CHP 11/0098

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN
CIVIL DIVISION
CHANCERY PROCEDURE

IN THE MATTER of FPA Limited

Judgment delivered on 6 August 2014
by His Honour the Deemster Doyle
First Deemster and Clerk of the Rolls

Introduction

1. This judgment concerns a legal issue in respect of a fund known as the Foundations Program which, in colloquial terms, went belly-up with liquidators being appointed in November 2011.

2. As with many corporate failures worldwide there is a potential for investors and creditors to suffer financially. It is human nature for investors and creditors to do all they can in an endeavour to eliminate or reduce their financial losses. This case is no exception.

3. The issue is whether, once the bank's security interests have been satisfied, certain assets or the proceeds therefrom are held on trust for certain investors who provided those assets, or whether such assets or the proceeds therefrom form part of the general assets of the company in liquidation available for pari passu distribution amongst the company's unsecured creditors.

4. Put shortly, is there a trust or not? Having heard legal argument on 31 July 2014 and having considered the position I have concluded that the assets are not held on trust by the liquidators of FPA Limited ("FPA"). I now provide my reasons for reaching such conclusion.

Background

5. Michael John Fayle (one of the liquidators of FPA) in his witness statement dated 9 May 2014 helpfully provided background information in respect of the legacy experienced investor fund known as the Foundations Program. FPA is stated to be a wholly owned subsidiary of Foundations Program Plc ("FPP").

6. Potential experienced investors were introduced to the Foundations Program by independent financial advisers. Rather than making cash investments to participate, investors ("Participants") would assign assets (in the vast majority of cases, life policies in which they held a beneficial interest) to FPA (the "Assigned Assets"). These Assigned Assets were then used by FPA to secure a bank facility from Barclays Private Clients International Limited ("Barclays" or "the Lender") which funded the investment of the Legacy Experience Investor Fund ("Legacy EIF") made by FPP. Additional

security was provided by means of a debenture granted by FPP in favour of Barclays. The Participants were allocated points proportionate to the value of the Assigned Assets in the Legacy EIF. The intention was that the Participants would share in a proportionate share of the profits made by FPP. The terms of participation also provided that losses would be shared in the same proportions.

7. The Foundations Program ran into significant difficulties for a variety of reasons, including the failure of the projects that the Foundations Program made investments into (through the finance to FPP raised through the loans from Barclays made on the back of the Assigned Assets).

8. Barclays eventually called in the loans they had made and during this process the then directors of FPP and FPA sought alternative forms of funding to replace the Barclays facility.

9. The directors of FPA and FPP entered into discussion with Stephen Brewer ("Mr Brewer") the Chairman of the Brewer Investment Group LLC ("BIG") a company incorporated in the State of Illinois USA for the purpose of raising finance through the issuance of loan notes by FPA. It appears that the monies raised through loan notes were largely directed to BIG and were not paid to FPP or FPA. Mr Brewer subsequently admitted that he diverted 90% of the funds to BIG. Mr Brewer is now bankrupt in the United States of America.

10. By orders made by this court on 23 November 2011 FPP and FPA were wound up and joint liquidators appointed.

11. It became apparent to the liquidators whilst investigating matters that it would be difficult, if not impossible, to progress any other issues or claims, or indeed to conclude the orderly winding up and distribution of assets of FPA and FPP, until the status of the Assigned Assets was resolved. In particular, once the liquidators accepted that the Loan Note Holders ought to be entitled to prove in the liquidation of FPA, there immediately existed competing claims between the Participants and the Loan Note Holders. In short, if the Assigned Assets are held on trust for the Participants, the Participants will be entitled to assert proprietary claims against them and there will be no assets available for distribution to the Loan Note Holders. Conversely, if there is no trust, the Participants and Loan Note Holders will both be able to assert claims in the context of the winding up of FPA.

The Issue

12. The issue before the court can in essence be summarised as follows:

    Once certain security interests of the prior assignee of the so-called Assigned Assets (Barclays) have been satisfied, will the Assigned Assets or the proceeds therefrom be held on trust for the investors who provided these assets (and if so on what basis) or do they form part of the general assets of FPA available for pari passu distribution amongst FPA's unsecured creditors? (the "Issue").

The order requested

13. The liquidators in their application dated 3 June 2014 (the "Application") applied for an

order in the form of a declaration. The amended draft order is as follows:

> "When the Assigned Assets of Participants in the Legacy Experience Investor Fund known as the Foundations Program which are currently held as security by Barclays are released by Barclays to the control of the Liquidators of FPA such released Assigned Assets or the proceeds therefrom [are] [or] [are not] held on trust by the Liquidators of FPA (for the benefit of the [Class 2] [or] [Class 2 and Class 3] Participants) on the following terms : [insert details of trust arrangements]."

Appearances and positions adopted

14. Mr Jonathan Wild appeared for the liquidators of FPA. The liquidators are impartial as to the outcome of the Application and seek a resolution of the Issue by enabling the respective competing interests to be considered by this court and thereafter a decision regarding the Issue reached.

15. The liquidators obtained opinions from two leading counsel on the Issue. Richard Gillis QC in his opinion dated 19 October 2012 stated that "the Assigned Assets are <u>not</u> held in trust but constitute part of FPA's assets in liquidation" (paragraph 3 of the opinion).

16. At paragraph 31 of the opinion Mr Gillis states:

> "In my view, and although the opposite is arguable, I am of the view that the Assigned Assets were not held in trust when they were first assigned by Participants to FPA nor will they be held by FPA in trust if Barclays re-assigns them back to it."

17. At paragraph 33 of the opinion Mr Gillis states:

> "In my view, the Assigned Assets were not held by FPA on trust when the Participants first assigned them to FPA."

18. At paragraph 35 of the opinion Mr Gillis states:

> "If, after FPP's debt to Barclays has been discharged, Barclays re-assigns some or all of the Assigned Assets to FPA, I am of the view that FPA will hold those assets as part of its general funds and not on trust, either for individual participants or for all Participants as a class."

