

Bridgehead's Submissions in respect to trade creditor claims

VID 95 of 2010

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL**

**IN THE MATTER OF THE *CORPORATIONS ACT 2001*
IN THE MATTER OF MARK RONALD LETTEN & ORS**

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Plaintiff

MARK RONALD LETTEN & ORS
Respondents

A Introduction

1. Terms used in these submissions have a meaning given in the Receivers' Preliminary Submissions ("Receivers' Submissions") dated 13 September 2011, unless otherwise defined.
2. These submissions are made on behalf of Bridgehead Properties Pty Ltd ("Bridgehead"), a trade creditor of each of Twinview and TGCH, in support of orders to the effect that:
 - (a) for the purposes of paragraph 2(d) of the Pooling Orders, the Receivers are justified in paying to the Liquidators of Twinview the total amount of the claims of the trade creditors contained in the proofs of debt lodged with the liquidators of Twinview and exhibited to the thirtieth affidavit of Damian John Templeton sworn 29 August 2011; and
 - (b) for the purposes of paragraph 2(d) of the Pooling Orders, the Receivers are justified in paying to the Liquidators of TGCH the total amount of

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the claims by trade creditors contained in the proofs of debt lodged with the liquidators of TGCH and exhibited to the thirtieth affidavit of Damian John Templeton sworn 29 August 2011.

B The Receivers' Submissions

3. The Receivers' Submissions accurately identify the relevant background material, the applicable paragraphs from the Pooling Reasons and the relevant legal principles. In particular, (but subject to the observations in part G below) the Receivers' Submissions have correctly identified that the "clear accounts rule"¹ is a potential obstacle to Bridgehead and the other trade creditors satisfying the Court that each of Twinview and TGCH has a right of indemnity and lien out of the assets in respect of which it is a trustee, and thus an obstacle to establishing a "trust creditor claim" within the meaning of the Pooling Orders.
4. Paragraph 25 of the Receivers' Submissions extracts key findings from the Pooling Reasons including the following:

"[247] On those bases, the receivers submitted that investors' contributions in respect of the other forms of investment should be deemed to have been received by LGHA (or the relevant Letten entity) subject to a trust in favour of the investors. The receivers submitted that conclusion was further reinforced because the funds contributed by the alternative forms of investment were most likely paid to LGHA and will have been applied in the same manner as investors' contributions pursuant to joint venture agreements.

[248] I accept that submission. In all the circumstances, notwithstanding the deficiencies in the screeds and the joint venture agreements, a trust was created when the moneys were received by LGHA or the relevant Letten Entity (as the case may be) to hold that money and apply it for the purposes of a joint venture in which the property or project was sufficiently identified to form the subject matter of a trust (citation omitted)"

5. It is notable in the context of the analysis in parts D and E below that these passages both refer to investors' contributions being received by LGHA or the relevant Letten entity; they do not contemplate joint receipt.
6. The Receivers' Submissions then state as follows:

¹ *RWG Management Ltd v Commissioner for Corporate Affairs* [1985] VR 1984

- “26. The question arising from these facts is whether the trust estate for which TGCH and Twinview are accountable:
- (a) is (or was) confined to the Glen Centre Property and the Twinview Property respectively;
 - (b) extended to all monies received by LGHA for application (as described in paragraph [248] of the Pooling Reasons) to the Glen Centre Property and the Twinview Property respectively.
27. On the first of these views, there has not been, as far as the Receivers are aware, any relevant loss to the trust estate. However, on the view described in paragraph 26(b) above, TGCH and Twinview respectively may have failed in their duty to get in and preserve the trust fund (specifically, that portion of it retained by LGHA representing the initial cash surplus).
28. There is a further possibility, which the Receivers submit may be the better view, being that the funds of all Schemes ought to be viewed as a single “master trust” of which the various corporate defendants constitute joint trustees. The Receivers submit that this would be consistent with the rationale which led to the making of the Pooling Orders. On the facts relating to the way in which the funds of the various schemes were dealt with, each of the approaches described in paragraph 26 may be artificial, given there is no way of determining whether the estate truly represents the funds that are referable to that particular Scheme.”

7. The clear accounts rule will apply if it can be established that Twinview or TGCH (as the case may be) can be shown to have acted in breach of trust or duty such as to give rise to a liability to pay compensation to the relevant trust fund in an amount equal to or in excess of the present value of that fund.
8. However, a close analysis of the facts as ascertained by the Receivers and reported in the various disclosure reports confirms that the position is in fact as stated in 26(a) above; namely, that the trusts estate for which TGCH and Twinview are accountable was confined to the Glen Centre Property and the Twinview Property (respectively) and there has been no relevant breach of trust or other conduct on the part of TGCH or Twinview that would give rise to an obligation to compensate that trust estate.

