HOUSE OF LORDS

BARCLAYS BANK LIMITED

-Vs-

QUISTCLOSE INVESTMENTS LIMITED

31st October, 1968

Lord Reid

Lord of Morris Borthy-y-Gest

Lord Guest

Lord Pearce

Lord Wilberforce

Lord Reid

my lords,

I agree with the speech of my noble and learned friend, Lord Wilberforce. I would only add that I am by no means satisfied that this House would be precluded from holding, in such circumstances as exist in this case, that notice of the trust received by the Bank after they had received the money could be effective.

I would dismiss this appeal.

Lord Morris of Borth-y-Gest

my lords,

I am in agreement with the speech of my noble and learned friend, Lord Wilberforce, which I have had the advantage of reading.

I would dismiss the appeal.

Lord Guest

my lords,

I have had the advantage of reading the opinion of my noble and learned friend, Lord Wilberforce. I agree with it and would dismiss the appeal.

Lord Pearce

my lords,

I have had the advantage of reading the opinion of my noble and learned friend, Lord Wilberforce. I entirely agree with it. Accordingly, I would dismiss the appeal.

Lord Wilberforce

my lords,

The events with which the present appeal is concerned took place in the final weeks preceding the collapse of Rolls Razor Ltd., an enterprise of which the moving spirit was Mr. John Bloom. The Company's audited accounts for the year 1963 showed a considerable trading profit: an interim dividend of 80 per cent, had been paid, and the figures admitted of the payment of a substantial final dividend.

On 14th May, 1964, the Directors, at a Board meeting, agreed to recommend a final payment of 120 per cent. But the Company had no liquid resources to enable it to pay this dividend, which required a net sum, after deduction of tax, of £209,719 8s. 6d.

On 4th June, 1964, its overdraft with the Appellant Bank was £485,000, against a limit of £250,000, and on that day the Bank by letter to Mr. Leslie Goldbart, one of the Directors, required this situation to be rectified, and stated that it would be unable to help in the payment of the final dividend unless this was made within the overdraft limit of £250,000.

The Annual General Meeting of Rolls Razor Ltd. was held on 2nd July, 1964, and payment of the 120 per cent, dividend was approved. No date was fixed by the approving resolution, but the Directors contemplated that payment would be made on 24th July.

Approval of the dividend made the Company a debtor in respect of the net amount to its shareholders. Provision of the sum required to pay it, as also of finance to enable the Company to continue trading, was the subject of negotiations by Mr. Bloom during the early part of July. He succeeded in obtaining the money needed to pay the dividend from the Respondent Company, which he owned or controlled.

At a Board meeting of the latter held on 15th July, 1964, it was resolved that a loan of £209,719 8s. 6d. be made to Rolls Razor Ltd. " for the purpose of that Company paying the final dividend on 24th July " next". On the same day, a cheque for that sum was drawn by the Respondent Company in favour of Rolls Razor Ltd. Rolls Razor Ltd. sent this cheque to the Appellant Bank's City Branch Office together with a covering letter on the notepaper of Rolls Razor Ltd., also dated 15th July, 1964, signed by Mr. Goldbart and addressed to Mr. G. H. Parker, a joint Manager of that Branch in the following terms: —

> *" Dear Mr. Parker,*
>
> *Confirming our telephone conversation of to-day's date, will you please open a No. 4 Ordinary Dividend Share Account.*
>
> *I enclose herewith a cheque valued at £209,719 8s. 6d. being the total amount of dividend due on the 24th July 1964. Will you please credit this to the above mentioned account.*
>
> *We would like to confirm the agreement reached with you this morning that this amount will only be used to meet the dividend due on the 24th July 1964."*

From an answer to an interrogatory administered to the Bank in the course of the action, it appeared that, in the telephone conversation referred to in this letter, Mr. Goldbart had informed Mr. Parker that arrangements had been made with an unspecified person to lend or otherwise provide money for the purpose of paying the dividend due to be paid by Rolls Razor Ltd. on 24th July, 1964.

The Appellant Bank had, on 8th June, 1964, opened an Ordinary Dividend No. 4 account. The Respondents' cheque for £209,719 8s. 6d. was specially cleared and credited to this account on 17th July, 1964. Mr. Bloom was unable to raise further sufficient finance and on 17th July, 1964, the Directors of Rolls Razor Ltd., resolved to put the Company into voluntary liquidation; the Appellant Bank was so informed.

