Australia – Federal Court

Federal Court of Australia: O'Loughlin J – sentenza 22 Gennaio 1999 [Peter Cox Investments Pty Ltd (in liq) v International Air Transport Association and another]

Peter Ivan Macks (the liquidator) was appointed liquidator of Peter Cox Investments Pty Ltd (the company) on 20 August 1996 by order of the Supreme Court of South Australia. He had earlier been appointed provisional liquidator on 17 July 1996.

The proceedings that are presently before the court arise as a result of competing claims that have been made with respect to certain funds that have been set aside by the liquidator. The rival claimants are Qantas Airways Ltd (Qantas) on behalf of the International Air Transport Association (IATA) and the Travel Compensation Fund (the TCF). Each claimant has presented its claim upon the premise that funds that are held by the liquidator are impressed with a trust in favour of the claimant.

The company

At the date of the liquidator's appointment, the company had cash on hand and at the bank totalling $504,774.65. Shortly after his appointment, and as a result of learning of the competing claims of IATA and the TCF, the liquidator, with the agreement of representatives of those bodies, set aside the sum of $434,077.01 (the fund) and deposited it in an interest bearing account pending the determination of the rights of the rival claimants. That account is account No . . . with the Commonwealth Bank, Rundle Mall, Adelaide.

According to the liquidator, one of the reasons for the failure of the company was an extensive series of admitted fraudulent transactions that had been effected by a director of the company over a period of some years. Creditors, including IATA and the TCF, at the date of the liquidator's affidavit, 8 July 1997, amount to $1,282,881.43. (*omissis*)

IATA

IATA is a body of airlines (sometimes called "carriers"); it is primarily responsible for the rules and regulations that govern the carriers and those who have been appointed agents to conduct business on behalf of the carriers. It is also responsible for managing the Bank Settlement Plan; that plan is a clearing house process by which agents settle moneys that are due to various carriers as a consequence of sales that have been made by agents. On or about 1 November 1994, IATA and the company entered into a written agreement entitled "Passenger Sales Agency Agreement' (the PSA Agreement). Under that agreement the members of IATA appointed the company to be an agent for each member and authorised it to sell air transportation on the airline services that each member offered. Of particular

relevance to this case, the terms of the agreement authorised the company to issue tickets in the name of a member in favour of a client and to collect from the client payment for such tickets. It is the practice of IATA that the national carrier represent it in any dispute that arises in a particular country. As Qantas is Australia's national carrier, it has represented IATA's interests in this litigation.

Clause 7 of the PSA Agreement provides for the remittance of moneys that are due by an agent to IATA. Subclause 7.1 is in the following terms:

7.1 on the issue by the agent of a traffic document on behalf of the carrier, or on the issue by the agent of its own transportation order drawn on the carrier, the agent, irrespective of whether it collects a corresponding amount, shall be responsible for payment to the carrier of the amount payable for the transportation or other service to which the traffic document or transportation order relates…

Subclause 7.2 is also relevant to these proceedings, it states:

7.2 except as otherwise provided in subpara 8.2 of this paragraph, [which provides for refunds when appropriate] the agent shall collect the amount payable for the transportation or other service sold by it on behalf of the carrier. All moneys collected by the agent for transportation and ancillary services sold under this agreement, including applicable commissions which the agent is entitled to claim thereunder, shall be the property of the carrier and shall be held by the agent in trust for the carrier or on behalf of the carrier until satisfactorily accounted for to the carrier and settlement made . . . Unless otherwise instructed by the carrier the agent shall be entitled to deduct from remittances the applicable commission to which it is entitled hereunder.

Between November 1994 and 17 July 1996, the date of the appointment of the provisional liquidator, the company, in the operation of its business as a licensed travel agent, issued airline tickets to clients for and on behalf of carriers who were members of IATA; in that same period the company also received moneys from clients in respect of the sale and purchase of such airline tickets. The moneys that were so received by the company were not placed in a special purpose account or a trust account; they were banked, along with other moneys that the company had received for a variety of purposes from a variety of sources in the company's general bank account.

IATA received payments from the company for tickets issued by the company on behalf of IATA carriers until late May 1996. However, payments then stopped and nothing was received from the company in respect of tickets that were thereafter issued by the company to the date of the appointment of the provisional liquidator. Until the company stopped making payments, it had followed the procedures required in the Bank Settlement Plan: payments were made fortnightly and were accompanied by a report from the company that detailed the tickets that had been sold on behalf of IATA carriers during the preceding fortnight. Payments were made in favour of IATA by direct debit for the amount owing for the issued tickets net of commission. The amount that is said to be owing to IATA (on behalf of various carriers) as at the date of liquidation is $557,560.88. The liquidator says that the company received an amount of $323,292.27 from clients for airline tickets in the period 1 July to 17 July 1996. However, the composition of this figure is not set out and no details have been given of the moneys that the company received in the month of June.

