FEDERAL COURT OF AUSTRALIA

Rambaldi (Trustee) v Commissioner of Taxation, in the matter of Alex (Bankrupt) [2017] FCAFC 217

|  |  |
| --- | --- |
| Appeal from: | *Rambaldi (Trustee) v Commissioner of Taxation, in the matter of Alex (Bankrupt*) [2017] FCA 567 |
|  |  |
| File number: | VID 639 of 2017 |
|  |  |
| Judges: | **ALLSOP CJ, DOWSETT AND BURLEY JJ** |
|  |  |
| Date of judgment: | 18 December 2017 |
|  |  |
| Catchwords: | **BANKRUPTCY** – whether a loan agreement between third party and bankrupt to discharge debt to Commissioner of Taxation was a transfer of property – whether a preference under s 122 of *Bankruptcy Act 1966* (Cth) –whether a Quistclose trust existed – appeal dismissed |
|  |  |
| Legislation: | *Bankruptcy Act 1966* (Cth) ss 5, 58(1), 115(1), 116, 122(1)  *Corporations Act 2001* (Cth) s 588FA |
|  |  |
| Cases cited: | *Analogy Pty Ltd (Receiver and Manager appointed) (In Liquidation) v Bell Basic Industries Ltd* (unreported, BC 9502636)  *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liquidation)* (1978) 141 CLR 335  *Australian Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia* (1991) 30 FCR 491  *Barclays Bank Ltd v Quistclose Investments Limited* [1970] AC 567  *George v Webb* [2011] NSWSC 1608  *Re Emanuel (No 14) Pty Ltd (in liq)*, *Macks v Blacklaw & Shadforth Pty Ltd* (1997) 147 ALR 281  *Richardson v The Commercial Banking Company of Sydney Ltd* (1952) 85 CLR 110  *Salvo v New Tel Ltd* [2005] NSWCA 281  *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407  *Toovey v Milne* (1819) 2B & A 683 |
|  |  |
| Date of hearing: | 8 November 2017 |
|  |  |
| Registry: | Victoria |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | General and Personal Insolvency |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 44 |
|  |  |
| Counsel for the Appellant: | Mr L Glick QC with Mr P Fary |
|  |  |
| Solicitor for the Appellant: | Frenkel Partners |
|  |  |
| Counsel for the Respondent: | Mr G Davies QC with Mr S Rosewarne |
|  |  |
| Solicitor for the Respondent: | ATO Review and Dispute Resolution |

|  |  |
| --- | --- |
| **Table of Corrections** |  |
|  |  |
| 1 February 2018 | In the fifth sentence of [43] “QAI” has been replaced with “the Commissioner”. |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | VID 639 of 2017 |
| IN THE MATTER OF ATHINA ALEX (A BANKRUPT) | | |
| BETWEEN: | GESS MICHAEL RAMBALDI AND ANDREW REGINALD YEO (AS JOINT AND SEVERAL TRUSTEES OF THE PROPERTY OF ATHINA ALEX, A BANKRUPT)  Appellant | |
| AND: | COMMISSIONER OF TAXATION  Respondent | |

|  |  |
| --- | --- |
| JUDGES: | ALLSOP CJ, DOWSETT AND BURLEY JJ |
| DATE OF ORDER: | 18 December 2017 |

THE COURT ORDERS THAT:

1. the appeal be dismissed; and
2. the appellant pay the respondent’s costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

# BACKGROUND

1. On 18 March 2014 the Deputy Commissioner of Taxation filed a petition in bankruptcy against Athina Alex (“Ms Alex”). We will refer to both the petitioning creditor and the respondent in this appeal as the “Commissioner”. On 8 December 2014, a Circuit Court Judge made a sequestration order against Ms Alex’s estate. The appellants (the “trustees”) were appointed to be trustees of the estate.
2. The relevant act of bankruptcy was failure to comply with a bankruptcy notice requiring Ms Alex to pay a specified amount to the Commissioner on or before 15 November 2013. Pursuant to s 115(1) of the *Bankruptcy Act 1966* (Cth) (the “Bankruptcy Act”) the bankruptcy is taken to have relation back to, and to have commenced on that date. The delay between the date of filing of the petition and the making of the sequestration order is explained, at least in part, by circumstances which are the subject of these proceedings.
3. Section 58(1) of the Bankruptcy Act provides:

Subject to this Act, where a debtor becomes a bankrupt:

(a) the property of the bankrupt, not being after acquired property, vests forthwith in the Official Trustee or, if, at the time when the debtor becomes a bankrupt, a registered trustee becomes the trustee of the estate of the bankrupt by virtue of section 156A, in that registered trustee; and

(b) after acquired property of the bankrupt vests, as soon as it is acquired by, or devolves on, the bankrupt, in the Official Trustee or, if a registered trustee is the trustee of the estate of the bankrupt, in that registered trustee.