19. Hugh Norbury QC based his opinion dated 15 January 2014 on the earlier opinion of Mr Gillis. Mr Norbury at paragraph 3 of his opinion states:

> "... I am of the view that the Assigned Assets are <u>not</u> and will <u>not</u> on reassignment be held in trust but will constitute part of FPA's assets in liquidation."

20. Mr Norbury at paragraph 33 of his opinion states:

> "In my view, and although the opposite is arguable, I am of the view that the Assigned Assets were **not** held in trust when they were first assigned by Participants to FPA and will **not** be held by FPA in trust if the lender re-assigns

them back to it."

21. At paragraph 34 Mr Norbury states:

> "In my view, the Assigned Assets were not held by FPA on trust when the Participants first assigned them to FPA."

22. At paragraph 39 Mr Norbury states:

> "I am of the view that FPA will hold those amounts as part of the general funds and not on trust, either for individual Participants or for all Participants as a class."

23. Mr Christopher Murphy appeared for the Class 1 Representative, Mr Eduardo Mar, the class representative of the loan note holders and SMP Partners Limited to represent the interests of unsecured creditors of FPA who submitted that the Assigned Assets are not, and will not be, subject to a trust.

24. Mr Robert Colquitt appeared for the Class 2 Representative, Mr Wright, who is the Class Representative of the Participants with an Assigned Asset held by the Lender by way of security who have an interest in arguing that the Assigned Assets either already are subject to a trust in the Lender's hands, or will be subject to a trust once re-assigned to FPA. He argued that a *Quistclose* trust of the Assigned Assets arises in the circumstances.

25. Mrs Annemarie Hughes appeared for the Class 3 Representative, Mr Morris, who is the Class Representative of the Participants whose Assigned Assets have already been realised by the Lender and who have an interest in arguing that the Assigned Assets are, or will be, held on a "class" trust for the benefit of all Participants (and not just the Participants who fall within Class 2).

26. I am grateful to all counsel for the considerable assistance they have provided the court in respect of this matter. It is most appreciated.

Submissions

27. I considered all the skeleton arguments filed and all the oral submissions put before the court. I do not set them all out in this judgment but I have full regard to them. In summary, the main submissions are as follows:

Class 1

28. On behalf of the Class 1 Representative the following submissions are made:

    (1) the Assigned Assets are not, and will not be, subject to a trust;

    (2) the transfer of both legal and beneficial interest in Assigned Assets is underlined in both the Deed of Assignment and in the Offering Document;

    (3) a full transfer of interest occurred;

    (4) there was no *Quistclose* or other trust at the time of the assignment of the

assets or at the time of re-assignment to FPA by the Lender of the Assigned Assets;

(5) there is no trust (whether *Quistclose*, *Kayford*, resulting, constructive or other) of the Assigned Assets arising at any time and that when the Assigned Assets are re-assigned they are assets of FPA and are available for the general creditors of FPA free of any trust;

(6) the mere fact that there is a disagreement between Class 2 and Class 3 about the objects of any of the formulation of trusts that have been put forward by them is further evidence that there is indeed no trust;

(7) this is not a trust situation. This is a series of commercial contracts under which it is clear that legal and beneficial ownership of the Assigned Assets passed entirely to FPA. It would be very dangerous to imply notions of trust into such arrangements where the effect of doing so would be totally at odds with the express wording of the documentation;

(8) the scheme documentation in effect says that the assets will be available to meet losses and liabilities (see fourth paragraph on page 6 of the Offering Document and also conditions 13.2 and 13.5). The intention being that the Assigned Assets are available to meet losses incurred;

(9) consideration should also be given to the positon of the loan note holders if the Assigned Assets are not part of the assets available in the liquidation. In such a case there would be severe financial consequences for the loan note holders.

Class 2

29. On behalf of the Class 2 Representative the following submissions are made:

(1) a fair description of the objectives and mechanics of the Program were as follows, assuming a solvent scenario (with references being made to the page numbers, conditions and parts within the Offering Document):

(a) the Program sought to utilise assets owned by Participants (i.e. the Assigned Assets) to generate further assets for the Participants;
[page 5]

(b) the Participants' Assigned Assets were used to secure the borrowing of monies from Lenders. The provision by the Participants of the Assigned Assets was their "gateway" to participation in the potential profits of the Program;
[Condition 5.1]

(c) the monies borrowed by the Program would be invested by the Program in the hope of making positive returns;
[Condition 4.4 and Part IV]

(d) over time, a Participant would become entitled to an increasing share

of the profits of the Program;
[Page 7, Condition 12.2 and 12.3 and Part V]

(e) the level of a Participant's profit share was to be calculated by reference to the value of the Assigned Assets provided by a particular Participant to the Program;
[Condition 8.1(b), Condition 8.7 and Part V]

(f) upon a redemption by a Participant, monies owing to a Lender referable to the value of the Participant's Assigned Assets would be repaid to the Lender;
[e.g. Condition 5.2]

(g) following such repayment to the Lender, the Lender would return the Assigned Assets to FPA;
[Condition 5.2, Condition 13]

(h) finally, FPA would return the Assigned Assets to the Participant, in addition to the Participant's share of the profits generated by the Program;
[Condition 5.2, Condition 13, and Part V]

(2) the scheme documents do not cover every eventuality. It is necessary and appropriate for the Court to engage in forming views as to the overall nature and intent of the Program, and the involvement of the Participants in that Program;

(3) in such circumstances:

(a) the Assigned Assets were never converted by FPA or FPP to other types of asset (e.g. cash), which (cash) became mixed up with the other cash of the Program for the purpose of onward investment;

(b) the integrity of the Assigned Assets remained intact and clearly identifiable as, for example, a life policy originally issued in the name of a particular and specific Participant;

(c) the intention of the Program (and more precisely FPA and the Class 2 Participants) was that the Assigned Assets were to be exclusively and specifically used as security for the ultimate purpose of enabling a Participant to receive profits from the Program, and the Assigned Assets were not to be treated (and were not treated) as assets of the Program (or FPA) that would either contribute to the Profits of the Program or which could be distributed to other Participants;

(d) it is sufficiently clear that the objective intention of the Program was that the Assigned Assets would ultimately be returned to the relevant Participant, on the basis that the relevant Participant was the original and ultimate owner of the Assigned Assets;

(e) it was not the case that either FPA or the Lenders had unfettered rights to use the Assigned Assets in their possession as they saw fit;

various Program documents constrained their respective use of the Assigned Assets;

(4) in all the circumstances it would be unfair, and inequitable, if the court were to determine that the Assigned Assets were truly and ultimately the beneficial property of FPA, as opposed to the relevant Participants. The way the court can achieve what is submitted as being the equitable result, is by the imposition of a *Quistclose* type trust, that recognises at each of the relevant stages (namely Stage 1 the provision of the Assigned Assets to FPA, Stage 2 the provision by FPA to the Lender of the Assigned Assets and Stage 3 the return of the Assigned Assets by the Lender to FPA) the beneficial ownership of the Assigned Assets remained with the relevant Class 2 Participant.

