

In depth

Quistclose trusts and green projects

Christopher Arvidsson*

*Hertfordshire Schools of Law and Education, University of Hertfordshire, Hatfield, AL10 9AB, UK. Tel: +44 (0)1707 28468. Email: c.arvidsson@herts.ac.uk.

ABSTRACT

This article analyses the relevance of *Quistclose* trusts in a situation in which lenders make green finance available to borrowers for environmentally sound and sustainable projects. This examination highlights how a transaction can be structured to increase the likelihood of such a trust being recognised. This article will also consider green loans (as defined by the Loan Market Association) since these loans have characteristics that can indicate the presence of a *Quistclose* trust. Beyond the practical aspects of creating a trust, the article explores whether a *Quistclose* trust can be useful when money is lent for green projects. It is possible to question if *Quistclose* trusts can motivate borrowers to be more conscious of how they use the loan money. In particular, the article discusses whether the fiduciary duty regarding the use of the funds can strengthen the integrity of certain loans.

INTRODUCTION

Entering into a loan can allow borrowers and lenders to make a positive environmental impact. For example, lenders can make green finance available so borrowers can fund projects like wind and solar farms,¹ acquire assets like electric vehicles,² or invest in carbon reduction and sustainability projects in an effort to become greener.³ It is desirable to facilitate the interaction between borrowers who are committed to using loan funds for green projects and lenders who wish to support such projects. But it is also desirable to ensure that the parties do not exaggerate their environmental ambitions⁴ and stay true to their commitments. In particular, if a lender makes green finance available to a borrower, the expectation must be that the loan funds truly go towards a green project.

This article explores the possibility of using a *Quistclose* trust when loan money is advanced for environmentally sound and sustainable projects (ESSPs). As part of this aim, it considers whether a lender can embed such a trust in order to influence their borrower's behaviour.⁵ For example, can

Quistclose trusts incentivise borrowers to be more restrictive in how they use the loan funds? Contract law is already being used to address the climate crisis.⁶ Can equity also support attempts within loan markets to positively impact the environment via the use of *Quistclose* trusts?

This article will refer to the green loan market in dealing with *Quistclose* trusts. Green loans, as understood by the Loan Market Association (LMA), have characteristics⁷ that are often relevant for recognising such trusts. First, the central feature of a green loan is the exclusive use of the proceeds for eligible Green Projects.⁸ Secondly, the proceeds should either be credited to a dedicated account or tracked by the borrower.⁹ The characteristics of a **designated purpose and segregation of money** can, prima facie, indicate that the loan funds are not at the borrower's free disposal and, consequentially, that the lender retains a beneficial interest in the money until the green project has been financed.

The article deals with two lines of inquiry. The first concerns the practical possibility of using *Quistclose* trusts when

¹ See generally Sarah Wire, 'What is Green Finance?' (Lloyds Banking Group 31 May 2024) <<https://www.lloydsbankinggroup.com/insights/green-finance.html>> accessed 24 June 2024.

² NatWest, 'Green Loans' <<https://www.natwest.com/business/loans-and-finance/sustainable-finance/green-loans.html>> accessed 24 June 2024.

³ Sainsbury's, 'Sainsbury's Announces First Corporate "Green" Loan to Support its Environmental Commitments' <<https://www.about.sainsburys.co.uk/news/latest-news/2014/21-07-2014>> accessed 24 June 2024.

⁴ See 'greenwashing' in general. For instance, United Nations, 'Greenwashing—The Deceptive Tactics Behind Environmental Claims' <<https://www.un.org/en/climate-change/science/climate-issues/greenwashing>> accessed 26 June 2024.

⁵ This question was recently posed (although not substantially addressed) by Lloyd Brown, 'Trusts and Credit Risk: The *Quistclose* Trust and Lenders' Risks in Loan Finance' (2023) 29 *Trusts & Trustees* 402, 409.

⁶ See The Chancery Lane Project, 'Our impact' <<https://chancerylaneproject.org/our-impact/>> accessed 14 June 2024.

⁷ See Asia Pacific Loan Market Association, Loan Market Association and Loan Syndications and Trading Association, 'Green Loan Principles' February 2023, 2.

⁸ *ibid.*

⁹ *ibid.* 4.

loan money is advanced for green projects and how stakeholders can structure their transactions to increase the likelihood of such a trust being recognised. The following arguments are presented as part of the first inquiry: (1) Stakeholders can, as a matter of principle, utilise and create *Quistclose* trusts when lending and borrowing money for ESSPs. (2) The so-called Restriction Intention—an intention that the loan money should not be at the borrower's free disposal—should be at the forefront in determining if a *Quistclose* trust has been created.¹⁰ (3) A Restriction Intention (which supports the finding of a trust) should be distinguished from personal obligations that merely limit how the borrower can use the loan money. (4) While some green loans can provide the foundation for a *Quistclose* trust, it does not follow that the green loan market is likely to be a fertile ground for these trusts.

The second line of inquiry relates to the usefulness of a *Quistclose* trust in a situation in which lenders make green finance available to fund green projects. In other words, why might stakeholders want to use such trusts when loan money is advanced for ESSPs? It is reasoned that they will not generally want to use a *Quistclose* trust because of the risk of the borrower's insolvency. The reason for this is that lenders will likely prefer to rely upon other forms of security. Given this observation, it is useful to ask if *Quistclose* trusts can be valuable beyond the context of insolvency. Two theoretical discussions follow in this regard. First, the article considers equitable tracing and asks if this process and the availability of proprietary remedies can influence borrowers to take more care in ensuring that the loan funds are used as agreed. Secondly, the article highlights that a *Quistclose* trust results in a fiduciary (rather than contractual) duty to use the loan money as agreed. The article questions if categorising this duty as fiduciary can influence how borrowers behave and thereby strengthen the integrity of loans for ESSPs.

The article is structured into five main sections. The upcoming section situates the article and outlines some *Quistclose*-related discussions falling outside its scope. After that, the article introduces the nature of *Quistclose* trusts, and further outlines three features that relate to the finding of a Restriction Intention. This is followed by a section that introduces green loans. The 'Trusts and financing ESSPs' section will then explain that a *Quistclose* trust can, as a matter of principle, be created when a lender makes green finance available

for ESSPs and that some green loans can likely provide the basis for a *Quistclose* trust. The final section discusses potential incentives for using *Quistclose* trusts if stakeholders wish to enter into a loan that can allow them to make a positive environmental impact.

