SUPREME COURT OF QUEENSLAND

CITATION:	*Vella & Anor v Gustafson & Ors* [2009] QSC 424
PARTIES:	**AUGUSTIN JOSEPH VELLA** (first plaintiff) and **NICALEX (AUST) PTY LTD ACN 103 047 356** (second plaintiff) **v** **STEPHEN GUSTAFSON** (first defendant) and **STEPHEN ANTHONY MATTHEWS** (second defendant) and **TAYLERED DEVELOPMENT PTY LIMITED ACN 068 984 976** (third defendant)
FILE NO/S:	BS 476 of 2007
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	3 and 4 December 2009
JUDGE:	Martin J
ORDER:	**1. JUDGMENT FOR THE PLAINTIFFS AGAINST THE FIRST DEFENDANT IN THE SUM OF $300,000 WITH INTEREST FROM 15 AUGUST 2005 TO TODAY.** **2. THE CLAIM AGAINST THE SECOND AND THIRD DEFENDANTS IS DISMISSED.**
CATCHWORDS:	LEGAL PRACTITIONERS – SOLICITOR AND CLIENT _ RETAINER – BREACH OF RETAINER – NEGLIGENCE – Where plaintiffs entered a money lending arrangement with a third party – Where first defendant prepared documents to effect the transaction – Where loan was unsecured - Where loan was not repaid – Where plaintiffs alleges that the first defendant was acting as their solicitor – Where plaintiffs alleges that the first defendant breached his retainer or was

negligent – Where first defendant disputes he was acting as the plaintiffs' solicitor – Where first defendant alleges the existence of a joint venture arrangement - Whether the first defendant was acting as solicitor for the plaintiffs – Whether the first defendant breached his retainer – Whether the first defendant was negligent – Whether the first defendant should be held solely responsible for the plaintiffs' loss.

RESTITUTION – UNJUST ENRICHMENT – Where plaintiffs transferred $300,000 to the second defendant pursuant to a money lending arrangement with third party – Where second defendant was not a party to the arrangement - Where money was intended to serve as a deposit for the sale of the second defendant's property to third party – Where no contract of sale was entered into – Where plaintiffs seek the return of the $300,000 on basis of unjust enrichment – Where second defendant alleges the money was received by him as repayment of loan to the third party – Where second defendant disputes knowledge of the plaintiffs' loan arrangement – Where second defendant disputes obligation to enter contract of sale with third party – Whether second defendant was aware of plaintiffs' loan arrangement – Whether second defendant was obliged to enter contract for sale – Whether the second defendant was unjustly enriched.

Black v Freedman & Co (1910) 12 CLR 105
Brandi v Mingot (1976) 51 ALJR 207
Dew v Richardson [1999] QSC 192
Hospitality Group Pty Ltd v Australian Rugby Union Ltd (2001) 110 FCR 157
Jones v Dunkel (1959) 101 CLR 298
Stringer v Flehr & Walker [2003] QSC 370

COUNSEL: L D Bowden with B Blond for the plaintiffs
S J English for the first defendant
S A Matthews for himself and the third defendant

SOLICITORS: QBM Lawyers for the plaintiffs
Gustafson's Lawyers for the first defendant

[1] The plaintiffs seek judgment against each defendant in the sum of $300,000. Against the first defendant, the plaintiffs plead that they have suffered damage in that amount by reason of:

(a) A breach by the first defendant of the retainer by the plaintiffs of the first defendant, or
(b) The breach by the first defendant of the duty of care he owed to the plaintiffs or
(c) Both (a) and (b).

Against the second and third defendant, the plaintiffs seek restitution of that same sum on the basis that they have been unjustly enriched.

Background

[2] The relationships which developed among the parties and the factual circumstances surrounding transactions among them are complicated and, to a large extent, in dispute. Some of the basic details of interactions between the parties, however, are set out below.

