VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D794/2005

CATCHWORDS

Domestic Building Contracts Act 1995 – Section 53(2)(bb) – meaning of - order sought for payment of money into Domestic Building Fund – nature of application – relevant considerations – money paid in on account of costs – meaning of – relevant considerations

APPLICANT	Rescom Constructions Pty Ltd (ACN 006 998 867)
FIRST RESPONDENT	Woodcrest Investments Pty Ltd (ACN 098 113 770)
SECOND RESPONDENT	Richard Sean Merigan
THIRD RESPONDENT	Bradley James Carter
FOURTH RESPONDENT	Joseph Alesci
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Interlocutory application for order that money be paid into the Domestic Builders Fund
DATE OF HEARING	9 March 2006
DATE OF ORDER	23 March 2006

[2006] VCAT 446

ORDER

1. Order that, by 23 April 2006, the Respondents pay into the Domestic Builders' Fund the sum of $200,000 pursuant to section 53(2)(bb) of the Domestic Building Contracts Act 1995 such sum to be held pending the resolution of this proceeding.

2. The application for an order that the respondents pay a further sum of $100,000 into the Fund on account of costs is refused.

3. Liberty to apply.

4. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr M Stiffe of Counsel
For the Respondents	Mr M H Whitten of Counsel

REASONS FOR DECISION

The proceeding

1. In this proceeding Rescom Constructions Pty Ltd ('Rescom') seeks recovery of various amounts pursuant to two building contracts, each dated 29 May 2003, namely:
   (a) $352,273.06, being the amount of the final claim under the contracts;
   (b) $133,882.00 plus GST, being the profit margin on work done directly by sub contractors engaged directly by Woodcrest;
   (c) interest.

   Payment of these amounts are sought from the other contracting party, Woodcrest Investments Pty Ltd ('Woodcrest') and also the Second, Third and Fourth Respondents ('the Guarantors') who have guaranteed certain obligations of Woodcrest to Rescom.

2. Woodcrest has counterclaimed for the repayment of certain amounts that it has paid to the Builder, damages for defective and incomplete work and also very substantial damages for misrepresentation. The development was carried out by Woodcrest as trustee of a trust ("the Trust"). No details of the Trust have been provided.

The application

3. This is an interlocutory application by Rescom for an order pursuant to s53(2)(bb) of the ***Domestic Building Contracts Act* 1995** ("the Act") that a sum of money in dispute in this proceeding plus an amount of costs be paid into the Domestic Builders' Fund ("the Fund") established by s.124 of the Act, pending the resolution of the proceeding. The order is sought against all four Respondents.

4. The matter came before me for hearing on 9 March 2006. Mr M Stiffe of Counsel appeared on behalf of Rescom and Mr M H Whitten of Counsel appeared on behalf of Woodcrest. A large volume of affidavit material was filed by both sides and Counsel made helpful written and oral submissions.

Background

5. The subject of the case is a fourteen unit development by Woodcrest in Aspendale on land, at least a part of which, originally belonged to a Mr and Mrs Marshall. The consideration for the acquisition of that land appears to have been the construction for them of Unit 14. The other 13 units were to be owned by Woodcrest as trustee of the Trust. Two Domestic Building Contracts were entered into, both dated 29 May 2003. The first was to construct Unit 14 for a price of $330,000 and the second was to construct Units 1 to 13 for a price of $4,125,000. Both prices were inclusive of GST. The form of contract used in each case was the HIA Victorian New Homes Contract, January 2003 edition, and a guarantee and indemnity in regard to Woodcrest's obligations was given to Rescom by the Guarantors.

6. The development was financed by Investec Bank (Australia) Limited ("Investec") which would advance money to meet Rescom's progress claims as assessed by the Investec's Quantity Surveyor. An amount of $200,000 was held by Investec as security pending the completion of the work. This money was provided by Woodcrest.