A NON-LINEAR DEVELOPMENT OF THE LAW OF QUISTCLOSE TRUSTS

This first main section outlines a few aspects of *Quistclose* trusts that the article will not discuss in much detail. This will help to situate the article, given that the 'development of the law of *Quistclose* trusts has not been linear'.¹¹

Much has been written about the classification of a *Quistclose* trust as express, resulting, or constructive.¹² But such a discussion might be of little practical relevance¹³ unless the subject matter of the trust is land.¹⁴ Rather than taking part in the classification debate, the article proceeds on the basis that 'unless, or to the extent that there is no express trust as to what is to happen on failure of the specified purpose, there is a resulting trust for the provider throughout the period of the trust as explained by Lord Millett in *Twinsectra*'.¹⁵

Another topic is whether certain *Quistclose* trusts—which can be used by a lender transferring funds to a borrower in financial distress—should be allowed under the law of corporate insolvency.¹⁶ Similarly, one can question if there are persuasive justifications for the continued existence of *Quistclose* trusts,¹⁷ especially since they give the lender priority over the borrower's unsecured creditors in the event of the borrower's insolvency.¹⁸

Furthermore, it is not obvious that the *Quistclose* trust exists as a single entity that should be responded to identically in all situations.¹⁹ Litigants can push for a *Quistclose* trust in various circumstances, and scholars have distinguished between different factual situations within which such a trust can be recognised.²⁰ For example, Hedlund and Rhodes differentiate Type A and Type B arrangements. Within the former, money has been transferred so that a person can pay their creditors.²¹ Within Type B arrangements, a person will have transferred money for some particular investment purpose.²² Hofri-Winogradow and David recently added Type C arrangements to the list.²³ This entails a situation in which customers have pre-paid for goods, and their money is to be segregated until the goods have been delivered.

¹⁰ The term 'Retention Intention' is borrowed from Ada Yee Lam Leung and Samuel Yee Ching Leung, 'Whither *Quistclose* Trusts? A Non-linear Development of the Doctrine' (2023) 29 *Trusts & Trustees* 158, 164.

¹¹ *Prickly Bay Waterside Ltd v British American Insurance Co Ltd* [2022] UKPC 8, [2022] 1 WLR 2087, [33] (Lady Arden); Leung and Leung (n 10).

¹² William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004); See Leung and Leung (n 10) 168.

¹³ As Leung and Leung (n 10) 168 recently observed: 'It is submitted that maybe this is the right time to put the theoretical debate aside and to move forward to focus on the applicability of the *Quistclose* doctrine as a matter of practicality. A lack of consensus in relation to its theoretical underpinning and justification does not seem to pose any practical problem to the application of the doctrine, as the chain of authorities (including *Prickly Bay Waterside Ltd*) has shown.'

¹⁴ A declaration of a trust of land must be manifested and proved by some signed writing. However, no such writing is required if the *Quistclose* trust is classified as a resulting or constructive trust. See Law of Property Act 1925, s 53(1)(b) and (2); See also *Ali v Dinc* [2020] EWHC 3055 (Ch), [2021] 2 P & CR 19, [232] (Worthington J).

¹⁵ *Prickly Bay Waterside* (n 11) [33] (Lady Arden).

¹⁶ For a recent article considering these matters, see Adam S Hofri-Winogradow and Gal David, '*Quistclose* Trusts from a Corporate Insolvency Perspective' (2022) 81 *Cambridge Law Journal* 524.

¹⁷ Emily Hudson, 'A Normative Approach to the *Quistclose* Trust' (2017) 80 *Modern Law Review* 775.

¹⁸ Hofri-Winogradow and David (n 16) 532–533.

¹⁹ Richard Hedlund and Amber Lavinia Rhodes, 'Loan or Commercial Trust? The Continuing Mischief of the *Quistclose* Trust' (2017) 4 *Conveyancer and Property Lawyer* 254, 268.

²⁰ *ibid* 260–262; Hofri-Winogradow and David (n 16) 525–526.

²¹ As in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567. See Hedlund and Rhodes (n 19) 260.

²² As in *Bieber v Teathers Ltd (In Liquidation)* [2012] EWCA Civ 1466, [2013] 1 BCLC 248. See Hedlund and Rhodes (n 19) 265–267.

²³ Hofri-Winogradow and David (n 16) 525–526.

It is accepted that *Quistclose* trusts can arise in different settings. However, the article does not consider different subspecies of such trusts and whether they demand a distinct response as to their creation or regulation. Instead, the article focuses on the relevance of *Quistclose* trusts in a situation in which the borrower has been instructed, via the loan documents, to use the money for ESSPs.

LOAN FUNDS AND DESIGNATED PURPOSES

This section will consider three features that can feed into the recognition of a *Quistclose* trust if a lender makes green finance available to a borrower for specific green projects. It will explore these features in light of the Restriction Intention. Before dealing with these aspects, it helps to clarify the basic characteristics of a *Quistclose* trust.

A *Quistclose* trust might be recognised when property²⁴ has been transferred from X to Y for a designated purpose since this can indicate that the property so transferred was not at Y's free disposal.²⁵ The situation can involve loan money having been earmarked for a specific purpose, such as enabling the borrower to purchase property,²⁶ or equipment,²⁷ or repay some of their creditors to avoid insolvency.²⁸ The effect of a *Quistclose* trust is that the borrower obtains legal title to the money with a power (or duty) to apply it for the stated purpose, with the lender retaining the beneficial interest in the funds until they have been used for the purpose.²⁹ This means that the borrower holds the funds on temporary trust for the lender. The borrower's proper application of the loan money will eventually end the trust and leave the lender with their normal remedy in debt.³⁰ If the purpose becomes incapable of being carried out, the trust persists, and the lender 'may bring proceedings to ensure the money is repaid to him or her, or as he or she directs'.³¹

Crucially, a *Quistclose* trust will not mechanically arise just because loan money is advanced for a specific purpose.³² There are some key features that can be examined to determine if such a trust is likely to be recognised. These features are significant, most obviously for the purpose of this article, because they can inform stakeholders how to increase (or reduce) the prospect of embedding a *Quistclose* trust as part of advancing loan money for ESSPs.

Recognising a *Quistclose* trust: relevant features

The classification of a *Quistclose* trust can be relevant in how the requirements for its recognition are expressed. If viewed as an express trust,³³ the three certainties will likely be emphasised.³⁴ A key question in such a situation is whether the lender—from an objective point of view—has displayed the necessary intention to create a trust.³⁵

The central analysis is couched in slightly different terms if the resulting trust analysis is selected (as herein). In this case, it is appropriate to be guided by Lord Millett's judgment in *Twinsectra*, which 'has become accepted as the core analysis of *Quistclose* trusts'.³⁶

According to Lord Millett in *Twinsectra v Yardley*, the 'question in every case is whether the parties intended the money to be at the free disposal' of the borrower.³⁷ The crux is that a *Quistclose* trust should not be recognised if the loan money was intended to be at the borrower's free disposal.³⁸ Contrarywise, a trust could be recognised if the money was not intended to be at the borrower's free disposal. The latter intention can be referred to as a '**Restriction Intention**'.³⁹ In essence, it is necessary to analyse the parties' arrangement and assess the features that can indicate whether the money was or was not (intended to be) at the borrower's free disposal.

