds it on trust for A, subject to a power in B's favour, which is revocable by A at any time, to apply the money according to the agreed purpose. It follows that C is not a beneficiary who has a right to the money, but merely an object to whom B *may* pay the money if B decides to do so.

In enforcing the 'primary trust', the Federal Court misunderstood the significance of the requirement for an 'exclusive purpose' in a *Quistclose* arrangement. The purpose is not significant as an end in itself; the focus is instead on the *implication* of the 'exclusivity' of the purpose: it reflects the parties' intention that the money is to be returned to A if it is not applied for the stated purpose. As Lord Wilberforce observed in *Barclays Bank v Quistclose*, 'by process simply of interpretation, ... if, for any reason the [purpose] could not be [attained], the money was to be returned to [A]: the word "only" or "exclusively" can have no other meaning or effect'.¹⁹ A can only demand the return of the property if B holds the property on trust for A in the meantime. Therefore, contrary to the Federal Court's observation, the *Quistclose* doctrine is concerned with enforcing the parties' intention that B will hold the money *on trust for A* pending application for the stated purpose. This explains why there is no English decision that enforces the 'primary trust'.

Even if it is arguable that the 'primary trust' is indeed capable of being enforced in some situations, it is at least clear, based on the authority of *Barclays Bank v Quistclose*, that B will be deemed incapable of carrying out the 'primary trust' in the event of B's insolvency. In *PECD*, however, even B's insolvency was insufficient to convince the Federal Court that the 'primary trust' had failed. If the court's decision on this point were correct, there seems to be no other event left that would trigger the 'secondary trust'. And an arrangement that involves a 'primary trust' that will never fail cannot properly be classified as a *Quistclose* trust at all.

IV.5. The Potential Recipients of the Monies Returned

If we suppose that the Federal Court could contemplate that the 'primary trust' would fail in *some* event, the question arises: to whom would the money be returned upon the failure of the 'primary trust'? As to this question, the Federal Court considered it 'fortunate' that it was able to avoid providing an answer, given that, in its view, the facts and circumstances of the case did not demand such a finding.²⁰ It seems, however, impossible on the facts to determine a principled answer to that question had the circumstances of the case called for it. In particular, it would not have been possible to identify the parties' intention as to the recipients of the monies to be returned. The rights issue exercise carried out by B for the injection of funds from its shareholders raised a sum of RM104 million, of which only RM30 million was to be paid to C.²¹ It would have been impossible to ascertain the shareholders who advanced the latter sum who would have the right to the return of the monies.

Even if the monies were earmarked such that it was possible to identify the shareholders who were entitled to the repayment, it remains impossible to determine whether those shareholders did in fact intend for the monies to be returned to them upon B's failure to pay

¹⁸ *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164. Their Lordships unanimously adopted the view expressed in PJ Millett, 'The *Quistclose* Trust: Who can Enforce It?' (1985) 101 LQR 269, 284.

¹⁹ *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL) 580.

²⁰ *PECD Berhad (In Liquidation) v AmTrustee Berhad* [2014] 1 MLJ 91 [67].

²¹ *PECD Berhad (In Liquidation) v AmTrustee Berhad* [2014] 1 MLJ 91 [6], [10].

the money to C. In the first place, it is only plausible that the subscribers of the rights issue exercise intended to become shareholders of, or increase their existing shareholding in, B. Indeed, as discussed above, this was the express finding by Court of Appeal in the second OS. This negates any intention that the RM30 million was to be returned to them if it was not paid to C. Even if *some* of those shareholders had an intention sufficient to create a *Quistclose* arrangement, it would have been necessary to determine whether the *majority* of those shareholders in question had such an intention, since it is arguable that anything less would not evince an intention that B should use the monies for an 'exclusive purpose' such that a *Quistclose* trust was created. The Federal Court clearly should have been more vigilant in its determination of the parties' intention instead of finding that a sufficient intention to create a *Quistclose* arrangement arose from the mere fact that the shareholders were 'well informed on the proposed utilisation of the proceeds of the exercise.'²²