The "cost plus" variation

7. After signing the contracts Rescom, Woodcrest and the Guarantors entered into a deed dated 27 October 2003 which provided amongst other things that:
   (a) The contract price would be Rescom's actual costs, plus 10% plus $100,000 payable by instalments over 12 months, such figures being exclusive of GST;
   (b) Each progress payment based on estimates would be adjusted when the actual costs were known, such adjustment to be taken up with the next progress payment; and

(c) The engagement of subcontractors was subject to the consent in writing of Woodcrest and they were to be paid in accordance with the determinations of the Investec's Quantity Surveyor.

8. The work was carried out with many variations. Rescom claims there were 534 "substantial variations". Woodcrest acknowledges that there were "some" but does not say how many. It does not appear that the procedures set out in the written contracts were followed in regard to these nor, it seems in regard to the construction itself. Some of the work was done by tradesmen engaged and paid directly by Woodcrest. Some materials were purchased and supplied by Woodcrest. These have been detailed by Rescom in its claim as totalling $1,338,820. Woodcrest has not dealt with this claim in its material and admits that it was entitled to engage tradesmen directly but denies that they delayed the work.

The hand over of the certificates

9. On 24 June 2005 the work was nearing completion On that day Rescom wrote to Woodcrest as follows:

> *"As discussed at last Tuesday's weekly site meeting and the Cost Summary number 16, there is an outstanding amount of $558,029.00.*
>
> *Estimated further costs for the completion are approximately $100,000.00 as outlined at the meeting, bringing the total cost of outstanding funds required to complete approximately $650,000.00.*
>
> *I spoke with Catherine of Investec today and she confirmed that approximately $119,000.00 would be paid into Rescom's account today. She also confirmed a further $60,000.00 of the financed sum would be available on issue of Certificate of Occupancy, and an amount of $195,000.00 (being the 5% retention held on Woodcrest) will also be released on C\O to Rescom.*
>
> *This means that the total funds available to Rescom on issue of C\O would be $374,000.00 as detailed below –*
>
> *$119,000.00*
> *$60,000.00*
> *$195,000.00*
> *$374,000.00*

Catherine also confirmed to me that the $200,000.00 cash bond held by Investec could only be returned to Woodcrest, as Investec were not legally entitled to pay it to Rescom.

Could you please confirm how and when the balance of the monies will be paid by Woodcrest to Rescom, this being the estimated sum of $276,000.00 as listed below:

Estimated Outstanding Costs	*$650,000.00*
Estimated amount to be paid by Investec	*$374,000.00*
	$276,000.00

As discussed on many occasions through the project, the insufficient funding has made it very difficult achieving the various stages, and now when C\O is required, getting the Certificates of Compliance from the various trades is also proving a challenge:

i.e. $558,000.00 outstanding

$119,000.00 monies received

$439,000.00

Nearly all the work is completed by the tradespeople we require compliance from and they are requesting payment prior to issuing the Compliance Certificates.

Please advise how we can address these issues, as currently the certificates are required for C\O."

10. On 27 June 2005 the Second Respondent, on behalf of Woodcrest, replied as follows:

"Re: Your letter of 24 June

At our meeting of Tuesday 21 June, you stated that you felt a further $70,000.00 would be required to complete the works, outside of invoices you currently hold. This would make the total required to complete the works using your calculations approximately $630,000.00.

I have spoken to Catherine today, who informs that there is still $274k to be released (inclusive of retentions). This when added to the $119,000.00 equals $393,000.00.

Further, we have a further $200k held with Investec pending practical completion of the project, making a total of $593k.

Again, as I have stated throughout the project, Woodcrest remains in a position to meet all amounts due and payable under our obligations.

The concern over Rescom's entitlements (or lack thereof) to monies held by Investec to a degree is strange, because Investec can't release any monies to Rescom without our approval, and yet we have funded the project to date this way without this issue being raised.

Again, we state, that aside from wages, our belief is that final payments should not be made to suppliers prior to practical completion and the issuing of their certificates, because, in effect, they have not completed their works until these are signed and issued.

Finally, I assume that these amounts calculated also include full payments to Shelford Engineering and Signall and Hobbs and not reductions for failures to complete works on time, and poor workmanship etc."