In *Prickly Bay Waterside Ltd v British American Insurance Co Ltd*, the Privy Council said, with reference to Lord Millett's judgment in *Twinsectra*, that the minimum necessary to constitute a *Quistclose* trust is an intention that the lender should retain a beneficial interest in the money.⁴⁰ This intention can be referred to as a '**Retention Intention**'.⁴¹ Given the frequent use of these terms throughout the article, the reader may find it useful to take note of this terminology:

- Restriction Intention: The intention that the loan money should not be at the free disposal of the borrower.
- Retention Intention: The intention that the lender will retain a beneficial interest in the loan money.

This article suggests that the Retention Intention, as noted in *Prickly Bay Waterside*, is closely allied to the Restriction Intention, as highlighted by Lord Millett in *Twinsectra*.⁴² That is because if the loan funds are not intended to be at the borrower's free disposition (Restriction Intention), then that is generally objectively telling of an intention that the lender

²⁴ As noted by Worthington J, 'Although *Quistclose* trust cases typically concern money, there is nothing in the general principles suggesting such trusts cannot be generalised to apply to any form of property ...' *Ali v Dinc* (n 14) [234].

²⁵ See *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, [68], [73]–[74] and [103] (Lord Millett); *Ali v Dinc* (n 14) [232] (Worthington J); *Challinor v Juliet Bellis & Co* [2015] EWCA Civ 59, [2016] WTLR 43, [55] (Briggs LJ).

²⁶ *Twinsectra* (n 25).

²⁷ *Re EVTR* [1987] BCLC 646.

²⁸ *Barclays Bank v Quistclose* (n 21).

²⁹ *Ali v Dinc* (n 14) [232] (Worthington J); *Twinsectra* (n 25) [69] and [100] (Lord Millett).

³⁰ *Twinsectra* (n 25) [69] (Lord Millett); *Barclays Bank v Quistclose* (n 21) 581 (Lord Wilberforce).

³¹ *Prickly Bay Waterside* (n 11) [1] (Lady Arden).

³² *Twinsectra* (n 25) [73] (Lord Millett).

³³ That should be a possibility as noted in *Prickly Bay Waterside* (n 11) [1], [32]–[33] (Lady Arden).

³⁴ See *Knight v Knight* (1840) 3 Beav 148; *First City Monument Bank Plc v Zumas Nigeria Ltd* [2019] EWCA Civ 294, [2019] WTLR 511, [18] (Newey LJ).

³⁵ *Challinor v Juliet Bellis* (n 25) [56]–[58] (Briggs LJ); *Twinsectra* (n 25) [71] (Lord Millett).

³⁶ *Prickly Bay Waterside* (n 11) [29] (Lady Arden).

³⁷ *Twinsectra* (n 25) [74] (Lord Millett).

³⁸ *ibid* [68] (Lord Millett).

³⁹ Leung and Leung (n 10) 164.

⁴⁰ *Prickly Bay Waterside* (n 11) [31] (Lady Arden).

⁴¹ Leung and Leung (n 10) 164.

⁴² *Twinsectra* (n 25) [74] (Lord Millett).

should retain some beneficial interest in the money (Retention Intention). A Restriction Intention should usually signify a Retention Intention.⁴³

Nevertheless, some authors propose that the Restriction Intention and Retention Intention might be different tests and that either one may support the finding of a *Quistclose* trust.⁴⁴ Despite this, the article will place the Restriction Intention at the forefront of the analysis. This intention is emphasised since the article follows Lord Millett's analysis in *Twinsectra*.

Several features can be assessed in analysing whether the parties intended the money to be at the borrower's free disposition and, consequentially, whether it was intended that the lender should retain a beneficial interest in the loan funds. Three such features are considered below. These features will reappear in the section on green loans as part of highlighting that such loans can indicate the presence of a Restriction Intention.

Exclusive purpose

Perhaps the feature that will be seen as the most telling of a Restriction Intention is the condition that the loan money is to be used for an exclusive purpose. That is to say, an agreement that the funds shall be used only for specific purposes (e.g., well-defined green projects) can signify a Restriction Intention and a Retention Intention.⁴⁵ If the finance documents state that the loan funds are to be **solely**, **only**, or **exclusively** used for particular green projects, then that reinforces a claim that the money was not intended to be at the borrower's free disposal.

In *Twinsectra*, the House of Lords considered an undertaking given by a solicitor to a lender. One of the paragraphs read: "The loan moneys will be utilised solely for the acquisition of property on behalf of our client and for no other purpose."⁴⁶ Lord Millett viewed this as making it clear that the money was not at the borrower's free disposal.⁴⁷ In *Barclays Bank v Quistclose Investments*, the word 'only' substantiated Lord Wilberforce's view that the loan was made to enable the borrower to pay a dividend and for no other purpose.⁴⁸ He said: "A necessary consequence from this, by process simply of interpretation, must be that if, for any reason, the dividend could not be paid, the money was to be returned to the respondents: the word "only" or "exclusively" can have no other meaning or effect."⁴⁹

In contrast, a *Quistclose* trust was not recognised in *Gabriel v Little*,⁵⁰ even though the facility letter defined the purpose of the loan. The loan had been made 'to assist with the costs of development of the Property'. The High Court noted that

the finance documents did not use any 'word of exclusivity' in referring to the purpose.⁵¹ The Court of Appeal agreed that no *Quistclose* trust was created.⁵²

If stakeholders wish to embed a *Quistclose* trust when lending money for ESSPs, words of exclusivity should be used to refer to the green projects since this can indicate a Restriction (and a Retention) Intention.

Separate account

When searching for a Restriction Intention, it is also relevant to consider whether and to what extent the borrower is required to keep the loan money in a separate bank account. A requirement like that can indicate that the money was not intended to be at the borrower's free disposal and that the lender retains a beneficial interest in the funds.⁵³ Lady Arden recently said that the 'absence of a provision for segregation is a powerful factor which indicates that there is no *Quistclose* trust'.⁵⁴ Conversely, a segregation requirement can support the finding of a trust since it indicates that the borrower should not treat the funds as forming part of their general assets. This is reinforced if such a requirement is paired with words of exclusivity as to the loan's purpose.⁵⁵

Overall, the parties are more likely to succeed in embedding a *Quistclose* trust when money is lent for ESSPs if they agree that the funds should be kept in a separate account until the project has been financed.

The structure of the contract & the proprietary rider

The overall structure of the loan agreement can further indicate whether the money was intended to be at the borrower's free disposal.⁵⁶ This third feature overlaps with those just examined (i.e., exclusive purpose and separate account). This is because the loan agreement can expressly assert that the money must only be used for a defined green project and be kept separate until that project has been financed.