The TCF

The Travel Compensation Fund is a fund that has been established under a trust deed that has been approved by the South Australian Minister as required by s 19 of the Act. Every licensed travel agent must be a contributor to the compensation scheme that has been established by the deed: see s 20 of the Act. Section 26 of the Act provides that the trustees named in the deed may sue and be sued under the

name "The Travel Compensation Fund". (*omissis*)

The TCF (…) moved the court on motion seeking various orders, including an order:

2. That there be a determination by the court upon the following questions:

2.1 When a client of the business known as Travel House paid money to it for ticketing was that money impressed with a trust in favour of the client if the purpose of the payment fails?

2.2 If so, is TCF by s 25 of the Travel Agents Act 1986 or otherwise at law entitled to the benefit of the trust in respect of that money to the extent that TCF has, consequent upon the client making a claim upon it, paid money to that client?

2.3 If so, is that part of the fund being moneys paid in by clients who made a claim which was met by TCF, money held in trust to that extent for TCF?

In the event of the court answering those questions in the affirmative then the TCF seeks further orders for accounts and inquiries.

The case for TCF

(*omissis*) The primary contention that was advanced on behalf of the TCF was that "a purpose trust" came into existence in favour of a client when that client paid moneys to the company for a nominated or identified purpose such as tickets for airline, railway or motor-bus carriage or for hotel, motel or apartment accommodation. It was submitted that the trust came into existence at the moment in time when the client's money was paid over to the company and, in the case of a payment for an airline ticket, before any trust was created in favour of IATA; it was further submitted that the trust in respect of that money continued to exist until the time when the client received the appropriate ticket. This particular argument concluded with the submission that the TCF is then subrogated to each client's right as a consequence of its having made compensatory payments to those clients. (*omissis*)

Thus, said Mr Strawbridge, when a client pays over money to a travel agent for an airline ticket, or for accommodation or for some other form of service, the client does so in the expectation of receiving that ticket or a voucher for that accommodation: the client's sole purpose in paying over the money is to acquire those rights; there is no other purpose. In like manner it was submitted that the agent's sole purpose in receiving the money must be for the provision of the requested service.

(*omissis*) As I understand the argument for the TCF, the trust that would arise in favour of IATA would only arise if and when the travel agent issued a ticket to a client; and at that point of time, the client would then receive satisfaction for what he or she had paid for. That client would not therefore have a need to make a claim on the compensation fund and therefore, the present claims of the TCF do not refer to such clients. On the other hand, there would be no trust in favour of IATA or any of its members if no ticket had been issued. Thus, the argument allowed, in my opinion, for the existence of two mutually exclusive trusts. The first trust would arise in favour of the client in respect of money paid over by the client to the travel agent; that trust would arise as soon as the client paid over the money and would continue to exist until such time as the required ticket issued in favour of the client. At that point of time, the travel agent would cease to hold the money in trust for the client but would immediately assume a trust in favour of IATA until the relevant payment was made to it. It is not a case of two trusts coexisting as submitted by Mr Strawbridge - rather, if his argument is accepted, it would be a case of mutually exclusive trusts with the second arising immediately upon the satisfaction of the first.

The Quistclose trust

To reject the suggestion that the relationship between the company and a client would be merely a debtor/creditor relationship, Mr Strawbridge relied on the decision of the House of Lords in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567. In that case Quistclose lent a company, Rolls Razor Ltd, a sum of money (the loan) for the express purpose of enabling Rolls Razor to pay a dividend that had earlier been declared in favour of its shareholders. Rolls Razor acquainted its banker, the appellant, with the purpose of the loan and, by arrangement, a special account was used to receive the loan. Then the unexpected occurred; Rolls Razor went into liquidation and the bank applied the money in the special account in partial satisfaction of the moneys owing to it on Rolls Razor's overdraft account. Lord Wilberforce, with whom the other Law Lords agreed said (at 579-80):

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 topay 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 15 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 decision in Quistclose, which was followed in *Stephens Travel v Qantas*, also made it clear that a mutual debtor-creditor relationship did not exclude, in appropriate circumstances, the creation of a trust in favour of the creditor. Lord Wilberforce addressed that issue in this manner (at 581-2):

"The second, and main, argument for the appellant 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 respondent's 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 coexistence 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*; *Ex parte Holland and Hannen* (1891) 8 Morr 243 where both Lindley LJ and Kay LJ recognised this): when the purpose has been carried out (that is, 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 (that is,

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".

