The Court of Appeal for Bermuda

CIVIL APPEAL No. 17 of 2009

Between:

KINGATE GLOBAL FUND LTD

Appellant

-V-

KNIGHTSBRIDGE (USD) FUND LIMITED (1)
FORTIS BANK (NEDERLAND) (2)
STANDARD CHARTERED BANK (3)
THE BANK OF BERMUDA LIMITED (HSBC) (4)

Respondents

Before: **Zacca, President**
Evans, JA
Ward, JA

Date of Hearing: **Monday, 9 November 2009**
Date of Judgment: **Thursday, 19 November 2009**

Appearances: Stephen Atherton, QC with Dennis Dwyer of Wakfield Quin for the Appellant
Victor Lyon, QC with Nathanial Turner of Attride-Stirling Woloniecki for Respondents 1-3
Andrew Martin of Mello Jones Martin for Respondent 4

JUDGMENT

Evans, JA

1. At issue in these proceedings is the beneficial ownership of a total of US$9 million held by the Bank of Bermuda in the account of Kingate Global Fund Ltd. ("The Fund"). The Fund is in liquidation and its

liquidators are the Appellants in this appeal. Kawaley J. held that the beneficial owners are the Respondents, who paid the money to the Bank in the circumstances set out below.

2. There is no doubt that the payments were made to the Bank for the credit of the Fund's account, and were received by the Bank and credited accordingly. The reason for the payments was that the Respondents sought to acquire shares in the Fund in response to a Private Offering of USD Participating Common Shares made by the Fund on 6 October 2008. The shares could not be issued, and the question now is whether the Respondents are entitled to recover the money, or whether it has become an asset of the Fund and is available for distribution in the liquidation accordingly. In legal terms, the issue is whether the payments were made to the Bank subject to a "special purpose" (or plain "purpose") trust. If so, the purpose having failed, the money must be returned to the Respondents.

3. The law is clear. The parties differ as to its application in the circumstances of this case. The circumstances were unusual, to the extent that the Fund was a "Feeder Fund" for a fund manager based in New York. "It issued shares to investors wishing to invest in Bernard L Madoff Investment Securities LLC ("BLMIS") in New York" (judgment para.2). It was the arrest of Mr. Madoff on 11 December 2008 which made it impossible to issue the shares for which the Respondents had subscribed, and which led later to the insolvency and liquidation of both BLMIS and the Fund.

4. It is common ground that the issue turns on the true construction of the terms of the Offer, which incorporated a lengthy and detailed Information Memorandum and associated documents.

5. The principle has twice been restated by the House of Lords in modern times. In *Barclays Bank Ltd. v. Quistclose Investments* [1970] A.C. 567 the Bank made a loan for the specific purpose of enabling its customer,

a company in serious financial difficulties, to meet its obligation to pay an ordinary share dividend. The House of Lords held –

> "That arrangements of this character for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person, has been recognised in a series of cases over some 150 years." (per Lord Wilberforce at 580C)

6. It was re-examined in *Twinsectra Ltd. v. Yardley and others* [2002] 2 A.C. 164 where money was paid to a solicitor against his "personal and irrevocable" undertaking, which was –

> "1. The loan moneys will be retained by us until such time as they are applied in the acquisition of property on behalf of our client.
> 2. The loan moneys will be utilised *solely* for the acquisition of property on behalf of our client *and for no other purpose.*
> 3. We will repay to you the said sum……together with interest……." (see para.58).

7. It was held that the solicitor "held the money in trust for the lender subject to a power to apply it by way of a loan to the client in accordance with the undertaking with the result that the money remained the lender's money until such time as it was so applied" (headnote para.(1))

8. Lord Millett analysed carefully the question "*Was there a Quistclose trust?"*(para.68). He explained the background, as follows –

> "68. Money advanced by way of loan normally becomes the property of the borrower. He is free to apply the money as he chooses, and save to the extent to which he may have taken security for repayment the lender takes the risk of the borrower's insolvency. But it is well established that a loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce. In the earlier cases the purpose was to enable the borrower to pay his creditors or

some of them, but the principle is not limited to such cases.

