



Neutral Citation Number: [2020] EWHC 3354 (TCC)

Case No. HT-2020-000355

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT (QBD)**

Rolls Building,  
Fetter Lane, London EC4A 1NL

Date: 8 December 2020

**Before :**

**THE HONOURABLE MR JUSTICE PEPPERALL**

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**Between :**

**DELUXE PROPERTY HOLDINGS LIMITED**  
**(a company registered under the**  
**laws of the British Virgin Islands)**

**Claimant**

**- and -**

**(1) SCL CONSTRUCTION LIMITED**  
**(2) HER MAJESTY'S REVENUE AND CUSTOMS**

**Defendants**

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**Seb Oram** (instructed by **DAC Beachcroft LLP**) for the **Claimant**  
There being no appearance for the Defendants

Hearing date: 8 December 2020

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**Approved judgment**

I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

**THE HONOURABLE MR JUSTICE PEPPERALL:**

1. By contracts dated 14 March and 5 April 2019, Deluxe Property Holdings Limited employed SCL Construction Limited to carry out building works in Tooting, South London. SCL raised various invoices in respect of the works each claiming VAT upon the works at the standard rate of 20%. It is, however, common ground that the works were in fact zero-rated for VAT purposes and that VAT totalling £449,454.07 was wrongly invoiced and paid.
2. Although SCL initially accounted to HM Revenue & Customs for the VAT invoiced to its customer, it has now obtained reimbursement of the overpaid tax by way of an accounting credit against its liability in the quarter ended 31 May 2020. There is no dispute that in such circumstances SCL is liable to repay the VAT wrongly invoiced to Deluxe. The issue between the parties is whether:
  - 2.1 SCL holds the accounting credit obtained from HMRC on trust for Deluxe; or
  - 2.2 the claim is only in debt, in which case SCL seeks to set-off such claim against other monies that it alleges are owed by Deluxe.

The difference between a proprietary claim and one in debt may well be important since SCL's counterclaim is disputed and SCL appears to be on the verge of liquidation.

3. This Part 8 claim came on for trial on 8 December 2020. Although SCL acknowledged service and relies on the evidence of its director, it has not appeared at trial. I proceeded in SCL's absence since I was satisfied both that SCL knew about this hearing and that it had made a conscious decision not to appear before the court:
  - 3.1 Deluxe's solicitors have formally certified service by first class post and email.
  - 3.2 When my clerk contacted all parties to confirm the arrangements for the hearing, the company's director, Mike Lee, replied on 26 November 2020 asserting that the company was then in the hands of administrators who would be in touch.
  - 3.3 Subsequently, on 2 December 2020 Neil Hammond-Jarvis of FRP Advisory Trading Limited emailed my clerk indicating that SCL is not in fact in administration but that Mr Lee has given instructions to FRP to assist him in placing the company into creditors' voluntary liquidation. He explained that the proposed date of the liquidation would be in the week commencing 21 December 2020, and added:

“In view of the above and after taking into account the company's circumstances, it will not be defending the action and will therefore not be attending the hearing. We are informed by the director that copious amounts of documentation defending the claim has (sic) already been lodged with the court and the company will be relying on that documentation to state its case. For the record, the director disputes the

claim from the claimant and does not consider them to be a creditor of the company, rather, a debtor.”

I should, for completeness, add that Mr Hammond-Jarvis does not appear to have any standing in this matter. That said, Mr Lee was copied into Mr Hammond-Jarvis’s email and has not refuted his assertion that SCL is not in administration.

4. No relief is sought against HMRC who understandably elected not to attend trial.

### **VAT REFUNDS**

5. Section 80 of the Value Added Tax Act 1994 provides that HMRC shall be liable to credit any overpaid output tax upon a claim being made under the section. Section 80(3) provides HMRC with a defence to such a claim where crediting the overpaid tax would unjustly enrich the claimant. This defence is supported by s.80A which provides:

“(1) The Commissioners may by regulations make provision for reimbursement arrangements made by any person to be disregarded for the purposes of section 80(3) except where the arrangements—

- (a) contain such provision as may be required by the regulations; and
- (b) are supported by such undertakings to comply with the provisions of the arrangements as may be required by the regulations to be given to the Commissioners.

