VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D190/2002
(D212/2002)

CATCHWORDS

DOMESTIC BUILDING CONTRACTS ACT 1995 – s.53 – builder ordered to make payment into Fund – builder later declared bankrupt – whether payment vests in trustee in bankruptcy – security for costs.

[2006] VCAT 417

APPLICANT:	Elias Moutidis
FIRST RESPONDENT:	Housing Guarantee Fund Ltd/Domestic Building (HIH) Indemnity Fund (Insurer)
SECOND RESPONDENT:	Soon Kuan Chew & Kee Ean Chuah (Owner)
INTERVENING:	The trustee in bankruptcy for the Applicant
WHERE HELD:	Melbourne
BEFORE:	His Honour Judge Bowman
DATE OF HEARING:	20 June 2005
DATE OF RULING:	10 March 2006

ORDERS

1. Ruling that the amount of $10,000 paid by the Applicant into the Domestic Builders Fund in accordance with an order pursuant to s.53 of the *Domestic Building Contracts Act* 1995 did not vest in the trustee in bankruptcy and does not form part of the estate of the bankrupt.
2. Second Respondent to provide details of reasonable costs and expenses.
3. Liberty to apply.

Judge Bowman
Vice President

APPEARANCES:

For Applicant:	No appearance
For First Respondent:	Mr McAndrew of counsel, instructed by Deacons
For Second Respondent:	In person
Intervening:	Ms McCredden of White Cleland Pty, Solicitors

RULING

BACKGROUND

1 This matter, which has a long and somewhat tortuous history, has been the subject of an earlier ruling by me. I have some familiarity with it. However, because of the turn of events, and in particular because the Applicant, Elias Moutidis ("Moutidis") has been declared bankrupt, the general factual background is of no relevance. Suffice to say that the matter involved a domestic building dispute, in which Moutidis, being the builder, disputed a decision by the First Respondent, the Housing Guarantee Fund Ltd., to pay an amount to the home owners, Mr Chew and Ms Chuah, who are described collectively as the Second Respondent.

2 The only matter still to be determined relates to costs. The proceedings are otherwise permanently stayed. The relevant facts for the purposes of the costs dispute are as follows:-

(i) Pursuant to an order of this Tribunal dated 24th March 2003 and prior to Moutidis becoming bankrupt, he paid into the Domestic Builders Fund ("the Fund") the sum of $10,000. This order was made pursuant to s.53 of the *Domestic Building Contracts Act* 1995 ("the Act"). The order does not specify what part of the amount paid is in respect of an allowance for costs or what part represents the amount of money in dispute. The records of the Tribunal indicate that the $10,000 was paid on 24th April 2003 and deposited in the Fund on 28th April 2003.

(ii) Moutidis had not satisfied costs orders previously made against him on 13th December 2002 and 17th February 2003.

(iii) By order of the Federal Magistrates' Court, Moutidis became bankrupt on 3rd May 2005. A trustee of the bankrupt's estate was appointed.

(iv) At a hearing before me on 20th June 2005, Ms McCredden, solicitor for the trustee, was granted leave to intervene on his behalf. On that occasion Mr McAndrew of counsel appeared on behalf of the Housing Guarantee Fund Ltd. Mr Chew and Ms Chuah, the home owners, represented themselves, although I note that they have previously had legal representation. By order made that day the action of Moutidis against all Respondents was permanently stayed, save for the question of costs. The basic question is whether the Respondents are entitled to any and, if so, what part of the $10,000 held in the Fund, the trustee effectively asserting that such amount forms part of the bankrupt's estate, and the Respondents asserting that it is, in essence, security for costs to which they are now entitled. Allied to that argument is a submission on behalf of the trustee that, because of the bankruptcy, this Tribunal essentially lacks jurisdiction to make the costs orders requested. The parties were afforded the opportunity of providing written submissions.

(v) The solicitors for the Housing Guarantee Fund Ltd have submitted that the position taken by the trustee in his submissions is incorrect, in that the monies paid pursuant to the order are monies held on trust for the Respondents and do not represent an asset beneficially held by Moutidis. However, this submission is stated as being "for the record" as, for commercial reasons, the Housing Guarantee Fund Ltd. has decided not to pursue an order that its costs be paid out of the $10,000 deposited with the Tribunal. Instead, it is seeking an order for its costs, and this is not opposed by the trustee. In other words, in seeking its costs it is standing in line with other creditors rather than seeking payment out of the money held in the Fund.

