VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference: D495/2004**

CATCHWORDS

Building contract – claims arising under – builder subject to deed of company arrangement – stay of proceedings – power to order – what claims are stayed – Corporations Act 2001 (CW)

APPLICANT:	Arthaus Pty Ltd (Subject to a Deed of Company Arrangement)
RESPONDENTS:	Ian Raymond Veall, Shirley Margaret Veall
WHERE HELD:	Melbourne
BEFORE:	Senior Member R. Walker
HEARING TYPE:	Directions Hearing
DATE OF HEARING:	10 October 2005
DATE OF ORDER:	24 October 20005

[2005] VCAT 2206

ORDERS

1 The Respondents' application to amend their counterclaim is dismissed.

2 The Respondents' counterclaim is stayed until further order.

3 Leave to the Respondents to file and serve Amended Points of Defence within 21 days of the date of this order.

4 Liberty to apply.

5 Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant:	Mr Heath, Counsel
For the Respondents:	Mr Hoyne, Counsel

REASONS FOR DECISION

Background

1. The Applicant ("the Builder") is a company subject to a Deed of Company Arrangement ("the Deed") entered into pursuant to Part 5.3A of the ***Corporations Act 2001*** (Commonwealth) ("the Corporations Act"). By this proceeding it seeks payment of the sum of $14,567.07 for domestic building work it carried out on behalf of the Respondents ("the Owners") said to be due pursuant to a progress payment certificate issued before it became subject to the Deed. The Owners have defended the proceeding and seek to counterclaim, alleging that the work is defective and that monies are due to them under provisions of the building contract.

The applications

2. There are two applications before me. The Owners seek leave to file and serve an amended defence and counterclaim. The amendments to the defence are non contentious but the Builder resists the application to amend the counterclaim. The Builder applies for a stay of the counterclaim on the ground that it is subject to the Deed, the effect of which is to bind the Owners and prevent them from maintaining a claim against it.

3. Both applications came before me for hearing on 10 October 2005. Mr Heath of Counsel represented the Builder and Mr Hoyne of Counsel represented the Owners.

The Points of Defence

4. The amendments sought to be made to the defence were not seriously opposed. I shall grant leave to the Owners to amend their defence to raise the matters referred to in the draft document filed. Amongst the amendments there is a claim in paragraph 11B to the effect that, if the Owners owe the Builder the sum claimed or any other sum they seek to set off their counterclaim against it. Although Mr Heath indicated that he did not oppose the application to amend the Points of Defence to include this claim he said that the Builder might well plead that there is no right of set off in such circumstances. As I pointed out to the parties, in a claim for work and labour done it may be that an owner can defend himself from a builder's claim by showing that, by reason of the deficient or incomplete nature of the works, they are worth less than the amount claimed (see

Hanak v Green) [1958] 2 QB 9. As such, what the Owners are alleging might amount to a defence rather than a set off in the strict sense but that is for consideration on another day.

The counterclaim

5. The remainder of the draft document filed by the Owners is their counterclaim. This sets out in detail various provisions of the building contract and pleads that, on 10 March 2004, the architect administering the contract served a notice upon the Builder. The notice was served after the operative date of the Deed. It is said that, under the terms of the contract the Builder was then required within a reasonable time to make good at its own expense the defects and faults referred to in the notice and it did not do so.

6. It is further alleged that, since the defects notice was served, more deficiencies in the work have been discovered and the Builder has been advised of them. The Owners claim that, since the failure of the Builder to comply with the notice served upon it by the architect occurred after the Deed commenced and since the other defects became patent also after that date, the claims with respect to these items are not caught by the Deed and can be the subject of a valid counterclaim.

7. An alternative argument is that, under the terms of the contract, when an administrator was appointed to the Builder, the Owners became entitled to determine the contract and they did so. They are now entitled to have the work carried out by others and the difference between the cost of doing so and the amount otherwise payable to the Builder under the contract will be a debt payable by the Builder to the Owners when that sum is ascertained and certified by the architect. This amount has not been ascertained and certified yet.