Nevertheless, the structure of the agreement is relevant in its own right and beyond the two features above. This is because a *Quistclose* trust should not be recognised if it is 'inconsistent with the instrument or contractual arrangements under which it is said to be created'.⁵⁷

For example, in *Gabriel v Little*, the Court of Appeal accepted that the facility letter, when read as a whole, was inconsistent with the existence of a trust.⁵⁸ It was observed that it was **not** an event of default to apply the funds beyond the identified purpose of the loan.⁵⁹ In addition, the conditions precedent had nothing to do with the stated purpose.⁶⁰ In

⁴³ One can also argue that the Retention Intention can signify a Restriction Intention. This is because if there is an intention to retain some beneficial interest in the loan proceeds (Retention Intention), then that can be indicative of an intention that the money should not be at the borrower's free disposal (Restriction Intention).

⁴⁴ Leung and Leung (n 10) 164–166.

⁴⁵ *Twinsectra* (n 25) [74] (Lord Millett); See also *Challinor v Juliet Bellis* (n 25) [55] (Briggs LJ).

⁴⁶ *Twinsectra* (n 25) [58] (Lord Millett).

⁴⁷ *ibid* [75] (Lord Millett).

⁴⁸ *Barclays Bank v Quistclose* (n 21) 580 (Lord Wilberforce).

⁴⁹ *ibid* (Lord Wilberforce).

⁵⁰ *Gabriel v Little* [2013] EWCA Civ 1513, 16 ITEL 567.

⁵¹ *Gabriel v Little* [2012] EWHC 1193 (Ch), [2013] 1 BCLC 750, [76] (Engelhart J).

⁵² *Gabriel v Little* (n 50) [41]–[43] (Gloster LJ).

⁵³ See *Twinsectra* (n 25) [95] (Lord Millett); *First City Monument Bank Plc v Zumax* (n 34) [35] (Newey LJ); *Prickly Bay Waterside* (n 11) [42] (Lady Arden).

⁵⁴ *Prickly Bay Waterside* (n 11) [42] (Lady Arden).

⁵⁵ As noted in *Gabriel v Little* (n 51) [76] (Engelhart J).

⁵⁶ *Bieber v Teathers* (n 22) [15] (Patten LJ); *Prickly Bay Waterside* (n 11) [15] (Lady Arden).

⁵⁷ *Prickly Bay Waterside* (n 11) [35] (Lady Arden).

⁵⁸ *Gabriel v Little* (n 50) [43] (Gloster LJ).

⁵⁹ *ibid*.

contrast, suppose that a failure to apply the funds for the designated green project(s) constitutes an event of default. Suppose also that the agreement includes conditions precedents and representations connected to the use of the loan funds for those projects, in such a case, the agreement will be more compatible with the recognition of a trust since there is a stronger indication that the money was not intended to be at the borrower's free disposal.

If the parties want to use a *Quistclose* trust as part of advancing money for ESSPs, they should ensure that the agreement indicates that the money is not, at any point, at the borrower's free disposal. So, even with the inclusion of a purpose clause and a requirement to keep the funds in a separate bank account, they should ensure that **all** of the terms of the agreement are consistent with an alleged Restriction Intention. That is to say, they should ensure that no terms are actually inconsistent with the assertion that the money was not intended to be at the borrower's free disposal. For example, if temporarily unallocated loan proceeds can be used freely,⁶¹ then the agreement is more likely to speak against the presence of a Restriction Intention than if any unallocated proceeds must also be dealt with in a particular manner.

Relevant to the structure of the contract, Judge Worthington observed in *Ali v Dinc* that it is critical to be confident that the arrangement does not merely entail **personal obligations**, which restrict the use of the property. What is necessary is the **proprietary rider** that the property is not, in the meantime, to be at the free disposal of the recipient, so that the transferor retains beneficial ownership.⁶² Judge Worthington supported this by referring to Patten LJ in *Bieber v Teathers Ltd*. In this case, Patten LJ stated⁶³:

It is ... necessary to be satisfied not merely that the money when paid was not at the free disposal of the [borrower] but that, objectively examined, the contractual or other arrangements properly construed were intended to provide for the preservation of the [lender's] rights and the control of the use of the money through the medium of a trust. Critically this involves the court being satisfied that the intention of the parties was that the monies transferred by the [lender] should not become the absolute property of [the borrower] (subject only to a contractual restraint on their disposal) but should continue to belong beneficially to the [lender] unless and until the conditions attached to their release were complied with.⁶⁴

This passage suggests that a Retention Intention is as important as a Restriction Intention since the latter is not enough to create a trust. However, it will be remembered that this article placed the Restriction Intention at the forefront of the analysis since a true Restriction Intention (as encapsulated by Lord Millett in *Twinstetra*) should generally come with a Retention Intention. Essentially, a Restriction Intention goes

beyond personal obligations, which merely limit how the borrower can use the money. For example, imagine that the lender has stated that the loan money **must not be used** for gambling, illegal purposes, or projects that will negatively impact the environment. Any of these conditions will limit how the borrower can use the money, but it does not follow that the funds are not intended to be at their free disposal.⁶⁵ Again, what is needed is a true Restriction Intention.

Based on this interpretation, Judge Worthington's observation in light of Patten LJ's remark is taken to support the following proposition: It is necessary to distinguish between (1) personal obligations that merely limit how the loan funds can be used and (2) the money not being at the borrower's free disposal (with the effect that the lender retains a beneficial interest). Only the latter denotes a Restriction Intention, which can support a *Quistclose* trust.

What do the observations above mean for stakeholders seeking to embed a *Quistclose* trust when loan money is advanced for ESSPs? They generally suggest that their agreement should demonstrate that any obligations go beyond limiting the borrower's use of the money. Instead, the agreement should show that the money was never intended to be at the borrower's free disposal.

Summary

The article has dealt with three features that can illuminate whether the parties intended the loan proceeds to be at the borrower's free disposal and, consequentially, whether it was intended that the lender should retain a beneficial interest. The upcoming section will demonstrate that green loans have characteristics that can speak in favour of a Restriction Intention. It will be seen that the proceeds of green loans must exclusively be used to finance eligible Green Projects. The proceeds should also, in some cases, be credited to a dedicated account. Finally, green loan documents will likely include provisions such as information undertakings, conditions precedents, and representations relating to, inter alia, how the borrower uses the loan funds.