1. Section  122(1) of the Bankruptcy Act provides:

(1) A transfer of property by a person who is insolvent (the debtor) in favour of a creditor is void against the trustee in the debtor’s bankruptcy if the transfer:

(a) had the effect of giving the creditor a preference, priority or advantage over other creditors; and

(b) was made in the period that relates to the debtor, as indicated in the following table.

...

1. For present purposes the relevant period was that beginning 6 months before the presentation of the petition and ending immediately before the date of Ms Alex’s bankruptcy.
2. The primary Judge found that on or about 7 July 2014 the Commissioner received a bank cheque in the amount of $118,071.62 issued by the Commonwealth Bank of Australia. The amount was applied in payment of debts then owed by Ms Alex to the Commissioner. It was common ground that the moneys in question were advanced by Quality Australia Investments Pty Ltd (“QAI”) pursuant to a “loan agreement” (“the agreement”) dated 1 June 2014, between QAI, Ms Alex and City Nominees Pty Ltd (“City Nominees”), a company controlled by her. Under the heading “Background” the agreement recites that:

A. The borrower has a net income tax debt with the Australian Taxation Office of approximately $85,000.00 not including General Interest Charges and penalties. The borrower is the sole director and shareholder of [City Nominees].

B. The Australian Taxation Office is in the process of serving [Ms Alex] with a Creditors Petition. Negotiations are on foot between [Ms Alex’s legal representatives] and the Australian Tax Office to reach a settlement.

C. [Ms Alex] wants to borrow $126,000.00 to pay the income tax debt, GIC and penalties.

D. [Ms Alex] further wants to borrow $5,000.00 to part pay the cost of her [legal representation].

1. Clause 1 sets out the following relevant definitions:

* “Amount Owing” means the outstanding balance plus any fees, costs, taxes or other amounts payable by the [Ms Alex] under this Loan Agreement; For clarity the amount owing as of 1 June 2014 is $131,000.00
* “Borrowers” means [Ms Alex] and [City Nominees].
* “Repayment Date” means the date which is six (6) months after this loan agreement date; for clarity purpose the repayment date will be 1 December 2014.

1. The involvement of City Nominees in the relevant transactions is irrelevant for present purposes. In general, we will dispense with reference to such involvement.
2. Clause 4 of the agreement provides:

[Ms Alex] must only use the loan for the purpose presented to the Lender, namely the payment of the Income Tax Debt relating to [Ms Alex] owed by her to the Australian Taxation Office and payment to [Ms Alex’s legal representatives]. The lenders' cheque for the loan will be drawn on the Deputy Commissioner of Taxation.

1. Fairly clearly, the preposition “on” in the last line should be replaced by the words “in favour of”.
2. Clause 7 provides:

7.1 [Ms Alex] must on the Repayment Date pay to the Lender an amount equal to the Outstanding Sum.

7.2 [Ms Alex] may repay the outstanding sum to the Lender prior to the Repayment Date provided that the Borrower has given to the Lender not less than two (2) months written notice of its intention to do so.

1. It is common ground that at some time prior to 7 July 2014, QAI provided the relevant bank cheque to Ms Alex who deposited it at a post office for credit of the Commissioner.

# these proceedings

1. On 20 July 2016 the trustees commenced proceedings against the Commissioner, seeking the following relief:

A. A declaration pursuant to sections 30(1)(b) and 116 of the [Bankruptcy Act] that [Ms Alex’s] money (as defined in paragraph 9 of the statement of claim) is vested in the [trustees].

B. Further or in the alternative, a declaration pursuant to sections 30(1)(b) and 122 of the Act that the payment (as defined in paragraph 10 of the amended statement of claim) is void against the [trustees].