(2) In this section ‘reimbursement arrangements’ means any arrangements for the purposes of a claim under section 80 which—

- (a) are made by any person for the purpose of securing that he is not unjustly enriched by the crediting of any amount in pursuance of the claim; and
- (b) provide for the reimbursement of persons who have for practical purposes borne the whole or any part of the amount brought into account as mentioned in paragraph (b) of subsection (1) or (1A) of that section.”

6. By regulations 43B and 43C of the VAT Regulations 1995, HMRC is required to disregard any reimbursement arrangements for the purposes of the unjust enrichment defence under s.80(3) of the Act except where such arrangements include the provisions described in regulation 43C. Such provisions include:

“(a) reimbursement for which the arrangements provide will be completed by no later than 90 days after the crediting of the amount to which it relates;

(b) no deduction will be made from the relevant amount by way of fee or charge (howsoever expressed or effected);

(c) reimbursement will be made only in cash or by cheque ...”

7. Further, by regulations 43B and 43G, HMRC is also required to disregard any reimbursement arrangements for the purposes of the unjust enrichment defence where such arrangements are not supported by undertakings that, among other matters:
- “(a) at the date of the undertakings [the trader] is able to identify the names and addresses of those consumers whom he has reimbursed or whom he intends to reimburse;
  - (b) he will apply the whole of the relevant amount credited to him, without any deduction by way of fee or charge or otherwise, to the reimbursement in cash or by cheque, of such consumers by no later than 90 days after his receipt of that amount (except insofar as he has already so reimbursed them) ...”
8. On 29 July 2013, HMRC published its guidance “How to correct VAT errors and make adjustments or claims (VAT Notice 700/45).” The guidance explains the two methods that a registered person can use to correct previous errors. Method 1 involves a simple balancing adjustment to the next VAT return but is not available where the error is in excess of £50,000. In such larger cases, method 2 must be used and the registered person must notify HMRC of the error on form VAT652.
9. Section 9 of the guidance explains the unjust enrichment defence. It explains the circumstances in which HMRC will refuse claims on the basis of unjust enrichment:
- “We will refuse claims for unjust enrichment where a trader:
- has charged VAT to his customers that he ought not have charged
  - has passed the economic burden of the wrongly charged VAT on to his customers
  - has suffered no loss or damage as a result of having passed the mistaken charge to his customers
  - is unable or unwilling to reimburse his customers with any amounts paid to him by HMRC”
10. Sections 9.2 and 9.3 clarify that a refund can only be obtained where the trader agrees to avoid being unjustly enriched by passing the refund back to the customer who bore the burden of the mistaken VAT charge. Section 9.6 provides:
- “Under the reimbursement scheme we will only make a refund to you if you agree to:
- sign an undertaking in the format set out in section 10 of this notice - once signed, you cannot amend it
  - make all refunds to customers within 90 days
  - repay any residual amounts not returned to your customers after 90 days to us within 14 days - we will not send reminders - if you fail to do this we will assess for the residue

- pass any statutory interest paid with the refunds to customers, this is subject to the same terms and conditions as the refund”

11. Section 10 then sets out the wording of the required undertaking.

### **THE EVIDENCE**

12. In April 2020, Kal Hassan of Interland Group Limited, who was acting as agent for Deluxe, sought to negotiate a deed of indemnity and assignment in respect of the anticipated tax refund. On 24 April 2020, Mr Lee indicated his agreement to the deed provided that clauses could be added allowing SCL to finish the project, agreeing a final account sum of £2,913,739.09 and agreeing that no liquidated damages would be levied. Mr Hassan immediately rejected this proposal complaining that Mr Lee was seeking to use the draft deed to leverage a position for SCL in respect of the agreement of its final account.