(5) a *Quistclose* trust exists on the basis that:

(a) the parties to that transaction can be found to have intended that the Assigned Assets were not to be at the free disposal of FPA;

(b) the parties intended that the Assigned Assets should not form part of FPA's general assets but should be used for a particular purpose, failing which they should be returned to the Participant;

(c) the parties intended that the beneficial interest of the Assigned Assets should remain with the Participant until the purpose was fulfilled;

(d) it would be unconscionable for FPA to keep the Assigned Assets disregarding the purpose for which they were obtained;

(e) if the above criteria are satisfied, it is not necessary that the parties should intend to create a trust, merely that their arrangements had the effect of creating a trust. There is no doubt that the parties here intended their arrangements, but the question, from the Class 2 Participants' perspective is whether those arrangements gave rise to a *Quistclose* trust at Stage 1, namely on the provision of the Assigned Assets to FPA;

(6) the provision of FPA by the Class 2 Participants of the Assigned Assets was for a clear purpose, which comprised two key elements, namely:

(a) that the Class 2 Participant's Assigned Assets were undoubtedly to be provided to third party banks to stand as security;

(b) that so long as those Assigned Assets were being used as security, the Assigned Assets would facilitate the participation of a Class 2 Participant in the Program, until such time, ultimately, as a Redemption by a Class 2 member occurred (the "Purpose").

In circumstances where FPA/the Program is insolvent, the Purpose has failed. Therefore, it would be appropriate for the court to recognise that a *Quistclose* resulting trust is operative, to ensure that the property of Class

2 is returned to Class 2, given the failure of the Purpose for which the Assigned Assets were provided;

(7) in both a solvent and insolvent scenario it would, in the scheme of the Program, be unconscionable to treat FPA as the beneficial owner of the Assigned Assets;

(8) the provision to FPA by the Class 2 Participants of the Assigned Assets was for a clear purpose (i.e. the Purpose);

(9) the Class 2 Participants and FPA did not intend the Assigned Assets to form part of the general assets of FPA;

(10) in view of the insolvency of FPA and the Program, the Purpose cannot be effected;

(11) in such circumstances, a *Quistclose* type resulting trust can be said to exist in favour of the Class 2 Participants. That *Quistclose* trusts operate to recognise that beneficial ownership of the Assigned Assets remained (and remains) with the Class 2 Participants throughout the Class 2 Participants' participation in the Program, with the effect that, both in the hands of the Lender, and/or following return to FPA, the Class 2 Participants should be viewed as the beneficial owners of the Assigned Assets;

(12) Class 2 does not accept Class 3's submissions that the Assigned Assets are held on trust for all the Participants.

Class 3

30. On behalf of the Class 3 Representative the following submissions are made:

(1) the Assigned Assets are, or will be, held upon trust for all the Participants;

(2) the only equitable alternative is that the Assigned Assets are held by FPA and available to the Participants and any other unsecured creditors;

(3) on the face of the documents, legal and beneficial ownership has been transferred to FPA, and the Participants assigned both legal and beneficial ownership to validly effect the assignment but this of itself does not preclude the Participant from retaining a beneficial interest in the Assigned Assets;

(4) the wording in the Offering Document and the Deed of Assignment does not prevent the existence of a trust relationship, or an intention on the part of the Participant to retain a beneficial interest;

(5) in addition to the wording of the documents, additional considerations must be taken into account and the Offering Document itself includes a number of inconsistencies rendering reliance on the specific extracts to argue that no trust arises unsafe;

(6) at the time of the assignment from the Participants to FPA, the Assigned

Assets were held by FPA subject to a *Quistclose* type trust;

(7) the transfer of the Assigned Assets to FPA was for the particular and exclusive purpose of FPA utilising the Assigned Assets as security for borrowing from the Lender. Looking at the documents as a whole, it is clear that the sole purpose of the assignment of the Assigned Assets to FPA was to permit FPA to sub-assign the policies to the Lender as security. That particular purpose was also intended to be an exclusive purpose and the Assigned Assets were not at the "free disposal" of FPA. The equitable interest in the Assigned Assets remained in the Participants pursuant to a resulting trust until the sub-assignment to the Lender. The same conclusion can be reached on the basis that the Assigned Assets were assigned to FPA for a purpose beyond merely standing as security i.e. a loan was made of the Assigned Assets to FPA to enable FPA to satisfy the debt to the Lender under the borrowing. Under this analysis, the equitable interest in the Assigned Assets remained in the Participants unless and until the Lender enforced its rights under the security. In respect of the Assigned Assets to be re-assigned by the Lender to FPA, that particular purpose has not been fulfilled; those Assigned Assets not being required to satisfy the debt to the Lender. Those Assigned Assets are therefore to be returned to the Participants collectively pursuant to a *Quistclose* resulting trust;

(8) it would be unconscionable for FPA, on re-assignment of the Assigned Assets, to use it to satisfy third party debts. On the true construction of the documents and the arrangement as a whole, it was never intended that FPA be free to utilise the Assigned Assets for its own purpose. It was to be used as security for any debt on the lending;