C. Further or in the alternative, an order pursuant to section 30(1)(b) and 121 of the [Bankruptcy] Act that the payment is void against the [trustees].

D. An order pursuant to section 30(1)(b) of the Act that the [Commissioner] pay the [trustees] the sum of $118,071.62.

E. Interest.

F. Costs.

G. Such further or other orders as the Court sees fit to make.

1. Paragraphs 9‑12 of the statement of claim are as follows:

9. Some-time prior to 7 July 2014, [Ms Alex] received the sum of $131,000.00 as a result of a loan from [QAI] and directed that the sum of $118,071.62 (**bankrupt's money**) be paid to the [Commissioner].

10. On 7 July 2014 (a date after the commencement of the bankruptcy), [Ms Alex] paid $118,071.62 (**payment**) to the [Commissioner] from [her] money.

11. By reason of the matters set out in paragraphs 2 to 10, [Ms Alex’s] money vested in the [trustees] prior to the payment.

12. In the premises:

i. the payment is a transfer of property that is void against the [the trustees]; and

ii. the [trustees] are entitled to recover the payment from the Commissioner.

1. In paras 13‑17 the trustees plead that the alleged payment to the Commissioner:

* had the effect of giving him a preference, priority or advantage over other creditors; and
* was made in the period beginning six months before the presentation of the petition and ending immediately before the date of the bankruptcy of Ms Alex.

1. The Commissioner accepts that the effect of the transaction was to give him a preference, priority or advantage over other creditors, and that it was made during the relevant period.

# A QUISTCLOSE TRUST

1. Although, in the end, the nature of a Quistclose trust may not be relevant to the resolution of this appeal, an explanation of the term will assist in understanding the dealings between QAI, Ms Alex and the Commissioner, the way in which the case was conducted below and on appeal, and the primary Judge’s reasons.
2. At [16] the primary Judge said:

Although the written submissions of the parties traversed a range of issues, the only remaining issue now between the parties is whether the loan money was property of Ms Alex. If it was her property, the Commissioner accepts that the other elements of the claims would be established.

1. At [18] his Honour said:

The Commissioner contends that the loan money was not property of Ms Alex and …, but rather was held on a Quistclose trust for payment to the Commissioner, and, in default, on trust to be repaid to QAI.

1. At [48] of the judgment his Honour concluded:

In the result the loan funds paid by QAI were held on a Quistclose trust and did not become the property of Ms Alex and …. The money is therefore not recoverable by the trustees from the Commissioner. It follows that the application is dismissed with costs.

1. The term, “Quistclose trust” is derived from the decision of the House of Lords in *Barclays Bank Ltd v Quistclose Investments Limited* [1970] AC 567. That case was concerned with circumstances in which one party (the “lender”) advanced money to another party (the “debtor”) who owed money to a third party (the “creditor”) on the agreed basis that the advance would be used only to discharge the relevant debt, the debtor agreeing to pay the lender, at some future time, the amount of the advance. In *Quistclose* at 580, Lord Wilberforce observed:

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 recognized in a series of cases over some 150 years.

1. At 580‑581, referring to the decision in *Toovey v Milne* (1819) 2B & A 683 concerning a similar arrangement, his Lordship said:

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 ... .

These cases have the support of longevity, authority, consistency and, I would add, good sense.

1. In *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liquidation)* (1978) 141 CLR 335 at 353 Gibbs CJ said (Jacobs and Murphy JJ concurring):

I must now deal with the argument advanced by counsel for the Bank in reliance on the decision in *Barclays Bank Ltd. v. Quistclose Investments Ltd*. That case is authority for the proposition that where money is advanced by A to B, with the mutual intention that it should not become part of the assets of B, but should be used exclusively for a specific purpose, there will be implied (at least in the absence of an indication of a contrary intention) a stipulation that if the purpose fails the money will be repaid, and the arrangement will give rise to a relationship of a fiduciary character, or trust.

(Footnotes omitted.)