[3] The first plaintiff (Mr Vella) is a real estate agent with an interest in property development. Mr Vella is also the sole director of the second plaintiff (Nicalex).

[4] The first defendant (Mr Gustafson) is the principal of Gustafson's Solicitors on the Gold Coast. That firm's practice concentrates on conveyancing.

[5] The second defendant, Mr Matthews, is a property developer and was, at all relevant times, a part-owner of a property at Molendinar ("the Molendinar property"), near Southport. He is also the director of the third defendant, Taylered Development Pty Ltd ("**Taylered Development**").

[6] In about 2002 Gustafson's Solicitors began to undertake conveyancing work for Mr Vella through Nicalex and another company he controlled, Jangus Developments Pty Ltd. That work was done by an employee of Gustafson's Solicitors, Christine French. At some time between 2002 and August 2005 Mr Vella told Ms French he had been approached by somebody about a money-lending venture and she suggested that he meet Mr Gustafson, who could assist him with any transaction. Mr Vella entered into some form of loan which he described as a "second mortgage situation". Under the transaction, Mr Vella lent $365,000 for six months at an annualised interest rate of 100%. He was to receive $50,000 after three months and the balance with interest at six months. Mr Vella was repaid the $50,000 but nothing else was received. He is seeking to recover what he can from the sale of the secured property.

[7] In 2005, Mr Gustafson agreed to lend $200,000 to a Mr Shane Vincent, another developer, whose relevance to these proceedings will soon become apparent. Mr Vincent defaulted on the loan and Mr Gustafson was not repaid. Mr Vincent later purported to be, but was not, a director of a company called Vinmatt Pty Ltd ("**Vinmatt**"). Mr Vincent had been an undischarged bankrupt since 2004, although this fact was unknown to the parties at the time of the relevant transaction. None of Mr Vincent's activities in relation to Vinmatt were authorised and that company has since been deregistered.

[8] Mr Matthews was also acquainted with Mr Vincent through some earlier development work. From 15 August 2002 to 7 July 2005, Mr Matthews was noted in ASIC records as a director of Vinmatt, but he denied any knowledge of that and denied ever consenting to becoming a director.

[9] The dispute in these proceedings arises out of a loan arrangement entered into between Mr Vella and Mr Vincent. The circumstances surrounding this loan were

that, in 2005, Mr Vincent expressed a desire to purchase Mr Matthew's Molendinar property for development purposes. Mr Gustafson agreed to assist Mr Vincent in the acquisition of the Molendinar property, in the hope that, through the prospective development of the property, Mr Vincent would be able to realise sufficient profits to repay Mr Gustafson's loan.

[10] Mr Vincent, purportedly through the company Vinmatt, entered into negotiations with Mr Matthews and the other owners of the Molendinar property for the purchase of the land. It soon became apparent, however, that the owners of that property were unwilling to sell the property unless, it is alleged by the plaintiffs, $300,000 was provided in advance to enable Mr Matthews to purchase an alternative property in Tasmania.

[11] On 13 August, Mr Vincent, not having the $300,000 otherwise available to him, contacted Mr Vella, allegedly at the suggestion of Mr Gustafson, about the prospect of obtaining a short-term loan. Mr Vella expressed some interest in the proposal and, on 14 August, agreed to a meet with Mr Vella and Mr Gustafson the following day. In the meantime, Mr Vella discussed the loan arrangement with an associate, Mr Hookway. Mr Hookway was not available to attend the scheduled meeting, so it was agreed that Mr Vella would attend the meeting alone, assess the proposal's merits and report back to Mr Hookway before taking further action.

[12] On 15 August, Mr Vella met with Mr Vincent at Mr Gustafson's office. Exactly what was discussed, who was present at various times and what each person's role in the transaction was to be is in dispute. However, it is clear that a sense of urgency pervaded the meeting and that there was some pressure on Mr Vella to transfer the full $300,000 to Vinmatt that very day. In exchange, it was proposed that Mr Vella would receive shares in the Geoff Wolter Unit Trust, of which Vinmatt was to be the trustee. The interest rate on the loan would be $25,000 per full calendar month or $822.00 per day. The full loan amount, plus interest, would be repaid by 15 November 2005.

