IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

CIVIL APPEAL CASE No.21 of 2003

BETWEEN: BOKISSA INVESTMENTS LTD
Appellant

AND: R.A.C.E. SERVICES PTY LIMITED (In Liquidation) ACN 010 358 246
Respondent

Coram: ***Justice Bruce Robertson***
Justice Daniel Fatiaki
Justice Patrick Treston

Counsels: *Mrs. R. Treston for the appellant*
Mr. T. Sullivan for the respondent

Hearing date: *7th November 2003*
Judgment date: *7th November 2003*

ORAL JUDGMENT OF THE COURT DELIVERED BY ROBERTSON J

This is an appeal against the decision of the Supreme Court at Port-Vila on 1st July 2003 entering summary judgment in favour of the respondent in the sum of AU$100,000.00 together with interest at a rate to be determined together with costs.

The specific grounds of appeal were:

1. The learned trial Judge erred in law and in fact in failing to find that there was a dispute between the parties about a substantial question of fact or a difficult question of law.
2. The learned trial Judge erred in law and fact in giving judgment on a summary judgment basis against the appellant in the sum of AU$100,000.00.
3. The learned trial Judge erred in law and fact in failing to find that the defendant had a arguable set off in the sum of AU$958,467.00.

insolvency by R.A.C.E. Services at the time. There was a denial of any specific purpose for the transfer or the creation of a trust.

On 21 March 2003 there was an amended statement of defence and a set off filed in which there was a denial of the ability of the liquidators to sue in their own names, an acceptance that there had been a transfer of funds but the appellant "denied the party and denied liability". It was contended that the funds were transferred to Bokissa Investment Ltd as a Trustee for Bokissa Island Resort Unit Trust, in repayment of funds previously lent to R.A.C.E. Services Limited and that R.A.C.E Services remained indebted to Bokissa Island Resort Unit in the total sum of AU$958,457.00.

The appellant said that the Company R.A.C.E. Services was solvent at the time the transfer was made, and the funds were properly paid in partial repayment of the debt. The appellant further pleaded that there was no understanding, no trust created and in any event there was no such thing as a Quistclose trust in Vanuatu. It sought to set off the AU$100,000.00 which had been received against the debt which remained outstanding.

The Judge noted that the issues to be answered were-

(a) Does the law of Vanuatu recognize a Quistclose trust?
(b) Have the claimant showed one existed in this case for the purposes of summary judgment?

The Judge considered the authority from which that phenomenum arises, Barclays Bank Limited v. Quistclose Investments Limited [1970] A.C. 576. He noted that since Independence the law of Vanuatu has looked to the principles of common law and equity where there is no relevant provision under the Constitution or statute law, and where there is no inconsistency, it will be applicable in Vanuatu having regard only to custom law. He concluded that there was no principle enunciated in the Quistclose trust concept which should not apply in Vanuatu. That finding is not really challenged before us and we respectfully concur with that conclusion.

The second issue to be considered in this appeal is whether the Judge was correct when he concluded that such a trust existed in this case. He noted the intention of the guiding minds of the two companies was clear on the face of the relevant documents. The money was transferred, in effect, to keep the business going in the short term. However, R.A.C.E. Services ceased trading very soon afterwards.

It was argued before us that a transfer to keep the business going was too uncertain as to constitute a specific purpose. Moreover it was submitted that the money was paid on 14 June 2001 but the administrators were not appointed until 18 June. Accordingly the money could have been applied for the alleged specific purpose during that four day period. In the absence of evidence as to how the money was applied during that time, the appellant contended it could not be concluded that the specific purpose had been established and the onus on the respondent to show that the money was not applied for that specific purpose was not discharged.

In response, it was argued that, on the basis of evidence for and on behalf of Bokissa Investments Ltd, the specific purpose of the transfer of the funds was really not in contention. It was specifically noted that there had never been any challenge to the facts:-

(a) That the AU$100,000.00 was transferred on 14 June 2001;

(b) Mr. David Cort, who gave evidence for Bokissa Investments Ltd accepted that the purpose of the transfer was to provide a fund whereby R.A.C.E. Services, or an entity related to it, could have funds to continue trading after the appointment of the voluntary administrator;

(c) Both parties were of a common understanding that the funds were being held by Bokissa Investments Ltd for that specific purpose.

It was also noted by Mr. Morrison in his written submissions that there was no suggestion that the transfer of money had been used in any way which benefited R.A.C.E. Services either between the 14 June 2001 and the 18 June 2001, or any at time thereafter. The respondent therefore contended that the Judge had properly concluded that the money having been

transferred for a specific purpose, which had been frustrated or defeated, there could no defence to the claim for the return of money.

It was noted in particular that these findings arose from evidence which was advanced by the appellant. Accordingly the appellant enjoyed no prospect of success in its defence because the Judge relied on its evidence in reaching the conclusion that summary judgment should be granted.

We have had the opportunity to review, in some detail, evidence which has been available in this case and have been directed particularly to the evidence of David Cort and his wife in public examinations in the Magistrate's Court in Brisbane, Queensland.