1. In *Australian Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia* (1991) 30 FCR 491 at 500‑501, Gummow J said, concerning *Quistclose*:

However, in the House of Lords, Lord Wilberforce said ... that a necessary consequence of the mutual intention of Quistclose and Rolls Razor to create arrangements which gave rise to a “primary” trust in favour of those entitled to the dividend was that, if the dividend could not be paid for any reason, the money, as a “secondary” trust, was to be returned to Quistclose; the intention was clear to create the secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out. This characterisation of what occurred is indicative of an express trust with two limbs rather than an express trust in favour of the shareholders and a resulting trust in favour of Quistclose which arose by reason of an incomplete disposition by Quistclose of the whole of its interest in the money lent to Rolls Razor. But, on either characterisation, Quistclose had a beneficial interest (although not at all relevant times an exclusive beneficial interest) in the money in question. Thus, it was not merely in the position of a lender with the benefit of a promise to repay. Nor was Quistclose a settlor who had fully settled a fund upon other parties and did so not retain for itself a beneficial interest sufficient for it to ensure performance of the trust.

1. In *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407 a receiver in possession of a company’s assets (appointed by a secured creditor) applied the proceeds of sale of such assets in discharging debts claimed by the company’s subcontractors. The receiver so acted in order to keep the subcontractors on site and working. In a subsequent liquidation of the company, the liquidator sought to recover the money paid to the subcontractors. The majority (Dawson, Gaudron and Gummow JJ) concluded that funds held by the receiver were held for the benefit of the bank and were paid out to protect the bank’s interest. The payment was therefore not made by, or on behalf of the debtor company. Their Honours said at 437‑438:

No doubt, as the authorities indicate, there may be a payment made by the debtor within the meaning of s 122(1) where the debtor directs a third party who holds funds at the direction of the debtor or is otherwise obliged to the debtor to account to the debtor not by payment to the debtor but to a creditor of the debtor. Thus, in *Re Stevens*, it was said that the debtor “parted with his assets, and the payment which he himself should have received he has authorised to be made to the creditor, and it is just the same as if he had received payment himself and had himself handed such payment to [the creditor]”. The result in that case was that the third party was to be treated as having acted on behalf of the debtor. Again, payments made by the debtor to the bailiff to avoid levy of a judgment are treated for this purpose as payments by the debtor to the judgment creditor, the bailiff having authority from that creditor to receive the moneys and to give a discharge.

In *Ramsay v National Australia Bank Ltd*, the Victorian Full Court, after reviewing the authorities, including passages in the judgments in this Court in *Octavo Investments Pty Ltd v Knight* and *Richardson v Commercial Banking Co of Sydney Ltd*, declared:

“We have seen no authority for the proposition that a payment out of his own moneys by B to C, pursuant to a contractual obligation to discharge A's debt to C, an obligation imposed upon B by a contract between A and B, can be said to be a payment made by A to C. The words of s 451 must be given their ordinary, natural meaning.”

Their Honours were speaking of s 451 of the *Companies (Victoria) Code* which had no material differences from s 565 of the *Corporations Law*.

The result, as applied to the present case, is that, even if the payments by the receiver out of the s 421 account are to be characterised as made pursuant to a contractual obligation of the receiver to Carrier and Air Con to discharge TOC's pre-receivership debts to them, there has been no payment, within the meaning of the preference provisions, made by TOC to Carrier and Air Con. The payments, to adapt the terms used by McLelland CJ in Eq in *Craftsman Modern Constructions Pty Ltd (In liq) v National Bank of Australasia Ltd*, were not made from moneys belonging to TOC, nor in any relevant sense were they made by an agent of TOC.

Counsel for the liquidator submitted that payments were made by the receiver on behalf of TOC by reason of the existence of the agency provided for in the debenture. We have indicated why that submission should not be accepted. Counsel further submitted that, if he had made good the proposition that the payments were made by TOC for the purposes of s 565 of the *Corporations Law* and s 122(1) of the *Bankruptcy Act*, there could be no further objection that these provisions still were inapplicable because the payments were not made out of the property of TOC. He referred to payments made by a third party to the creditor at the direction of the debtor to pay the creditor out of moneys owed by the third party to the debtor. The same situation was said to arise where the debtor paid the creditor by order upon the bank of the debtor out of an account conducted by the debtor and in credit. However, in each of these cases, the payment received by the creditor is, in the sense indicated earlier in these reasons, the product of the chose in action, itself property, represented by the indebtedness of the third party or bank to the debtor.

(Footnotes omitted.)