11. I note that in his response Mr Merrigan makes no comment on Mr Gunther's allegation about insufficient funding and he adopts and apparently accepts the figures contained in Mr Gunther's letter which are based on an outstanding amount of $558,029.00. He describes this as *"the total required to complete the works using your calculations"*. In regard to the $200,000.00 held by Investec, he speaks of this together with the other sums available to justify his statement that "*Woodcrest remains in a position to meet all amounts due and payable under our obligations"*. He says that the inability by Investec to release monies directly is "*strange*".

The contract stage reached

12. Rescom has pleaded that, on 8 July 2005 the work under the building contracts had reached or nearly reached "substantial completion", although that is not a term defined in any of the documents. This is denied by Woodcrest but I note that the Certificates of Occupancy state that the final approval was given by the building surveyor the day before so it appears likely that Rescom's allegation was true, at least to the extent that the units were fit for occupation.

13. On that day, 8 July 2005, according to Mr Gunther's affidavit, Mr Merrigan promised him that, when Investec released the $200,000.00 it was holding to

Woodcrest on the issue of the Certificates of Occupancy the $200,000.00 would be paid to Rescom and that it had not been committed elsewhere by Woodcrest. He says that because of this promise he handed over the certificates to Mr Merrigan but the $200,000.00 was not paid. Mr Gunther somewhat emotively describes Mr Merrigan as having cheated him. Mr Merrigan does not respond to this allegation in his affidavit despite its serious nature.

14. Rescom now seeks an order pursuant to s.53(2)(bb) that Woodcrest pay the sum of $200,000, plus an amount of $100,000 on account of costs, into the Fund. As to the costs, affidavit material has been filed on behalf of Rescom that its costs up to and including the first day of the trial are likely to be in excess of $114,944.00.

Payment into the Fund

15. Section 53 (2) of the Act (where relevant) reads as follows:

"***53 Settlement of Building Disputes***

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

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

…….

(ba) Order the payment of a sum of money representing a part payment under a major domestic building contract if –

(i) the requirement in paragraph (b) of section 42 has been met but the requirement in paragraph (a) of that section has not; and

(ii) the Tribunal is satisfied that the work required to complete the contract (including rectifying any defect) is minor in nature and not such as would prevent the owner from occupation and quiet enjoyment of the building;

(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 builder's fund pending the resolution of the dispute;

(bc) Order payment of a sum of money to be paid out of domestic builder's fund representing the amount of any sum paid into the domestic builder's fund in accordance with an order under paragraph (bb)."

15. The section has been used by the Tribunal from time to time, particularly as a stakeholder for settlement money pending the doing of work. In this regard the subsection has a merely mechanical operation that is, where money needs to be held for some reason it is convenient to order that it be paid into the Fund. The circumstances in which it might be convenient to make such an order might be varied and numerous. However the wording of the section suggests that it and the other two subsections have a greater role to play than that. Counsel were unable to find any case where the scope of the operation of these provisions has been considered. They were referred to briefly in ***Dura Australia Constructions Pty Ltd v. Vilacon Corp. Pty Ltd*** [1999] VCAT 44 but the learned Deputy President did not need to consider their application in that case. In the more recent case of ***Moutidis v. Housing Guarantee Fund*** [2006] VCAT 417, Judge Bowman held that, once money is paid into the Fund under subsection (2)(bb), the party paying it in parts with it completely and has no interest in it. The Fund does not hold it on trust but must disperse it as directed by the Tribunal.

16. The opening word "may" in subsection (2) suggests that the Tribunal has a discretion whether or not to make an order of the nature described (***Interpretation of Legislation Act 1984*** s. 45(1)).

Subsection 53(2)(ba)

17. By section 42(a) a builder must not demand final payment until the work carried out under the contract has been completed in accordance with the plans and specifications. However, s.53(2)(ba)(i) permits the Tribunal to make an order for a sum of money representing a part payment notwithstanding that the work is incomplete, provided the requirement in s.42(b) has been met. That requirement is that any occupancy permit that is required has been issued and given to the owner or, where an occupancy permit is not required, where a certificate of final inspection has been issued and given to the owner. By s.53(2)(ba)(ii), before

ordering the payment the Tribunal must be satisfied that the work required to complete the contract (including rectifying any defects) is minor in nature and not such as would prevent the owner from occupation or quiet enjoyment of the building. A payment under this subsection is a payment to the builder, not a payment into the Fund. It is referred to as a "part payment", which suggests that it is part of some greater amount to which the builder might have been entitled had the work been complete and free from defects. In assessing the amount to be ordered I think the Tribunal would have to have regard to the extent of the "minor" work required to complete the contract. No order is sought pursuant to this subsection.

