

JUDGMENT : MR. JUSTICE AKENHEAD: TCC. 30th November 2007.

1. In this claim, the claimant seeks alternative injunctions. Those are set out in paras.12 and 13 of its particulars of claim. The claimant is a building contractor who was employed by the defendant developer under a contract dated 24th February 2006 to construct new apartments and convert two warehouses at Druid Street, Hinckley, Leicestershire. The contract was in the standard form of Building Contract, Private Edition, with Contractor's Design Portion Supplement, 1998 edition, Amendments 1 to 5. The contract sum was £3.79 million. The contractual dates for possession and completion respectively were 5th December 2005 and 12th February 2007. By 12th October 2007 the total gross amount certified for payment was some £3.97 million. For reasons which are unclear but which give rise to no issue, interim certificates were divided into what was called the "northern" and "southern" sites. The total that appears on the certificates as retention, on my arithmetic, is £124,207.93.
2. This standard form of contract, as others, provides for retention at a certain percentage to be deducted from interim certificates, and then released as the works are partially or practically complete. It is clear from the words of the contract, as well as numerous legal authorities, that the retention monies are held on trust. Clause 30.5.1 of the contract conditions says this:
"The employer's interest in the retention is fiduciary as trustee for the contractor and for any nominated subcontractor (but without obligation to invest)."
There is no issue here that the employer's interest is as a trustee and, as a trustee, particularly one arising under an express trust, the employer owes obligations not just contractually but as a trustee, and, in that capacity, additional obligations in that regard may arise over those arising strictly, directly and expressly from the contract.
3. Clause 30.5.3 says this:
"The Employer shall, to the extent that the Employer exercises his right under clause 30.4, if the Contractor... so requests at the date of payment under each Interim Certificate place the Retention in a separate banking account (so designated as to identify the amount as the Retention held by the Employer on trust as provided in clause 30.5.1) and certify to the Architect with a copy to the Contractor that such amount has been so placed. The Employer shall be entitled to the full beneficial interest in any interest accruing in the separate banking account and shall be under no duty to account for any such interest to the contractor or any subcontractor."
4. In certain circumstances the Employer is entitled to have recourse to the retention monies but it must always be clear that there is an established right to do so.
5. What has happened in this case is that the contractor, for reasons best known to itself, did not make any enquiries in the early part of the contract as to whether or not a separate trust fund had been established in respect of retention monies. It does appear that, by October 2007, a very substantial part of the works, if not the whole of the works, had been completed. By that stage something just more than the original contract price had been certified gross for payment. The last certificates to be issued bear the date of 12th October 2007, and it is from those two certificates that the total retention is arithmetically ascertainable. There is no issue that, in the last week of September 2007, the claimant asked the defendant to set up a separate banking account and pay the retention money into it.
6. By 19th October the defendant had instructed his bank, the Royal Bank of Scotland, to set up a separate account, and it appears that within a few days of that request it had been set up. It seems clear that the defendant had instructed his bank to transfer funds which were held elsewhere within the bank to be transferred into that account. The requisite amounts had been designated for payment into this new account but, for reasons which appear to be oversight on the part of the bank, had not actually been paid.
7. The claimant's solicitors had written letters on 10th and 19th October 2007, the latter of which said:
"If we have not received satisfactory confirmation from you within the next 48 hours, we will seek an injunction to enforce clause 30.5 of the contract and obtain a court order requiring you to place the retention into a separate bank account."
8. The Royal Bank of Scotland wrote to the claimant by letter dated 19th October 2007 in these terms:
"I hereby confirm that the bank has received instructions from the above customer to open a new account in the name of Harmail Singh Mattu, trading as Urban Suburban, re Bodill retention monies, to hold the following amounts of money, £63,453.18 and £59,754.75. This account is not yet opened but the account opening process is being initiated and this should take two to three working days."
9. There the matter apparently rested, although behind the scenes, and largely unknown to the claimant, Mr. Mattu was taking steps to ensure that the account was properly set up. He received a fax from his bank on 31st October that the new account was open and fully functional. It does seem clear, however, that the money had not been transferred by that stage.
10. Whatever the position truly was, the claimants, who felt they had not fully heard what was going on, and had received no confirmation that the account had been set up and had the requisite amount of money in it, issued these proceedings on 9th November and directions were given fairly promptly by Ramsey J., as to the processing of this action. It is a Part 8 claim and it is agreed that this does represent a final hearing as opposed to a procedural hearing because all of the issues that I have to address now have to be addressed finally, and this will dispose of the matter.

