Glen Eight P/L v Home Building P/L (In administration), Peter Ngan & Interco P/L

JUDGMENT : **McDougall J :** New South Wales Supreme Court : 31st March 2005

1 The plaintiff (Glen Eight) and the first and third defendants (Home Building and Interco respectively) are parties to a building contract made on 13 February 2003 (the contract). Glen Eight was the principal and Home Building and Interco were together referred to as "the Contractor". Under the contract, Home Building and Interco were required to carry out the design and construction works required to convert a commercial property at Milsons Point into residential accommodation.

2 Under the contract, Glen Eight was required to make progress payments. Its obligations to do so were conditioned, amongst other things, by cl 43 of the General Conditions. By cls 43.2 and 43.3, the Contractor (ie, Home Building and Interco) was required to pay subcontractors before it had any entitlement to be paid a progress payment by Glen Eight.

3 Clause 43 was amended both to reinforce that concept and to provide remedies if the Contractor failed to follow the regime. Those remedies, which were to be initiated by the superintendent under the contract, included the establishment of a bank account to which Glen Eight and the Contractor were joint signatories and the payment of subcontractors and suppliers out of that account. The relevant provision stated specifically "that all monies in the account would be held in trust for the Principal for the purpose of paying suppliers and subcontractors to the works".

4 In about October 2003, Mr Revay, a director of Glen Eight, became aware that subcontractors were complaining that they had not been paid. He directed Mr Munro, the financial controller of Glen Eight, to deal with this. Specifically, he instructed Mr Munro to discuss with representatives of Home Building "*how Glen Eight could be certain that payments by it to Home Building would be remitted in the manner required under the construction contract ...*". (See Mr Revay's affidavit sworn 17 March 2005 at paragraph 28.)

5 Mr Munro's evidence is that on 3 November 2004 he and a Mr Waller of Glen Eight discussed the matter with Mr Alexander. It appears from other evidence that Mr Alexander was held out to Glen Eight as a director of both Home Building and Interco. Mr Munro sets out his account of that conversation in para 17 of his affidavit sworn 16 March 2005. That account was not challenged (unsurprisingly, since this was an interlocutory application). Mr Munro summarised the effect of what was achieved between him and Mr Alexander in paragraph 20 of his affidavit as follows:

"*In summary, the procedure we agreed (as set out above) was as follows:*

(a) Home Building would provide Glen Eight with a list of specific payments it proposed to make to subcontractors for that month;

(b) next, Glen Eight would review the list and advise Home Building which specific payments it authorised Home Building to make;

(c) next, Home Building would draw cheques to each subcontractor equal to the amount of the specific payments authorised by Glen Eight. The cheques would be signed by Kevin Carter of Home Building.

(d) next, Home Building would give the cheques to Glen Eight and I would sign each cheque as joint signatory of the St George Account.

(e) next, Glen Eight would transfer to the St George Account an amount of money equal to the sum of all specific payments it authorised Home Building to make. This could take place before I signed the cheques, depending on how quickly Home Building brought the cheques for signing;

(f) next, Home Building would forward the cheques to each subcontractor or the relevant subcontractor would pick up its cheque from the Home Building office."

6 Thereafter, payments were made by Glen Eight to Home Building (or Interco - the distinction is irrelevant) in accordance with what Mr Munro said had been agreed. Between 8 and 17 November 2004, four payments totalling $1,446,232.27 were deposited by Glen Eight to the St George account of Home Building. The total so deposited equalled exactly the total of the subcontractors' entitlement approved by Glen Eight for payment, although it may be assumed that at least some of the payments (the first three were round figures of $150,000, $700,000 and $350,000) were estimates rather than exact totals.

7 After November, there was a slight change in procedure. There were apparently negotiations between Glen Eight and Home Building or Interco as to the amounts to be paid to subcontractors, and when an amount was established, or whilst it was being established, Glen Eight would pay into the St George account amounts sufficient to cover the liability. Thus, payments of $2,000,000 exactly were made in the St George account on 3 December 2004, 21 December 2004 and 28 January 2005. Those amounts do not correlate exactly to the amount of approved subcontractors' claims; and on the evidence, the amount of approved claims in respect of which the last payment was made was $1,726,153.41.

8 On 8 February 2005, Home Building was placed into voluntary administration. The second defendant (the administrator) was appointed administrator. On that day, there was a total of $1,816,851.37 standing to the credit of the St George account. That represented the unapplied balance of the $2,000,000 deposit on 28 January 2005. All but $520 – ie, $1,816,331.37 – was transferred to the administrator's trust account on 8 February 2005. In accordance with the arrangements made on 3 November 2004 as varied, cheques for the approved amount of $1,726,153.41 had been drawn and signed. However, not all of those cheques had been given to the subcontractors; on the evidence, the cheques actually provided to subcontractors and presented were approximately $232,000.