(9) in the alternative the Assigned Assets which are to be re-assigned to FPA are subject to a *Re Kayford* type express trust. There was, pursuant to the documents, an express declaration by FPA in favour of the Participants that the Assigned Assets were to be held on trust for the Participants collectively should the purpose of the assignment to FPA fail. That purpose has now failed; the Lender having enforced its security and the remaining Assigned Assets no longer being required;

(10) in addition, the construction of the Offering Document does not prevent a resulting trust of the Assigned Assets back to the Participant;

(11) applying the principles of a constructive trust it would be unconscionable for FPA to assert any beneficial interest in the Assigned Assets and deny the beneficial interests of the Participants. FPA can be said to have acted as the agent of the Participants, and therefore, upon receipt of the remaining Assigned Assets from the Lender, a constructive trust arises in favour of the Participants, even if the Offering Document negatives an express trust;

(12) there is also a trust on re-assignment from the lender to FPA. Condition 13 of the Offering Document envisages that the Assigned Assets will be re-assigned to the Participants. Although the risk of losing the Assigned Assets is identified in the documents this is only contemplated (a) in the

event that the Lender enforces its security and (b) where there is a deficit on a Participant's Ledger Account which must be discharged;

(13) there was a clear intention that the Assigned Assets would be held on trust for the Participants collectively on re-assignment by the Lender to FPA. Although it can be said that the particular purpose was fulfilled at the point of assignment to FPA, the *Quistclose* trust is in effect re-ignited at the point of re-assignment. Further, any monies due back to FPA should be held on a resulting trust for the Participants, because FPA had simply acted as agent for the Participants in assigning the Assigned Assets onto the Lender;

(14) the Participants were all members of the public who assigned their life policies to FPA as part of a collective investment. Although they were Participants in an experienced investor fund, who can be expected to have a certain degree of understanding of the risks involved, it cannot be conscionable for FPA to now withhold the Assigned Assets (which in respect of some Participants will amount to the whole of, or at least a large part of, their estates) in circumstances where it was clearly intended that the Assigned Assets would only be used as security for the borrowing and that any remaining would be re-assigned to the Participants collectively. It cannot have been intended and it would not be conscionable for FPA to act as if it had a carte blanche right to deal with and dispose of their life policies as it saw fit;

(15) the Assigned Assets are, or will be, held upon trust for all the Participants.

Law

31. I turn now briefly to the relevant law.

32. In *Marley v Rawlings* [2014] UKSC 2, a case concerning the construction of a will, Lord Neuberger (with whom Lord Clarke, Lord Sumption and Lord Carnwath agreed) stated:

> "18. During the past forty years, the House of Lords and Supreme Court have laid down the correct approach to the interpretation, or construction, of commercial contracts in a number of cases starting with *Prenn v Simmonds* [1971] 1 WLR 1381 and culminating in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900.
>
> 19. When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions. In this connection, see *Prenn* at 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, per Lord Wilberforce, *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke at paras 21-30."

33. It appears common ground amongst counsel that Norris J in *Bieber v Teathers Limited (in liquidation)* [2012] EWHC 190 (Ch) summarised the position in respect of *Quistclose* helpfully when he stated:

> "15. As the pre-action claim, the terms of the Particulars of Claim and the form of the preliminary issue suggest the fundamental question is whether the Claimants can avail themselves of the remedies that would arise if a Quistclose trust was established. Following the decisions in Barclays Bank v Quistclose Investments [1970] AC 567 and Twinsectra Ltd v Yardley [2002] 2 AC 164 the underlying principles by reference to which such a trust will arise are clear. I would summarise them as follows.
>
> 16. First, the question in every case is whether the payer and the recipient intended that the money passing between them was to be at the free disposal of the recipient: Re Goldcorp Exchange [1995] 1 AC 74 and Twinsectra at [74].
>
> 17. Second, the mere fact that the payer has paid the money to the recipient for the recipient to use it in a particular way is not of itself enough. The recipient may have represented or warranted that he intends to use it in a particular way or have promised to use it in a particular way. Such an arrangement would give rise to personal obligations but would not of itself necessarily create fiduciary obligations or a trust: Twinsectra at [73].
>
> 18. So, thirdly, it must be clear from the express terms of the transaction (properly construed) or must be objectively ascertained from the circumstances of the transaction that the mutual intention of payer and recipient (and the essence of their bargain) is that the funds transferred should not be part of the general assets of the recipient but should be used *exclusively* to effect particular identified payments, so that if the money cannot be so used then it is to be returned to the payer: Toovey v Milne (1819) 2 B & Ald 683 and Quistclose Investments at 580B.
>
> 19. Fourth, the mechanism by which this is achieved is a trust giving rise to fiduciary obligations on the part of the recipient which a court of equity will enforce: Twinsectra at [69]. Equity intervenes because it is unconscionable for the recipient to obtain money on terms as to its application and then to disregard the terms on which he received it from a payer who had placed trust and confidence in the recipient to ensure the proper application of the money paid: Twinsectra at [76].
>
> 20. Fifth, such a trust is akin to a "retention of title" clause, enabling the recipient to have recourse to the payer's money for the particular purpose specified but without entrenching on the payer's property rights more than necessary to enable the purpose to be achieved. It is not as such a "purpose" trust of which the recipient is a trustee, the beneficial interest in the money reverting to the payer if the purpose is incapable of achievement. It is a resulting trust in favour of the payer with a mandate granted to the recipient to apply the money paid for the purpose stated. The key feature of the arrangement is that the recipient is precluded from misapplying the money paid to him. The recipient has no beneficial interest in the money: generally the beneficial interest remains vested in the payer subject only to the recipient's power to apply the money in

accordance with the stated purpose. If the stated purpose cannot be achieved then the mandate ceases to be effective, the recipient simply holds the money paid on resulting trust for the payer, and the recipient must repay it: Twinsectra at [81], [87], [92] and [100].

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

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

23. It is in my judgment implicit in the doctrine so described in the authorities that the specified purpose is fulfilled by and at the time of the application of the money. The payer, the recipient and the ultimate beneficiary of the payment (that is, the person who benefits from the application by the recipient of the money for the particular purpose) need to know whether property has passed."