11. It was after the issue of proceedings that Mr. Mattu discovered, he says to his horror, that the monies had not actually been transferred into the account, and I understand and have no reason to doubt that by the third week or so of November all (bar possibly £1,000) had been transferred into the account. I have been told and assured by counsel for Mr. Mattu, who has obtained instructions from him this afternoon, that to the best of his knowledge and belief at least £123,207.93 remains in the account.
12. Now, in terms of analysis, given the fact that the retention monies are held on trust, it seems to me that it was incumbent following the request in late September from the claimant for Mr. Mattu to set up the separate trust account. Even the law of trust, let alone the law of contract, does not require instantaneous setting up of an account and transfer of money. One must take into account the commercial realities. It would seem clear that a reasonable period for the setting up of the account and the transfer of the money would be two to three weeks. Whilst it cannot readily be said that Mr. Mattu was to any significant extent in breach of trust or contract for failing to set up the account promptly enough, it is clear, in my view, that he was at least nominally in breach of trust and contract in failing to pay (or to secure the payment of) the retention money into the account within that sort of period.
13. So therefore it seems to me that at the time these proceedings were instituted there was a cause of action which the claimant had against Mr. Mattu relating to breach of trust and breach of contract.
14. However, one further matter has emerged. The name of the account is not sufficiently clear that it can be described as a designated trust account. At the moment it is referred to, as the RBS letter of 19th October says, as the "Harmail Singh Mattu, trading as Urban Suburban, re Bodill retention money account". It seems to me that that does not make it anywhere near clear enough to the bank or anyone else that it is a trust account or that the sums in it are impressed with a trust. Therefore there is a further, albeit, I am confident, only a temporary, breach of trust and contract relating to that. The account should have been designated as a trust account.
15. Bodill had, by way of an allowed amendment, sought an injunction that the retention should be held in an escrow account with moneys only to be released at the direction of Mr. Matthu's solicitors. This was, in my judgment, seeking much more than the contract requires and might be justified only if there was evidence that Mr. Matthu had been behaving deliberately badly. There was no such evidence.
16. So far as relief is concerned, after a very helpful hearing with counsel (both of whom have been of great assistance), it emerges that a *modus operandi* can be worked here which will satisfy everyone. First, as I have indicated, Mr. Mattu has told his counsel and has told me that the money, £123,000-odd, remains in the account and he is prepared to undertake to the court that that is true to the best of his knowledge and belief. Secondly, Mr. Mattu has indicated that he is prepared to give an undertaking to the court that he will instruct the Royal Bank of Scotland to re-designate the account as a trust account with Bodill named also in the name of the account, and he is prepared to do that by Wednesday noon of next week, that is 5th December 2007. Finally, and this seems to me to provide all the protection that Bodill could expect to have, if not rather more in one way, Mr. Mattu is prepared to undertake to the court that he will give three clear working days' notice - I think I had better say in writing - to the claimant of any intention to remove or use any monies in this trust account.
17. It seems to me that with those three undertakings it is not necessary to make any other order. I am sure Mr. Mattu will know, and certainly will be informed of the consequences of not complying with undertakings given to the court. That said, I have absolutely no reason to believe that he will not comply with those undertakings. Given those undertakings, there is therefore no need to make any order. There will be permission to apply if for any reason the undertaking relating to instructions to the bank cannot be given by Wednesday noon. Obviously if the undertakings are not met, then the claimant has the option of seeking other relief in this court.

MR. A. JINADU (instructed by Freeth Cartwright) appeared on behalf of the Claimant.

MR. A. CHAMBERS (instructed by Barlow Poyner Foxon) appeared on behalf of the Defendant.