1. The decision in *Quistclose* was applied by the Full Court of Western Australia in *Analogy Pty Ltd (Receiver and Manager appointed) (In Liquidation) v Bell Basic Industries Ltd* (unreported, BC 9502636). *Quistclose* was also considered and applied by the Court of Appeal of New South Wales in *Salvo v New Tel Ltd* [2005] NSWCA 281. In *George v Webb* [2011] NSWSC 1608, Ward J examined the cases in some detail.
2. The upshot of this brief examination of the cases is that the correctness of the decision in *Quistclose*, and Lord Wilberforce’s reasoning in support of that decision have been widely accepted for almost another 50 years on top of the long history preceding that decision. In some cases (including *Quistclose* itself) the relevant advance was appropriated to a particular account in the name of the debtor, so that the relevant fund could be identified as, in a sense, having come into its hands. In other cases, such as *Sheahan* and the present case, the advance did not, in any sense, pass into the debtor’s hands.
3. The primary Judge concluded that in all but one respect, this case was on all fours with *Quistclose*. The one exception was that in *Quistclose*, as we have said, the moneys were paid into the debtor’s account, so that they actually came into its hands. In the present case, the moneys did not pass into Ms Alex’s hands. The trustees submitted that as the funds did not pass to Ms Alex, there was no need to assume the creation of a Quistclose trust. His Honour rejected this argument, holding that the question was not whether there was a need for a trust at the time of payment, but whether the parties intended that there be a trust.

# THE APPEAL

1. The grounds of appeal are as follows:

1. The Trial Judge erred in law in finding that it is a requirement of s 122(1) of the [Bankruptcy Act] that the "property" referred to in that section be property beneficially owned by [Ms Alex] ("debtor's own property") ... .

2. The Trial Judge erred in law in finding that there was no transfer of "property" by [Ms Alex] within the meaning of s 122(1) of the [Bankruptcy Act ] ... in circumstances where:

(a) legal title and interest in and to the bank cheque and/or the moneys the subject of the bank cheque, vested in the bankrupt upon its delivery to her;

(b) [Ms Alex] exercised her rights as legal owner of the bank cheque by presenting it to the bank for payment in favour of the [Commissioner]; and

(c) [Ms Alex] obtained such legal title and interest to the bank cheque prior to the payment to the [Commissioner].

3. The Trial Judge erred in law in failing to find that there was "a transfer of property by [Ms Alex] to [the Commissioner]" constituted by the transfer of legal title to and interest in the bank cheque in circumstances ... ) where:

(a) [Ms Alex] borrowed moneys the subject of the payment from QAI;

(b) [Ms Alex] directed that QAI pay the Commissioner;

(c) [Ms Alex] became indebted to QAI;

(d) QAI procured a bank cheque in favour of the Commissioner;

(e) QAI provided the bank cheque to [Ms Alex];

(f) [Ms Alex] gave the bank cheque to the Commissioner; and

(g) the Commissioner applied the bank cheque in part payment of the amount owed by [Ms Alex] to it.

4. The Trial Judge erred in law in failing to find that there was "a transfer of property by [Ms Alex] to [the Commissioner]" within the meaning of s 122(1) of the [Bankruptcy Act] in the circumstances set out in ground 3.

5. The Trial Judge erred in law in failing to find that the Commissioner had received a “preference, priority or advantage”, or at least an “advantage”, over other creditors in circumstances where:

(a) the Commissioner received a part payment of the debt owed to him;

(b) other creditors did not receive a part payment.

6. The Trial Judge erred in failing to find that:

(a) the payment by [Ms Alex] to the Commissioner was "a course of dealing initiated by a debtor that is intended to, and does, extinguish a creditor's debt" (using the language of *Re Emanuel (No 14) Pty Ltd (in liq)*, *Macks v Blacklaw & Shadforth Pty Ltd* (1997) 147 ALR 281 (**Emanuel**) in the context of Part 5.7B of the *Corporations Act 2001* (Cth)); and

(b) "a course of dealing initiated by a debtor that is intended to, and does, extinguish a creditor's debt can in its totality" (**Emanuel**) be a "transfer of property by [Ms Alex] to [the Commissioner" within the meaning of s 122(1) of the [Bankruptcy Act] ... ).