The material

8. The application for a stay is supported by an affidavit of Tanya Lee Davidson sworn 21 June 2005. In it Miss Davidson deposes that the Builder entered into a Deed of Company Arrangement on 5 March 2004 and exhibits the Deed to her affidavit.

9. Section 444D (1) of the ***Corporations Act*** states:

"A Deed of Company Arrangement binds all creditors of the company, so far as concerns claims arising on or before the date specified in the Deed under paragraph 444(4)(i)".

Special provisions are then made in subsections (2) and (3) in regard to secured creditors and lessors which are not material to this application. The words *"… the date specified …."* for present purposes is 5 March 2004.

10. Section 444E provides:

"Protection of company's property from persons bound by deed:

(1) *Until a deed of company arrangement terminates, this section applies to a person bound by the deed.*

(2) *The person cannot:*
   (a) *make an application for an order to wind up the company; or*
   (b) *proceed with such an application made before the deed became binding on the person.*

(3) *The person cannot:*
   (a) *begin or proceed with a proceeding against the company or in relation to any of its property; or*
   (b) *begin or proceed with enforcement process in relation to property of the company;*

   except:

   (a) *with the leave of the Court; and*
   (b) *in accordance with such terms (if any) as the Court imposes.*

(4) *In subsection (3):*
   "property", in relation to the company, includes property used or occupied by, or in the possession of, the company."

Jurisdiction

11. Mr Hoyne submitted first that the Tribunal had no jurisdiction under the ***Corporations Act*** to grant a stay. He referred to s58AA, which provides that proceedings in relation to a matter under that Act may be brought in any Court, and pointed out that this Tribunal is not a Court. That is so but the application for a stay is not made under the ***Corporations Act***. It is made under s.80 of the ***Victorian Civil and Administrative Tribunal Act*** 1998 which empowers the Tribunal to give directions at any time in a

proceeding and do whatever is necessary for the expeditious or fair hearing and determination of the proceeding. If s.444E of the ***Corporations Act*** applies, the Respondents are prevented by that section from continuing with their counterclaim and in these circumstances it would be appropriate for a Member of the Tribunal to direct that the counterclaim be stayed.

12. Mr Hoyne suggested that if the Tribunal did have jurisdiction to order a stay, the power should be exercised sparingly because it amounts to a summary determination that the Owners' arguments are "unarguable". It seems to me that if a respondent to a proceeding alleges that it cannot be proceeded with by reason of this provision of the ***Corporations Act*** that question should be determined before the proceeding continues any further. If that cannot be done fairly in a summary way then the question can be set down for a preliminary hearing with such directions as to the filing and service of material and submissions as might be appropriate. To leave the determination of the matter until the full hearing would risk wasting substantial sums of money in costs and in particular, expose companies under administration, which might be expected to be short of funds, to needless expenditure in defending proceedings that Parliament has said should not be brought or continued.

The law

13. As to the scope of these provisions, Mr Heath relies upon the decision of the Victorian Court of Appeal in ***Brash Holdings Limited (Administrator Appointed) and others v Katile Pty Ltd & Anor*** [1996] 1 VR 24. The Court in that case was concerned with the effect of a Deed of Company Arrangement on the rights of landlords of property leased by the company but the statements of principle made are of general application. After considering the legislative context of the section, the Court of Appeal said on (p 31)

"It is in this context that s444D occurs. Subs(1) provides that the deed of company arrangement "binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed under para444A(4)(i)". For the respondents, it was submitted that the notion of "creditors" in s444D(1) should be read as limited to those having "claims arising on or before the day specified in the deed", and then, according to the respondents, what were those "claims" should be read as meaning only debts due and payable on or before that day. But we see no reason why