69. Such arrangements are commonly described as creating "a *Quistclose* trust".....When the money is advanced, the lender acquires a right, enforceable in equity, to see that it is applied for the stated purpose, or more accurately, to prevent its application for any other purpose. Once the purpose has been carried out, the lender has his normal remedy in debt. If for any reason the purpose cannot be carried out, the question arises whether the money falls within the general fund of the borrower's assets, in which case it passes to his trustee in bankruptcy in the event of his insolvency and the lender is merely a loan creditor; or whether it is held on a resulting trust for the lender. *That depends on the intention of the parties collected from the terms of the arrangement and the circumstances of the case*." (our italics).

9. In deference to Mr. Atherton's submissions in the present case, we should add the following quotations from Lord Millett's speech –

"73. 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 that is not enough to create a trust; once lent the money is at the free disposal of the borrower. Similarly payments in advance for goods or services do not ordinarily create a trust. The money is intended to be at the free disposal of the supplier and may be used as part of his cashflow. Commercial life would be impossible if this were not the case.

74. The question in every case is whether the parties intended the money to be at the free disposal of the recipient: *In re Goldcorp Exchange Ltd.* [1995] 1 AC 74, 100 per Lord Mustill. His freedom to dispose of the money is necessarily excluded by an arrangement that the money will be used exclusively for the stated purpose....[citing Lord Wilberforce in

> *Quistclose*……. "the word 'only' or 'exclusively' can have no other meaning or effect."]…
>
> 76. ……..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……The duty is not contractual but fiduciary……..because a person who makes the 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. This is a classic situation in which a fiduciary relationship arises, and since it arises in respect of a specific fund it gives rise to a trust".

10. Lord Millett then examined the precise nature of the equitable interests arising in such a situation, and concluded that the trust is "an entirely orthodox example of the kind of default trust known as a resulting trust". The borrower "has no beneficial interest in the money, which remains throughout in the lender subject only to the borrower's power or duty to apply the money in accordance with the lender's instructions." (para.100). Lord Hoffman held that the money was held in trust "but subject to a power to apply it…..in accordance with the undertaking" (para.13).

11. We note from the above that emphasis is placed, not so much on the existence of a purpose for which the money is paid (because that factor alone would include straightforward commercial transactions, such as payments in advance), as upon the fact that both parties intend that the recipient shall be free to use it as his own.

The payments

12. It is common ground that the Respondents made payments to the Bank for the account of the Fund on 28 November 2008, respectively the First and/or Second Respondents (Knightsbridge and/or Fortis) who paid US$6 million and the Third Respondents (Standard Chartered) who paid US$3 million, and that the payments were made in respect of Subscription Agreements responding to the Fund's Private

Offering. These payments form part of the credit balance of more than US$25 million held by the Bank to the Fund's account.

Construction

13. The issue turns, therefore, on the true construction of the Offer documents, principally the Information Memorandum, for it is these which reveal what the parties` intentions were. Kawaley J. examined them in detail, and concluded –

> "47. I find that the subscription monies were received on implied terms that required Kingate to treat the monies as separate from their own assets until either (a) the subscription applications were granted or (b) the monies were returned because the applications were refused…….
>
> 48. This conclusion, though it may accord with common sense and general notions of fairness, is ultimately obvious on an analytical reading of the relevant documentation….".

14. The Fund described itself as "an open-end investment company organised as an international business company in the [B.V.I.] on February 11, 1994". Its objective was "long-term capital appreciation" which was to be achieved by means of –

> "*Stock/Options Trading.* The Fund seeks to obtain capital appreciation for its assets through the utilisation of a non-traditional stock/options trading strategy. The Fund is designed for long term investment. See "THE FUND – The Fund's Investment Objective and Investment Process.""".