[13] At the end of meeting, the plaintiff agreed to enter the transaction and to execute documents necessary to give it legal effect. As Mr Hookway was not immediately available to execute the documents, Mr Vella agreed that he would provide the full $300,000 himself to begin with, and then enter a separate arrangement with Mr Hookway to allow the latter to participate via a contribution of $150,000 to Mr Vella.

[14] Bank records establish that at 1:10 pm on 15 August 2005 a transfer was made from the bank account of Nicalex, Mr Vella's company, to the trust account of Douglas and Collins Lawyers, a Tasmanian firm acting for Mr Matthews.

[15] The following documents were prepared by Mr Gustafson and signed by Mr Vella and others on or about the same day:

(a) Declaration of Trust (as between Mr Vella and Mr Hookway in relation to Mr Hookway's contribution);
(b) Application for units in the Geoff Wolter Unit Trust ("the unit trust") (by Mr Vella);
(c) Trust deed for the Geoff Wolter Unit Trust;

(d) Deed of option agreement ("option agreement") (for the benefit and protection of Mr Vella's interests).

[16] No traditional loan or mortgage documents in favour of the plaintiffs were ever executed. At all material times, the unit trust had no assets of value and the units were worthless. The plaintiffs, therefore, had no security for the loan, nor did they receive any personal guarantees from the directors or shareholders of Vinmatt.

[17] Once received into the solicitor's trust account, the $300,000 was made available to Mr Matthews, who says that he retained $200,000 for the purchase of the Tasmanian property and transferred the remaining $100,000 to the account of Mr Vincent.

[18] On or about 15 September 2005, the first plaintiff exercised the options under the option agreement, converting the first plaintiff's interest in the Geoff Wolter Unit Trust as holder of the units to an unsecured loan in the sum of $300,000.

[19] Vinmatt failed to repay the loan by 15 November 2005 and defaulted on the loan.

[20] No contract was ever executed for the sale of the Molendinar to Mr Vincent or Vinmatt. The property was not transferred to Vinmatt and Vinmatt did not give a mortgage to the plaintiffs.

[21] None of the $300,000 has ever been repaid to Mr Vella.

The causes of action

[22] The plaintiff's cause of action against the first defendant is based on breach of retainer. Mr Vella alleges that Mr Gustafson was, at all material times, acting as his legal representative. He claims that it was Mr Gustafson's duty to properly inform and warn him of the risks associated with the transaction and to take various actions necessary to secure and protect his interests. Mr Vella alleges that Mr Gustafson failed to properly perform these duties and should be held liable as a result. Mr Gustafson disputes this claim on the basis that at no time did he act as solicitor for the plaintiff or his company, Nicalex, that he was prevented from doing so by his personal interest in the transaction. He submits that the proposed arrangement between Mr Vella, Mr Vincent and himself was that of a Joint Venture for the development of the Molendinar property. He submits that he prepared legal documents as part of his contribution to the Joint Venture, and not as a legal adviser to either plaintiff. As such, he says he owed no duties to either of those parties.

[23] The cause of action against the second and third defendant is for unjust enrichment and in restitution. As to Mr Matthews, the plaintiffs contend that he accepted the $300,000 from Mr Vella with the knowledge that the money was paid as a conditional loan, not to be used other than in connection with the execution of a contract in favour of Vinmatt in respect of the Molendinar property. To retain that money, in circumstances where the expected contract was never executed, is to be unjustly enriched. Against this, Mr Matthews argues that he never understood the transfer of $300,000 to be a conditional loan from Mr Vella or a deposit for the sale of the Molendinar property to Mr Vincent or Vinmatt. He says there was no obligation under any agreement to sell that property. Rather, he pleads that he was owed $200,000 by Mr Vincent and that the amount of $300,000 was paid to him as

settlement of that debt. He says the extra $100,000 was returned to Mr Vincent on the basis that the amount paid exceeded the amount owing.