"creditors" should be so limited. The purpose of s444D(1) is to ensure that all creditors are bound so far as concerns the claims described; but the whole purpose of Pt5.3A is, we think, to bind all creditors. Some of them may have claims arising on or before the day specified in the deed and, in due course, claims arising after that day; and the purpose of s444D(1) is to ensure that they are bound only so far as concerns the former and not the latter.……

In our opinion, the reference to "all creditors" in s444D(1) must be read and understood in the context of all other references to "creditors" in Pt5.3A. What has so far been described is sufficient to show that the general scheme of the Part is to involve the company's creditors, without further limitation or description. The word "creditors" should, in the absence of any good reason otherwise, be read as used in the same sense throughout Pt5.3A, and it is difficult to suppose that sections, drawn so widely as, for instance, s435A (describing the object of the Part) had in mind anything less than all of the creditors for the time being of the company.

14. The court referred to a number of sections to support its interpretation and continued:

"All this provides compelling reason for supposing that "the creditors" upon whom such powers are conferred are not substantially different from "the creditors" mentioned in relation to voluntary winding up, in Pt5.5 of the Law. It may be that under Pt5.3A "the creditors" have greater power as regards the initiation of the winding up of the company than they do under Pt5.5; but that only provides more, rather than less, reason for supposing that "the creditors" are not substantially different under the two Parts. It would be more surprising, not less, if the additional power conferred upon "the creditors" by Pt5.3A was conferred upon a significantly narrower group than that having power under Pt5.5."

15. Hence it would seem that the Owners are "creditors" for the purpose of this Part of the ***Corporations Act*** and this was not disputed by Mr Hoyne. He acknowledged that there were claims the Owners had that arose before the date of the Deed and that they are unable to pursue those without leave. The argument is that the two claims referred to that are the subject of the counterclaim arose after the date of the Deed and are therefore not caught by it.

16. As to when claims "arise", the Court of Appeal in ***Brash*** said (at p.34):

"The respondents put an alternative submission that, if that was rejected, then the expression "claims arising on or before the day specified in the deed" should be confined to claims falling due and payable on or before the day specified in the deed and not afterwards. This would be sufficient to exclude, in the present case, all claims for future rent; for the day specified in the deed cannot be a day later than that on which the administration began. But, the conclusion having been reached that those who are creditors for the purposes of s444D(1), so that they are bound by the deed of arrangement, are all those having debts or claims within s553(1) (as if the relevant date mentioned therein were the day specified in the deed), it follows, we think, that the reference in s444D(1) to "claims arising on or before the day specified in the deed" is no more than a legislative attempt to fix that day as "the relevant date" for the purposes of s553. S553 speaks of "debts or claims the circumstances giving rise to which occurred before the relevant date" and we think that there is no material difference between that expression and the one adopted in s.444D, which is "claims arising on or before the day specified in the deed". Whether the question is in respect of what claims a deed of company arrangement binds creditors or what claims are admissible to proof against a company in liquidation (at least if that company be insolvent), the legislation must either directly or indirectly fix a date as at which the existence of the claim is to be determined. This is so whether or not future and contingent claims are to be recognised; for even a future or contingent claim is something the existence or non-existence of which at the present time is to be determined. The very notion of a future debt involves a comparison of the creditor's right which exists now with the same creditor's right which will arise in the future. A false emphasis has been given to the words in s444D(1) which impose a temporal limitation. Similar words appear of necessity in s553(1). The words of s444D(1), "arising on or before the day ...", do not, with respect, support the conclusion, which commended itself to his Honour, that the subsection does not comprehend future or contingent debts or claims."