34. In the Court of Appeal in *Bieber* [2012] EWCA Civ 1466 Patten L J at paragraph [15] noted that both sides in that appeal accepted Norris J's summary as an accurate statement of the relevant principles but added "by way of emphasis that in deciding whether particular arrangements involve the creation of a trust and with it the retention by the paying party of beneficial control of the monies, proper account needs to be taken of the structure of the arrangements and the contractual mechanisms involved."

35. In *Du Preez Limited (formerly Habana Limited) v Kaupthing Singer & Friedlander (Isle of Man) Limited* 2010 MLR 55 the Appeal Division stated the following at paragraph [47]:

> "[47] We are satisfied that, pursuant to the authorities as set out above, in order for there to be a *Quistclose* trust moneys must be transferred by a payor to a recipient on a common understanding [communicated by the payor to the recipient and accepted by the recipient] that the moneys are to be used for a specific purpose, in which event the moneys do not form part of the general funds of the recipient. If no such purpose is communicated to the recipient before or at the time of transfer, the moneys vest absolutely in the recipient. Thus in each case the issue is whether the parties intended the moneys to be at the free disposal of the recipient. So expressed, a *Quistclose* trust is an example of an orthodox resulting trust where the lender pays money to the borrower by way of loan but does not part with the entire beneficial interest in the money and in so far as he does not it is held on a resulting trust for the lender from the date of payment."

At paragraph [62] the Appeal Division added:

> "[62] In our judgment the rationale for a *Quistclose* trust coming into existence is unconscionability : it is unconscionable for the recipient of moneys not to

> honour the specific purpose for the use of the moneys as communicated to, and agreed by, him. That was why in *Twinsectra* Lord Millett stated [at paragraph 76], '[i]t is unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it`. We thus agree with Mr Pascoe that if moneys are paid by a payor to a recipient without any communication as to the purpose for which the moneys are to be used and the payor subsequently instructs the recipient that he is only to use the moneys for a specified purpose, the recipient is free to ignore such instruction."

36. *Quistclose* has been followed in Manx law for some time. To take an earlier example see Deemster Luft's judgment in *Magenta Finance and Trading Company v Savings and Investment Bank Limited (in liquidation)* 1984-86 MLR 116.

37. The courts have emphasised the flexible nature of the *Quistclose* trust. In particular I note Lord Millet's comments at paragraph 99 in *Twinsectra* [2002] UKHL 12 that "...There is clearly a wide range of situations in which the parties enter into a commercial arrangement which permits one party to have a limited use of the other's money for a stated purpose, is not free to apply it for any other purpose, and must return it if for any reason the purpose cannot be carried out."

38. I also note Patten L J's references in *Bieber* [2012] EWCA Civ 1466 paragraph [15] to the comments of Mason J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 97 albeit directed to a slightly different context:

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."

39. In respect of *Re Kayford* type trusts Deemster Corlett in his judgment in *Habana Limited v Kaupthing Singer Friedlander (Isle of Man) Limited* (21 July 2009) in particular at paragraphs 57 to 60 referred to the *Re Kayford* line of authorities and although I have full regard to the relevant law in respect of such trusts I do not set it all out again in this judgment.

40. I have also considered the other authorities on resulting and constructive trusts referred to by counsel. The relevant legal principles in the areas of law referred to by counsel are well established and not in dispute. What is in dispute is the application of such legal principles to the circumstances put before the court. To resolve that dispute I now turn to some of the relevant documentation.

The Offering Document

41. The investment was made on the basis of the Offering Document and the relationship between the parties is in the main governed by that document. The Offering Document makes it clear that Participants were being given "the opportunity to create,

in effect, an additional investment using an existing asset" (page 5).

42. The Program was primarily aimed at applicants wishing to contribute life assurance plans by way of assignment. FPP would then arrange term loan facilities from financial institutions against the security of the Assigned Assets and the loan proceeds would be used to pursue the Fund's investment strategy.

43. The summary of the Program includes the following at page 7:

> "• Upon the redemption of his Participation, a Participant's Assigned Asset will normally be re-assigned or re-transferred to him. However, if the Participant's Ledger Account is in deficit (either because of accumulated Losses under the Program or because of the imposition of other charges including commissions paid to intermediaries), then the Participant will become liable to pay the amount of the deficit to Foundations. He will not be entitled to the re-assignment or re-transfer of his Assigned Asset until he has discharged this liability and, if he does not do so within a period of three weeks, Foundations may sell or otherwise realise his Assigned Asset(s) or an appropriate proportion thereof in order to obtain the sums due.
>
> • Furthermore, the Assigned Asset of a redeeming Participant may be retained by a Lender under the terms of its Lender Security, in which event a Participant's right to re-assignment or re-transfer of his Assigned Asset will be similarly suspended.
>
> • The obligations of Foundations under the Participations are neither secured nor guaranteed."

44. Part III of the Offering Document sets out the detailed terms and conditions of the participations.

45. Under paragraph 2.1(c) a Participation shall only be issued when "the intending Participant has executed and delivered his Assignment to the Company [Foundations Program PLC] or the relevant Subsidiary (as may be required by the Company) and all steps required to be taken in order to procure that legal title to the Participant's Assigned Asset is vested in the name of the Company or the relevant Subsidiary (or to its order, including to any Lender pursuant to the Lender Security) have been taken to the satisfaction of the Company."

46. It can be seen therefore that the legal title to the Assigned Asset must be vested in FPP or the relevant Subsidiary or to its order.

47. Under paragraph 4.1 (headed Investment of Proceeds) it is stated that "the Program may procure the addition of the relevant Assigned Asset(s) to the terms of any Lender Security" and "Under the Program, such Assigned Asset(s) ... may be used as security for borrowing under any Facility ..."

48. Condition 4.3 provides:

> "For the avoidance of doubt, the Company and the relevant Subsidiary (as the case may be) shall become the absolute beneficial owner (subject to the terms of the Assignment, these Conditions, the Application Form, the Offering Document and the

terms of any applicable Lender Security) of the Assigned Asset(s), to the exclusion of the Participant, who shall only be entitled to exercise the rights granted to him against the Company and the relevant Subsidiary under these Conditions."