Subsection 53(2)(bb)

18. Subsection (bb) is concerned with money in dispute. Its positioning immediately after (ba), which deals with only a part of what would have been due to the builder, suggests at first sight that (bb) was intended to deal with the rest of that payment and that the two subsections are strung together as part of an overall scheme. There are a number of difficulties with that interpretation and I think it is untenable. First, (bb) does not refer to the preceding subsection and does not say that its operation in a particular case is confined to a situation where an order is also made under (ba). There is nothing in its wording to suggest that it should be so read down. Secondly, the opening words of subsection (2) are *"…the Tribunal may do <u>one or more</u> of the following –"* (my emphasis) stating quite specifically that an order might be made under (bb) without there being also an order under (ba). Of course, for an order to be made under subsection (ba) it is not necessary for there to be any money in dispute. There might be no dispute at all as to what work needs to be done or what it would cost to carry out and so (ba) can operate without (bb). For the two reasons given, particularly the opening words of subsection (2), I think (bb) can also operate without (ba). This subsection is capable of a very wide application indeed, since in virtually every domestic building dispute it can be said that there are moneys in dispute. However, orders for payment into the Fund are discretionary. When should that discretion be exercised?

The legislative purpose

19. The subsections were inserted by s.6 of the **Licensing and Tribunal (Amendment) Act 1998.** There is an explanation by the Attorney General in her second reading speech in the Legislative Assembly of the purpose of the provisions and what they were intended to achieve (see *Hansard – Legislative Assembly - 22 October1998*). The minister said (where relevant)

> "*Under the **Domestic Building Contracts Act 1995** a builder is not able to demand final payment under a major domestic building contract …until the work is completed in accordance with the plans and specifications of the contract and the owner is given either a copy of a permit under the Building Act 1993 or a copy of the certificate of final inspection. This has enabled certain owners to extend unreasonably the time for making the final payment in circumstances where only very minor works or minor rectification remains outstanding. This has also happened where a discrete item requiring installation is not available from third party suppliers. In either case, the owner can occupy the building and nevertheless withhold final payment to the builder.*
>
> *Before the **Domestic Building Contracts Act 1995**, domestic building contracts relied upon a concept known as practical completion for entitlement of builders to demand final payment. This lead to significant dissatisfaction from owners who are frequently left in a position where final payment was made and unfinished works never completed. The Act addressed this problem; but the possibility of abuse swung in favour of owners.*
>
> *The Bill solves the problem by expanding the powers of VCAT … to be able to order part payment of the final instalment to the builder in appropriate circumstances as well as payment of the amount in dispute to the domestic builders' fund pending resolution of the dispute. This amendment will help prevent inequity to either owners or builders during the completion of domestic building*".

20. Although these comments appear to show that it was intended to tie subsections (ba) and (bb) together and confine the operation of (bb) to situations where orders are made under (ba) I do not think that interpretation is permissible on the clear

wording of the statute. Section 35(1) of the ***Interpretation of Legislation Act 1984*** permits the Tribunal to have regard to parliamentary debates but reference to such extrinsic material must be confined to cases where there is a real ambiguity to be resolved. Where, as here, the Act appears to be clear and unambiguous reference cannot be made to Hansard in order to create an ambiguity which would not have existed otherwise (see ***Mills v. Meeking*** (1990) 169 CLR 214 at p. 223 and the cases there cited).