IV.6. The Leave Question

The leave question that the Federal Court specifically had to determine was 'whether the beneficiary of a *Quistclose* [trust] can in law be a person who is not a provider or payor of the money'.²³ The question, phrased as such, is misleading, as it fails to distinguish between two very different situations. The first situation is a case where A transfers money to B, B agreeing to apply the money exclusively for an agreed purpose, failing which the money will vest absolutely in X. Although X is a third party who was not a 'provider' of the money, in principle the *Quistclose* doctrine would compel B to hold the money on trust for the benefit of X, subject to a power in B's favour, revocable by A²⁴ at any time, to apply the money for the exclusive purpose. X would then be able to demand the repayment of the money from B if the exclusive purpose is not carried out. This result coheres with the doctrine's emphasis on giving effect to the parties' intention. *PECD* was, however, not a case of this sort. Instead, the 'person who is not a provider ... of the money' in question was C, the so-called 'beneficiary' of the exclusive purpose; and the question was whether C was able to enforce the 'primary trust'. As already discussed, there is no basis in principle or authority for suggesting an affirmative answer in this case.

IV.7. Creating New Law?

On one reading of the decision in *PECD*, it might be suggested that the Federal Court was in fact creating new law, extending the *Quistclose* doctrine beyond its settled scope of application. Curiously, the court chose to cite at length an article by Barrie Lawrence Nathan, 'In Defence of the Primary Trust: *Quistclose* Revisited',²⁵ to justify its decision, instead of considering the more widely cited texts on the subject.²⁶ In that article, Nathan suggests that a 'more just'²⁷ result is achieved if the 'primary trust' is enforced where 'the loan is nominally for a purpose, but there is a specific property and there are specific creditors who can be identified and would be capable of enforcing the trust on *Re Denley* principles.'²⁸

A close examination reveals two reasons why this argument lacks a principled rationale. First, on Nathan's argument, the enforcement of the 'primary trust' turns on the specific facts of a case: it differentiates between cases where there *is* an identifiable creditor(s) behind the

²² *PECD Berhad (In Liquidation) v AmTrustee Berhad* [2014] 1 MLJ 91 [9].

²³ *PECD Berhad (In Liquidation) v AmTrustee Berhad* [2014] 1 MLJ 91 [30].

²⁴ Of course, the agreement may alternatively provide that that the power is revocable at X's will.

²⁵ Barrie Lawrence Nathan, 'In Defence of the Primary Trust: *Quistclose* Revisited' (2012) 18 OJT&T 123.

²⁶ See eg David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* (18th edn, LexisNexis 2010) [1.25]; John McGhee QC (ed), *Snell's Equity* (32nd edn, Sweet & Maxwell 2010) [25-035]; Jill E Martin, *Hanbury & Martin: Modern Equity* (19th edn, Sweet & Maxwell 2012) [2-009].

²⁷ Nathan (n 25) 123.

²⁸ Nathan (n 25) 128–9. *Re Denley's Trust Deed* [1969] 1 Ch 373 (Ch).

specific purpose and cases where there *is not*. An ‘identifiable creditor’ is, however, demonstrably not a material fact that determines how and whether a *Quistclose* trust is enforced. Suppose that the parties in two different cases intend B to use the money loaned from A for an exclusive purpose, the only difference being that an ‘identifiable creditor’ can be determined behind the purpose in one case but is absent in the other. What justification is there for the diametrically different outcomes that would result if Nathan’s argument were adopted? After all, the content of the parties’ intention as to the beneficial use of the loan money in both cases are identical; and the difference in outcome would make a mockery of the courts’ aim to give effect to the intention of the parties. This is why courts do not take it upon themselves to enforce the specific purpose itself, but instead focus on the *implication* of the ‘exclusivity’ of the stated purpose: it is taken to indicate a positive intention that the money is to be returned to A if it is not applied for the stated purpose.