15. The Offer was of "USD Class Participating Common Shares (the "USD Shares") at a net price per USD share equal to the Net Asset Value (as defined herein) of the USD shares……..As of December 31, 2007, the audited Net Asset Value per Share of the USD Shares was U.S. $421.37 and there were 6,429,431 Shares outstanding…..Investors are referred to herein as "Shareholders"".

16. Simple arithmetic reveals that the Net Asset Value of the Fund at 31 December 2007 was assessed at more than US$2.6 billion. The Minimum Initial Subscription was U.S. $250,000.

17. The Manager of the Fund was Kingate Management Ltd., a Bermuda company, which "evaluates and monitors the Investment Advisor and, in general, provides all necessary management services to the Fund". The Manager "may also manage directly the investment of a portion of the Fund's assets".

18. Another company "located in Bermuda", Citi Hedge Fund Services Ltd., was appointed as the Fund's Administrator, to administer "the day-to-day activities of the Fund's operations, which include, without limitation, receiving subscriptions and processing redemption requests, calculating the Net Asset Value, responding to shareholder inquiries and similar matters".

19. The core role of "Investment Advisor" was defined as follows –

> "The Fund's assets are managed by a New York based NASD registered broker-dealer employing approximately 350 people and acting primarily as a market-maker in listed and unlisted stocks and convertible securities.....The Investment Advisor utilizes a "split strike conversion" options strategy consistent with that of the Fund.....The Investment Advisor has managed the assets of the Fund since its inception and it is anticipated that the retention of such Investment Advisor will continue....."

20. The Offer Documents include many cautionary warnings as to risks that were involved. Thus –

> "INVESTMENT IN THE FUND INVOLVES RISK
> YOUR ATTENTION IS DRAWN TO THE RISK FACTORS AND CONFLICTS OF INTEREST DETAILED HEREIN"
> "The purchase of USD Shares is speculative and involves a high degree of risk. There is no assurance that the Fund will continue to be profitable ....."

"CERTAIN RISK FACTORS

Achievement of Investment Objective
There can be no assurance that the Fund will continue to achieve its investment objective or that the Manager or the Investment Advisor will continue to succeed in achieving the Fund's investment objective……..

Dependence on the Manager
"All decisions with respect to the general management of the Fund are made by the Manager, who has complete authority and discretion in the management and control of the business of the Fund, including the authority to delegate all investment management decisions to the selected Investment Advisor……..As a result, the success of the Fund for the foreseeable future will depend largely upon the ability of the Manager, and no person should invest in the Fund unless willing to entrust all aspects of the management of the Fund to the Manager, having evaluated its capability to perform such functions.

Dependence on the Investment Advisor
The Manager has delegated all investment duties with regard to USD Shares to the Investment Advisor. As a result, the success of the Fund for the foreseeable future will depend on the ability of the Investment Advisor to achieve the Fund's investment objective. Neither the Manager nor the USD Shareholders have any control over the investment and trading decisions of the Investment Advisor, and no person should invest in the Fund unless willing to entrust all aspects of the investment management of the Fund to the selected Investment Advisor, having evaluated its capability to perform such functions……

Trading Strategies of the Investment Advisor
The Fund is a single-advisor fund and the overall success of the Fund depends upon the ability of the Investment Advisor to be successful in its own strategy……..

Special Techniques used by the Investment Advisor
The Investment Advisor uses special investment techniques that may subject the Fund's invest-ments to certain risks…

Risks of Lack of Independent Data
The Investment Advisor's strategy, involving split strike conversions, is a unique investment program, and is often not well followed by the Wall Street Community. Accordingly, there is very little independent data available to assist a prospective investor in his analysis of the Fund…

Possibility of Fraud or Misappropriation
Neither the Fund nor the Custodian has actual custody of the assets. Such actual custody rests with the Investment Advisor and its affiliated broker-dealer. Therefore, there is a risk that the custodian could abscond with these assets. There is always the risk that the assets with the Investment Advisor could be misappropriated. In addition, information supplied by the Investment Advisor may be inaccurate or even fraudulent. The Manager is entitled to rely on such information (provided they do so in good faith) and is not required to undertake any due diligence to confirm the accuracy thereof."

