37. Quistclose trusts

Reading: Hudson, chapter 22.

Specific reading:
- Thomas, Powers, (Sweet & Maxwell, 1998), 194-210
- Swadling (ed), The Quistclose Trust: Critical Essays (Hart, 2004)

1. The core principle … a resulting trust …

2. … or an express trust with two limbs, or a mere power to use the money? …
Re Elizabethan Theatre Trust (1991) 102 ALR 681, Gummow J

3. … or retention of title by lender?
Twinsectra Ltd v. Yardley [2002] 2 All E.R. 377, at 398, House of Lords, per Lord Millett: ‘… the Quistclose trust is a simple, commercial arrangement akin … to a retention of title clause (though with a different object) which enables the borrower to have recourse to the lender’s money for a particular purpose without entrenching on the lender’s property rights more than necessary to enable the purpose to be achieved. The money remains the property of the lender unless and until it is applied in accordance with his directions, and in so far as it is not so applied it must be returned to him. I am disposed, perhaps predisposed, to think that this is the only analysis which is consistent both with orthodox trust law and with commercial reality.’

4. What would be the most sensible commercial method?
- Vagueness of resulting trust biting only once the money has been misapplied, or
- Vagueness of constructive trust biting only once the money has been misapplied, or
- “Retention” (/ creation?) only of equitable interest in the money, or
- Exactness of express trust in a trust instrument, or
- Lender retains absolute title in the money and lender pays the money to the intended recipient?