GREEN LOANS AND THE GREEN LOAN PRINCIPLES

The article uses the term green loan as understood by the LMA. For this reason, it is necessary to refer to the Green Loan Principles (GLP).⁶⁶ These were launched in 2018 (and updated most recently in 2023) by the LMA, the Asia Pacific Loan Market Association (APLMA), and the Loan Syndications and Trading Association (LSTA). The principles offer a recommended framework of standards to be used across the green loan market.⁶⁷ The GLP define green loans as 'any type of loan instruments ... made available **exclusively** to finance, re-finance or guarantee, in whole or in part, new

⁶⁰ *ibid.*

⁶¹ On temporarily unallocated loan proceeds in the context of green loans, see Asia Pacific Loan Market Association, Loan Market Association, and Loan Syndications and Trading Association, 'Guidance on Green Loan Principles' February 2023, 6.

⁶² *Ali v Dinc* (n 14) [243] (Worthington J).

⁶³ The article has used the terms **borrower** and **lender** instead of **payee** and **payor**, respectively.

⁶⁴ *Bieber v Teathers* (n 22) [15] (Patten LJ).

⁶⁵ Lord Millett made a similar observation in *Twinstetra* (n 25) [73]. He said: 'A *Quistclose* trust does not necessarily arise merely because money is paid for a particular purpose. A lender will often inquire into the purpose for which a loan is sought in order to decide whether he would be justified in making it. He may be said to lend the money for the purpose in question, but this is not enough to create a trust; once lent the money is at the free disposal of the borrower.'

⁶⁶ Green Loan Principles (n 7).

and/or existing eligible Green Projects and which are aligned to the **four core components** of the GLP.⁶⁸

Two principal features can be extracted from this definition. First, it reveals that the loan proceeds should be exclusively used for eligible Green Projects. Secondly, green loans must be aligned with the four core components of the GLP. These are (1) use of proceeds, (2) process for project evaluation and selection, (3) management of proceeds, and (4) reporting.⁶⁹ These will characterise a green loan and set it apart from other loans.⁷⁰ As such, when documenting a green loan, the parties should ensure that it is aligned with the core components of the GLP. Notably, the guidance provided by The Chancery Lane Project (TCLP)⁷¹ can help stakeholders in doing so.⁷²

Despite the existence of some guidance, such as that offered by TCLP, it has been recognised by the APLMA, LMA, and LSTA that there is ‘no template wording available for use in green loan documentation due to the varied nature of this market and, as such, a case-by-case approach will be required’.⁷³ Naturally, one green loan will differ from the next, and the terms of the agreement should be tailored to reflect the relevant transaction. Accordingly, a green loan arrangement will not categorically provide the foundation for a *Quistclose* trust. Whether a contractual loan or trust is created should depend upon the individual loan and how it is structured and made to comply with the components of the GLP.

In particular, aligning a loan with components (1) and (3) might indicate that the loan money is not intended to be at the borrower’s free disposal. The upcoming sub-sections will summarise the core components.

Component (1): use of proceeds

Component (1) means that the proceeds must be used to finance eligible Green Projects, which should be described in the finance documents.⁷⁴ These projects should provide clear environmental benefits, and the GLP recognise and provide indicative examples of eligible Green Projects categories, such as renewable energy, energy efficiency, and pollution prevention and control.⁷⁵ A loan can be made to align with Component (1) by including a purpose clause and other use of proceeds provisions that specify the eligible green project categories.⁷⁶ For example, a draft clause provided by TCLP reads: ‘The Borrower shall apply all amounts borrowed by it

under the Green Facility towards: (a) The financing of the Eligible Green Project in accordance with the **Green Loan Framework ...**’.⁷⁷ TCLP showcases this Framework as a schedule and it will describe how the proceeds should be used.⁷⁸

Alignment with Component (1) will limit how the borrower can use the loan proceeds. This is because the borrower will be committed to applying the money towards eligible projects. As noted above, constraining the borrower’s use of the money by requiring them to apply it for some defined purposes can support a Restriction Intention.

Depending upon the green loan documents, the borrower’s ability to deal with the funds can be more or less restricted. There is a difference between an agreement stating that the funds can only be used for purpose X (as in *Twinspectra*) and an agreement listing several (broad) eligible green project categories, allowing the borrower to assign funding to any of them. It is possible to question if the use of proceeds requirement in the green loan context is sufficiently stringent to support the finding of a Restriction Intention. The answer must depend on how the individual green loan is structured and documented. Yet, it should be remembered that the key question is whether the parties intended the money to be at the borrower’s free disposal.⁷⁹ The question is not whether the purpose of the loan is described in broad terms or whether specific words of exclusivity have been used when referring to that purpose.⁸⁰

Component (3): management of proceeds

Component (3) of the GLP can further suggest—especially in combination with the use of proceeds requirement—that the loan money is not intended to be at the borrower’s free disposal. Component (3) means that the proceeds should be credited to a dedicated account (or otherwise be tracked by the borrower).⁸¹ As part of the management of proceeds requirement, the ‘borrower should make known to the lenders any intended types of temporary placement for the balance of unallocated proceeds’.⁸² It was noted above that a segregation requirement is of evidential significance and that it can signify a Restriction Intention.⁸³ It is possible to align a loan with Component (3) by including provisions in the finance documents requiring segregation of the loan money. As mentioned above, the work of TCLP can support stakeholders in aligning

⁶⁷ *ibid* 2. The publication states that the GLP ‘aim to promote the development of the green loan product by providing a recommended framework of market standards and guidelines for use across the green loan market, whilst allowing the loan product to retain its flexibility.’

⁶⁸ *ibid* (emphasis added).

⁶⁹ Green Loan Principles (n 7) 2–4.

⁷⁰ *ibid* 2. The publication reads: ‘It is important that green loans should not be considered interchangeable with loans that are not aligned with the four core components of the GLP.’

⁷¹ TCLP has written a range of climate clauses that can be incorporated into agreements to encourage decarbonisation and reduced climate impact. See The Chancery Lane Project, ‘Our impact’ (n 6).

⁷² The Chancery Lane Project, ‘Harrison’s Clause: Green Loan “Starter Pack”’ <<https://chancerylaneproject.org/climate-clauses/green-loan-starter-pack/>> accessed 15 June 2024.

⁷³ Guidance on Green Loan Principles (n 61) 8.

⁷⁴ Green Loan Principles (n 7) 2.

⁷⁵ *ibid*.

⁷⁶ Guidance on Green Loan Principles (n 61) 8.

⁷⁷ The Chancery Lane Project (n 72) (emphasis added).

⁷⁸ *ibid*.

⁷⁹ *Twinspectra* (n 25) [74] (Lord Millett).

⁸⁰ Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew, *Underhill and Hayton: Law of Trusts and Trustees* (20th edn, LexisNexis 2022) [27.6].

⁸¹ Green Loan Principles (n 7) 4.

⁸² *ibid*.