21. The sole relevance of these provisions for present purposes is that they make it clear, beyond any possibility of doubt, that the Offer was intended to attract funds which would be managed by the Investment Advisor, that is to say, the unnamed and otherwise unidentified New York broker- dealer who had managed the Fund from inception. Funds received for this purpose were treated as subscriptions for shares in the Fund as a limited company, and the price of each share was the Net Asset Value of the Fund divided by the number of shares outstanding i.e. issued but not redeemed at the relevant date, which was essentially the time of subscription (see further below). The payments were made with the object of increasing the amount available for investment by the New York "Investment Advisor".

22. (We were informed that there were perhaps five other 'Feeder Funds' of this type connected with Mr. Madoff's company. We do not know whether those others had the same relationship with his company, but the pattern is clear. Funds subscribed would be actively managed by the broker/dealer in New York, and the role of the local Manager, if not

simply nominal, would be very limited indeed. It is striking that there was an express exclusion of liability for the 'Manager' in the event of misrepresentation or even fraud by the Investment Advisor (see 'Possibility of Fraud or Misappropriation' above)).

23. At this point, we should note that the terms of the Offer provided for payment of a "Subscription Charge", as follows –

> "A sales charge of up to five percent (5%) of the amount invested is payable on subscription of the USD Shares, but such charge may be waived in whole or in part at the sole discretion of the Manager."

It also stated that the Fund paid a monthly fee to the Manager (1.5% of the month-end NAV), "customary fees" to the Administrator and Directors` fees "in accordance with reasonable practice".

24. Having identified the purpose for which the payments were made, we come to the central part of the inquiry: what were the parties` intentions as to the basis on which the moneys would be held by the Bank for the account of the Fund? Were they at the free disposal of the Fund? Or were they held for the specific purpose of acquiring shares in the Fund, and thereafter being added to the Fund's assets in New York, and for no other purpose? If the latter, upon the acquisition of shares becoming impossible, the moneys are held for the Respondents by the Bank.

25. It is necessary at this stage to say more about the procedures for the acquisition and redemption of shares, as set out in the Offer documents.

26. **<u>Subscriptions</u>**

> "*Generally*. The USD Shares may be purchased as of the first Business Day……of the month (herein the "Subscription Date") at a price equal to the Net Asset Value per USD Share as of the last Business Day of the immediately preceding calendar month (the "Valuation Date"), plus any applicable

> subscription charges.....The Fund may (i) discontinue the offering....at any time.....
> *Procedure.* .....The acceptance of subscriptions of [sic] the commencement of each month is subject to (i) receipt by the Administrator of completed Subscription Forms by the last Business Day prior to the Subscription Date.....and (ii) confirmation of the receipt of cleared funds by the Bank at the latest by the Subscription Date. The Fund reserves the right to accept or reject subscriptions at its absolute discretion..... As part of the Administrator's and the Fund's responsibility for protection against money laundering, the Administrator may require a detailed verification of the identity of a person or entity applying for Shares."

27. The Anti Money Laundering provisions, as might be expected, require verification of subscribers and they entitle the Administrator to require further information and compliance with statutory and other requirements. They conclude –

> "If within a reasonable period of time .....the Administrator has not received evidence satisfactory to it as aforesaid, it may, in its absolute discretion, refuse to allot the USD Shares applied for in which event subscription monies will be returned without interest to the account from which such monies were originally debited, refuse to process a redemption request, or otherwise proceed in accordance with applicable laws. Subscription monies may be rejected by the Administrator if the remitting bank or financial institution is unknown to the Administrator."