7. The Trial Judge erred in failing to find that the other elements of s 122(1) of the [Bankruptcy Act] were satisfied.

8. Further or in the alternative, the Trial Judge erred by failing to find that:

(a) [Ms Alex’s] rights under the QAI loan agreement were "property" within the meaning of s 5 of the [Bankruptcy Act] (**relevant property**);

(b) the relevant property vested in the trustees pursuant to ss 58, 115 and 116 of the [Bankruptcy Act] and the doctrine of relation back; and

(c) the moneys paid to the [Commissioner] were the "identifiable substitute" for the relevant property (using the language of Lindgren J. in *Anscor Pty Ltd v Clout (Trustee)* [2004] FCAFC 71.

1. At the hearing of the appeal, the trustees indicated that they would make no submissions concerning ground 5, the Commissioner having conceded that if the trustees succeeded on another ground, he would be liable to pay to them the amount received. The trustees also abandoned either ground 7 or ground 8. Unfortunately, the transcript discloses that counsel’s intention was a little unclear. It may be that the intention was to abandon ground 7. As we understand it, the Commissioner’s views regarding ground 5 would also extend to ground 7. As to ground 8, counsel for the trustees addressed it at ts 23‑24 and, at ts 24, ll 23‑30, abandoned reliance on it.
2. In their submissions on appeal, the trustees submit that the policy of the Australian bankruptcy legislation was, “securing equality of distribution among creditors of the same class”, which policy had the effect of, deterring the, “race to the Courthouse”. At paras 4 and 5 of the trustees’ written outline they submit:

4. The trustees contend that the course or totality of dealings between [Ms Alex] and the Commissioner was “[a] transfer of property by a person who is insolvent (the debtor) in favour of a creditor” within the meaning of the section.

5. The “transfer of property” here included the following elements:

(a) [Ms Alex] borrowed moneys the subject of the payment from QAI;

(b) [Ms Alex] directed that QAI pay the Commissioner;

(c) [Ms Alex] became indebted to QAI;

(d) QAI procured a bank cheque in favour of the Commissioner;

(e) QAI provided the bank cheque to [Ms Alex];

(f) [Ms Alex] gave the bank cheque to the Commissioner; and

(g) the Commissioner applied the bank cheque in part payment of the amount owed by [Ms Alex] to him.

1. In the course of the hearing, however, the trustees accepted that their case as pleaded was that the payment of $118,071.62 to the Commissioner was void as against the trustees and that such sum should be paid to them. Hence the relevant “property” was that amount. The question was whether Ms Alex had transferred property (ie the sum of $118,071.62) to the Commissioner.
2. The trustees submit that a finding that there was a Quistclose trust was not inconsistent with a finding that there had been a transfer of property within the meaning of s 122. They rely upon a passage in the decision of the Full Court in *Re Emanuel (No 14) Pty Ltd (in liq);* *Macks v Blacklaw & Shadforth Pty Ltd* (1997) 147 ALR 281. That case arose under the provisions of s 588FA of the Corporations Law then in force. That provision was in similar terms to those of s 588FA of the *Corporations Act 2001* (Cth). Section 122 of the Bankruptcy Act is in quite different form. It focusses on a transfer of property by the insolvent debtor in favour of a creditor. On the other hand, s 588FA focusses on a “transaction” to which the insolvent company and a creditor are parties, with or without other parties. Clearly, the word “transaction” may include many contractual or other arrangements apart from transfers. Further, under s 588FA the benefit to the creditor may not necessarily be derived from any action by the insolvent company. The decision in *Emanuel* focussed on the wording of s 588FA. However at 290 the Full Court said:

Finally we should indicate that in written supplementary submissions the respondent has contended that the deed on its proper construction created a trust for the payment of creditors of a type similar to that considered in [*Quistclose***]**: on the so-called "Quistclose" trust, see *Re Australian Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia* (1991) 30 FCR 491; 102 ALR 681; 5 ACSR 587 especially at FCR 499ff …

1. The Court found that the evidence did not support the submission that a trust had been created. In the present case, the trustees rely particularly upon the sentence:

All that a trust finding would do would be to change the machinery employed by the parties in extinguishing Emanuel's debt to Blacklaw.