17. Mr Hoyne said that a possible future breach of covenant is a mere expectancy not a claim and relied upon the decision of the Full Court of the Federal Court in ***Lamsoon Australia Pty Ltd v Molit*** (1996) 22 ACSR 169. However I note that on 180 of its

judgment the Court said:

"To suggest that because a contract might be, but has not yet been, repudiated means that an existing contractual obligation to pay money in the future should be treated as giving rise not even to a contingent claim but to a claim "which might never arise" seems to us, with respect, simply wrong. It would apply equally, in principle, to a mortgage debt or terms sale. In truth, there is in each case an existing right; in each case it does not follow, because the right will bear fruit in the future when money is required to be paid, and may be defeasible in certain events, that it is not a claim which has arisen. A question may arise as to the valuation of the claim: in the case of a winding-up that question will be answered by reference to s554A; in the case of a deed of company arrangement, it may be answered by reference to the terms of the deed.

"Future breaches of covenant" may be quite another matter. No doubt it is true, for example, that the right of a lessor under an existing covenant to keep leased premises in repair is an existing right or claim which may in theory have a value. A right to sue for damages for a particular future breach of that covenant, however, is we think, looked at before the breach occurs, not even a contingent claim: it is a mere expectancy and could not be the subject of proof. But that is a question which does not arise in this case. Finally, in this context, it may be instructive to return to James Smith and Sons (Norwood) Ltd v Goodman. In that case the question was whether a lessor could prove in the liquidation of the lessee for the value of future instalments of rent in circumstances where the lease had, before the winding up of the lessee, been assigned. Bennett J and the Court of Appeal held that such a proof was admissible; the liability was treated as contingent not because the dates of payment of instalments of rent had not arrived but because the lessor was treated substantially as if it were a guarantor having an accessory liability only, the assignee being the party principally liable.

For those reasons, on this aspect of the case we agree with the conclusion of the learned trial judge: Lam Soon Australia's claim for the "Future Rent" is one which arose on or before the day specified in the deed."

18. This case does not seem to support Mr Hoyne's submission. Certainly, it would seem that something like a breach of covenant by doing something to the premises after the

Deed had been entered into would not fall within the Deed because there was nothing whatsoever at the date of the Deed to indicate that the covenant might be breached and that the future claim might arise. However the court in Lam Soon referred to the policy behind Part 5.3A which is set out in s. 435A, which:

"... is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

(a) *maximises the chances of the company, or as much as possible of its business, continuing in existence; or*

(b) *if it is not possible for the company or its business to continue in existence - results in a better return for the company's creditors and members than would result from an immediate winding up of the company."*

The court said that an interpretation which would promote that object was to be preferred. There is no inconsistency with the approach taken in ***Brash***.

19. Moreover, s. 553 of the ***Corporations Act*** says (where relevant) as follows:

"Debts or claims that are provable in winding up

(1) Subject to this Division, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company.

(1A) *Even though the circumstances giving rise to a debt payable by the company, or a claim against the company, occur on or after the relevant date, the debt or claim is admissible to proof against the company in the winding up if:*

(a) *the circumstances occur at a time when the company is under a deed of company arrangement; and*

(b) *the company is under the deed immediately before the resolution or court order that the company be wound up.*

This subsection has effect subject to the other sections in this Division."

Hence, future and contingent claims are provable, even though they may not be "present" claims, provided that the circumstances giving rise to them occur before the

relevant date. Those "circumstances" must amount to something less than all the ingredients of a present cause of action with respect to the claim, otherwise it would be a present claim.

20. Mr Hoyne also relied upon the case of ***Del Borrello v Reilly*** (2001) WASC 157 where Wheeler J expressed the view that damage caused to leased premises by a company under administration by the removal of fixtures in breach of a covenant in the lease would have been a mere expectancy at the time the company went into administration, since at that time no such breach had occurred. Again, I see no inconsistency. The basis of such a claim would have been a breach which may or may not have occurred in the future and no part of the basis for such a claim could be said to have been in existence on the date the deed commenced.