Relying on the principles enunciated by Lord Wilberforce, the TCF has argued that the sole intention of a client in paying money to a travel agent for an airline ticket was for the agent, in turn, to apply that money only for the purpose for which it was paid: for example, for the purpose of acquiring an airline ticket. That therefore represents, so it was claimed, the creation of a trust of which the client was the beneficiary; if the purpose of the trust fails, the money belongs tothe client and is to be refunded to the client -- or, on the principle of subrogation, to the TCF. Mr Strawbridge further submitted that it could never have been the intention of the client, nor of the company, that the client's money would become part of the general assets of the company. And, he added, it is necessary for the purpose of IATA's trust that this be so: otherwise, if the money, when paid by the client to the company, becomes part of the general assets of the company, there would be no trust in favour of IATA.

(*omissis*) The answer to the question whether a debt or trust was created in any particular case depends upon the intention of the parties. If the parties intended that the one receiving the money should hold that money for the benefit of the other or for the benefit of a third party, then it will be a trust because there is actual trust property. If the payee was entitled to use the money as his own, being under an obligation merely to repay the same amount of money at a future time, then he is merely a debtor.

The relevant intention is to be inferred from the language employed by the parties; for that purpose the court is entitled to look into the nature of the transaction and the circumstances of the relevant parties and their relationship: see *Walker v Corboy* (1990) 19 NSWLR 382; *Re Australian Elizabethan Theatre Trust*: at FCR 503.

In Re Miles; *Ex parte National Australia Bank Ltd v Official Receiver in Bankruptcy* (1988) 85 ALR 216 Pincus J took a more restrictive view of the decision in Quistclose. He was of the opinion that it would not be right to apply the Quistclose principle "beyond the field defined by the House of Lords": at 221. He described it as being the "actual payment of money by the party claiming to be the beneficiary of a resulting trust, for the purpose of discharge of debts by the payee, that purpose having failed".

With respect, this seems to me to be an unnecessarily restrictive approach. I favour the view that Quistclose merely stands as authority for the proposition that an apparent debtor-creditor relationship can incorporate a trust relationship when such a trust relationship accords with the mutual intentions of the parties. (omissis)

But in our judgment, what was not here established was that these clients expected them "to retain and deal with that property or its proceeds in a particular way", and that an "obligation" to do this was undertaken by the defendant.

The case against TCF

The case for the liquidator and the case for IATA were separately presented by Mr Keen and Mr Rice. In many respects their arguments proceeded in tandem and it will, therefore, be convenient to deal

with them together. The first and the fundamental proposition that they advanced was, as I have already indicated, that the decision in Quistclose has not been followed in Australia. Mr Keen cited *Re Australian Elizabethan Theatre Trust*; *Lord v Commonwealth Bank of Ausralia* (1991) 30 FCR 491 102 ALR 681; *Walsh Bay Developments Pty Ltd v FCT* (1995) 130 ALR 415 at 425 and ; *Re Emanuel (No 14) Pty Ltd (in liq)*; *Macks v Blacklaw & Shadforth Pty Ltd* (1997) 147 ALR 281 at 290 in support of that proposition.

But none of these authorities can be regarded as a decision not to follow the decision of the House of Lords. Gummow J in *Re Australian Elizabethan Theatre Trust* was careful to contain the effect the decision and he did not see it as creating some "new legal institution": at FCR 503. He saw it only as an example of the particular operation of principle upon the facts as found. In fact, at FCR 499 of his judgment, Gummow J noted the various cases in Australasia in which Quistclose had been considered and applied. (*omissis*)

The strength of the case against the TCF lies in the fact that there is no evidence that would support a finding that it was the mutual intention of clients and the company that the company would hold their money in trust and refund it to them in the event of the company being unable to obtain the ticket (or other service) that a client had sought.

(omissis)

Conclusion

I have come to the conclusion that the TCF has failed to establish the existence of a trust in respect of the moneys that were paid by clients to the travel agent and in respect of which the clients did not receive some or all of the services to which they were entitled. I have come to that decision because of a combination of factors. They are as follows:

-- The relationship between each client and the company was a routine commercial transaction epitomising the business that the company conducted. The courts are reluctant to introduce trusts into such commercial transactions: *Walker v Corboy* (1990) 19 NSWLR 331 at 390 per Clarke JA and at 398 per Meagher JA.

-- No discreet evidence was advanced that pointed to a mutual intention of the parties that supported the existence of a trust. The only evidence from which a trust might be inferred was the provision in subcl 15.2 of the trust deed and, in my opinion, that was not sufficient for the reasons that I have earlier set out.

-- There was no evidence before the court of any directions having been given by clients to the company as to how and in what manner the moneys were to be held or applied.

-- The company received moneys from its clients and deposited them in its general bank account. There was no obligation -- statutory or contractual -- requiring it to separately account for those moneys.

-- The onus of proof lies on those who assert that a trust was created: *Re Armstrong* [1960] VR 202; *Re Travel House of Australia Pty Ltd; Browne v DCT (SC(Vic)*, Murray J, 1978, unreported). In the present case the evidence of an intention to create a trust is absent.