⁸³ See *Twinspectra* (n 25) [95] (Lord Millett); *Prickly Bay Waterside* (n 11) [42] (Lady Arden).

loans with the components of the GLP. Among other things, TCLP suggests specific undertakings relating to the management of proceeds requirement.⁸⁴

Components (2) and (4): process for project evaluation and selection & reporting

This article has highlighted the use of proceeds and management of proceeds requirements above. Both of these can suggest that the green loan funds are not intended to be at the borrower's free disposal. The other two components, (2)⁸⁵ and (4),⁸⁶ broadly speaking, concern information exchange and communication. Component (2) requires the borrower to communicate, among other things, the process by which they decide 'how the project(s) to be funded fits within the eligible Green Projects categories'.⁸⁷ Component (4) requires the borrower to make and keep information on how the proceeds have been used. This information should include a list of the Green Projects that have been financed and the amounts allocated to each of the projects.⁸⁸ The loan documents can include provisions such as information undertakings, conditions precedents, and representations to align the loan with Components (2) and (4).⁸⁹

TRUSTS AND FINANCING ESSPS

This section will address two questions in light of the discussions above. First, is it possible, as a matter of principle and practice, to create a *Quistclose* trust when loan money is advanced for ESSPs? Secondly, can green loans (as understood by the LMA) provide the foundation for a *Quistclose* trust?

Turning to the first question: It should certainly be possible to create a *Quistclose* trust as part of advancing loan money for ESSPs.⁹⁰ This possibility is consistent with the general nature of trusts of this kind. It was noted above that *Quistclose* trusts are often said to be relevant when money has been transferred from X to Y for a defined purpose. It should not matter if the loan money is transferred for the purpose of acquiring property,⁹¹ repaying creditors,⁹² or financing ESSPs as long as a Restriction Intention can be identified.

A transaction can be purposefully structured to signify the presence of a Restriction Intention. That is to say that the parties can deliberately increase the probability of a *Quistclose* trust being recognised when a lender makes green finance available to a borrower. The loan documents can make it clear that the money must be exclusively used for the designated ESSPs. The agreement can require the loan proceeds to be kept in a special bank account until the project has been financed. In addition, it can include provisions such as conditions precedent and undertakings related to, among other things, the use of the money and the designated ESSPs. The parties can also agree that a breach of a clause relating to, for

instance, the proper use of the funds will constitute an event of default. These features, if combined and if no other terms of the agreement are inconsistent with an alleged Restriction Intention, should indicate that the loan money is not at the borrower's free disposal and that the lender retains a beneficial interest until the borrower has financed the green project. The section on green loans has shown that some loans already possess traits that can signify a Restriction Intention.

This brings us to the second question: Can green loans provide the foundation for a *Quistclose* trust? Giving a universal answer to this question is not possible since each green loan will differ. That said, considering the components of the GLP, some loans classifying as green can probably provide the basis for a *Quistclose* trust. However, a preliminary assumption is this: There is likely an overarching obstacle to the frequent recognition of *Quistclose* trusts within the green loan market. That obstacle has to do with the distinction between (1) personal obligations restricting the use of the money and (2) the money not being at the borrower's free disposal. It will be remembered that Judge Worthington highlighted the notion of the 'proprietary rider' when thinking about obligations constraining the use of the property. Green loans will limit and constrain a borrower's use of the loan money in the sense that the funds must be used for green projects, but it may be difficult to show that the money was not intended to be at their free disposal. In particular, a loan aligned with Component (1) of the GLP can legitimately allow the borrower to retain a great deal of flexibility in determining how the proceeds from the loan can be used.

THE VALUE OF QUISTCLOSE TRUSTS?

The section above has suggested that a *Quistclose* trust can be created as part of advancing loan funds for ESSPs. This section will consider if there are any compelling reasons for trying to do so. In other words, can the interposition of a trust provide any utility when a lender makes green finance available to fund green projects? A preliminary point to note is that the existence of a trust cannot, in itself, preclude the funds from being misused. Irrespective of the presence of a trust, the borrower can deliberately or otherwise commit a breach of trust by using the money for non-authorized purposes. A trust cannot prevent this any more than a contract can prevent the occurrence of a breach of contract.

Lloyd Brown recently speculated whether *Quistclose* trusts could 'assist lenders in influencing the behaviour of their borrowers'.⁹³ He gave the following example: '[A] lender could utilise *Quistclose* as a risk management technique to provide a loan with a condition that the borrower does not use the money for projects that would be deemed harmful to climate change. If the borrower breaches this specific purpose, the

⁸⁴ The Chancery Lane Project (n 72).

⁸⁵ 'Process for Project Evaluation and Selection'.

⁸⁶ 'Reporting'.

⁸⁷ Green Loan Principles (n 7) 4.

⁸⁸ *ibid.*

⁸⁹ Guidance on Green Loan Principles (n 61) 8.

⁹⁰ Of course, a *Quistclose* trust will not automatically be recognised merely because money has been paid for a given ESSP. The trust is contingent upon a Restriction Intention.

⁹¹ As in *Twinsectra* (n 25).

⁹² As in *Barclays Bank v Quistclose* (n 21).

⁹³ Brown (n 5) 409.

lender will have the right to recover the loan under a resulting trust ...⁹⁴

Brown's passage raises a few questions, two of which are outlined next. First, would a condition that the money **must not** be used for certain projects commonly be enough to create a *Quistclose* trust? That is to say, would this condition be indicative of a Restriction Intention or personal obligations limiting the borrower's ability to use the money. The two main cases examined in Brown's article (*Twinsectra* and *Barclays Bank v Quistclose Investments*) deal with loan money being earmarked for some particular purpose and nothing else.⁹⁵ Arguably, a Restriction Intention is more readily apparent if the borrower must fund a specific green project than if the borrower must not fund a project that can adversely impact the environment. All else being equal, and generally, a condition that the borrower **must fund** project X will restrict their use of the money more than a condition that the borrower **must not fund** project X. The condition of 'must not fund X' is more likely to involve personal obligations restricting the use of the money as opposed to the proprietary rider that the money is not at the borrower's free disposal.

The second question concerns why a *Quistclose* trust would be useful in this context and why the potential existence of such a trust would affect the borrower's behaviour. Suppose that the agreement comes with a condition regarding the use of the money (in the form of a purpose clause) and that non-authorized application of the funds constitutes an event of default. Is this contractual duty not enough to influence the borrower to use the money as agreed? Brown's article does not deal with this aspect. As such, the upcoming sub-sections will consider some potential motivations behind using a *Quistclose* trust when loan money is advanced for ESSPs. The final motivation is the one that aligns most closely with the idea of the trust as a mechanism for influencing the borrower's behaviour.