21. In regard to the claim for latent defects, Mr Hoyne submitted that no cause of action accrued until such time as the latent defects became apparent. In support of his contention he cited Halsbury's Laws of Australia paragraph 255-192 ***Sherson and Associates Pty Ltd v*** **Bailey** (Supreme Court of New South Wales Court of Appeal - 19 October – unreported) and ***Pullen v Gutteridge Haskins Daly Pty Ltd*** [1993] 1 VR 27. Those are authorities in regard to when loss occurs in causes of action in tort, where loss is an essential ingredient. The rights of the Owners here are contractual and the cause of action is complete upon the occurrence of the breach of contract. In this context, a cause of action for defective work accrued upon the performance of the defective work. Perhaps for this reason, the proposed amended Points of Counterclaim include an alternate claim in tort. However, if the rights of a creditor against a company under administration arise in contract, it does not seem to me that the creditor can escape the operation of the ***Corporations Act*** by framing an alternate claim in tort. The circumstances giving rise to any tortious claim and indeed, the sine qua non of all the Owners' claims against the Builder, however expressed or formulated, is the defective or incomplete building work the Builder carried out for them. Even if the "loss" for the purpose of a tortious claim could be said to have been suffered after the relevant date, the breach occurred beforehand. To adopt such an interpretation of the ***Corporations Act*** as urged by Mt Hoyne would be quite inconsistent with the manifest policy of the Part.

22. As to the alternate claim for breach of the defects liability clause in the building contract, Mr Hoyne pointed out, quite rightly, that the notice was not served by the architect until after the Builder went into administration and the failure by the Builder to comply with the notice did not occur until later still. Although Mr Heath submitted that the Builder's failure to comply with the notice could not constitute a breach for which the Builder was liable in damages or at all, the relevant clause of the building contract does impose an obligation on the Builder to comply with the notice and it is at least arguable that a cause of action in damages arises from the Builder's breach of its contractual obligation to comply with the notice. A party ought to be able to litigate an arguable case. Further, as Mr Hoyne submitted, a building contract may, by its operation, produce successive causes of action through repeated breaches by a builder of different obligations.

23. Despite these arguments, all the work was done before the date of the Deed and it seems to me that the machinery set out in the contract for the enforcement of the Owners' contractual rights falls within the description of "claim". Some rights might be for an immediate claim in damages and others would "bear fruit" in the future as a result of the Owners availing themselves of procedures set out in the contract or in tort when defects were discovered. They are all nonetheless claims. The first type is a present claim and the others are future claims. Any other conclusion would produce the absurd result that the Owners could seek both the benefits of the Deed with respect to their contractual claim for bad workmanship and then issue fresh proceedings for their alternate claims in tort and for non compliance with the architect's certificate claiming relief with respect to the same matters.

24. I accept Mr Heath's analysis that the rights accruing to the Owners from the defective and incomplete work performed by the Builder accrued to them before the Builder went into administration and the mere fact that the machinery available for the enforcement of those rights operates in the way described cannot alter that situation. Insofar as any additional claim might accrue to the Owners after the deed they resulted from a breach by the Builder before that date, I think they are "future claims" within the meaning of the Part.

25. Finally, Mr Hoyne frankly admitted that, since the next step in the process following the failure of the Builder to comply with the architect's notice was the service of a second notice, that part of the proposed counterclaim was premature. He said however that it ought to be allowed to proceed at this stage for convenience, because service of the second notice would occur before the hearing when the loss was and it would be convenient to allow the amendment now. As I pointed out at the time, I think it would be inappropriate for the Tribunal to allow an amendment that will have the effect of introducing a cause of action which has not yet accrued. To do so would be to invite an application pursuant to s.75 of the ***Victorian Civil and Administrative Tribunal Act*** 1998 which would inevitably succeed.

26. In any event, I think that Mr Heath is right and that the proposed counterclaim cannot be proceeded with for the reasons given.

27. I shall give leave to the Owners to amend the Points of Defence in the manner described but it may be that, since there will be no counterclaim for the defence to refer to, the document as filed will have to be substantially redrawn.

SENIOR MEMBER R. WALKER