Was Mr Gustafson acting for Mr Vella and Nicalex?

[24] Mr Gustafson maintained that he was never acting as Mr Vella's or Nicalex's solicitor in these arrangements, but that both he and Mr Vella were engaging in the transaction on their own behalves. Mr Bella gave evidence that, during the meeting on 15 August, he asked Mr Gustafson on a number of occasions if the proposal was safe and was told that no such proposal was completely safe but that he (Mr Gustafson) would protect his interests as he had done in the previous transaction.

[25] I interpolate here that it is curious that Mr Vella, who had already been party to a failed high interest transaction, and Mr Gustafson, who had been party to a similar transaction with Mr Vincent, should engage in the same type of enterprise again. Mr Gustafson said he saw it as his only hope of recovering his losses from the first, failed loan agreement. It is, I think, most likely that cupidity overwhelmed common sense with both of them; but that plays no part in the assessment of their legal rights.

[26] Mr Gustafson maintained that he was not acting as a solicitor when he took part in the meeting and that he had not since then acted for either of the plaintiffs.

[27] Another unusual aspect of the history of this transaction is that Mr Gustafson, who has been a solicitor for about 30 years, took no notes of the conversations had during the 15 August meeting or at any time after it. Mr Gustafson explained that this was because he was not acting for anybody but himself. The absence of such notes, while it might be thought to be unusual, does not necessarily place Mr Gustafson at any elevated position of risk of being disbelieved. As Chesterman J said in *Dew v Richardson* [1999] QSC 192:

> "[10] I was referred to the judgment of Denning LJ in *Griffiths v Evans* [1953] 1 WLR 1424 at 1428 at which the judge said:
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> > '... I would observe that where there is a difference between a solicitor and his client ... the courts have said, for the last 100 years or more, that the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it ... The reason is plain. It is because the client is ignorant and the solicitor is, or should be, learned. If the solicitor does not take the precaution of getting a written retainer he has only himself to thank for being at variance with his client over it and must take the consequences.'
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> The judgment was a dissenting one. The other Lord Justices merely noted that the solicitor's evidence had been accepted by the trial judge and, conventionally, decided the case in accordance with the finding on credit. **I cannot accept it is a principle of law that wherever a solicitor and his client**

> **disagree about the terms of a retainer (or advice) and the solicitor has not made a written note of the communication the client's evidence *must* be accepted. Findings of fact, especially those based upon an opinion as to the creditworthiness of witnesses, are to be made from a careful and objective examination of the evidence adduced with respect to those facts.** To introduce the notion that in a given circumstance facts must be found a certain way is to replace justice in the individual case determined by the application of legal principle to idiosyncratic facts with the arbitrariness of a determination made by reference to a mindless ritual.
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> I approach the critical question on the basis that both client and solicitor, plaintiff and defendant, have an equal right to be believed. Which of their respective versions is to be accepted will depend upon the persuasiveness of their evidence as judged by surrounding, objective circumstances." (emphasis added)

[28] I return to the question of the existence of a retainer. The means by which the existence of a retainer might be established were considered by Philippides J in *Stringer v Flehr & Walker* [2003] QSC 370. Her Honour said:

> "[72] It is clear that in addition to a retainer arising by express agreement, a retainer may be inferred from the acts and conduct of the parties as well as or in the absence of their express words. As was stated in *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd*, the question in the latter class of case is whether the conduct of the parties viewed in the light of the surrounding circumstances shows a tacit understanding or agreement. The conduct of the parties must be capable of proving all the essential elements of an express contract. A retainer may thus be presumed in circumstances where it is proved that the solicitor and client relationship in fact existed. **However, in such cases the de facto relationship must be a necessary and clear inference from the proved facts before a retainer will be presumed**.
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> [73] In *Pergrum v Fatharly* Anderson J considered the principles concerning the implication of a retainer stating:
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> > '**When both parties to a transaction consult the same solicitor and together give him the information needed to prepare the documents in which their respective rights and obligations are to be set out and the solicitor accepts responsibility to prepare the documents without any indication that he cannot fully discharge his professional duties to them both there is a strong bias towards finding that the solicitor tacitly agrees to act for both parties and to undertake the usual professional responsibilities to them both … In the absence of a clear indication by the solicitor that the solicitor does not**

> **accept one of the parties as his client it is natural in such a case to assume both are relying on him for professional advice and assistance**. This follows from the mere fact that both have consulted him. There may be other circumstances which show that there is no reliance by one or other of the parties on the solicitor, but, if not, reliance should be inferred as a fact. And when a solicitor accepts responsibility to do professional work requiring special knowledge and skill and there is in fact a reliance on him to apply his expert knowledge and skill in the performance of that work, there exists 'the elements which lie at the heart of the ordinary relationship between a solicitor and his client … ' See *Hawkins v Clayton* (1988) 164 CLR 539 at 578 per Deane J. …
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> This does not mean a solicitor whose services are sought by both parties is bound to accept that he is to serve both parties. He can refuse to do so and elect to act for one party only. This requires a very clear statement by the solicitor that this is to be his position.'" (emphasis added)

[29] Mr Gustafson consistently denied he was acting for Mr Vella and said that he had told him that he could not act as he, too, was a party to the transaction and, thus, was in a position of conflict. There can be no doubt that these circumstances would give rise to a conflict but that, alone, cannot prevent the creation of a solicitor/client relationship.

[30] The other person present at the 15 August meeting was Mr Vincent. It was put by Mr Bowden that I should draw the inference that, as Mr Vincent was not called, he could not give evidence that would assist Mr Gustafson. While that inference was open, it is open with respect to both the plaintiffs and the first defendant. All the evidence points towards Mr Vincent having been a rogue and it is not surprising that neither side sought to have him give evidence.

[31] In order to resolve the conflict in evidence between the plaintiffs and the first defendant, I intend to examine the documentary evidence which has been established. At the meeting which took place, Mr Gustafson had already arranged to have produced certain documents. They were: an application for units in the Geoff Wolter Unit Trust, the trust deed for the Geoff Wolter Unit Trust, an Option Agreement between Mr Vella and Vinmatt, a declaration of trust whereby Mr Vella declared that he held units in the Geoff Wolter Unit Trust for the sole benefit of Mr Hookway. Later, Mr Gustafson prepared for Mr Vella a notice of exercise of option with respect to the deed between Vinmatt and Vella. There are also a series of letters written on the letterhead of Gustafson's solicitors which point to the existence of a retainer:

- Letter to Douglas and Collins, 24 February 2006 "We act for Nicalex Pty Ltd …"
- Letters of 28 February 2006 and 28 February 2006 to Douglas and Collins.
- Email to the second defendant of 1 March 2006 in which the following appears: "I have reported your advice to my client and am now

instructed as follows. Unless copies of a signed contract or transfer of Licuria's interest to you and your wife and a contract on the above terms signed by you and your wife to Vinmatt P/L are in my hands or I receive a bank cheque for $300,000 in favour of A J Vella Superannuation Fund within seven days from today, I am strongly advising my client to commence legal proceedings against you and Taylered Investments Pty Ltd and most likely your wife… You have had the use of my client's money for some six and a half months …"

- Letter to the first plaintiff on 15 March 2006: "We refer to the above matter for which you have requested the file. We have not billed you in respect of this matter as it was our understanding that the costs associated with the project would be paid by Vinmatt Pty Ltd." The letter goes on to refer to a "note of initial instructions to document proposed transaction". The balance of the letter is one which is consistent with the relationship of solicitor and client.
- A mortgage document prepared by the first defendant for the plaintiff dated 25 August 2005.