9 In these proceedings, Glen Eight claims that the balance from time to time standing to the credit of the St George account, after the making of the arrangements to which I have referred on 3 November 2004, were trust moneys. It says that they were to be held on trust for the subcontractors in respect of whose claims they were paid in, and otherwise (pursuant to a resulting trust) on trust for it. The administrator did not agree with this proposition. Accordingly, on 17 March 2005, Glen Eight commenced these proceedings and sought and obtained interlocutory relief. The effect of the Court's orders made on 21 March 2005 is that, relevantly, the defendants are restrained up until midnight tonight from transferring, disposing of or in any other way dealing with the amount of $1,816,331.37 other than that the administrator was at liberty to use - $15,000 for legal expenses and the costs of his administration.

10 The question that was argued before me was whether the interlocutory relief that was granted on 21 March 2005 should be extended, and if so, on what terms.

11 Essentially, the issues were:

(1) Whether there was a serious question to be tried that the amounts standing to the credit of the account after 3 November 2004 were impressed with a trust and, if they were, whether Glen Eight was entitled, at least on a resulting trust, to the benefit of those amounts if the primary trust failed.

(2) Assuming that the first question was answered, at an interlocutory level, in favour of Glen Eight, whether the amount for which relief should be granted should be the full amount taken by the administrator or some lesser amount.

(3) Whether allowance should be made for the administrator to draw his legal fees and the costs of administration from the amount in question.

12 As I have said, Glen Eight's case is that a trust was created in respect of the payments made by it pursuant to the arrangements made on 3 November 2004. If there is to be an express trust, it must be shown that there was an intention to create the trust, property subject to the trust and definable beneficiaries of the trust. I summarised the principles, sufficiently for present purposes, in my judgment in ***Salvo & Ors v New Tel (in liquidation)*** [2004] NSWSC 675 at paras 47-49:

"*47 It is clear that, to create an express trust, it is necessary to show three things:*

(1) the intention to create the trust;

(2) the property that is subject to the trust; and

(3) who are the beneficiaries of the trust.

*See **Kauter v Hilton** (1953) 90 CLR 86, 97 (Dixon CJ, Williams and Fullagar JJ) and **Associated Alloys Pty Limited v ACN 001 452 106 Pty Limited (in liquidation)** (2000) 202 CLR 588, 604 [29] (Gaudron, McHugh, Gummow and Hayne JJ).*

*48 In seeking to identify the intention to create a trust, it is appropriate to have regard not only to the language used by the parties but also to the nature of the transaction and the circumstances that attend their relationship: **Walker v Corboy (**1990) 19 NSWLR 382. In considering whether a trust has been created, there is no need for particular caution in drawing the inference that the parties intended to create a trust: **Bahr v Nicolay [No 2] (**1988) 164 CLR 604.*

*49 The decision in **Associated Alloys** also demonstrates that:*

(1) At 603 [26]-[28]: the "flexible interplay of law and equity" (in the words of Lord Wilberforce in Quistclose at 582) means that contractual rights and obligations may be affected by equitable considerations; or as Mason and Deane JJ put it in Gosper v Sawyer (1985) 160 CLR 548, 568, there is no dichotomy between contract and trust.

(2) At 598 [12]: if the trust is said to arise upon the proper construction of a contract made between the parties, then ascertaining the intention of the parties will involve the construction of the contract (and this will also demonstrate the interaction between any trust and the other contractual relations that have been created).

*(3) At 605 [34]: although an express obligation to keep money separate would point to the existence of a trust if none had been explicit (**Cohen v Cohen** (1929) 42 CLR 91; **Puma Australia Pty Ltd v Sportsman's Australia Ltd [No 2]** [1994] 2 Qd R 159), "where the existence of a trust is explicit, the absence of an express obligation to keep trust monies separate does not deny the trust"."*

13 I pointed out that in seeking to identify the relevant intention, one should have regard not just to the language used by the parties but to the circumstances of their relationship and the nature of the transaction; and that there was no need for particular caution to be observed in drawing the inference that the parties intended to create a trust.

14 In the present case, I am satisfied that there is an arguable case (or a serious question to be tried) as to the second and third of the elements that I have described (ie, that there is identifiable trust property and identifiable beneficiaries). Clearly, if there were an intention to create a trust, it would be (on Glen Eight's evidence) a trust in respect of the amounts paid by Glen Eight into the St George account after 3 November 2004 in respect of the claims of subcontractors; and equally, on that case, the subcontractors would be the primary beneficiaries of the trust. In this context, I should note that if there is an express trust, the absence of an intention to keep the money separate does not deny its existence. See the decision of the majority in ***Associated Alloys Pty Limited v AC 001 452 106 Pty Limited (in liquidation)*** (2000) 202 CLR 588 at 605 [34].