C. Joint Venture Agreements

9. The starting point for the analysis is the joint venture agreements (“JVAs”) entered into between Twinview and TGCH (respectively) and certain of the

investors in “the Projects”, as defined in those JVAs. This is the only document that can be said to define the scope of each of Twinview and TGCH’s obligations in respect of the Projects. The so-called “screeds” generally do not identify the putative “Manager” by name and do not, in any event, purport to impose any relevant obligations on the manager except, perhaps, to purchase the property and act as manager of a joint venture for the investors

10. A sample of the JVAs for each of Twinview and TGCH are included in the disclosure report for the Twinview Joint Venture (report no. 2) at DJT-16 to the fifth Templeton affidavit and the disclosure report for the Glen Centre joint venture (report no. 3) at DJT-17 to the fifth Templeton affidavit. Those sample joint venture agreements are relevantly the same. They include the following provisions:

- Recital A – *“The Investors and the Manager have agreed to associate themselves as Joint Venturers for the purposes of acquiring an Interest in the [relevant Project] and to hold the same as an investment and to earn income therefrom (“the Project)”*.
- Recital B – *“The Manager has agreed to act as nominee of the Investors and as Manager of the Joint Venture and will enter into the Contract of Sale for the purchase of the Project and agrees to enter into all other contracts on behalf of and nominee [sic] for the Investors”*.
- Clause 1.1(c): *“ ‘Capital Contribution’ means the aggregate of the Equity Contribution which each Investor contributes to the capital of the Joint Venture as set out opposite each Investor’s name in column 4 of the Schedule together with any further amounts so contributed from time to time”*. [The Schedule provides in effect that the “Capital Contribution” is the aggregate of the “Equity Contribution” and the “Debt Contribution”].
- Clause 1.1(i): *“ ‘Participating Interest’ means the interest which an Investor holds from time to time in the Joint Venture which interest shall be equal to the proportion that the Capital Contribution of that Investor bears to the aggregate Capital Contributions of all Investors”*.

- Clause 1.1(j): “ ‘Interest’ – means a share or interest in the investment known as the “Project”.
- Clause 2.2: “The assets of the Joint Venture shall be held by the Manager on trust for the Investors and the Investors shall own the beneficial interest in those assets as tenants-in-common in accordance with their respective Participating Interests”. [Notably, the expression “assets of the Joint Venture” is not defined in the JVA].
- Clause 3.2: “The Manager shall hold all assets of the Joint Venture including the Interest on behalf of the Investors in accordance with the terms and conditions of this Agreement, particularly clause 2.2”.
- Clause 4.2(f): “In carrying out its duties and obligations under or pursuant to this Agreement, the Manager shall:

...

keep full accurate and proper books of account and records of all expenditure incurred in the course of the Project and of all income received by the Manager in the course of the Project and keep all documents supporting and evidencing all entries in those books of accounts and records”.

- Clause 4.3(a): “A bank account, if required, for the Joint Venture shall be established by the Manager in the name of a Manager and the Joint Venture with a Bank selected by the Manager. Subject as hereafter provided in this clause 4.3, all Capital Contributions and other money of the Joint Venture shall be paid to or deposited into that account or into a solicitors’ or accountants’ trust account as notified to the Investors by the Manager. Monies of the Joint Venture may also be paid direct to or applied at the direction of any creditor of the Joint Venture without the need to first deposit those monies into account.”
- Clause 5.1: “Each Investor agrees to contribute to the Joint Venture its Capital Contribution to be held and used by the Manager in accordance with the terms and conditions of this Agreement”.

- Clause 5.2: *“Immediately upon signing this Agreement, each Investor shall pay its Equity Contribution to the Manager”.*
- Clause 9.1: *“Each party covenants and agrees with the other party to indemnify and keep indemnified that other party from and against all liabilities, losses and damages which may arise in respect of any breach of the obligations imposed on the first party under this Agreement and, without in any way limiting the generality of the foregoing and where the first party is the Manager, any losses and damages which may arise from the Manager, in breach of its obligations under this Agreement, entering into any obligations or making any warranties or representations whatsoever for or behalf of the Joint Venture without the necessary power or authority to do so.”*

D. Payments by Investors

11. The disclosure report for Twinview at page 12 under the heading “Scheme Structure” states in notes 2 and 3 as follows:

“LGHA performed as a treasury function on behalf of Twinview. LGHA collected all receipts from any debt and/or equity raising undertaken by Twinview. ...Third party Investors have contributed \$3.6 million to the Scheme. Cash investments made by Investors were via LGHA (ie Investor cheque made payable to LGHA)”.