21. The provisions themselves give no guidance as to how the discretion they confer is to be exercised. The fact that a discretion should be unfettered does not mean that the Tribunal member is at large. As Denning MR pointed out in ***Ward v. James*** [1966] 1Q.B. 273 at 294:

> *"It is an essential attribute of justice in a community that similar decisions should be given in similar cases…"*

In deciding what are considerations relevant to the exercise of the discretion I think I should look first at the words used in subsection (2)(bb) and the context in which it appears in the Act. From this it is apparent that there has to be a dispute and the money that is the subject of that dispute must be claimed in a domestic building dispute. In addition, there is s.53(1), which states:

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

Mr Whitten argued that the word "resolve" is suggestive of final orders only but I do not think subsection (1) is so restricted. The ultimate resolution of such a dispute may involve not only the final order but also numerous interlocutory orders made during the running. The opening words of subsection (2) suggest that the power to make the interlocutory orders referred to are included within the general ambit of subsection (1). For these reasons, I think that any order made under (bb) must be also thought by the Tribunal to be fair in the circumstances. This will require a careful consideration of the circumstances of the individual case.

22. Although I cannot have regard to the minister's speech to interpret the section, I can see no reason why I should not have regard to it to assist me in determining

when the discretion should be exercised. She said that the purpose was to enable the Tribunal:

> *"…to order part payment of the final instalment to the builder in appropriate circumstances as well as payment of the amount in dispute to the domestic builders' fund pending resolution of the dispute."*

The mischief the amendment was intended to address was, according to the Minister that the operation of the Act permitted:

> *"…owners to extend unreasonably the time for making the final payment in circumstances where only very minor works or minor rectification remains outstanding."*

and

> *"….the owner can occupy the building and nevertheless withhold final payment to the builder"*.

23. I am not aware of any previous application of this nature to come before the Tribunal. It is neither necessary nor appropriate to attempt to lay down general principles for application in all future cases. However it seems to me that a payment into the Fund should be ordered where it is fair to do so in the circumstances and where such an order would avoid the mischief identified by the Minister.

The exercise of the discretion

24. In this case Woodcrest has received Certificates of Occupancy and taken possession of the units when they were substantially completed. It has the benefit of Rescom's work and has withheld the final payment. It has sold some units and leased or occupied others or offered them for sale. It disputes that anything further is payable under the contract on the basis that it has a counterclaim alleging incomplete and defective work and claiming damages on various bases. In essence it disputes the whole of the final payment. It seems to me that the fact that Woodcrest has the taken the Units without paying the final claim is, subject to any other relevant considerations, a strong reason why I should order payment of the disputed amount into the Fund but it is not the only matter to be considered. I now turn to the circumstances of this case and the reasons advanced by the parties for and against the making of the order sought.

The possibility of a barren judgment

25. I accept that the possibility of there being a barren judgment if no order is made is a relevant consideration, although the more usual practice to follow in those circumstances would be an application for a Mareva type injunction. There was considerable affidavit material concerning whether or not the First Respondent was solvent or would be able to satisfy any judgement given in this proceeding. It was pointed out that a number of the units had been sold, others are leased and there is a caveat over the title to one, which is the subject of litigation by intending purchasers. Both Mr Gunther and Rescom's Project Manager, Allan Budding, have sworn in their affidavits that Mr Merriman told them that the Trust would be "collapsed" when all the GST credits had been claimed in order to avoid payment of GST. In his affidavit Mr Merriman denies that he made "statements in the presence of Gunther and Allan Budding in the form alleged". As a denial, this wording seems somewhat guarded but it is a very serious allegation that is made and none of the deponents has been cross-examined. I would not be prepared to make such a finding on conflicting affidavits where there has been no cross-examination.

26. Mr Whitten submitted that Rescom had failed to establish that Woodcrest was a company without assets but I think that in referring to the unsold units he oversimplifies the position. The only assets referred to in the course of hearing the application were the units themselves and, as I pointed out, they are not assets that Woodcrest owns beneficially. All that it has beneficially is a right to indemnify itself from the Trust assets that it holds with respect to liabilities incurred in the course of acting as trustee. Those controlling its affairs could wind up the Trust and divest Woodcrest of the Trust assets rendering its right of indemnity worthless. Nevertheless, although the liability of Woodcrest without assets might then be a concern, the other Respondents have guaranteed its obligations and there is nothing to suggest that they are men of straw.