[32] Mr Vella retained his present solicitors in early 2006 and sought to recover his file from the first defendant. Mr Vella's solicitors then engaged in correspondence with Mr Gustafson in which they set out Mr Vella's version of events and it was not until a letter of 31 May 2006 that Mr Gustafson said that he did not believe that he was acting for Mr Vella at the relevant time.

[33] The documentary evidence is consistent with a relationship of solicitor and client. It was argued for Mr Gustafson that his actions were those of a desperate man seeking to recover his own losses. But that does not explain the references in correspondence to "act for", "my client", "I am now instructed", "I am strongly advising my client". In particular, the letter to Mr Vella of 15 March 2006 containing the words "We have not billed you" and "note of initial instructions" lead me to the view that Mr Gustafson was acting for Mr Vella and Nicalex at all relevant times as their solicitor.

The duty of the first defendant

[34] I accept the evidence of Mr Vella as to the gist of the conversation he had with Mr Gustafson on 15 August. It is consistent with the fact that he had acted for Mr Vella before and with the documents created by him for Mr Vella to execute.

[35] Mr Gustafson told Mr Vella:

(a) That the deal looked good and should be okay.
(b) That he would not be acting for Mr Vincent.
(c) That in a worst case scenario he could sell up Vinmatt by way of having a security in the form of a second mortgage over the Molendinar property.
(d) That he (Mr Gustafson) would have an interest in the development and that he was going to be paid out of the venture.

[36] Mr Gustafson did not, but should have, warned Mr Vella that not having a signed contract for the Molendinar property could lead to difficulty. I accept that Mr Vella would not have gone ahead with the transaction had he known of that.

[37] In the circumstances of this proposed transaction an ordinary and reasonably prudent solicitor would have, at least, ensured that further security was obtained for Mr Vella and would have advised him that the proposed option agreement was likely to be ineffective unless the contract for the sale of the Molendinar property was signed and enforceable. Mr Vella said that Mr Gustafson had told him that if there was default then it would be a simple matter of selling up the property or otherwise realising upon the security. This could not have occurred in the absence of a binding contract for sale of the Molendinar property.

[38] I accept that Mr Gustafson failed in his duty to Mr Vella by not:

(a) Ascertaining whether the Geoff Wolter Unit Trust had assets available in the event of default.

(b) Advising the plaintiffs to obtain appropriate security whether by way of a security over real property or personal guarantees from people of substance associated with Vinmatt and by conducting appropriate searches.

[39] Had Mr Gustafson considered the matters in the preceding paragraph he would have known that the Geoff Wolter Unit Trust had no assets, that Mr Vincent was not a director of Vinmatt, and that Mr Vincent was a bankrupt.

[40] As a result of the breach of duty or negligence of Mr Gustafson, Mr Vella and Nicalex have lost the sum of $300,000.

The second and third defendants

[41] The claim against the second and third defendants is pleaded as an unjust enrichment claim and a claim in restitution. Mr Matthews, who appeared for himself and the third defendant, gave evidence that Mr Vincent had owed him money for some considerable time arising out of earlier transactions between the two of them. He said that he had no communication with Mr Gustafson prior to the $300,000 being telegraphically transferred to his solicitor's trust account. He had been having conversations with Mr Vincent and was expecting to receive $200,000 in his Tasmanian solicitor's trust account in order to settle on a property in Tasmania. On the afternoon that the money was transferred he received a call from Mr Vincent to say that $300,000 had been transferred and that he required the unneeded $100,000 to be transferred back to him. This was done by Mr Matthews on 16 August.