12. The notes to the Scheme structure diagram in the disclosure report in respect of TGCH are in similar terms (at page 13), save that they do not specifically assert that investor cheques were made payable to LGHA. However, the Court should infer that they were, given that the disclosure report for TGCH confirms that LGHA collected all receipts and TGCH did not itself have a bank account into which cheques or deposits payable to TGCH could be paid. Thus, the Court can be satisfied that all Investors who made out cheques or otherwise deposited funds for investment into a Project, did so knowing that the funds were being paid (at least in the first instance) to LGHA.
13. To the extent that Investors made payments purportedly in respect of a particular Project otherwise that pursuant to a JVA (that is, where no JVA was executed or by rolling over from an earlier investment), there is no document

or other basis for imposing any obligation on either Twinview or TGCH to get in or take control of those funds.

14. In that regard, it is notable that the Twinview disclosure report states (page 5) that Investors' investments in the Scheme came about by the following means:

"(a) execution of a joint venture agreement: 35 Investors (this is the number of JVAs we have sighted – which were provided by LGHA)

(b) rollover from another Scheme – 4 Investors (based on initial investment details provided by LGHA

(c) payment of funds without execution of a joint venture agreement or other document: 43 Investors (this may include Investors who have signed a JVA that we have not sighted)".

15. Likewise, in respect of TGCH, the disclosure report (page 5) states that Investors investments in the Scheme came about by the following means:

"(a) execution of a joint venture agreement – 10 Investors (this is the number of JVAs we have sighted which have been provided by LGHA);

(b) rollover from another Scheme – it is not possible to ascertain which Investors have rolled over due to limitations in Investor information provided by LGHA;

(c) payment of funds without execution of a joint venture agreement or other document – 83 Investors (this may include Investors who have signed a JVA that we have not sighted)".

16. Accordingly, close to half of the investments in the case of Twinview and the vast majority of investments in the case of TGCH, appear have been made in circumstances where there were no written terms governing the relationship (if any) between Twinview/TGCH and the investors. In those cases, "a trust was created when the moneys were received by LGHA...to hold that money and apply it for the purposes of a joint venture in which the property or project was sufficiently identified to form the subject matter of a trust" (Pooling Reasons at [248]).

17. There is no basis for imposing an equivalent obligation on either Twinview or TGCH in circumstances where the funds were not paid to them, except to the extent that an investor's funds can be traced into the funds paid by LGHA to each of Twinview and TGCH for the purchase and development of (respectively) the Twinview Property and the Glen Centre Property. For the reasons comprehensively discussed in the Pooling Reasons, identifying whether any funds paid by investors to LGHA for investment in either the Twinview Property and the Glen Centre Property is impracticable.

E. Trust Obligations Under the JVAs

18. In cases where the parties did execute a JVA, identifying the nature and extent of the obligations of Twinview and TGCH to the investors concerned is essentially a question of construction of the JVA and, in particular, the provisions set out above. In that regard, it is submitted that:

- (a) there is nothing in the terms of the JVAs nor any relevant surrounding circumstances (to the extent they are known) that imposes on Twinview and TGCH any obligation to get in and receive Capital Contributions, either expressly or by implication;
- (b) in particular, the expression "*assets of the Joint Venture*" as referred to in clauses 2.2 and 3.2 of the JVAs is not defined to include the Capital Contributions or any other money paid by Investors;
- (c) having regard to the provisions of clause 4.3 discussed below which expressly contemplate that Capital Contributions can be paid to a third party to be held on trust or used to pay creditors of the Joint Venture directly, "*assets of the Joint Venture*" should be construed as referring only to assets that came under the direct control of the Twinview and TGCH being (respectively) the Twinview Property and the Glen Centre Property;
- (d) further, the JVAs specifically contemplate (clause 4.3) that a bank account for the deposit of Capital Contributions will be established by the Manager only "*if required*" and goes on to expressly provide that Capital Contributions can be paid to or deposited into "... *a solicitors' or accountants' trust account as notified to the Investors by the Manager*";

- (e) there is no evidence concerning the circumstances in which Investors came to make payments to LGHA, including whether Investors were notified or understood that by making cheques payable to LGHA they were paying their Capital Contributions to an “*accountants’ trust account*”;
- (f) what is clear, however, from the Pooling Reasons at [248] is that funds paid to LGHA were in fact held on trust by LGHA (not Twinview or TGCH, either alone or together with LGHA) for the investors for investment in the relevant project;
- (g) accordingly, to the extent those funds were misapplied, the misapplication was by conduct of LGHA, giving rise to a liability in LGHA (not either Twinview or TGCH) to compensate the relevant trust estate (being the pool of investor funds provided to LGHA for the purposes of investment in the relevant project);
- (h) in those circumstances, the assets of the Joint Venture held by Twinview and TGCH subject to the trust established under clause 2.2 of the JVAs (and thus the trust estate for which Twinview and TGCH were accountable) was at all times limited to (respectively) the Twinview Property and the Glen Centre Property; and
- (i) the Receivers have confirmed that there has not been, as far as the Receivers are aware, any relevant loss to the trust estate so defined (paragraph 27 of the Receivers’ Submissions).