A second problem with Nathan’s argument stems from its reliance on the case of *Re Denley’s*.²⁹ In that case, Reginald Goff J held that a trust set up by a company ‘for the purpose of a recreation or sports ground ... for the benefit of the employees of the company’ was a valid trust that did not offend the beneficiary principle because the benefit to those employees was direct or tangible.³⁰ While the case does decide (albeit arguably incorrectly) that those employees had ‘*locus standi* to apply to the court to enforce the trust’,³¹ it does not also hold that they were *beneficiaries* such that they could exercise their *Saunders v Vautier*³² rights to collapse the trust and call for the monies. By allowing C to demand the monies in B’s hands in *PECD*, the Federal Court was unjustifiably extending the (already doubtful) authority of *Re Denley’s*, with the upshot of distorting the *Quistclose* doctrine vis-à-vis Malaysian law.

IV.8. Reconciliation: An Express Trust?

Given the difficulties with the Federal Court’s analysis, it seems much more plausible instead to explain *PECD* as a straightforward express trust, created for the benefit of C. Since the Federal Court insisted that the leave question presupposed that the various documents in the parties’ dealings had ‘created a trust in favour of [C]’,³³ it would have been unnecessary and irrelevant to go on to hold that that trust was a ‘primary trust’ under the *Quistclose* doctrine. Instead, it would have been open to the court to decide either that A had expressly transferred the monies to B as trustee for the benefit of C, or that B had expressly declared itself as trustee for C’s benefit upon receipt of the monies from A.

At the very least, the straightforward express trust analysis would have led the Federal Court properly to address the conflicting decisions of the Court of Appeal as to whether or not a trust arose in respect of the RM30 million to begin with. It would also have adequately addressed the concerns shared by the lower courts in *PECD* as to B’s unconscionable behaviour, which would have amounted to both breach of its letter of undertaking and contravention of the relevant securities legislation, as well as the courts’ desire to uphold

²⁹ *Re Denley’s Trust Deed* [1969] 1 Ch 373 (Ch).

³⁰ *Re Denley’s Trust Deed* [1969] 1 Ch 373 (Ch) 383.

³¹ *Re Denley’s Trust Deed* [1969] 1 Ch 373 (Ch) 383. It is arguable whether English law recognises the ‘enforcer principle’ at all—that is, whether a trust can be valid where there are merely ‘enforcers’ of the trust instead of identifiable beneficiaries: see *Paul Matthews*, ‘From Obligation to Property, and Back Again’ in DJ Hayton (ed), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer Law International 2002). Cf David J Hayton, ‘Developing the Obligation Characteristic of the Trust’ (2001) 117 LQR 96.

³² *Saunders v Vautier* (1841) Cr & Ph 240.

³³ *PECD Berhad (In Liquidation) v AmTrustee Berhad* [2014] 1 MLJ 91 [35].

shareholder protection and market integrity,³⁴ without having to strain the principles governing the *Quistclose* doctrine in order to justify its decision.

V. CONCLUSION

The misapplication and distortion of the *Quistclose* doctrine created by the decision in *PECD* seems to hark the demise of the *Quistclose* trust under Malaysian law, since the principles propounded by the *Quistclose* doctrine would cease to have any real scope for application if 'primary trusts' do not fail even in the event of B's insolvency. It is sincerely hoped that the decision in *PECD* will be overruled by the Federal Court of Malaysia at the earliest opportunity so as to avoid this manifestly undesirable development in the law. More importantly, it is hoped that the decision in *PECD* would serve as an indication to Commonwealth jurisdictions how *not* to develop the *Quistclose* doctrine so as to avoid an irreconcilable distortion of trust principles.

³⁴ See eg *PECD Bhd & Anor v AmTrustee Bhd and other appeals* [2010] 5 MLJ 35, [2010] 1 CLJ 940 (CA, Malaysia) [38], [41] and [71]; *PECD Berhad (In Liquidation) v AmTrustee Berhad* [2014] 1 MLJ 91 [23], [27], [64]–[65].