In our judgment, it is impossible to read that material without concluding that, as at 14 June 2001, R.A.C.E. was in a critical financial position and its Directors knew it. The transfer of the funds to the appellant Company in Vanuatu, David Cort admits, was because of that situation and as a precaution against the future. Mrs. Cort in her evidence had indicated that they had nothing, assets were likely to be frozen and that this was, to use my words, a nest egg for the future.

In all this we do not ignore the affidavit of Allan Cort dated 10 April 2003. That must be one of the more extraordinary pieces of evidence which the Court has ever had to confront. It makes absolutely no sense on its face. It was put, at its most charitable, that it was apparently prepared for someone else to sign, but it is sheer gobbledygook and nonsense, and we place no reliance of any sort upon it. If anything, it perhaps would raise ones level of suspicion of and cynicism at the ex post facto rationalizations which are now sought to be made.

In a case such as this, which is in factual terms very distant from the factual scenario in any of the previous cases in Australia, New Zealand or the United Kingdom dealing with a Quistclose trust, the Court must keep its feet on the ground and look at reality. The Cort family had an extraordinary array of individual legal entities which they had created to undertake a series of business activities. There was a payment of AU$100,000.00 between one of

these and another one at a time when the former was in a critical financial position.

The appellant is adamant in presenting its case that the AU$100,000.00 was no gift. It is anxious that the Court should not view what occurred as being for any improper purpose in endeavoring to defeat creditors. It is in our view impossible, if you take out those two alternatives, to see what else could have been the reason for the transfer, other than the creation of the trust as so clearly alleged by Mr. David Cort in other proceedings.

It is a necessary implication in this case, that the funds having been transferred for that reason, that if the entities did not continue to operate and the purpose for which the money had allegedly been transferred had been frustrated, then the obligation to repay has to come back.

We note that the authorities suggest that this sort of trust will only arise where the agreed purpose an exclusive purpose, but in this case all the ingenuity of counsel is unable to identify anything which has any touch of reality about it, which would not otherwise constitute offences under the Australian Corporation Legislation or be the most blatant breach of fiduciary duty, or both.

In those circumstances and bearing in mind the nature of the legal entities which were dealing with each other, it appears to us that the conclusion reached by the trial Judge that there was no defence and no amount of trial was going to be able to create a defence, was properly reached.

We are also satisfied on the basis of the evidence before him and before us that the debt which was owed was clearly a debt of Bokissa Resort Unit Trust. Mr. Hopkins said that and Mr. David Cort himself had said that and that material is unchallenged.

We do not overlook the fact that the evidence also discloses that there had been a long history and tradition of money going around. But we indicated

to counsel when people choose to operate their affairs through a stream of legal entities, for whatever perceived advantage they might think that has, they take with it the responsibilities and the consequences of the individual legal form of each of those entities. There was no debt owing by Bokissa Investments, the current appellant, to R.A.C.E. There is nothing in the evidence which would suggest that a debt owing by R.A.C.E. or to some other entities could in any way be set off. The fact that someone might have done a series of bookkeeping transactions and made advances and done things is pure speculation and hypothesis without foundation. The history of money moving and debt payment out of available cash from time to time is no justification in law for saying that there was or could have been a set off in this case.

On that issue of set off, Mr. Cort in his evidence had asserted that the respondent was owed AU$958,000 by the appellant as trustee of the Bokissa Island Unit Trust, and that the payment of AU$100,000 was to be treated as a set off under s.533c Cooperation Act (Australia).

The assertion that Bokissa Investments Ltd was the Trustee of the Bokissa Islands Trust does not appear from the evidence. It showed that the trustee at the relevant time for the Bokissa Islands Trust was JAYSBEURY PTY Ltd (ACM010711470): see the affidavit of Collin Hopkins. There was no evidence to contradict this. Accordingly the Judge was correct to conclude that there was no basis upon which a set off could be claimed or sustained.

The only other issue which arises was the fact that the original proceedings had another named party but this is not a material matter which affects any issue of liability and has not been seriously suggested in this appeal.

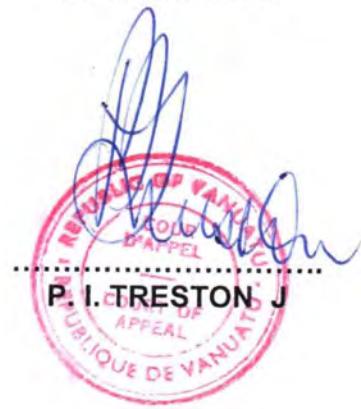
We are therefore of the clear view that, although a Court must always be cautious about the entry of summary judgment, here there are no material conflicts in the evidence. The case is in fact unusual in that the position of the respondent is in fact met by reference to evidence which was produced by the appellant itself. On that basis and applying the standard tests we are of the view that there is no basis upon which we should differ from the judgment of

the Court below. This is a case where summary judgment was clearly appropriate and no set off was available in law.

The appeal is accordingly dismissed. The judgment below is confirmed. The appellant will pay costs in the normal manner.

Dated at Port-Vila this 7th day of November 2003

BY THE COURT



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P. I. TRESTON J