[42] Documents were created for the purpose of transferring the title in the Molendinar property to Mr Vincent or to Vinmatt. There was, though, a complication. Mr Vincent wanted the sale price to be $1.2 million with a rebate clause of $250,000 or $300,000. It seems that this wanted in order to achieve a higher valuation and, thus, allow Mr Vincent to borrow more money. The property, on Mr Matthew's evidence, was not worth the higher sum. It was ultimately sold for $903,000.

[43] The plaintiffs point to Mr Matthew's position as a director of Vinmatt, but I accept his evidence that he did not, at any stage, accept appointment as a director or know that he had been appointed as a director. Mr Matthews was cross-examined on the basis that the whole purpose of the transaction with him was that it would afford Mr Vincent a "kick back of $100,000". It is, I think, curious that Mr Matthews, having had transferred into his solicitor's trust account the sum of $300,000 from Nicalex, then, on the following day, directed that the balance of $100,000 be transferred to Mr Vincent rather than being sent back to Nicalex.

[44] Mr Bowden submitted that I should draw an adverse inference (on the basis of the doctrine in *Jones v Dunkel* (1959) 101 CLR 298) because the second and third defendants did not call Mr Vincent.

[45] The inference which can be drawn in a circumstance such as this is no more than that the evidence which was not called would not have helped the party who failed to call the witness: *Brandi v Mingot* (1976) 51 ALJR 207. The making of a *Jones v Dunkel* inference depends upon the closeness of the relationship of the absent witness with the party who did not call him. See *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157. In this case, one might not expect Mr Matthews (who was unrepresented) to call Mr Vincent, given that Mr Vincent had misled him on numerous occasions about his capacity to repay the loan and, although they had once been close business acquaintances, they no longer were. I do not think that it is appropriate to draw the *Jones v Dunkel* inference in this case.

[46] The case for the plaintiff is that the second and third defendants were recipients of the $300,000 that had been obtained by fraud by Mr Vincent, and that they were volunteers in that they provided no consideration for the payment of the $300,000 to them. This was part of the plaintiffs' claim that there was an involvement by the second and third defendants in the overall transaction and that they were obliged to execute a contract for the sale of the Molendinar property to Mr Vincent. That version of events was denied by Mr Matthews and he said that the money was paid to him (or at least $200,000 of it) because that was money owed to him by Mr Vincent. I accept that Mr Vincent did owe Mr Matthews that money.

[47] It was also argued for the plaintiffs that the second and third defendants were aware of the conditional nature of the transaction and their obligation to secure the execution of a contract for the Molendinar property. Once again, this was denied by Mr Matthews and no evidence was otherwise called to support it. Part of the plaintiffs' problem in pursuing this line of argument is that Mr Matthews was only a part-owner of the Molendinar property, and there was no evidence of any relationship between the other part-owners and Mr Vincent or Mr Gustafson. For there to have been any conditional aspect of the transaction, the other part-owners would have had to have been involved.

[48] The burden in this part of the case necessarily lies on the plaintiffs and they have not discharged that burden by establishing beyond the balance of probabilities that there was, in fact, such a relationship that would engage the principle in *Black v Freedman & Co* (1910) 12 CLR 105. That case dealt with money which had been stolen and which became trust money which could then be followed into another person's hands. The plaintiffs rely on the money going into the hands of the second and third defendants as volunteers and without consideration. The plaintiffs argued that there was a scheme of sorts, engaged in at least by Mr Vincent and Mr Matthews, which led to them being duped into handing over $300,000 to Mr Matthews. All aspects of that allegation have been denied by Mr Matthews. There is no other persuasive evidence which would lead me to the conclusion that the plaintiffs have discharged the onus which would allow a finding to be made that there was an agreement or arrangement between the second and third defendants and Mr Vincent, or that they received it as volunteers alone.

[49] The claim against the second and third defendants is dismissed.

Orders

[50] I give judgment for the plaintiffs against the first defendant in the sum of $300,000 with interest from 15 August 2005 to today. I dismiss the claim against the second and third defendants.