49. Condition 5 refers to the "Rights of the Participant". Condition 5.1 provides that the Program shall, upon a redemption, pay (or procure payment) to the Participant any due Redemption Payment subject to the provisions of Condition 12. Condition 5.2 provides that upon redemption "the Company and the relevant Subsidiary shall use all reasonable endeavours (subject to these Conditions and to the terms of any applicable Lender Security) to procure the re-assignment to the Participant of the related Assigned Asset(s)."

50. Condition 5.3 provides:

> "The obligations of the Program to the relevant Participant under each Participation are neither guaranteed nor secured and shall rank pasi passu among themselves, equally and rateably without discrimination or preference."

51. Condition 13 is entitled "Re-assignment of Assigned Assets". The following are extracts from Condition 13:

> "13.1 When, pursuant to the redemption of a Participation under Condition 11, either:
>
> (a) a Redemption Payment is payable to a Participant pursuant to Condition 12.4. or
> (b) a redeeming Participant is not entitled to receive a Redemption Payment but his Ledger Account balance is zero;
>
> the Company and the relevant Subsidiary shall (subject to the terms of any Lender Security) take all reasonable steps to procure that the Participant's Assigned Asset(s) is/are re-assigned or re-transferred to the Participant within 60 days following the completion of all applicable redemption procedures. If for any reason it is not possible to effect such a re-assignment or re-transfer within that period then the Program shall promptly notify Participant of that fact in writing.
>
> 13.2 When, pursuant to the redemption of a Participation under Condition 11, the final balance on a Participant's Ledger Account, as calculated pursuant to Condition 12.2 or 12.3 (as appropriate), is negative, then the Participant shall (immediately upon demand being made thereof by the Program), become liable to pay to the Program the amount of such negative balance and upon receipt of the same it shall be treated as Unallocated Profit and form part of the Program Portfolio for the purposes of these Conditions.
>
> 13.3 ... [provision in respect of interest on negative balance]
>
> 13.4 In the circumstances set out in Condition 13.2, neither the Company nor the relevant Subsidiary shall be required to re-assign the Participant's Assigned Asset(s) to the Participant unless and until the Participant has discharged all his obligations under this Condition 13.

13.5 In the circumstances set out in Condition 13.2, if the Participant fails to discharge all his obligations to the Program under this Condition 13 within three weeks of receipt (or deemed receipt) by the Participant of the demand referred to in Condition 13.2, the relevant Subsidiary may (in its discretion) elect to sell or otherwise dispose of, or redeem or encash, the whole or any part of the Participant's Assigned Asset(s).

13.6 If the relevant Subsidiary exercises its power to deal with a Participant's Assigned Asset pursuant to Condition 13.5, the Subsidiary shall use the proceeds arising therefrom to discharge the obligations of the Participant under this Condition 13 and to meet the costs of such dealing. Thereafter, the relevant Subsidiary shall (and the Company shall procure that the Subsidiary shall) pay the balance of such proceeds (if any) to the Participant and (if any remain) reassign the Participant's Assigned Asset(s) to him. In dealing with a Participant's Assigned Asset(s) pursuant to Condition 13.5, neither the Company nor the Subsidiary nor any of their respective employees, officers or agents shall be liable (without prejudice to any other provision of these Conditions excluding liability therefor) for any loss suffered by the Participant arising as a result thereof.

13.7 Any re-assignment of an Assigned Asset pursuant to this Condition 13 shall be made without any covenants, undertakings, warranties or representations whatsoever from the Company or the relevant Subsidiary or any other person."

52. Part IV of the Offering Document is entitled "Investment Objectives, Policies and Techniques." There is reference to "Custody Arrangements" and the following appears:

> "Assigned Assets are assigned by Participants initially to the Initial Subsidiary and subsequently assigned by way of security to the Lender(s) for the time being on collateral for the facilities; accordingly, the Assigned Assets are not held by the Custodian."

53. Part VI of the Offering Document highlights the "Risk Factors". The following are extracts:

> "The policies and techniques used by the Company in the investment of the Proceeds may not be successful. If the Company has incurred losses under the Program in previous years, Participants will have to recover their respective shares of those losses before they may be able to realise any gains. The Program has no operating history. There can be no assurance that the Program will achieve its investment objective so there exists a possibility that a Participant could suffer a substantial loss, including the loss of all or part of any Assigned Assets."

> "... if the Program is unsuccessful and the Company is unable to meet its obligations to the Lender(s) ... the Lender(s) may enforce its/their security against the Company and the Subsidiaries, which may result in Participants losing the entirety of their Assigned Assets."

> "In addition, the terms of the Lender Security may mean that a Participant who submits a Redemption Request may not be able to receive a re-assignment or

re-transfer of his Assigned Asset(s) because it/they are being retained by the relevant Lender."

"As unsecured and unpreferred creditors of the Company, the claims of Participants will rank and abate pari passu with the claims of all other unsecured creditors and behind the class of secured creditors and those creditors whose claims are preferred under general laws relating to insolvency and bankruptcy."

54. There is then the following warning with the heading in bold:

> "**A Participant may lose his Assigned Asset(s)**
>
> If the Program makes losses, a Lender may enforce its security against a Participant's Assigned Asset(s) and realise some or all of such Assigned Asset(s). In these circumstances the Participant may not receive all of his Assigned Asset(s) back at the end of his Participation. In addition, if a Participant has a negative balance on his Ledger Account he shall be liable to pay this balance to the Program; if he fails to do so, he may lose some or all of his Assigned Asset(s)."

The Application Form

55. The Application Form makes it clear that any participation is subject to the provisions of the Offering Document. The applicant confirms that the applicant is not relying on any information or representation other than that set out in the Offering Document. The applicant declares that the applicant has "read and understood the Offering Document and accepts the risks of an investment in Foundations Program. In particular, I am aware that the Program Portfolio is subject to market fluctuations and to the risks inherent in all investments and that the value of my participations may go down as well as up. I am aware that the Program Portfolio assets may be subject to volatile price movements which may result in capital loss which could result in a full or partial redemption (and the loss to me) of my Assigned Asset."