Insolvency

It is well-known that *Quistclose* trusts can be practically significant in the event that a borrower becomes insolvent. More specifically, it can be important here if the lender has not taken a conventional form of security.⁹⁶ The trust is significant because it can allow the lender—having a proprietary interest in the loan money—to obtain priority over the borrower's unsecured creditors.⁹⁷ As such, to the extent the funds have not been or cannot be used as instructed, the *Quistclose* trust can be viewed, in substance, as a security device which can protect a lender from their borrower's

insolvency.⁹⁸ For this reason, a lender might be interested in a *Quistclose* trust if the borrower cannot (or will not) provide the lender with more traditional forms of security.⁹⁹

However, the risk of the borrower's insolvency should not, in the ordinary course of events, be a particularly compelling reason for attempting to create a *Quistclose* trust when lending money for ESSPs. This is because a lender will likely prefer to protect itself against such a risk by relying on other methods, such as taking a guarantee from a third party or by way of a mortgage and so on.¹⁰⁰ On the topic and as an example, NatWest's overview of green loans makes it clear to prospective borrowers that security may be required.¹⁰¹ Given the observations in this sub-section, it is necessary to consider if—beyond the insolvency context—there are any compelling reasons for using a *Quistclose* trust when advancing money for ESSPs.

Tracing in equity

Another incentive relates to the process of tracing,¹⁰² and proprietary remedies. By virtue of the *Quistclose* trust, the lender will have a proprietary interest in the loan funds,¹⁰³ and this entitles them to trace in equity.¹⁰⁴ Equitable tracing could be relevant if the borrower, contrary to the loan documents, has mixed the loan funds with their own money in an account and then proceeded to purchase an asset that has increased in value.¹⁰⁵ After the tracing process, the lender may be able to pursue a proprietary claim in respect of that (substitute) property and potentially benefit from the increased value.¹⁰⁶ An approach like this might send a clear signal to borrowers that they are fully expected to apply the funds towards ESSPs. It can signal that borrowers should not be opportunistic and will not be permitted to benefit from the misapplication of funds since the lender can target substitute assets which have increased in value. In this way, a *Quistclose* trust can perhaps influence borrowers to use the funds as agreed and not for other projects or assets.

Nevertheless, a strategic use of *Quistclose* trusts like this is speculative and can be unpragmatic. For one, it is conceivable that the borrower will be unaware of the existence or relevance of the trust and the notion of the tracing process. Additionally, it is not guaranteed to be commercially sensible for lenders to pursue this path even if a borrower has, in breach of trust, mixed the loan money and used money from this mixture to acquire unauthorised assets. On the assumption that the lender actually manages to discover that the loan money has not been used for the defined green project(s), the value of the substitute asset (if any) may not be enough to

⁹⁴ *ibid.*

⁹⁵ *Twinsectra* (n 25).

⁹⁶ Ewan McKendrick, 'Commerce' in William Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 150.

⁹⁷ *Prickly Bay Waterside* (n 11) [32] (Lady Arden).

⁹⁸ See the 'security question' being discussed in Hofri-Winogradow and David (n 16) 532–533.

⁹⁹ See McKendrick (n 96) 150–152.

¹⁰⁰ As noted by McKendrick, '[I]t has to be remembered that there are many other ways of obtaining priority in the event of insolvency. The most obvious alternatives are traditional forms of security, such as a mortgage or a charge. *Quistclose* will not displace these traditional securities and, indeed, it was never intended that it should.' *ibid* 151.

¹⁰¹ NatWest (n 2).

¹⁰² On the tracing process, see *Foskett v McKeown* [2001] 1 AC 102, 128 (Lord Millett).

¹⁰³ See *Ali v Dinc* (n 14) [255] (Worthington J).

¹⁰⁴ *ibid* [255] and [260] (Worthington J); Alastair Hudson, *Equity and Trusts* (10th edn, Routledge 2021) [20.3.1] and [22.5.3].

¹⁰⁵ In contrast, it is not possible to trace into a mixed fund at law. See *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 285 (Millett J); *Agip (Africa) Ltd v Jackson* [1991] Ch 547, 566 (Fox LJ).

¹⁰⁶ See *Ali v Dinc* (n 14) [260]–[262] (Worthington J).

justify the associated process and costs.¹⁰⁷ This is even more true if the borrower is solvent and the lender can instead invoke the event of default provisions in the loan agreement.

Fiduciary relationship and integrity

This sub-section deals with a final speculative incentive for using a *Quistclose* trust when lenders make green finance available to borrowers. It is a theoretical discussion, and there are grounds upon which the line of reasoning below can be criticised. Some of these are outlined before the article's conclusion.

The final incentive concerns *Quistclose* trusts as a device for strengthening the integrity of loans for ESSPs. More specifically, embedding a trust might influence how stakeholders view and treat loans for projects that will positively impact the environment. Generally speaking, promoting the integrity of (and respect for) loans for ESSPs is desirable. This is partly because of their relative significance compared to loans that are not intended to facilitate any broader positive impact.

The central question in this sub-section is whether *Quistclose* trusts can influence stakeholders to perceive loans for ESSPs in a manner that can reinforce their integrity. Before dealing with this question, it is helpful to consider what the notion of integrity of such a loan would entail. As a baseline, for a loan like this to maintain its integrity, it is crucial that the funds are not used indiscriminately. The money should go towards projects that positively impact the environment. For example, the integrity of the green loan market would be damaged if there was no expectation and transparency regarding the green use of the money. In short, the integrity of loans for ESSPs would be compromised if stakeholders were permitted or incentivised to be indifferent regarding the use of the loan proceeds.

In dealing with the central question noted above, it is necessary to make a preliminary point. A *Quistclose* trust will, to some extent, elevate the relationship between the borrower and lender. Equity's intervention means that their relationship goes from solely contractual to fiduciary in nature. Lord Millett touched upon this point in *Twinsectra*. He said: 'It is unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it. **Such conduct goes beyond a mere breach of contract.**'¹⁰⁸ In essence, the *Quistclose* trust means that the borrower's duty to apply the money for the stated purpose is 'not contractual but fiduciary'.¹⁰⁹ Lord Millett explained that the duty is characterised as fiduciary since 'a person who makes money available on terms that it is to be used for a particular purpose only and not for any other purpose thereby places his **trust and confidence** in the recipient to ensure that it is properly applied'.¹¹⁰ The point so far is that a *Quistclose* trust will give rise to a fiduciary relationship with the effect that certain loans for ESSPs can be underpinned by a contract and 'concurrent fiduciary duties' (as modified by that contract).¹¹¹

Crucially, it is the presence of a fiduciary relationship and duty that might contribute to a condition in which stakeholders perceive loans for ESSPs in a way that strengthens their integrity. The article will expand upon this statement by extrapolating an argument made by Matthew Harding. In examining how equity, contrary to some views, contributes to commercial certainty, Harding writes:

[T]he embedding of fiduciary norms in structures and arrangements ... generates another, more generalised, sort of certainty. It creates conditions under which relevant communities of practice develop a sense that certain roles and offices are fiduciary in character, and this then contributes to certainty within the communities in question about what is expected in these roles and offices. Thus, role-occupants such as lawyers and professional trustees might come to view themselves and their transactions from the perspective of the fiduciary.¹¹²

Drawing on Harding's argument, the existence of a *Quistclose* trust—and the consequential fiduciary duty regarding the use of the money—might encourage stakeholders to develop a sense that the borrower's role in this context is fiduciary. Using Harding's expression, borrowers might come to view themselves from the perspective of the fiduciary. This can contribute to certainty within the relevant market as to what is expected with respect to these transactions. It can also lead to self-selection by appropriate borrowers willing to accept and use a structure which embeds fiduciary norms and duties. Furthermore, one can consider if the presence of a fiduciary relationship will adjust lenders' expectations of those who participate in such transactions.