On or about 20th July it amalgamated all the accounts of the Company except the Ordinary Dividend No. 4 account. On 5th August, 1964, the Respondent's solicitors demanded repayment from Rolls Razor Ltd. of the sum of £209,719 8s. 6d. but repayment was not made and no demand at this time was made upon the Appellant Bank. The effective resolution for the liquidation of Rolls Razor Ltd. was passed on 27th August, 1964, and on the following day the Appellant Bank set off the credit balance on Ordinary Dividend No. 4 account against part of the debit balance on Rolls Razor Ltd.'s other accounts. There followed in due course demand by the Respondents for repayment of this sum by the Bank and the present proceedings.

Two questions arise, both of which must be answered favourably to the Respondents if they are to recover the money from the Bank. The first is whether as between the Respondents and Rolls Razor Ltd. the terms upon which the loan was made were such as to impress upon the sum of £209,719 8s. 6d. a trust in their favour in the event of the dividend not being paid. The second is whether, in that event, the bank had such notice of the trust or of the circumstances giving rise to it as to make the trust binding upon them.

It is not difficult to establish precisely upon what terms the money was advanced by the Respondents to Rolls Razor Ltd. There is no doubt that the loan was made specifically in order to enable Rolls Razor Ltd. to pay the dividend. There is equally, in my opinion, no doubt that the loan was made only so as to enable Rolls Razor Ltd. to pay the dividend and for no other purpose. This follows quite clearly from the terms of the letter of Rolls Razor Ltd. to the Bank of 15th July, 1964, which letter, before transmission to the Bank, was sent to the Respondents under open cover in order that the cheque might be (as it was) enclosed in it.

The mutual intention of the Respondents and of Rolls Razor Ltd., and the essence of the bargain, was that the sum advanced should not become part of the assets of Rolls Razor Ltd., but should be used exclusively for payment of a particular class of its Creditors, namely, those entitled to the dividend. A necessary consequence from this, by process simply of interpretation, must be that if, for any reason, the dividend could not be paid, the money was to be returned to the Respondents: the word "only" or "exclusively" can have no other meaning or effect.

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.

In *Toovey* v. *Milne* (1819) 2 Barn. & Ald. 683 part of the money advanced was, on the failure of the purpose for which it was lent (viz. to pay certain debts) repaid by the bankrupt to the person who had advanced it. On action being brought by the assignee of the bankrupt to recover it, the plaintiff was nonsuited and the nonsuit was upheld on a motion for a retrial. In his judgment Abbott C.J. said:

> *"I thought at the trial, and still think, that the fair inference from the facts proved was that this money was advanced for a special purpose, and that being so closed with a specific trust, no property in it passed to the assignee of the bankrupt. Then the purpose having failed, there is an implied stipulation, that the money shall be repaid. That has been done in the present case ; and I am of opinion that that repayment was lawful, and that the nonsuit was right"*

The basis for the decision was thus clearly stated, viz., that the money advanced for the specific purpose did not become part of the bankrupt's estate. This case has been repeatedly followed and applied (see *Edwards* v. *Glynn* (1859) 2 E. & E. 29 ; *Re Rogers ex parte Holland and Hannen* (1891) 8 Morr. B.C. 243 ; *Re Drucker* [1902] 2 K.B. 237 C.A.; *Re Holley* [1915] 1 Hansell 181). *Re Rogers* was a decision of a strong Court of Appeal. In that case, the money provided by the third party had been paid to the creditors before the bankruptcy. Afterwards the trustee in bankruptcy sought to recover it. It was held that the money was advanced to the bankrupt for the special purpose of enabling his creditors to be paid, was impressed with a trust for the purpose and never became the property of the bankrupt. Lindley L.J. decided the case on principle but said that if authority was needed it would be found in *Toovey* v. *Milne* (u.s.) and other cases. Bowen L.J. said that the money came to the bankrupt's hands impressed with a trust and did not become the property of the bankrupt divisible amongst his creditors, and the judgment of Kay L.J., was to a similar effect.

These cases have the support of longevity, authority, consistency and, I would add, good sense. But they are not binding on your Lordships and it is necessary to consider such arguments as have been put why they should be departed from or distinguished.