Deed of Assignment

56. Paragraph 2.1 of the Deed of Assignment provides as follows:

> "2. ASSIGNMENT AND ACKNOWLEDGEMENT
> 2.1 The Assignor hereby assigns and agrees to assign all of his interest in the Policies to the Company (or to such other entity as it may direct on its behalf) absolutely, as legal and beneficial owner.
> 2.2 The Assignor acknowledges that the Policies will be mortgaged and assigned by way of security by the Company to a lender or lenders from time to time pursuant to the terms of the Program. The Assignor agrees and consents to such mortgage and/or assignment by way of security and acknowledges that such lender or lenders may enforce their security against the Policies (including by way of sale, redemption or other disposal) and that such lender or lenders may be able to refuse to release the Policies to the Company or to the Assignor in certain circumstances."

57. Under clause 5 the Company grants to the Assignor revocable authority to deal with the policies by way of giving instructions as to how the funds underlying the Policy are

to be invested. To that very limited extent it is arguable that clause 5 recognises the Assignor's continued "interest" in the Assigned Assets. The Deed however contains no provisions regarding the circumstances in which FPA might be obliged to re-assign the Policy.

Determination

58. In order to determine the relationship between the parties and the status of the Assigned Assets I have considered the relevant documents including the Offering Document, the Application Form and the Deed of Assignment. I have considered the documents in the context of the factual background giving rise to the Issue. Some of that background is outlined in this judgment. The details are contained in the evidence of Mr Fayle and the other evidence before the court.

59. I look at the documents to ascertain the objective intention of the parties as to how they intended the Assigned Assets should be held. The Offering Document and the Deed of Assignment constitute the terms on which the Participants made the investments and are crucial documents in terms of establishing the objective intention of the parties as to the terms on which the Assigned Assets were provided.

60. By making FPA the absolute beneficial owner of the Assigned Assets to the exclusion of the Participants (see condition 4.3 of the Offering Document) those assets are not subjected to a trust. Condition 4.3 of the Offering Document is totally inconsistent with a trust arrangement. Condition 4.3 is totally inconsistent with the retention by the Participants of any beneficial interest in the Assigned Assets. The unqualified and unconditional nature of the assignment (see clause 2 of the Deed of Assignment whereby the Assignor assigns "all his interest in the Policies to [FPA] ... absolutely as legal and beneficial owner") is also totally inconsistent with the notion that FPA in some way holds the equitable interest in the Assigned Assets on trust for the Assignor or that the Assignor retains some beneficial interest. The contents of the Offering Document and the Deed of Assignment contain clear statements as to the objective intentions of the parties, namely an outright transfer of all legal and equitable interests to FPA.

61. Condition 5 of the Offering Document is not consistent with the submission that the Participant retains or, at some time in the future, acquires a proprietary interest in the Assigned Asset. I agree that condition 5.3 of the Offering Document also points against an intention to create any form of trust. It was made plain that the Program's obligations to Participants were "neither guaranteed nor secured and shall rank pari passu amongst themselves". This is inconsistent with the Participants in some way retaining a proprietary interest in the Assigned Assets in the hands of FPA. This is not the objective intention suggested by the express wording of condition 5.3.

62. I would add, by way of additional support to my conclusion, that condition 4.1 does not create an obligation on the Program. The word "may" not "shall" is used. It is expressed in permissive not mandatory terms. FPA is not required to use the transferred assets in a particular way failing which the asset must be returned. Although it may well have been the expectation of the parties that the Assigned Assets would be added to the Lender security (see on page 40 of the Offering Document under the heading "Investment Objectives" the reference to "Foundations will use Participants' Assigned Assets as security under the Lender Security for borrowing ..." and on page 46 under the heading "Risk Factors" the reference to "the Company will

procure that each Subsidiary assign certain Participants' Assigned Assets received by it under the Program to the relevant lender as security for the Company's obligations under, inter alia, the relevant Facility(ies)") there was no contractual obligation to use the Assigned Assets in that way, or return them. Contrast this with the *Twinsectra* where the money was transferred on terms that "the loan moneys will be utilised solely for the acquisition of property on behalf of our client and for no other purpose".

63. Under clause 2.1 of the Deed of Assignment the Assignor assigned "all of his interest" in the policies "absolutely, as legal and beneficial owner".

64. In respect of the re-assignment to FPA by Barclays there is nothing in the documents to suggest that on re-assignment FPA is to hold the reassigned asset in a trust capacity.

65. It cannot be shown that when FPA obtains legal title to the Assigned Assets (either on first assignment by the Participant or on a re-assignment by the Lender) the beneficial proprietary interest in those assets is to vest in some person other than FPA.

66. Condition 4.3 of the Offering Document and clause 2 of the Deed of Assignment are unequivocal in effect and are incompatible with any notion that the Participants retain an equitable proprietary interest in the Assigned Assets. These provisions contain clear statements as to the objective intentions of the parties, namely an outright transfer of all legal and equitable interests to FPA.

67. I have also concluded that on any re-assignment by the Lender to FPA, FPA will hold the assets as part of its general funds and not on trust, either for individual Participants or for all Participants as a class. The absence of a trust on initial assignment, although not of itself determinative, points to an absence of a trust upon the return of the Assigned Assets. The Offering Document read as a whole does not clearly reveal an intention that FPA was to take a re-assignment of the Assigned Assets subject to a trust in favour of the Participants who had provided those re-assigned assets. There is nothing in the provisions of the Offering Document dealing with the re-assignment of Assigned Assets which indicates that the rights and obligations thereby created were intended to operate or do operate in property and trust rather than contract. It is correct that the provisions envisage that once the Participant has redeemed his participation and settled any negative balance on his Ledger Account, his Assigned Asset will be re-assigned to him. But before that re-assignment takes place there is nothing which suggests that the providing Participant was already intended to be the beneficial owner of that re-assigned asset. No trust relationship is created on re-assignment.