In summary, the presence of a fiduciary duty might incentivise stakeholders to adjust their behaviour in a way that helps to ensure that the loan funds are used in accordance with the spirit of the agreement. In particular, the characterisation of the duty as fiduciary can perhaps encourage borrowers to be more restrictive and conscious of how they use the loan funds. If so, the *Quistclose* trust will, to some extent, influence stakeholders to perceive loans for ESSPs in a way that strengthens their integrity.

Objections

Several objections can be raised against the ideas encapsulated in the sub-section above. First, one can question whether *Quistclose* trusts could contribute to a condition in which borrowers view themselves and their conduct from the perspective of the fiduciary. For example, Harding speaks of 'role-occupants such as lawyers and professional trustees'.¹¹³ Unlike a borrower, a person in such a role is in a recognised category of fiduciary relationship.¹¹⁴ Because of

¹⁰⁷ The following observation is relevant in this context: 'I also hold that C is entitled to trace the Loan funds, and assert proprietary claims to their traceable proceeds. However, I suggest that the evidence-gathering expense in doing so is not warranted unless there is good reason. That might be to secure for C the profitable investments generated by D1 using these funds, or to protect C on D1's insolvency by securing the personal claim to equitable compensation by a lien against the traceable proceeds.' *ibid* [262] (Worthington J).

¹⁰⁸ *Twinsectra* (n 25) [76] (Lord Millett) (emphasis added).

¹⁰⁹ *ibid* (Lord Millett).

¹¹⁰ *ibid*.

¹¹¹ 'The existence of a contract does not exclude the co-existence of concurrent fiduciary duties (indeed, the contract may well be their source); but the contract can and does modify the extent and nature of the general duty that would otherwise arise.' *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 206 (Lord Browne-Wilkinson).

¹¹² Matthew Harding, 'Equity and the Value of Certainty in Commercial Life' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart 2019) 152.

this certainty, relevant expectations can more consistently be formed within these communities. In contrast, it is doubtful if stakeholders can develop a sense that a fiduciary (rather than contractual) duty categorically underpins loans for ESSPs. Far from every loan gives rise to a trust and so far from every borrower will be in a fiduciary relationship.

Secondly, it is questionable whether a duty that is characterised as fiduciary would influence borrowers any more than a contractual duty would. From a borrower's perspective, the distinction between a fiduciary and a contractual duty might be a matter of terminology.

Thirdly, even if we presume that the parties wish to use a trust to embed a fiduciary duty as part of their transaction, it seems strange that they would opt for a structure that relies on a *Quistclose* (resulting) trust. It would increase transactional certainty if the loan agreement explicitly purports that the borrower holds the loan money on express trust for the lender until the green project has been financed. If an express trust is used, then the borrower would also be more likely to appreciate—at least with assistance from their lawyers—that they are in a fiduciary relationship.¹¹⁵ The same is not true if the parties try to use a *Quistclose* (resulting) trust.

Finally, commercial parties do not always welcome the presence of a fiduciary relationship and fiduciary duties. In general, the fiduciary's core obligation of loyalty¹¹⁶ will be out of place in a number of commercial transactions. For example, whether or not a loan is for a green project or something else, the borrower and lender will each tend to their own interests. Borrowers may even be discouraged from entering into such agreements if green finance and loans for ESSPs become associated with fiduciary norms. This would be an unfortunate development, given that green financing should be allowed to flourish without equity's intervention.

CONCLUSION

This article has examined the use and relevance of *Quistclose* trusts in a situation in which loan money is advanced for

ESSPs. The article explained that such a trust could, as a matter of practice, be incorporated when lenders make green finance available to fund certain projects. It also noted how stakeholders can structure their transactions to be more indicative of a Restriction Intention. Green loans have traits that can, prima facie, be telling of such an intention. But despite the borrower being limited in how the loan money can be used—notably that the funds must be used for eligible Green Projects—it will, in some cases, be challenging to demonstrate that the funds were not intended to be at their free disposal. That is to say, it can be difficult to routinely draw out a true Restriction Intention from the green loan market. This observation, however, does not negate the practical possibility of embedding a *Quistclose* trust when lenders make green finance accessible to borrowers who undertake that the funds will be used for green projects. It is not inconceivable that some stakeholders will want to embed a trust as part of their arrangement, and the law should facilitate this option. Beyond the practical considerations of creating *Quistclose* trusts, the article has questioned whether these trusts can provide any utility when money is lent for ESSPs. In particular, the article discussed equitable tracing and the presence of a fiduciary duty as two hypothetical reasons for attempting to create such a trust. Despite these discussions, one can remain sceptical about whether a *Quistclose* (resulting) trust can add much value when lenders make green finance available to borrowers. More generally, the discussions in this article can perhaps encourage us to think about the suitability of equity's intervention in the context of green financing.

AUTHOR BIOGRAPHY

Dr Christopher Arvidsson is a Senior Lecturer at the University of Hertfordshire. He has taught a range of modules including Trusts Law, Property Law, and Contract Law. Email: c.arvidsson@herts.ac.uk.

¹¹³ *ibid.*

¹¹⁴ See generally Graham Virgo, *The Principles of Equity & Trusts* (4th edn, OUP 2020) 447.

¹¹⁵ Hedlund and Rhodes (n 19) 259–260.

¹¹⁶ *Bristol & West Building Society v Mothew (t/a Stapley & Co)* [1998] Ch 1, 18 (Millett LJ).

© The Author(s) (2024). Published by Oxford University Press.

This is an Open Access article distributed under the terms of the Creative Commons Attribution License (<https://creativecommons.org/licenses/by/4.0/>), which permits unrestricted reuse, distribution, and reproduction in any medium, provided the original work is properly cited.

Trusts & Trustees, 2024, 30, 496–505

<https://doi.org/10.1093/tandt/ttae063>

In depth