13. Meanwhile, on 11 April 2020, Landmark PT Limited (tax advisers acting for SCL) emailed a draft claim for repayment that it intended to submit on behalf of SCL in respect of the overpaid tax pursuant to s.80 of the Value Added Tax Act 1994 to both SCL and Mr Hassan and Shachar Livni of Interland. On 16 April 2020, Mr Lee emailed Mr Hassan confirming that the claim had been submitted. In fact, Landmark did not formally lodge the claim with HMRC until 27 April 2020.

14. In accordance with HMRC guidance, the application included a signed reimbursement undertaking in the terms required by section 10 of VAT Notice 700/45:

“In relation to a claim for £415,365.87 made on 23<sup>rd</sup> March 2020 relating to prescribed accounting periods 05/19, 08/19, 11/19 and 02/20 made under section 80 VAT Act 1994. In accordance with the terms of section 80A VATA 1994 and regulations 43A to 43G of the Value Added Tax Act Regulations 1995, Part VA Reimbursement Arrangements (Statutory Instrument 1995/2518), I agree to comply with the following reimbursement arrangements.

‘I, the undersigned, can identify the names and addresses of consumers whom I intend to reimburse. I will reimburse those persons, in cash or by cheque, all of the amount credited by HMRC under section 80(1) or 80(1A) of the VAT Act 1994, together with any associated interest, without any deduction, for whatever purpose, within 90 days of receiving the credit and I understand that I cannot use the credit for any other purpose ...”

15. There appear to be two errors in the opening words of the undertaking. First, the amount of the VAT claim was misstated. This is, however, of no consequence since the undertaking clearly applied to “all of the amount credited by HMRC” and was not, in my judgment, limited to the sum of £415,365.87. Secondly, the claim was not lodged on 23 March 2020 but five weeks later. Again, nothing turns on this since the undertaking was plainly given in connection with the April claim.

16. By an email dated 20 May 2020, Mr Potts of Landmark confirmed that he had submitted the claim. Further, he advised that given the huge disruption caused to HMRC by the COVID-19 pandemic, he should approach HMRC to try to broker “an alternative more practical approach” rather than pursuing “the technically correct legal process.” His advice having been accepted, he wrote to HMRC on 18 June 2020 giving notice that SCL would process its tax reclaim through an adjustment to its VAT return for the quarter ended 31 May 2020. His email explained:

“I understand that the expected response time for section 80 claims is in the region of 21 weeks which suggests a response could be received in early October 2020 – obviously the current COVID crisis has had a severe disruptive effect on HMRC and many businesses.

I also understand from other VAT652 claim applicants that some HMRC officers have suggested running the adjustments through the VAT return in order to relieve pressure on the HMRC VAT corrections team and to allow traders to rectify their VAT position in a shorter timeframe.

I am writing to inform you that SCL Construction will be following this course of action and including the attached adjustment in their May 2020 VAT return as a negative figure of £449,454.07 in Box 1.

I hope in these unique and challenging times that HMRC can appreciate the reason for this decision.”

17. On 7 July 2020, SCL submitted its VAT return for the quarter ended 31 May 2020. As explained by Mr Potts, a deduction was made to the figure for VAT due in the accounting period in the sum of £449,454.07. The net effect of this adjustment, after declaring both the VAT that would otherwise have been due for the period and the company’s VAT reclaim for the period in respect of its purchases, was that SCL made a claim for repayment of £435,555.95.
18. On 10 July 2020, Mr Leatt of HMRC responded to the original s.80 claim. Although it appears that Mr Leatt had not yet read the 18 June email, he noted the negative output tax in the company’s return and asked whether the VAT reclaim had been included in the return. Mr Potts confirmed the position and on 14 July Mr Leatt advised that the tax repayment had been cleared via the 05/20 return and would be paid in the next few days. The VAT refund was paid by HMRC on 16 July 2020.
19. Having recovered the overpaid tax through the VAT return, SCL formally withdrew its s.80 claim on 14 August 2020. On 18 September 2020, Mr Leatt advised:
- “As you withdrew the section 80 claim and made the adjustment through a return, a credit note should have been issued to your customer. Could you let me know if you did issue a credit note?”
20. On 7 October 2020, O’Farrell J granted an injunction requiring SCL to pay to Deluxe’s solicitors “any monies in the possession or control of [SCL], which

represent monies paid to [SCL] by [HMRC] in respect of the claim made by [SCL] under s.80 of the Value Added Tax Act 1994 on or around 14 April 2020.” Further, the judge ordered SCL to provide information to Deluxe by 5pm on 9 October 2020. Ten minutes after that deadline, but otherwise in purported compliance with the court’s order, Mr Lee responded:

- “2.1 The SC80 VAT Claim was made on 14<sup>th</sup> April 2020. The SC80 was cancelled as we were unable to identify s (sic) to the client not being able.
- 2.2 No monies have been received in respect of the above claim and the claim has now been cancelled
- 2.3 We have not received any monies in respect of ‘the VAT Claim’
- 2.4 We are not in receipt of any monies relating to ‘the VAT Claim’”

- 21. By a statement dated 20 October 2020, Mr Lee clarified SCL’s position. He asserted that the injunction had no effect because SCL did not receive any funds through its s.80 claim but rather by way of adjustment to its May 2020 VAT return. Mr Lee did not dispute SCL’s liability to repay the VAT payment. He asserted, however, that the overpaid VAT had been credited against outstanding invoices owed by Deluxe and that, after such set-off, SCL was not indebted to Deluxe. The essence of SCL’s position is that Deluxe has wrongfully terminated the building contracts and, even after the credit for the VAT overpayment, owes £529,211.52 to SCL.
- 22. Further, Mr Lee complained that the solvency of SCL was being questioned. He asserted in terms that the company was not insolvent and gave details of the value of its current projects. As already explained, the court has since received emails suggesting variously that SCL might be in administration or that instructions have been given to liquidate the company. The company’s solvency is not, however, an issue before the court.

## **ARGUMENT**

- 23. Mr Oram, who appears for Deluxe, argues that SCL holds the tax refund on trust for Deluxe. He puts the matter on three alternative bases:
  - 23.1 First, Mr Oram argues that SCL holds the tax refund on resulting trust by reason of the written undertaking to HMRC, which made clear that the refund was sought for the sole purpose of reimbursing Deluxe. This is, he contends, a classic Quistclose trust.
  - 23.2 Alternatively, Mr Oram argues that a constructive trust arose from the purpose and structure of the statutory refund scheme under the 1994 Act since an accounting credit or physical payment under such scheme is made for the limited purpose of ensuring reimbursement to the consumer who wrongly paid the VAT. Equity, he argues, should restrain SCL from unconscionably denying Deluxe’s title to such refund.
  - 23.3 In the further alternative, Mr Oram argues that the undertaking given by SCL to HMRC operated contractually and amounted to a promise to transfer the accounting credit or payment to Deluxe. Such promise can, he argues, be

enforced pursuant to the Contracts (Rights of Third Parties) Act 1999, thereby conferring beneficial title to the refund upon Deluxe.

24. I am hugely indebted to Mr Oram for his impressive written and oral submissions and for his industrious citation of authority in support of each of the three ways in which he puts his client's case.

## **DISCUSSION**

### **QUISTCLOSE TRUST**

#### *Did a Quistclose trust arise in this case?*

25. Snell's Equity (34<sup>th</sup> Ed.) explains the Quistclose trust, named after the case of Barclays Bank Ltd v. Quistclose Investments Ltd [1970] A.C. 567, at para. 25-033:

“A trust may arise where one person, A, advances money to another, B, on the understanding that B is not to have the free disposal of the money and that it may only be applied for the purpose stated by A. The effect of the trust is to reserve in A the beneficial interest in the money, so providing him with some proprietary security for his advance.”

26. In Twinsectra Ltd v. Yardley [2002] UKHL 12, [2002] 2 W.L.R. 802, Lord Millett described, at [68] and [76], the rationale of the trust in the case of a loan for a restricted purpose:

“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 ...

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. Such conduct goes beyond a mere breach of contract. . . The duty is fiduciary in character because a person who makes money available on terms that it is to be used for a particular purpose only and not for any other purpose thereby places his trust and confidence in the recipient to ensure that it is properly applied. 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.”