28. The Subscription Instructions required payment in full "at latest by the Subscription Date" and further provided as follows-

> "**Confirmation**
> Confirmations will be sent to Subscribers showing the details of each transaction. The USD Shares will ordinarily be issued in respect of accepted applications at the Net Asset Value.....per USD Share as of the last Business Day of the month following the date on which the Fund has verified the receipt of the cleared Funds.
> A Share Certificate will be issued only if specifically requested by the Subscriber."

29. The Subscription Agreement forming part of the Offer documents includes a warranty by the Subscriber, if an individual person, that he has an individual net worth in excess of US$1 million, that he has knowledge, expertise and experience in financial matters to evaluate the risks of investing in the Fund, and that he can bear the risk of loss of his entire investment. It also contains what the Judge rightly regarded as the most directly relevant of this multitude of provisions –

> "(u) **Subscriptions.** The Subscriber acknowledges that the Fund reserves the right to reject in its absolute discretion this and any other Subscription for Shares in whole or in part, in any order, at any time prior to a Subscription Date (as defined in the Information Memorandum), notwithstanding prior receipt by the Subscriber of notice of acceptance of the subscription. If the Shares are over-subscribed, the Fund will determine in its sole discretion which subscriptions shall be accepted. If this subscription is rejected or if the sale of the Shares is not completed for any reason (in which event this subscription shall be deemed to be rejected), the Fund shall as soon as practicable return any funds transferred by the Subscriber (without interest) along with this Agreement and any other documents delivered by the Subscriber."

30. The subscription is "for as many Shares as may be purchased for the amount indicated below and subject to the provisions of the Memorandum and Articles of Association".

31. The Articles of Association include –

> "11. The Company shall allot and issue shares only upon receipt by the Company or its authorised agents of an application in such form (including minimum amount) as the directors may from time to time determine……"
> "14. No shares shall be issued during any period when the determination of Net Asset Value of shares of that class or series is suspended pursuant to Regulation 62 hereof."
> "55. The Net Asset Value of a class of shares, for the purpose of issuing and redeeming shares, shall be determined by or under the direction of the Administrator with the concurrence of the directors as at each applicable Valuation Date ……."

> "59. The directors may suspend the determination of Net Asset Value of a class of shares, and consequently may suspend the right of members to require the Company to the [sic] issue or redeem shares of that class, for the whole or part of any period when :……".

32. Redemptions

The shares were not traded on any market, so an investment could only be realised under the Redemption process described in the Offer document as follows –

> "**Redemptions**
> *Generally.* Redemptions may be made as of the last Business Day of each calendar month (herein the "Redemption Date") upon [35] days` prior notice, at the Net Asset Value as of the Redemption Date. Settlements are generally made within [30] days after the Redemption Date……".

33. Under the heading "Settlements", in the section on "Certain Risk Factors", the Information Memorandum provided –

> "……during the period between submitting a notice of redemption and obtaining settlement, the redemption proceeds remains [sic] at risk of loss, without interest, and under certain circumstances, such proceeds may be required to be restored to the Fund."

34. Articles 44 to 54 were concerned with the Redemption of Shares; Article 47 has been quoted above.

35. Finally, the Offer Documents identified the Bank as "the Fund's banker for purposes of receiving subscription funds, disbursing redemption payments and processing cash transactions not directly related to the Fund's portfolio. Additionally, the assets of the Fund represented by the USD Shares ("the USD Assets") are held in the Custody of the Bank pursuant to a Custodian Agreement [dated May 1, 2000]."