27. Mr Whitten acknowledged the power of the Tribunal to make asset preservation orders under s. 80 or 97 of the Act but said that to obtain such an order the party seeking it had to show a real risk of dissipation of assets that the Defendant has within the jurisdiction. He said that the real purpose of such an order is to prevent

an unscrupulous defendant rendering itself judgement proof by dissipating its assets. He said that such was not the position here. He cited a number of authorities which support his submission. He also likened the application of Rescom to an attempt to obtain summary judgment under s.75 or s. 78 of the Act and said that the grounds for obtaining such an order had not been demonstrated.

28. I accept Mr Whitten's submission that there is not sufficient in the material to warrant the granting of a Mareva type injunction but this is not an application for such an order. I also accept that there is no basis for the granting of summary judgment but again, this is not such an application. The Fund may provide a convenient place to keep money ordered to be provided as security for costs but I think s.53(2)(bb) also stands on its own, even though similar considerations might sometimes apply to applications for these other types of orders.

The conduct of the parties

29. It is significant that the allegation made in Mr Gunther's affidavit, in regard to the promise of the payment of $200,000 if the certificates were handed over, has not been answered. For the purpose only of this application I accept his evidence in that regard. It therefore appears that Rescom was induced to part with the Certificates of Occupancy by a promise to pay the $200,000 referred to and that after the certificates were handed over the promised money was not paid. I think this is a significant matter to be taken into account.

The relative strengths of the claim and counterclaim

30. The subsection contemplates that the money ordered to be paid in will be the subject of dispute. The mere fact that the party ordered to pay it in denies that he owes it is not to the point. However the relative strengths and weaknesses of the respective cases is something I think I should consider in exercising my discretion as to whether or not to make the order. If I were to find that the builder's case appeared weak and the owner's case strong, that would be a relevant consideration to be weighed with the other matters to be taken into account.

31. This is an interlocutory application and no witnesses have been heard. I have only the pleadings and the affidavits to tell me about the claim and counterclaim.

Nevertheless, apart from the counterclaim, the letters referred to above would suggest a strong prima facie case that Rescom is entitled to at least a substantial part of the money it is claiming.

32. As to the counterclaim, I have some concerns. First, the claim with respect to defective and incomplete work seems a little hollow in regard to the units that have been sold. Further, it is not suggested that the expert whose report has been obtained has differentiated between the work done by tradesmen engaged by Rescom and the tradesmen engaged directly by Woodcrest. Indeed, Mr Gunther in his affidavit suggested that much of the work complained of was done by Woodcrest's tradesmen. It has also not been suggested that the rectification work has been done and yet a number of the Units that have not been sold have been occupied.

33. The claim with respect to the recovery of the overpayments seems inconsistent with the correspondence referred to. The claim set out in the Counterclaim in regard to this is for damages because Rescom "overcharged" Woodcrest. However it has not been suggested that the payments were involuntary or that they were paid by mistake.

34. The claim for delay damages would need to be assessed having regard to the scope of the works, the impact of the variation deed upon the terms of the printed forms of contract, the number of variations and their impact on the progress of the work, the fact that much of the work appears to have been done by Woodcrest's own tradesmen who might have caused or contributed to the delay. I cannot say anything further about the claim except to say that it is by no means clear on its face that it will succeed.

35. The claim for damages for misleading and deceptive conduct or alternatively, negligence, appears from paragraphs 122 and 126 of the Counterclaim, to be for "$1.5 million to $2 million". In essence, the complaint is that Rescom represented that it could build the development for $4.4 million, whereas it cost "in the order of $6 million". Assuming for the moment that this representation was made, it is not clearly spelled out what if any loss or damage was suffered. As I pointed out

during submissions, it is not pleaded as a warranty, (and it is difficult to see how it could have been, given the contractual documents) so any damages would have to be assessed on a tortious basis. It was not suggested that the representation induced Woodcrest to enter into an unprofitable contract. Indeed, such indications as I have on the material would suggest that a profit was made. This claim as presently pleaded does not seem to be maintainable.

Relative hardships

36. Mr Whitten submitted that the granting of the order *"…would have an obvious impact on Woodcrest's financial affairs and its ability to conduct this proceeding"* but no evidence has been filed by Woodcrest in this regard. All that appears is that Woodcrest would have to find the money to pay into the Fund. But the amount sought is less than the amount of the final payment that it has withheld.