27. Lord Millett added, at [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 A.C. 74, 100 per Lord Mustill. His freedom to dispose of the money is



necessarily excluded by an arrangement that the money shall be used *exclusively* for the stated purpose, for as Lord Wilberforce observed in the Quistclose Case [1970] A.C. 567, 580:

‘A necessary consequence from this, by a process simply of interpretation, must be that if, for any reason, [the purpose could not be carried out,] the money was to be returned to [the lender]: the word ‘only’ or ‘exclusively’ can have no other meaning or effect.’”

28. In this case SCL made a claim to recover overpaid tax pursuant to s.80 of the 1994 Act. Such claim was properly supported by reimbursement arrangements as required by s.80A, regulations 43B, 43C and 43G of the 1995 Regulations and VAT Notice 700/45. Absent such arrangements and, in particular, the written reimbursement undertaking, HMRC would have been entitled to refuse the claim for a refund pursuant to s.80(3).
29. That was the proper context in which Landmark asked HMRC to allow SCL to make an adjustment to its May 2020 VAT return. The proposal was simple pragmatism in view of the considerable disruption caused by the COVID-19 pandemic and the likely significant delay in processing the s.80 claim. But for that, there would have been no question of SCL’s being entitled to make such a significant VAT correction through its VAT return: reg. 34 of the 1995 Regulations; section 4 of VAT Notice 700/45. On the facts of this case, HMRC only allowed the overpayment to be claimed back through the return in circumstances where SCL had already given a signed reimbursement undertaking such that HMRC would not have a statutory defence under s.80(3).
30. Accordingly, the mechanics of precisely how HMRC allowed the claim to be processed did not change the character of the claimed refund. This was a refund of tax mistakenly charged to Deluxe that was supported by a reimbursement undertaking. SCL had undertaken in terms to reimburse its customer “in cash or by cheque, all of the amount credited by HMRC ... without any deduction, for whatever purpose.” Further, SCL had undertaken that it could not use the credit for any other purpose. It was, I am satisfied, a payment made by HMRC for the sole and express purpose of allowing SCL to reimburse the mistakenly charged VAT to Deluxe and was clearly intended to restrict SCL’s freedom of disposal so that the credit was to be exclusively used for the stated purpose without set-off.
31. In my judgment, the allowance of an accounting credit in SCL’s favour by HMRC’s payment on 16 July 2020 gave rise to a Quistclose trust under which SCL held the accounting credit and the VAT repayment (being monies representing at least part of such credit) on trust for HMRC for the purpose of reimbursing Deluxe in accordance with the reimbursement undertaking.

*Is the trust enforceable by Deluxe?*

32. Under a Quistclose trust, the beneficial ownership of the property remains vested in the party making the advance who has standing to enforce the trust: Twinsectra [81],

[96]-[97]; Re Margareta Ltd [2005] EWHC 582(Ch), [2005] B.C.C. 506. Accordingly, the beneficiary under the trust in this case was HMRC and not Deluxe. The accounting credit was therefore held upon trust for HMRC subject only to SCL's power to apply it in accordance with the stated purpose. Such trust would ordinarily only be enforceable by the beneficiary, HMRC.

33. This is, however, a claim by the intended payee under the arrangements between HMRC and SCL. In Re Margareta, Michael Crystal QC sitting as a Deputy High Court Judge held, at [24], that the intended payee under a Quistclose trust may obtain a beneficial interest in the fund:

“where the existence of the trust arrangements is communicated to the intended payee and the latter gains a beneficial interest in the money either because of the creation of an estoppel in his favour or because communication perfects an assignment of the donor's equitable interest to him. (See Acton v. Woodgate (1833) 2 My. & K. 492, at p.495; Ellis & Co. v. Cross [1915] 2 K.B. 654, at p.659; Browne v. Cavendish (1844) 1 Jon. & La T. 606, at pp.635–36; Morrell v. Wootten (1852) 16 Beav. 197, at pp.202–203; Re Hamilton (1921) 124 L.T. 737.)

