AEROLIFT INTERNATIONAL LIMITED ~V~ MAHOE HELI-LIFT (SI) LIMITED AND MAHOE SAWMILLS LIMITED AND ATTORNEY GENERAL

High Court of Solomon Islands
(Palmer J.)

Civil Case No. 387 of 1995

Date of Judgment: 6th September 2002

Bridge Lawyers for the first and second Applicants/Defendants
Sol-Law for the Respondent/Plaintiff
Attorney-General for the Third Defendant

Palmer J.: I gave final judgment in this case on 14th September 2001. Part of the final orders issued by this Court were:

> *"(C)(1). Allow claim* (against the Director of Civil Aviation) *for reasonable damages for wrongful grounding, negligence and breach of duty for the period December 1995 to July 1996 be assessed in chambers if not agreed, plus interest at 5% with effect from 12th December 1995 to date of payment."* [Words in brackets added]
>
> *(F)(1). Order release of Funds plus interest acquired from the term deposit, to be paid to the Plaintiff less any taxes, dues and costs payable to Government."*

On same date, learned Counsel Mr. Nori applied by Summons seeking orders to have order "(F)(1)" above varied and to be paid to the second Defendant (hereinafter referred to as "MSL") instead.

Submissions on this Summons were agreed by learned Counsels to be made in writing. These were lodged in February and March 2002 unfortunately Court has not been able to deliver judgment until today.

Counsel Nori submits that it is totally inconsistent with the reasons and judgment of the court that the funds restrained being the sum of USD157, 340-00 should be released in favour of the Plaintiff (hereinafter referred to as "Aerolift"). Those funds formed part of the claim of Aerolift for lease of the helicopter pursuant to the lease agreement entered into with MSL on 28th June 1995. As part of the payment proceeds for use of that helicopter, the first Defendant (hereinafter referred to as "MSI"), had issued irrevocable letters of authority ("ILA") to the National Bank of Solomon Islands Limited ("NBSIL") to have funds paid in favour of Aerolift as and when they became

available. They were however restrained by the court as there appeared to be dispute on the question whether they were due and owing or not.

Learned Counsel Mr. Nori points out in his submissions that the court in its judgment had ruled against Aerolift on almost all of its claims, which meant that such order for the release of the restrained funds in favour of Aerolift ought not to have been made. He submits they ought to be released in favour of MSL instead.

Aerolift on the other hand argues to the contrary that the order was correct in any event as it was impressed with a primary trust in favour of Aerolift. Learned Counsel Mr. Sullivan based his arguments on the principles of the **Quistclose Trust** enunciated in *Barclays Bank Ltd v. Quistclose Investments [1970] AC 567* (House of Lords).

The essence of a *Quistclose Trust* in relation to the facts of this case is two-fold: (i) that the ILA had been impressed with a trust such that in the event the trust fails the proceeds of the ILA should be repaid to MSI, and (ii) that NBSIL had notice of that trust.

It is not in dispute that the primary trust was vested in Aerolift as the intended recipient of the proceeds of the ILA for purposes of paying off the debts or liability of MSL. It is also not in dispute that NBSIL had notice of that primary trust as well as the secondary trust of MSI.

Unfortunately in analyzing the application of the principles of the *Quistclose Trust*, I do not arrive at the same conclusion as that which had been impressed upon me by learned Counsel Mr. Sullivan in his submissions. The basis on which the ILA had been issued was on the ground that a legally binding and enforceable contract existed between Aerolift and MSL. This Court however had subsequently found in its judgment that the lease agreement from which the debt was due and owing was illegal and thereby unenforceable. The trust thereby in my respectful view must necessarily fail. Just as the lease agreement could not be enforced for illegality the trust in this case cannot also be enforced. To do so would simply be to permit the illegal contract to be enforced under the guise of a *Quistclose Trust.* This court cannot permit that.

The second ground relied on by Aerolift is that MSI should also be made liable in tort by this Court in conjunction with the Director of Civil Aviation ("DCA") for breach of duty for the wrongful grounding and continued detention of the helicopter from December 1995 to July 1996. This submission was based essentially on the grounds that there had been collusion between Bergman and the DCA, which resulted in the wrongful grounding of Aerolift's helicopter. Unfortunately, I am not satisfied that MSI can be held liable for something which was not within its duty to discharge. The responsibility for making the necessary orders (that is orders for grounding and detention) fall squarely on the shoulders of the DCA and no amount of excuse or

blame can exonerate him from his duties, or shift the duty and responsibility to Chris Bergman or MSI. No amount of collusion can shift the burden of making the relevant orders, to MSI. The DCA alone is responsible and must bear the consequences of any negligent action and damages, which flow from that. This ground therefore must also fail.

Finally, Mr. Nori submits the funds should be released in favour of MSL as the rightful owner. Unfortunately he is also wrong on that. Where the primary trust fails, the funds must return to the person who holds the secondary trust over those funds. In this instance, it is MSI.

I am satisfied those funds should be released in favour of MSI and I do so order. I do note however, that in his concluding submissions, learned Counsel Mr. Sullivan had submitted that those funds in any event should continue to be restrained pending expiry of the appeal period and where an appeal is filed pending final determination of the said appeal. I am satisfied such order should be granted.

ORDERS OF THE COURT:

1. **Amend paragraph (F)(1) of the orders of this court dated 14th September 2001 by deleting that order and replacing it with the order to the effect that the restrained funds in the sum of USD157, 340-00 less any taxes, dues and costs payable to the Solomon Islands Government, shall be paid out to the first Defendant, Mahoe Heli-Lift (SI) Limited,**

   Provided that the said funds shall continue to be restrained until expiry of the appeal period and where an appeal has been filed until determination of the appeal.

2. **Each party to bear their own costs in this application.**

The Court.