Conclusion

37. Weighing these matters I think this is an appropriate case in which to order the disputed sum of $200,000 to be paid into the Fund. I now turn to the application that $100,000 also be ordered to be paid into the Fund "on account of costs".

Payment on account of costs

38. The positioning of the words "(including an amount on account of costs) immediately after the words "…any money in dispute…" would at first sight suggest that, for an amount on account of costs to be ordered, it must also be part of the money in dispute. However to read the words in that way would be to deprive them of any scope for operation because at an interlocutory stage there are no costs able to be claimed and so none that could be the subject of a dispute. I think what the section is suggesting is that a sum of money can be ordered to be paid into the Fund on account of the costs of the proceedings that will determine the dispute.

39. As Mr Whitten pointed out, a Respondent is not generally ordered to provide security for costs. Why then should there be the power to make an order that has a

similar effect in a domestic building dispute and does this provide an indication as to how the power to order payment of such a sum should be exercised?

The nature of a Domestic Building Dispute

40. This is a specialist list dealing with building cases on a regular basis. In all but the simplest cases the contracts generally follow a common form. The contract price is divided into staged payments to be made to coincide with various stages of construction reached or in some cases, at specified time intervals. The contract might divide the price into separate sums and allocate them between the various stages of the work or it might provide that the amount to be paid with each claim will depend upon periodic assessments by some third person of the value of the work done. In general, a builder has until the completion of the work to fix any defects and any incomplete work. The existence of defective or incomplete work prior to completion is not usually a reason for the owner to refuse to pay a staged payment unless the contract says so or unless the deficiency is such that the work is not at the stage which is required to be reached before the payment is due. The purpose of staging payments is to ensure that the builder receives a cash flow in order to finance the continuation of the construction but does not receive payments in excess of the value of the work done.

41. As the Minister pointed out in her speech, this regime was altered in regard to domestic building cases by the s.42 of the Act, which provides that a builder must not demand the final payment until the work carried out under the contract has been completed in accordance with the plans and specifications and the building owner has been given either a copy of the certificate of occupancy or a certificate of final inspection.

42. Building contracts generally involve very large sums of money, only a relatively small percentage of which represents the profit to the builder. The final payment under a contract might amount to a large proportion of the builder's profit on the contract. If the owner withholds it, the builder must nonetheless pay for the labour and materials used in constructing the building for the owner and so the impact on the builder's liquidity might be severe. In any event, he will not have that money to finance any legal proceedings to enforce payment from the owner who has the

corresponding benefit of being in possession of the amount of the payment that has been withheld in order to finance any litigation that the builder brings against him. This would generally be unfair where the owner has received the certificate of occupancy, taken possession of the building and has the benefit of the builder's work.

43. Ordering money to be paid into the Fund on account of costs might redress this unfairness to the extent that, although the builder does not have the amount of the final instalment to fund the litigation, neither does the owner have it to fight him with. However this consideration disappears where the amount withheld is paid into the Fund. To then order the owner to pay in an amount of costs as well would tip the scale back the other way and put him at a disadvantage relative to the builder. In such a case, I think the Tribunal's approach should be analogous to an application for security for costs and the matters to be taken into account should be similar.

44. In this case Woodcrest is the respondent. Security for costs is not usually ordered against a respondent because, whereas an applicant assumes the risk of recovery of costs when he commences the proceeding, a respondent is a party by compulsion. In some cases this might not reflect the realities of the situation in that someone might, by his conduct, leave another with no alternative but to sue him in order to protect that other person's rights but the cases in which that argument has found favour are limited (see ***Williams*** 1.62.01.25 and the cases there cited). Nor is a respondent who counterclaims normally ordered to provide security where the scope of the counterclaim is not outside the ambit of the applicant's claim (***Williams*** 1.62.01.30).

45. Although I have expressed some reservations about the counterclaim as presently pleaded this is an interlocutory matter and I have heard no viva voce evidence. There is not sufficient on the material before me to warrant an order that any sum be paid into the Fund by Woodcrest on account of costs.

SENIOR MEMBER R. WALKER