Construction – a provisional view

36. In our judgment, on the correct interpretation of these provisions, and having regard to the fact that Subscribers sought to be shareholders because that was synonymous with becoming Investors in the Fund,

there is no justification for inferring that the Subscription monies were intended to become the company's i.e. the Fund's money before that status was achieved. The monies were paid to the Bank for that purpose and that purpose alone. It is not easy to identify any circumstances in which the Fund might seek to use the money "as its own". Its own expenses were intended to be covered by the Subscription Charge payable to it (when Subscriptions were accepted) and by the fees payable to the Manager and the Administrator, again when Subscriptions were accepted. The possibility that the Fund might use leverage or borrow money for investment purposes was theoretical not real, and in any event its ostensible powers to do so have to be reconciled with forthright statements that all the Fund's assets were held and administered by the Investment Advisor in New York.

37. We therefore agree with the Judge that on the true construction of the documents the answer is "ultimately obvious". "Ultimately," because no conclusion can be reached until these lengthy and complex documents have been perused. "Obvious", because as a matter of common sense there is no reason to suppose that either party, the subscribers or the Fund, expected the investment to be made, or the Subscribers to become shareholders, before the applications were accepted. There was never any intention that the money should be used for any other purpose.

38. We are impressed by the anti money laundering provisions, which profess that the Fund would be ultra-cautious to avoid accepting any application supported by subscription monies whose origin or provenance was doubtful. This is a strong indication, in our judgment, that the Fund would not regard such moneys as its own until it was satisfied on this count.

39. There was express provision for the Bank account into which the payments were to be made. This was not described as a segregated account, but its purposes were specified. They were, to receive and hold subscription funds and to disburse redemption moneys. These both

suggest that the account would hold moneys that were on their way either into or out of the Fund. Those moneys by definition would not form part of the Fund itself, nor was there any reason why they should be used by the company for any other purpose of its own. The third category is unclear – "cash transactions not directly related to the Fund's investment portfolio". Whatever else it may mean, this does not suggest payments made by the Fund in the course of its own business – and if it does, why is it limited to cash payments only? In our judgment, these last words do not detract from the impression that subscription funds and redemption moneys are the shareholders` money, not the Funds'.

40. Mr. Atherton relied upon the fact that the subscriptions held by the Bank apparently were included as assets in the Fund's accounts. He accepted that the accounts also included the Fund's liability to repay the subscribers, but nevertheless, he submitted, this showed that the Fund regarded the money as its own. This submission, however, is of little, if any, weight because, as Channell J pointed out in *Henry v. Hammond* [1913] 2 KB 515, "the only use of looking at the facts to see whether in the particular case he has kept the money as a separate fund is to see whether he has recognised his obligation, the obligation itself being the essential thing" (page 521).

41. The Judge considered the redemption provisions in greater detail than this judgment has done, and concluded that they indicated a positive intention that, in the event of insolvency, the moneys should be returned to the Subscribers; in other words, that the Subscriber retained beneficial ownership of them. This conclusion reinforces the overall view we have stated above. We also agree with him that the omission of any reference to the risk which materialised in the present case is significant and helpful to the Respondents.

42. Both Mr. Atherton and Mr. Lyons made submissions based on the precise wording of various of the provisions to which we have been referred. For example, Mr. Atherton distinguished between references to

the sale, allotment and issue of the shares, and to the circumstances in which the directors were entitled to suspend the Net Asset Valuation exercise provided for in the Articles. None of these submissions, in our judgment, is inconsistent with the conclusion we have reached. The facts are straightforward. The subscribers did not become shareholders, nor could they ever be, when the procedure for assessing the relevant Net Asset Value was suspended, and could never be revived.

Further authorities

43. Our provisional view, however, is subject to consideration of further authorities on which Mr. Atherton for the Appellants relied. These include cases where judges held that subscription monies paid in advance or as part-payment for a company's shares was the company's money, notwithstanding that no shares were issued.