15 The first element has caused me more difficulty. For Glen Eight, Mr Newlinds of Senior Counsel, who appeared with Mr Kerr of Counsel, pointed to the surrounding circumstances, and to the perceived need on the part of Glen Eight to vary the existing arrangements. He conceded that the contractual scheme, which I have briefly described, would not of itself support the inference that there was an express trust. (I interpolate that this concession sat uneasily with the declaratory relief sought by prayer 2 of the summons.) However, he submitted, that was to be taken into account as background in considering, objectively, the intention to be attributed to the parties in their discussions of 3 November 2004 and in their actions that followed upon those discussions.

16 For Home Building and the administrator, Mr Allen of Counsel pointed to the variation to cl 43 to which I have referred, placing particular stress on the ability of Glen Eight to require the creation of what would by force of a contract be a trust account. He submitted that was a circumstance to be taken into account in considering whether, Glen Eight not having taken that step, there should nonetheless be attributed to it the intention to create a trust through the mechanism I have described.

17 I have referred above to Mr Munro's summary of the arrangements that he put in place on 3 November 2004. When one looks at those against the problem that had been experienced (non payment of subcontractors and the possibility of cessation of work) and in the light of the alternative risk that would follow from uncontrolled payments (an increasing and possibly irrecoverable debt owed by Home Building to Glen Eight), I think there is a basis on which the Court, on a final hearing, could conclude that the intention to create a trust should be attributed to the parties.

18 Factors that support that conclusion include the identification and approval of the subcontractor payments that were to be made, the making of payments equal to the amount of approved payments, the requirement for representatives of Glen Eight to sign cheques and the negation of any other payment being made out of the account (the exception in respect of wages does not deny this analysis).

19 Accordingly on balance, I am satisfied that there is a serious question to be tried as to whether the first element - of intention to create a trust - is made out.

20 That leads to the second issue which is the amount (if any) in respect of which relief should be granted. The evidence suggests that the balance in the account, prior to the January deposit of $2,000,000, was about $148,000. Thereafter, after several other payments were made, the balance fell to the amount in question (or that plus $520). Mr Allen submitted that, in circumstances where $2,000,000 had been paid in against approved claims of (in round figures) $1.726 million, and where on the evidence cheques amounting (again in round figures) to $232,000 had been presented and paid, the amount should be at most (and once again in round figures) $1.5 million.

21 There is some force in this analysis. However, I think, the situation shown by the bank statements is that before Glen Eight made any of its payments, there was no more than $6,223.35 standing to the credit of the account. Thereafter, with the exception of two payments totalling $150,000 and a couple of thousand dollars for interest, all payments were made by or at the request of Glen Eight. The amounts totalling $150,000 appear, on the evidence, to have been directed to the payment by electronic funds transfer of wages, or to purposes other than payments to subcontractors.

22 On the case that Glen Eight seeks to argue, there was either a primary trust in favour of subcontractors for amounts paid in or a resulting trust in its favour to the extent that the primary trust failed. On that analysis, I think that there is a serious question to be tried as to whether the whole amount in question, rather than some lesser amount, established by arithmetical arguments of the kind I have described, is impressed with a trust. Accordingly, if relief is to be granted, I think it should be granted in respect of the full amount subject only to what follows.

23 The third issue is, as I have said, the payment of legal and other expenses by the administrator. That was the only point that was put on balance of convenience grounds, it appearing, (I think obviously enough) that otherwise the balance of convenience would favour the continuation of relief, so as to preserve the trust fund (if such it be) until a final determination can be made. On Glen Eight's analysis, any dealing with the trust fund other than by payment to it would be a breach of trust. If the administrator were to draw upon the fund in his trust account for payment of administration expenses, or specifically for the payment of legal costs, that too would be a breach of trust. It would be a breach of trust because it would be a diversion, for an unauthorised purpose, of what is on Glen Eight's version trust money. In these circumstances, I think, it would be arguable that the administrator might be liable (assuming that Glen Eight made good its case at a final hearing) on a *Barnes v Addy* basis. See ***Consul Developments Pty Limited v DPC Estates Pty Limited*** (1975) 132 CLR 373. I do not, however, need to decide that point and I should not be taken as expressing any concluded view on it.

24 The countervailing submission is that if the administrator cannot have access to some part of the fund, Glen Eight will succeed by default. The administrator's evidence makes it clear that there will be no substantial assets other than the disputed amount, and that at present no creditor has offered to underwrite either this or any other litigation. If, therefore, the administrator is not entitled (at his own risk) to have access to the funds for the purpose of defending these proceedings, the issue will be in effect decided without the need for a final hearing - decided by default rather than by right. That is not an attractive proposition.