68. As was plain from the Offering Document, the purpose of the provision of the Assigned Assets was to provide security for borrowing from financial institutions with the loans being used to pursue the Fund's investment strategy. The purpose has not failed. It is not unconscionable to conclude that in the circumstances of this case no trust is established. There was no guarantee that the Participants would receive monies or that the Assigned Assets would be "re-assigned or re-transferred to" the Participants. Although the position of an insolvent estate and the appointment of liquidators was not expressly dealt with, it was recognised in the Offering Document that "there exists a possibility that a Participant could suffer a substantial loss, including the loss of all or part of my Assigned Assets".

69. Moreover it was made plain in the Offering Document that the Participants were "unsecured and unpreferred creditors of the Company, the claims of Participants will rank and abate pari passu with the claims of all other unsecured creditors and behind the class of secured creditors and those creditors whose claims are preferred under general laws relating to insolvency and bankruptcy".

70. It was made plain in bold terms that "A Participant may lose his Assigned Asset(s)". If things went well redemption could take place and it may be that the relevant Participant would receive back the Participant's Assigned Assets. If they did not and liquidators were appointed the Assigned Assets were not subject to any trust but would form part of the assets of the company. There is no unconscionability in such circumstances.

71. It is correct that there are some provisions in the Offering Document (for example reference in paragraphs 2.1(c) and 3.2 to legal title only, reference to the possibility of re-assignment, reference in paragraph 14.1 to "his Assigned Asset(s)", and the Deed of Assignment (paragraph 5)) which may suggest retention of some interest in the Assigned Assets. These do not however detract from the broad and clear thrust of the Offering Document and the Deed of Assignment that the legal and beneficial title is transferred out of the Participant and the Assigned Assets are not the subject of any trust express, implied, resulting or constructive.

72. I also accept that there are no express provisions which directly deal with the particular circumstances that have arisen. That is not unusual in the commercial world. In such circumstances the court must do its best to determine the terms of the relationship between the parties based on the evidence including in particular the contractual documentation agreed by the parties.

73. Patten L J in *Bieber* [2012] EWCA Civ 1466 at paragraph [56] referred to the difficulty in imposing additional terms which are in fact inconsistent with express contractual terms that have been agreed and quoted from Lord Pearson in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 ALL ER 260 in respect of implied terms. Norris J at paragraph 79 of his judgment at first instance in *Bieber* [2012] EWHC 190 (Ch) stated:

> "...The intended legal relations between the parties were set out in detail in documents which each Claimant warranted he had considered and received advice upon. It is not unduly technical to say that the interests of the investors are to be found in those documents properly construed, and not in some unstated understanding which contradicts those terms."

74. I appreciate in this case there is the argument that the provisions of the contractual documentation did not cover, or at least did not cover in detail, the position of an insolvent liquidation although there were general references to unsecured creditors ranking pari passu. A court should however be slow to impose a trust relationship on a contractual relationship when such trust relationship would be inconsistent with the express contractual terms agreed between the parties and where there is no unconscionability.

75. In the case presently before me the parties do not seek to argue that terms should be implied into the contract but that equitable obligations should, in some way, be superimposed. Equity intervenes in circumstances where it would be unconscionable

not to do so. Patten L J in *Bieber* at paragraph [59] was of the view that the essentially contractual framework of the relevant document in that case was what each of the investors signed up to as the governing instrument. The same can be said in respect of the Offering Document, the Application Form and the Deed of Assignment in this case. In the circumstances of *Bieber* Patten L J at paragraph [61] was of the opinion that the claim based on a *Quistclose* trust was not maintainable. Sullivan L J and Arden L J agreed.

76. It is clear from an objective consideration of the relevant documentation in this case (in particular the Offering Document, the Application Form and the Deed of Assignment) and all the relevant circumstances that the position was that the Participant transferred the legal and beneficial title to the Assigned Assets to FPA. There is no legitimate room or necessity for an express, implied or other trust to be imposed. To superimpose a trust upon the contractual arrangements between the parties would be inconsistent with what they agreed.

77. There is no unconscionability. These experienced investors knew they could lose the Assigned Assets. The investors expressly assigned the legal and beneficial title to the Assigned Assets. The investors could make a profit and receive money and the Assigned Assets back or the investors could lose money and the Assigned Assets. There was no guarantee that the Assigned Assets would be returned to them. No trust was, or should be, imposed in respect of the Assigned Assets.

78. Counsel have briefly touched upon the adverse financial consequences for the loan note holders and the Participants depending upon how the Issue is determined. Courts do not decide cases on the basis of sympathy for those who may or will suffer severe adverse financial consequences. Courts must decide cases on the law. This court decides the Issue on the basis of the law. Applying the relevant law I have concluded that the Assigned Assets are not the subject of a trust.

79. Where an unfortunate state of insolvency arises it is understandable that investors and creditors may wish, in order to advance their own personal financial positions, to argue that assets are subject to a trust in their favour rather than part of the overall pot available to be shared by all creditors. I agree with Mr Murphy that where a state of insolvency arises it is appropriate that the rights and obligations of the parties affected by the insolvency are governed by the general law and procedure relating to insolvency subject, of course, to any valid trust arguments. To do otherwise affords undue preference to one set of creditors over another. As was made plain in the Offering Document all unsecured creditors should rank equally. There are no valid trust arguments in this case. The Assigned Assets form part of the general assets of FPA available for pari passu distribution amongst the company's unsecured creditors. The Assigned Assets or the proceeds from such assets are not subject to a trust in favour of any or all of the Participants.

Order

78. The order I make is as follows:

    1. Capitalised terms in italics in this order are terms defined in MJF4.

    2. When the *Assigned Assets* of *Participants* in the Legacy Experience Investor Fund known as the *Foundations Program* which are currently held as

security by *Barclays* are released by *Barclays* to the control of the Liquidators of *FPA*, such released *Assigned Assets* or the proceeds therefrom are not held on trust by the Liquidators of *FPA*.

3. Each *Class Representative's* reasonable and proportionate costs of and incidental to the *Trust Application* shall be paid by *FPA* on the indemnity basis. Before any such costs are paid, each *Class Representative's* costs shall be submitted to the Liquidators for approval. In the event that the Liquidators do not approve such costs, they shall be assessed by the Court on the indemnity basis.