(vi) Mr Chew and Ms Chuah have also made written submissions. Their recollection is that the order of Senior Member Cremean of 24th March 2003 specifically related to costs as opposed to the amount in dispute, and that the order for payment of $10,000 was to be allocated as to $5,000 in respect of security for costs of the Housing Guarantee Fund Ltd. and as to $5,000 for their costs. They seek an order that monies be paid out of the Fund in relation to their costs on the basis that the funds are effectively being held on trust for the Respondents. Their submissions specifically refer to the previous costs orders made against Moutidis and his failure to pay these. Be that as it may, the order made by Senior Member Cremean on 24th March 2003 reads as follows:-

> "I order the Applicant to pay the sum of $10,000 into the Domestic Builders Fund, such sum to remain until further order (which may be made by consent) or until the outcome of the proceedings is known."

Other orders made that day relate to the proceedings being stayed pending payment and include a self-executing order. However, there is no indication in the orders as to any break-up of the $10,000 as between Respondents, or any indication as to the purpose or construction of the payment. This is, in no way, a criticism of the order made.

(vii) A subsidiary argument which has arisen is whether the $10,000, if it is not part of Moutidis' estate, can in fact be applied to the enforcement of costs orders already incurred. The trustee argues that such an order applies only to future costs and not to costs orders made before the order of 24th March 2003. It is argued that those costs orders are provable debts in the bankruptcy and can only be enforced against the property of the bankrupt with leave of the Federal Court or the Federal Magistrates' Court.

RULING

3 Section 53 of the Act, pursuant to which the order was made, is broad in its ambit and general in its wording. It reads as follows:-

> "(i) The Tribunal may make any order it considers fair to resolve a domestic building dispute.

(ii) Without limiting this power, the Tribunal may do one or more of the following –

…..

(bb) order payment of a sum of money representing the amount of any money in dispute (including an amount on account of costs) to be paid into the Domestic Builders Fund pending the resolution of the dispute;

(bc) order payment of a sum of money to be paid out of the Domestic Builders Fund representing the amount of any sum paid into the Domestic Builders Fund in accordance with an order under paragraph (bb)."

4 Thus, it can be seen that the section is expressed in more general terms than, for example, Rule 62 of the *Supreme Court Practice (General Civil Procedure) Rules* 1996, which Rule relates to security for costs. In addition, the broad powers conferred by the section relate to a concept different from that of payment into court.

5 Nevertheless, in answering the basic question which could be expressed as "Whose money is the $10,000?", assistance can be gained from those authorities dealing with monies in court and particularly where a bankruptcy has occurred. Many of these authorities were considered by Mullighan J in *Pilmer & Ors v HIH Casualty and General Insurance Limited & Ors (No. 2)*, a decision of the Supreme Court of South Australia reported at (2005) 212 ALR 636. After reviewing the authorities, Mullighan J came to the following conclusion at page 656:-

> "The party who pays money into court in the circumstances referred to in the cases does not retain any legal or equitable interest in the money. The money is vested in the registrar and is to be disbursed in accordance with the decision of the court."

6 In his judgment, His Honour referred to and followed the approach adopted in England by the Court of Appeal in *WA Sherratt Ltd v John Bromley (Church Stretton) Ltd* [1985] 1 QB 1038. At page 647, he quoted from Oliver LJ as follows:-

> "… in my judgment a defendant paying into court … parts outright with his money. I doubt whether it can be said that the Accountant-General is a trustee and in whose hands his money can be traced. Nor is there a "debt" or chose in action in the accepted sense of the word. The money becomes subject entirely to whatever order the court may see fit to make and to treat it as the defendant's property available for distribution in his bankruptcy is to assume, for the purpose of exercising the court's discretion, the very situation which will only arise if the court exercises discretion in a particular way."

Mullighan J went on to say:-

> "Each of the members of the court in *Sherratt* accepted that the party paying in "parts outright" with his money."