25 The administrator has been asked to give an undertaking to repay any amount used by him for costs, if it should be held that Glen Eight is entitled to the benefit of a trust over the full amount. He has declined to give any such understanding. I can understand why this would be so in circumstances where there do not appear to be any other

assets out of which he could be indemnified and where (on the evidence) no creditor has offered him an acceptable indemnity. However, it would mean, if Glen Eight succeeded, that it would be required to pursue its case against the administrator if, having been permitted to do so, he had access to the funds for the purpose of defending these proceedings.

26 The question is a difficult one. However, on balance, I think that relief should be granted on condition that would enable the administrator, should he desire to do so, to have access to the fund for the purpose of defending this litigation. I put the matter in that way because I do not wish to suggest in what I have said that he is authorised to do so (far less do I wish to suggest that he would not be committing a breach of trust should he do so). As I said, I express no view either way on that question.

27 The consequence is that I think Glen Eight has made out its claim for a continuation of injunctive relief, and that the relief should extend to the whole of the trust fund, subject to the condition that the administrator may draw from it from time to time up to a certain amount, either to be agreed between the parties or otherwise fixed by the Court should he decide to do so. It should however be understood that if the administrator does decide to do so, he does so at his own risk in the event Glen Eight succeeds.

28 The evidence does not permit me to fix an appropriate amount, which should be left to the discretion of the administrator to access. In the circumstances, what I propose to do, having noted that Glen Eight by its Senior Counsel continues the existing undertaking as to damages given to the Court, is to continue the order 1 made on 21 March 2005 and to stand the proceedings over for a short time to enable the parties either to agree as to the amount to which the administrator might have access or to put before me sufficient evidence to enable me to decide what that amount should be.

29 Upon the plaintiff by its Senior Counsel giving to the Court the usual undertaking as to damages, I extend up until midnight on 1 April 2005 order 1 made on 1 March 2005. I note that order 1 is subject to, and its continuation is likewise subject to, order 2 also made on 21 March 2005.

30 I direct the parties to bring in short minutes of order to give effect to my reasons at 9.30 am on 1 April 2005.

31 When I gave my reasons ex tempore on 31 March 2005, I omitted to deal explicitly with one issue raised by the defendants. However, when I made orders on 1 April 2005, I indicated to the parties' legal representatives my reasoning on that issue and said that I would include it in the revised version of my ex tempore reasons. This I now do.

32 The administrator's evidence showed that on 31 January and again on 17 March 2005, Interco gave to Glen Eight what purported to be payment claims made under the *Building and Construction Industry Security of Payment Act* 1999 (the Act). The first of those payment claims was for an amount of almost $5.5 million, and the second, which apparently included the amount of the first, was for an amount of $6.65 million. Each payment claim purported to be made by Interco but noted that it might include amounts "formally" (or in one case "formerly") claimed by Home Building.

33 Glen Eight denied that the payment claims were valid (its response was given to the first, but the reasons given would seem to apply equally to the second). Further, it said, it had provided a payment schedule: at least, in response to the first payment claim. It gave other reasons why, it said, claims could not be enforced by the mechanism for judgment set out in s 15 of the Act.

34 The documents that were proved as the purported payment claims did not on their face comply with the requirement in s 13(2)(a) of the Act to identify the construction work to which they related. However, it is apparent that each claim was accompanied by supporting documents (which were not proved), and it may be that this requirement was met by, or on a fair reading of the accompanying documents could be said to have been satisfied in, those documents.

35 The parties did not address me on the arguments either way (including those raised by Glen Eight's solicitors dealing with the alleged invalidity of the claims). However, I do not need to express any view whether, on an arguable basis or otherwise, the payment claims are valid or invalid. That is because the Act provides a mechanism to a claimant where a respondent has failed to provide a payment schedule in the time specified by s 14. The claimant may sue for and recover as a debt the amount of the claim (s 15(2)(a)(i)) or make an adjudication application (s 15(2)(a)(ii)). On the evidence, neither of those steps has been taken in relation to either claim. If Interco and Home Building maintain that the payment claims are valid, they may take one or other of those steps. If the claims are upheld as valid then the result will be a judgment in their favour. At that time, it would be open to them to move for dissolution or variation of the order restraining them and the administrator from having access (except in limited circumstances) to the fund in issue. At present, there is no compelling case that they have any entitlement, and no reason for permitting them to have access to that fund in advance of making out their entitlement (if they seek and are able so to do). The money will not disappear: it will remain in the administrator's trust account (unless the parties agree otherwise) except to the extent that the administrator is entitled and decides to have access to it in accordance with the terms of the relief that has been granted.

36 Accordingly, these considerations do not (and did not when I decided to continue the interlocutory regime) provide a sufficient reason for withholding the interlocutory relief sought.

C R C Newlinds SC/S A Kerr (Plaintiff) instructed by Gadens (Plaintiff)
D Allen with S Earl (Sol) (Defendants) instructed by Laurence & Laurence (1 and 2) Dibbs Barker Gosling (3)