44. Counsel helpfully have referred us to much of the line of authority upon which Lord Wilberforce relied in *Quistclose*. First was *Toovey v. Milne* (1819) 2 B. & A. 683, a common law judgment a contractual analysis and what the Judge regarded as "a fair decision". Then *Moseley v. Cressey's Co.* (1865) L.R. 1 Eq. 405 where the Vice-Chancellor held that a "deposit" paid on account of a purchase of shares became the company's money, notwithstanding that no shares were allotted and the prospectus included "Deposit returned if no allotment made". In *Stewart v. Austin* (1866) L.R. 3 Eq. 299, before the same Vice-Chancellor, the Attorney General perhaps understandably submitted that the doctrine of a 'purpose trust' "has been long exploded", and the same conclusion was reached. The decision in *Moseley's* case was followed in the Australian cases of *In re Fada (Australia) Ltd.* [1927] S.A. State Reports 590, and more recently in another Australian judgment, in *Re Associated Securities Ltd.* (1981) 6 ACLR 248 (Supreme Court of NSW) where Needham J. came close to saying that it established a rule, that "in an ordinary case" money paid to a company for a projected share issue becomes the property of the company.

45. Meanwhile, in England, in *In re Nanwa Gold Mines Ltd.* [1955] 1 WLR 1080 Harman J. held that the beneficial interest remained with the subscribers, where the prospectus stated that the application moneys would be refunded "and meanwhile held in a separate account". He distinguished *Moseley'*s case on that ground, and he also pointed out that the supposed rule derived from that case, if it existed, had been abrogated by statute in England so far as listed companies were concerned (see section 51(3) of the Companies Act 1948). More recently, a 'special purpose trust' was established in different circumstances i.e. not share allotment cases, in *Neste Oy v. Lloyd's Bank plc* [1983] 2 Lloyd's Rep.658 (Bingham J.) and *Cooper v. PRG Powerhouse Ltd.* [2008] EWHC 498 where Evans-Lombe J. helpfully reviewed the authorities in some detail.

46. Mr. Atherton disclaimed any suggestion that he was contending for a rule of law, to the effect stated by Needham J. in *Re Associated Securities* in 1981. Rather, he submitted that *Moseley'*s case and others which have followed it have established that, absent special circumstances and express provisions in relevant documents, the circumstances in a share allotment case are such that the principle does not apply. It is a fine distinction, but one that we can recognise.

47. Nevertheless, in our judgment it would be wrong to categorise cases and to hold that, because it is a particular kind of case, the trust does or does not arise. It is probably for this reason that *Moseley'*s case has been distinguished (as by Harman J. in *In re Nanwa Gold Mines*) and effectively put to one side (as by Lord Wilberforce in *Quistclose* [1970] AC at 581B). Whether that be correct or not, we do not find it a helpful precedent in the vastly different circumstances of the present case.

48. We should also refer, finally, to Mr. Lyons` submission that *Moseley'*s case was wrongly decided, and whether it is right, as he asked rhetorically, that a person's money should be used to pay the company's creditors, before that person becomes a shareholder and so

entitled to a share in the company's profits. He reminded us of the basic principles of incorporation established in *Trevor v. Whitworth* (1887) 12 App. Cas. 409 and *Salomon v. A. Salomon & Co. Ltd.* [1897] AC 22. However, we reject that submission, essentially for the reasons we have stated above. We do not consider that it is conceptually impossible that money paid to a company in respect of a projected issue of shares should be received by the company as its own. *In re Fada (Australia) Ltd.* perhaps demonstrates this, particularly in relation to the payments made by existing shareholders for further shares already allocated to them. But the basic principle, now clearly stated in *Twinsectra*, is that the existence or otherwise of a "purpose" trust depends on the circumstances of the individual case, and specifically upon the true construction of the terms on which the payment was made. We have endeavoured to apply that principle in the present case, and the Judge did also.

49. We hold that his judgment was correct, and we dismiss the appeal. We also direct that the Appellants shall pay the Respondents their costs of the appeal, but this is subject to any representation made in writing within seven days from when this judgment is handed down.

Signed

Evans, JA

I agree

Signed

Zacca, President

I agree

Signed

Ward, JA