F. The Master Trust

19. The “master trust” approach posited in the Receivers’ Submission depends on the court finding that the various corporate defendants are joint trustees of all the funds of the schemes (paragraph 28 of the Receivers’ Submissions). This in turn depends on a finding that the special purpose corporate defendants (such as Twinview and TGCH) are trustees of funds deposited directly with LGHA for investment in the relevant project, which then became irretrievably intermingled with funds deposited with LGHA for investment in other projects. There is no other basis on which Twinview and TGCH could be elevated to the position of joint trustee of funds paid to LGHA. It is submitted in sections

D and E above that such a finding is not supported by the facts, including a proper construction of the JVAs.

20. The better view, which is also consistent with the rationale that led to the making of the Pooling Orders (see, in particular, the Pooling Reasons at [239] to [248]), is that:

- (a) each of Twinview and TGCH holds (respectively) the Twinview Property and the Glen Centre Property on trust for LGHA and such of the investors who can trace the funds deposited by them with LGHA into the purchase and development of those properties;
- (b) LGHA holds funds deposited with it for investment in the project comprising the purchase and development of the Twinview Property and the Glen Centre Property, together with any interest it holds beneficially in the Twinview Property and the Glen Centre Property, on trust for the investors in those projects (respectively);
- (c) because the court has found that it is at least impracticable (if not impossible) to trace funds deposited by investors with LGHA into particular projects or properties (and for no other reason), investors in the project comprising the purchase and development of the Twinview Property and the Glen Centre Property, now hold instead (subject to further order) an interest in the pool established by the Pooling Orders.

G. The Clear Account Rule Revisited

21. There are grounds for arguing that trade creditors with claims properly incurred for the benefit of the trust estate are entitled to claim directly against the estate, thus avoiding the effect of the clear accounts rule. These grounds were recently examined in a thorough and well reasoned article.²

22. In defining his "Core Argument", the author postulates (at p836) that: "*guided by US jurisprudence, the High Court could deliver the desired outcome of a direct route of access to trust assets which bypasses the clear accounts rule, by revisiting three premises underpinning the current position*". As the author in substance concedes, the extent of the "revisiting" required is beyond the

² Nuncio D'Angelo; "*The unsecured creditor's perilous path to a trust's assets: Is a safer, more direct US-style rout available*", (2010) 84 ALJ 833

capacity of a Judge at first instance and possibly also an intermediate appellate court. However, Bridgehead seeks to reserve its position to agitate the issues canvassed in the article, in the event that the court's findings on the application are revisited on appeal.

23. This issue will be canvassed further in the course of oral submissions.

H. Investor Claims

24. To the extent that any submissions on behalf of the investors develop the "master trust" approach referred to in paragraphs 28 and 29 of the Receivers' Submissions, Bridgehead relies on parts D, E and F of its submissions above. So far as the proofs of debit received from investors are concerned, in the absence of further evidence in support of the claims asserted in those proofs of debt, Bridgehead refers to and relies on paragraphs 31 to 33 of the Receivers' Submissions. However, Bridgehead may seek to make further submissions concerning the proofs of debt if the arguments anticipated by those paragraphs of the Receivers' Submissions are the subject of further evidence or written submissions.

I. Costs

25. The email from Mr Kelton to the Court of 28 September 2011 confirms that Bridgehead is the only party which has indicated to the Receivers an intention to be a "*contradictor from the perspective of proper trust creditors*" and has been endorsed by the Receivers as "*the ideal candidate for this role*". Mr Kelton's email also notes that, given no contradictor has emerged who can argue in the interests of the broader investor pool, the Receivers propose to make submissions "*to ensure that the investors' interests are advanced and the Court is properly advised as to the merits of both sides of the argument*".

26. Thus Bridgehead will be carrying the argument for the benefit of all proper trust creditors of Twinview and TGCH (and possibly in respect of other schemes where funds become available to meet trust creditor claims) and its willingness to do so has allowed the Receivers to take the opposing argument on behalf of the investor claimants, in circumstance where (notwithstanding the order made on the last occasion that, subject to further order, any contradictor is to bear its own costs in respect of the application) the costs of

that argument will be paid on an indemnity basis as a priority receivership cost. In the circumstances, Bridgehead will in due course seek to make submissions in support of an order relieving it of all or part of its costs of the application.

Dated: 12 October 2011

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