1. We see no assistance for the trustees’ case in that passage. As we understand the case, the payment by the third party lender to the creditor was made in settlement of claims between the third party lender and the debtor. Hence the payment involved a reduction in the debtor’s claim against the third party lender. Such a transaction might well satisfy s 588FA. However that proposition says nothing about the application of s 122 to the present case.
2. Concerning grounds 1, 2 and 3, the trustees submit that the primary Judge erred in:

* finding that s 122(1) required that the relevant property be beneficially owned by Ms Alex;
* finding that there was no transfer of property within the meaning of s 122(1);
* finding that there was no transfer of property by Ms Alex, given that:
* Ms Alex had legal title to the bank cheque and/or the moneys represented by the bank cheque, which property vested in her upon delivery to her of the bank cheque;
* Ms Alex exercised her rights as legal owner of the bank cheque by presenting it to the bank for payment to the Commissioner; and
* Ms Alex obtained legal title and interest to the bank cheque prior to payment to the Commissioner;
* failing to find that there was a transfer of property by Ms Alex to the Commissioner created by the transfer of the legal title and interest in the bank cheque.

1. Once it is accepted that the relevant property was the sum of $118,071.62, and any relevant transfer had to be of that amount, it becomes obvious that these grounds are without merit. There is simply no point at which ownership of the bank cheque, or the funds represented by it passed to Ms Alex. The bank cheque was acquired by QAI and, inferentially, at its expense. The cheque was drawn upon the relevant bank and payable to the Commissioner. The trustees provided no real basis for inferring that Ms Alex had ever become entitled to the money. Rather, the trustees seemed to assert that she claimed some entitlement to the money based on her alleged legal rights over the bank cheque. However the argument concerning the legal title to the bank cheque is without merit. There is simply no basis for inferring that Ms Alex had anything more than possession of it for a limited purpose. At one stage, the trustees seemed to submit that the relevant interest was that of a person in possession of a chattel against any other person who tries to deprive him or her of such possession. The irrelevance of such a proposition is obvious.
2. In submissions, the trustees emphasized that the agreement reflected a borrowing by Ms Alex, and so the payment to the Commissioner should be viewed as a payment by direction of her money. That, however, is to mischaracterize the transaction. Ms Alex’s indebtedness arose because of QAI’s payment of its money to the Commissioner pursuant to the agreement with her. She received no property from QAI and made no payment to the Commissioner.
3. We find nothing of assistance in the decision of the High Court in *Richardson v The Commercial Banking Company of Sydney Ltd* (1952) 85 CLR 110.
4. On appeal, the Commissioner effectively submits that there was no transfer of property to, or by Ms Alex. Our rejection of the trustees’ analysis of the facts leads to this conclusion. Once that proposition is accepted, it follows that the trustees must fail. In our view, the trustees correctly submit that no Quistclose trust arose. However the parties had in mind such a transaction. The need for it would only have arisen had the advance been made to Ms Alex. For whatever reason, that event did not occur. The most that she had was a contractual right, enforceable against QAI. There was certainly no suggestion that any such right was transferred by her to anybody else, let alone to the Commissioner. The funds passed directly to the Commissioner, and so no trust came into effect.
5. Our findings concerning ground 3 also dispose of ground 4. Ground 6 relies upon the assumption that the decision in *Emanuel* is of some present relevance. We have rejected that proposition.
6. For reasons previously given, we need not deal with the other grounds.
7. We should deal with one other matter. We have concluded that no Quistclose Trust arose because, in effect, no legal or equitable interest ever passed to Ms Alex. At [48], the primary Judge held that the funds paid by QAI were held on a Quistclose trust and did not become the property of Ms Alex and City Nominees. We agree with the second proposition, but not the first. The Commissioner’s case as pleaded was always either that the money was paid to the Commissioner and not to Ms Alex or, alternatively, that it was advanced to her on trust to pay to the Commissioner. See para 11 of the amended notice of defence. The order under appeal was simply that the application be dismissed with costs. That order was based upon the finding that property in the money had not passed to Ms Alex, not upon the finding that there was a Quistclose trust. Hence his Honour’s finding concerning the trust was of no significance. However we thought it appropriate to state our views fully.
8. The appeal must be dismissed with costs.

|  |
| --- |
| I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop, Justice Dowsett and Justice Burley. |

Associate:

Dated: 18 December 2017