(See generally the discussion by P Millett Q.C., ‘The Quistclose Trust: Who Can Enforce It?’ (1985) 101 L.Q.R. 269, especially pp.287–290.)”

34. Lewin on Trusts (20<sup>th</sup> Ed.) cites Re Margareta as authority for such proposition. It is, as the deputy judge identified, supported by other authority. In particular, the deputy judge relied on the 1985 article in which Peter Millett QC, as he then was, explained the orthodox position that a direction given by A to B to pay money to C does not create any legal or equitable right in favour of C. Mr Millett then added, at p.290:

“All this, of course, depends upon the absence of any communication to C. Where C is a party to the arrangements, or their existence is communicated to him, an irrevocable trust in C's favour is created. It is sometimes suggested that this results from an estoppel, on the ground that there is no other ground upon which a trust, initially revocable, can subsequently become irrevocable. But this would seem to proceed from a misunderstanding of the true nature of the trust at its inception. If, as is here suggested, it is not a revocable trust for C but a trust for A, then in accordance with ordinary principles communication to C perfects an assignment of A's equitable interest to C, and converts A's revocable mandate into an irrevocable trust for C.”

35. It will be noted that Mr Millett's argument depended first on the proper recognition of the fact that there is a single trust for A and the rejection of the theory of the earlier primary or, as he called it, “illusory” trust for C. Later, as Lord Millett in the Twinsectra Case, he authoritatively rejected the two-trust theory at [78]-[79]. Further, Mr Millett cited the decision of Sir John Romilly M.R. in Morrell v. Wootten (1852) 16 Beav. 197, at pp.202-203, in support of his proposition that communication might perfect the assignment and convert A's mandate into an irrevocable trust for C.

36. Having considered Lord Millett's speech in Twinsectra, Morrell's Case and the decision of James LJ in John v. James (1878) 8 Ch.D. 744, I respectfully agree with the deputy judge in Re Margareta that Mr Millett correctly identified the principle in his 1985 Article and that communication to C perfects the assignment.
37. Here, the reimbursement undertaking was plainly communicated in draft to Deluxe's agent on 11 April 2020. Further, the fact that such undertaking had been given was again communicated on 16 April (albeit prematurely) and on 20 May 2020. I am therefore satisfied that such communication perfected the assignment of HMRC's interest in the tax refund and that SCL holds the accounting credit and July repayment on a resulting trust in favour of Deluxe in accordance with its undertaking.

*The quarter ended 28 February 2019*

38. The undertaking was, however, only given in respect of any claim arising from the accounting periods ended 31 May 2019, 31 August 2019, 30 November 2019 and 29 February 2020. In fact, some £1,701.64 of the s.80 claim was made in respect of an earlier quarter ended 28 February 2019. Mr Oram therefore concedes that the resulting trust cannot attach to that element of the refund.

**CONSTRUCTIVE TRUST**

39. Goff & Jones: The Law of Unjust Enrichment (9<sup>th</sup> Ed.) consider the unjust enrichment defence under s.80(3) of the 1994 Act. The editors comment at para. 32-08:

“In cases where the trader has put secure mechanisms in place to ensure that HMRC's repayment will be passed back to the customers, these mechanisms will undo his unjust enrichment at their expense and so the statutory defence is not available. In principle, it should also be possible for the court to impose this outcome in cases where the customers are identifiable, by denying the defence and ordering restitution, but stipulating that the money repaid by HMRC should be held on constructive trust for the customers.”

40. The editors cite the decision of the Federal Court of Australia in KAP Motors Property Ltd v. Commissioners of Taxation [2008] F.C.A 159 as authority for such view. The case concerned a very similar statutory scheme in Australia for the repayment of wrongly paid Goods & Services Tax. The trader had refused to give a reimbursement undertaking, but Emmett J held that an equivalent defence of unjust enrichment was not available to the tax authority since, even in the absence of an undertaking, any refund of the overpaid tax was held by the trader on constructive trust for the customer. He explained, at [41]:

“Such a trust would arise from any unconscionability that would otherwise flow if KAP Motors and GAP Motors retained, as a windfall gain, any refund made by the commissioner. A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property to assert his own beneficial interest in the property and deny the beneficial interest of another ...”