It is said, first, that the line of authorities mentioned above stands on its own and is inconsistent with other, more modern, decisions. Those are cases in which money has been paid to a company for the purpose of obtaining an allotment of shares (see *Moseley* v. *Cressey's Co.* 1865 L.R. 1 Eq. 405 ; *Stewart* v. *Austin* L.R. 3 Eq. 299; *The Nanwa Gold Mines Ltd.* [1955] 1 W.L.R. 1080). I do not think it necessary to examine these cases in detail, nor to comment on them, for I am satisfied that they do not affect the principle on which this appeal should be decided. They are merely examples which show that, in the absence of some special arrangement creating a trust (as was shown to exist in *Re Nanwa Gold Mines Ltd.*), payments of this kind are made upon the basis that they are to be included in the company's assets. They do not negative the proposition that a trust may exist where the mutual intention is that they should not.

The second, and main, argument for the Appellants was of a more sophisticated character. The transaction, it was said, between the Respondents' and Rolls Razor Ltd., was one of loan, giving rise to a legal action of debt. This

necessarily excluded the implication of any trust, enforceable in equity, in the Respondents' favour: a transaction may attract one action or the other, it could not admit of both.

My Lords, I must say that I find this argument unattractive. Let us see what it involves. It means that the law does not permit an arrangement to be made by which one person agrees to advance money to another, on terms that the money is to be used exclusively to pay debts of the latter, and if, and so far as not so used, rather than becoming a general asset of the latter available to his creditors, at large, is to be returned to the lender. The lender is obliged, in such a case, because he is a lender, to accept, whatever the mutual wishes of lender and borrower may be, that the money he was willing to make available for one purpose only shall be freely available for others of the borrower's creditors for whom he has not the slightest desire to provide.

I should be surprised if an argument of this kind - so conceptualist in character - had ever been accepted. In truth it has plainly been rejected by the eminent judges who from 1819 onwards have permitted arrangements of this type to be enforced, and have approved them as being for the benefit of creditors and all concerned.

There is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies: when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose (see *Re Rogers* (u.s.) where both Lindley L.J. and Kay L.J. explicitly recognised this):

- when the purpose has been carried out (i.e. the debt paid) the lender has his remedy against the borrower in debt;
- if the primary purpose cannot be carried out, the question arises if a secondary purpose (i.e. repayment to the lender) has been agreed, expressly or by implication;
- if it has, the remedies of equity may be invoked to give effect to it, if it has not (and the money is intended to fall within the general fund of the debtor's assets) then there is the appropriate remedy for recovery of a loan.

I can appreciate no reason why the flexible interplay of law and equity cannot let in these practical arrangements, and other variations if desired. It would be to the discredit of both systems if they could not. In the present case the intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear and I can find no reason why the law should not give effect to it.

I pass to the second question, that of notice. I can deal with this briefly because I am in agreement with the manner in which it has been disposed of by all three members of the Court of Appeal. I am prepared, for this purpose, to accept, by way of assumption, the position most favourable to the bank, i.e., that it is necessary to show that the bank had notice of the trust, or of the circumstances giving rise to the trust, at the time when they received the money, viz., on the 15th July, 1964, and that notice on a later date, even though they had not in any real sense given value when they received the money or thereafter changed their position, will not do.

It is common ground, and I think right, that a mere request to put the money into a separate account is not sufficient to constitute notice. But on 15th July, 1964, the bank, when it received the cheque, also received the covering letter of that date which I have set out above: previously there had been the telephone conversation between Mr. Goldbart and Mr. Parker, to which I have also referred.

From these there is no doubt that the bank was told that the money had been provided on loan by a third person and was to be used only for the purpose of paying the dividend. This was sufficient to give them notice that it was trust money and not assets of Rolls Razor Ltd.: the fact, if it be so, that they were unaware of the lender's identity (though the Respondent's name as drawer was on the cheque) is of no significance. I may add to this, as having some bearing on the merits of the case, that it is quite apparent from earlier documents that the bank were aware that Rolls Razor Ltd. could not provide the money for the dividend and that this would have to come from an outside source and that they never contemplated that the money so provided could be used to reduce the existing overdraft.

They were in fact insisting that other or additional arrangements should be made for that purpose. As was appropriately said by Russell L.J., it would be giving a complete windfall to the bank if they had established a right to retain the money.

In my opinion, the decision of the Court of Appeal was correct on all points and the appeal should be dismissed.