

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D794/2005

**CATCHWORDS**

Domestic Building Contracts Act 1995 – s.53(2)(bb) - Domestic Builders' Fund - payment into fund – nature of payment – capacity in which money held by director – whether money in fund attracts interest – whether person entitled to money in fund entitled to interest

<b>APPLICANT</b>	Rescom Constructions Pty Ltd (ACN 006 998 867)
<b>FIRST RESPONDENT</b>	Woodcrest Investments Pty Ltd (ACN 098 113 770)
<b>SECOND RESPONDENT</b>	Richard Sean Merigan
<b>THIRD RESPONDENT</b>	Bradley James Carter
<b>FOURTH RESPONDENT</b>	Joseph Alesci
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	15 December 2006
<b>DATE OF ORDER</b>	30 April 2007
<b>CITATION</b>	Rescom Const v Woodcrest Inv (Domestic Building) [2007] VCAT 657

**ORDER**

The application for an order for payment of interest on moneys held in the Domestic Builders' Fund is dismissed.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	Mr T. Hinz, Solicitor
For the Respondents	No appearance



## REASONS

### Background

- 1 On 23 March 2006 I ordered the Respondents to pay into the Domestic Builders' Fund the sum of \$200,000.00 pursuant to s.53(2)(bb) of the *Domestic Building Contracts Act 1995*, such sum to be held pending the resolution of this proceeding.
- 2 Terms of Settlement were subsequently entered into pursuant to which it was agreed between the parties that the Respondents would pay into the Fund the lesser sum of \$175,000.00 to be held until such time as the Tribunal ordered that the money be paid out pursuant to s124(3)(b)(a) of the Act. I am told this money was paid into the Fund on 31 May 2006.
- 3 On 28 November 2006 the parties submitted minutes of consent order for the said sum of \$175,000.00 to be paid out of the fund. I made an order pursuant to those minutes on 30 November 2006.
- 4 Paragraph 5 of that order provides as follows:

“The parties’ application for interest in respect of money held in the Domestic Builders’ Fund and any incidental or consequential orders shall be determined by the Tribunal at the Directions Hearing to be held on 15 December 2006 at 9.15 a.m. at 55 King Street Melbourne with an allocated time of 45 minutes”.
- 5 Pursuant to this order the sum of \$175,000.00 was paid out of the Fund to the parties and the matter came before me on 15 December 2006 for argument as to whether the Applicant, who received nearly all of the money, was entitled to be paid out of the Fund the interest that had accrued on the money while it was in the Fund. I heard submissions from Mr Hinz, the Applicant’s Solicitor and reserved my decision.

### Submissions

- 6 In *Moutidis v Housing Guarantee Fund Limited* [2006] VCAT 417 a Vice President of this Tribunal, his Honour Judge Bowman, held that once money is paid into the Fund under sub-section 2(bb) of s.43 of the Act, the party paying it in parts with it altogether and thereafter has no interest in it. The Fund does not hold it on trust but must disperse it as directed by the Tribunal. In my reasons for decision where I first ordered that money be paid into the fund I referred to and followed this decision.
- 7 Mr Hinz now submits that this approach is incorrect and should not be followed. He said that the reasoning of Judge Bowman was deficient in that his Honour appeared to have accepted that the Tribunal was similar to a Court. Mr Hinz pointed out, correctly, that the Tribunal is not a Court but a creature of statute.
- 8 However although his Honour relied upon authorities relating to the character assumed by money paid into Court it does not seem to me that it

makes any difference. A common fund set up by legislation for the purpose of receiving money paid into Court is of a similar nature to the common fund set up under the *Domestic Building Contracts Act 1995*. The fund itself is itself a creature of statute and what happens to the money paid into it and how that money is dealt with and dispersed is something that is determined by the legislative provisions that set the Fund up.

- 9 Mr Hinz submitted that, as a Tribunal and not a Court, I should look only at the fairness of the situation in deciding what to do. However, although the Tribunal is required to act fairly and according to the substantial merits of the case in all proceedings (s. 97) and to conduct each proceeding with as little formality and technicality and as much speed as the requirements of the Act and the proper consideration of the matters before it permit (s. 98) it is nonetheless required to apply the law. The orders that it makes give effect to existing legal rights. They do not create rights that would not have otherwise existed.
- 10 Mr Hinz submitted that the money in the Fund was held beneficially for the parties to the proceeding. I do not believe that is the case. The money was ordered to be paid into the Fund until ordered to be paid out by the Tribunal. The section setting up the Fund does not constitute the director a trustee. The director simply administers the Fund in accordance with the Act.
- 11 Mr Hinz handed me what appears to be an exchange of communications that he had with an officer of the Department expressing a willingness to pay interest if the Tribunal should so order and confirming that income had been earned on monies held by the Fund during the relevant period. It may well be that the Department considers that it would be just for the Applicant to receive interest on this money but I cannot make an order just because the department's officers think it would be fair to do so.

### **The Fund**

- 12 Section 124(4) of the *Domestic Building Contracts Act 1995* provides:

“The director may invest any part of the Fund not immediately required for the purposes of the Fund in any manner approved by the treasurer”.
- 13 Inevitably, if the money is invested it will earn income but the section is silent as to what happens to this income.
- 14 Money paid into court attracts interest which is credited to the accounts of the persons in whose favour it is paid in but that occurs because the Supreme Court Act and the rules so provide (see *Supreme Court Act 1986* s113; Rules of Civil Procedure 1.79.09).
- 15 Since money in the common fund does not belong to any of the parties that paid it in, interest earned on the money does not ipso facto belong to any of those persons (for a discussion on the use of common funds in Victoria see *Melbourne v Department of Social Securities* (1988) 85 ALR 291 at 294).

Interest earned on the money in the fund does not belong to a beneficiary unless and until it is allocated to the beneficiary according to the rules of the Fund (see *Flannery v Secretary, Department of Social Security* (1987) 78 ALR 431. Once allocated it becomes income of the beneficiary (ibid p.-436).

- 16 In the present case the only provision made for payment of money out of the Fund is to be found in sub-section 3. That provides as follows:
- “(3) There may be paid out of the Fund –
- (a) The costs and expenses incurred in the administration and enforcement of this Act and the regulations; and
  - (b) The costs and expenses of the Tribunal in respect of proceedings under this Act; and
  - (ba) Money ordered by the Tribunal to be paid out of the Fund; and
  - (c) Costs and expenses incurred by the director in carrying out his or her functions under this Act; and
  - (d) Amounts determined by the director for the purpose of providing education programs and advice to building owners and builders in relation to the carrying out of domestic building work and the operation of this Act”.
- 17 The only avenue for the Applicant to receive any interest on the money paid in would be sub-section (ba) but I think this is just a machinery provision. The Tribunal cannot order any money it likes to be paid out of the Fund. The person in whose favour the payment is made must have a lawful entitlement to that money. Since there is no provision in the section for the crediting of income from the Fund to any of the persons who paid the money in and no provision has been made entitling any such person to share in the income of the Fund I cannot make any order under sub-section (3)(ba) for the payment of interest. The Tribunal gives effect to legal rights. It does not create them.
- 18 I note that the second reading speech of the *Licensing and Tribunal (Amendment) Act 1998* which inserted sub-section 3(ba) into the Act is silent on the question of interest. It may be that the failure to make any provision in the section for the payment of interest is an oversight by Parliament but I can only deal with the legislation as it is.

### **Conclusion**

- 19 Since there is no lawful basis for me to make an order that interest be paid out of the Fund I cannot make such an order. The application will therefore be dismissed.

**SENIOR MEMBER R. WALKER**