41. I accept Mr Oram's submission that the same result is achieved under English law. English law imposes a constructive trust where a party, with no other interest, acquires property for the sole purpose of remitting it to another since equity regards it as unconscionable for him to retain the benefit for himself. For example, in De Bruyne v. De Bruyne [2010] EWCA Civ 519, [2010] 2 F.L.R. 1240, the court found that a father held shares transferred to him on a constructive trust in order to give effect to an agreement to hold the shares on trust for his children. Patten LJ explained at [51]:

“There are, however, a number of situations in which equity will hold the transferee of property to the terms upon which it was acquired by imposing a constructive trust to that effect. These cases do not depend on some form of detrimental reliance in order to re-balance the equities between competing claimants for the property. They concentrate instead on the circumstances in which the transferee came to acquire the property in order to provide the justification for the imposition of a trust. The most obvious examples are secret trusts and mutual wills in which property is transferred by will pursuant to an agreement that the transferee will hold the property on trust for a third party. In neither case does the intended beneficiary rely in any sense on the agreement (he may not even be aware of it) but, in both cases, equity will regard it as against conscience for the owner of the property to deny the terms upon which he received it. It is not necessary in such cases to show that the property was acquired by actual fraud (although the principle would apply equally in such cases). The concept of fraud in equity is much wider and can extend to unconscionable or inequitable conduct in the form of a denial or refusal to carry out the agreement to hold the property for the benefit of the third party which was the only basis upon which the property was transferred. This is sufficient in itself to create the fiduciary obligation and to require the imposition of a constructive trust. The principle is a broad one and applies as much to *inter vivos* transactions as it does to wills: see Rochefoucauld v. Boustead [1897] 1 Ch 196, [1897] 66 LJ Ch 74; Bannister v Bannister [1948] 2 All ER 133.”

42. The argument for a constructive trust in the instant case is stronger than in the KAP Motors Case as a reimbursement undertaking was given, but the constructive trust arises independently of such undertaking because it would be unconscionable for SCL to retain the benefit of a tax rebate intended solely for the benefit of its customer who had borne the burden of wrongly paying the tax. Accordingly, I conclude that SCL holds the accounting credit and the VAT repayment (being monies representing at least part of such credit) on trust for Deluxe. On this occasion, the trust attaches to the credit and repayment irrespective of whether it arose from the quarters expressly identified in the reimbursement undertaking or the omitted quarter that ended 28 February 2019.

**CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

43. In view of these conclusions, it is unnecessary to consider the third way in which Mr Oram puts Deluxe's case.

**THE SET-OFF**

44. These Part 8 proceedings would plainly be an inappropriate vehicle to determine the question of Deluxe’s disputed liability upon the termination of the contracts and any outstanding trading invoices. Indeed, for that reason O’Farrell J refused SCL permission to plead a counterclaim. Whether SCL be right or wrong to assert such claim, I am satisfied that the existence of a claim in debt is no answer to the proprietary claims pursued in these proceedings. As HHJ Weeks QC, as he then was, observed in Zemco Ltd v. Jerrom-Pugh [1993] B.C.C. 275, at p.279B:

“what is clear is that there is a general rule that ... there can be no set-off for a simple debt against a proprietary claim”

[See also the judgment of Hoffmann LJ on appeal at p.280E expressly approving this statement of principle, and Guinness plc v. Saunders [1988] 1 W.L.R. 863 (CA).]

**RELIEF**

45. I therefore grant declaratory relief that SCL holds the accounting credit and the VAT repayment (being monies representing at least part of such credit) on trust for Deluxe. I order that the trust be wound up and that SCL do transfer to Deluxe the balance of the trust property. Further, it appearing from Mr Lee’s own evidence that SCL has in fact used the tax rebate to fund the company’s general business activities, I find that SCL has acted in breach of trust and is liable as trustee to restore the trust fund.