7 In *Commercial Banking Co. of Sydney Ltd v Colonial Financiers of Australia Pty Ltd* [1972] VR 702, money paid into court by a debtor was held to constitute a payment in favour of a creditor within the meaning of s.122 of the *Bankruptcy Act* 1966, but it is to be noted that the money was so paid in within 6 months of the presentation of the petition. In *Shirlaw (now Rodgers) v Malouf* (1989) 97 FLR 382, a payment to stakeholders was treated as being similar to the payment of money into court. In that case the payment was made outside the 6 month period. The Supreme Court of New South Wales found that there was no preference within the terms of s.122. In that decision, reference is also made to the decision of the High Court of Australia in *Grant v O'Leary* (1955) 93 CLR 587, which decision considered the relationship of an agent holding a deposit under a contract for sale. The contract of the sale of land provided for a deposit to be held by the agent until settlement. It was stated by the High Court, inter alia, that, except in the event of the vendors becoming disentitled to receive it, the purchasers had parted with the deposit beyond recall. In "*McDonald, Henry and Meek. Australian Bankruptcy Law & Practice*" 5th edition, at paragraph [116.1.195] reference is made to the following proposition:-

> "Where upon an action being brought against the bankrupt, he, before bankruptcy, paid money into court, it was held that such money was specifically fixed with the equities of the plaintiff."

Two old English cases and *Shirlaw* are referred to in support of this proposition. In summary, the authorities establish that a party paying money into court parts with it outright, and, if such payment is made outside the 6 month period referred to above, it is not void as a preference.

8 In relation to payment into court by way of security for costs, it would seem to be even clearer that the person so paying is parting outright with the money. In *Ockerby & Co. Ltd. v Cohen Ltd.* (1917) 19 WALR 94, it was determined that a plaintiff who has paid money into court as security for costs cannot withdraw the money except by leave, even though judgment was given for him at the trial. Thus, even in the event of victory, there is no automatic reversion of ownership of the money to the party paying it in.

9 Given the sweeping powers conferred by s.53 of the Act, the position seems, if anything, clearer again in relation to the present situation. The Tribunal can order that money be paid into the Fund. The purpose of such a payment, other than being part of the general power to make an order that the Tribunal considers fair to resolve a domestic building dispute, is not specified. The section does not state that the money paid is in some way dependent upon the resolution of the dispute, although in the present case the order included reference to the sum paid remaining in the Fund until the outcome of the proceedings was known. The Tribunal can order that the money be paid out of the Fund. Other than the general requirement of fairness, again there is no statutory direction as to the manner or purpose of the payment out or as to the recipient.

10 In my opinion, the person so ordered to pay such money into the Fund is parting outright with it. It is not being held on trust for that person. Nothing will happen

without further order. The money may or may not be returned in whole or in part to the person who has made the payment.

11 Accordingly, in my opinion, in the present case when Moutidis paid $10,000 into the Fund, he parted outright with it. Furthermore, he parted with it in excess of 2 years before being declared bankrupt. It did not continue to be an asset of his in any sense of the word. It was no longer his property. Upon his being declared bankrupt, it did not vest in the trustee. It is not part of the bankrupt's estate.

12 Further, whatever may have been the intent behind the making of the order, it is nevertheless not an order for security for costs. Mr Chew and Ms Chuah have, in essence, submitted that the money was intended to go towards the satisfaction of the outstanding costs orders following taxation of costs. As stated, the trustee has argued that monies paid by way of security for costs can only be applied to future costs incurred. Authority is quoted in that regard.

13 Whether or not that general proposition be so, as I have stated several times, the powers conferred by s.53 of the Act are broad. In my opinion they are not limited in the way that the trustee has argued. I do not accept the argument that the amount held in the Fund can only be applied in relation to costs incurred after the payment.

14 As previously stated, the order made on 24th March 2003 was a simple one directing payment into the Fund of $10,000. The Housing Guarantee Fund Ltd. confirmed in writing that it does not seek access to any part of that amount. In those circumstances I see no reason why the full amount is not available for payment to Mr Chew and Ms Chuah should it be required. I am uncertain as to the amount of costs and expenses in fact incurred by Mr Chew and Ms Chuah, but it seems to me that they should be reimbursed for their costs and expenses up to a maximum of $10,000 from the amount currently being held by the Fund. Pursuant to s.53 of the Act, I am prepared to so order upon being supplied with the figure representing the reasonable costs and expenses incurred by them. The balance, if any, of the $10,000 shall remain in the Fund pending any further submissions.

15 Accordingly I await details of the costs and expenses incurred by Mr Chew and Ms Chuah. This should not simply be a global figure, but a breakdown of legal costs and disbursements should be set out.

Judge Bowman
Vice President