FEDERAL COURT OF AUSTRALIA

Quin v Bitcon [2020] FCA 1065

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| File number: |  |
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| Judge: | **STEWARD J** |
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| Date of judgment: | 28 July 2020 |
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| Catchwords: | **BANKRUPTCY AND INSOLVENCY –** application for declaration that surplus funds from sale of property vest in trustee in bankruptcy – where bankrupt involved in domestic building dispute and charged and found guilty of causing criminal damage to property – where restraining order made over property owned by bankrupt – where compensation order awarded in favour of first respondent and partly discharged through garnishing money from bankrupt’s bank account – where restraining order varied to allow mortgagee to enforce security rights and sell property – where orders made to disburse sale proceeds in payment of costs incurred in sale of property, in payment of monies owing to mortgagee, and also in payment of remaining amount owing under compensation order – where order made to pay ‘Residual Surplus Funds’ following sale of property into Domestic Building Fund pending resolution of domestic building dispute – where V.C.A.T. found in favour of respondent in domestic building dispute – where estate of Bankrupt sequestrated and applicant appointed trustee – where property sold and proceeds paid to mortgagee, to first respondent in satisfaction of compensation order, leaving Residual Surplus Funds – where Residual Surplus Funds held by V.C.A.T. – whether Residual Surplus Funds formed part of bankrupt’s estate pursuant to s. 58 of *Bankruptcy Act 1966* (Cth.) following satisfaction of restraining order and compensation order  |
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| Legislation: | *Bankruptcy Act 1966* (Cth.) ss. 5, 27, 29, 30, 31, 58, 58A, 60, 82, 116*Confiscation Act 1997* (Vic.) ss. 15, 18*Domestic Building Contracts Act 1995* (Vic.) ss. 1, 4, 53, 57, 124*Family Law Act 1975* (Cth.) s. 79*Sentencing Act 1991* (Vic.) s. 86Explanatory Memorandum, *Domestic Building Contracts and Tribunal Bill 1995* (Cth.)Explanatory Memorandum, *Licensing and Tribunal (Amendment) Bill 1998* (Cth.)  |
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| Cases cited: | *Commissioner of Taxation v. Linter Textiles Australia Ltd (In Liquidation)* (2005) 220 C.L.R. 592*Gertig v. Davies* (2003) 85 S.A.S.R. 226*Harmer v. Federal Commissioner of Taxation* (1991) 173 C.L.R. 264*Iron Mountain Mining Ltd v. K & L Gates* [2016] WASCA 166*Jones v. Daniel* (2004) 141 F.C.R. 148*Moutidis v. Housing Guarantee Fund (Domestic Building)* [2006] VCAT 417*Norman v. Federal Commissioner of Taxation* (1963) 109 C.L.R. 9 |
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| Date of hearing: | Determined on the papers |
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| Date of last submissions: | 5 June 2020 |
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| Registry: | Victoria |
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| Division: | General Division |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | General and Personal Insolvency |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 69 |
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| Counsel for the Applicant: | Mr. C. R. Brown with Ms. K. Wangmann |
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| Solicitor for the Applicant: | Williams Winter |
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| Counsel for the First Respondent: | Mr. A. Kirby |
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| Solicitor for the First Respondent: | Meerkin & Apel |
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| Counsel for the Fourth and Fifth Respondents: | The Fourth and Fifth Respondents did not appear |

ORDERS

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|  | VID 1400 of 2019 |
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| BETWEEN: | DAVID CHARLES QUIN (AS TRUSTEE OF THE BANKRUPT ESTATE OF KITCHENER CRESPIN)Applicant |
| AND: | SPENCER JOHN BITCONFirst RespondentDIRECTOR OF CONSUMER AFFAIRS VICTORIAFourth RespondentVICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNALFifth Respondent |

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| JUDGE: | STEWARD J |
| DATE OF ORDER: | 28 JULY 2020 |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the costs of the first respondent, to be agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

STEWARD J.:

1. By an amended application, the trustee in bankruptcy for the estate of Mr. Kitchener Crespin (the “trustee”) seeks, amongst other things, a declaration that surplus funds which have arisen from the sale of 125 Warren Road, Parkdale (the “Property”) vest in the trustee. Prior to sale, Mr. Crespin had been the registered owner of the Property. Until recently, there was a dispute as to whether the surplus funds were held by the Victorian Civil and Administrative Tribunal (“V.C.A.T.”) or by the Director of Consumer Affairs Victoria (the “Director”) in his capacity as director of the Domestic Building Fund (the “D.B.F.”) established pursuant to s. 124 of the *Domestic Building Contracts Act 1995* (Vic.) (the “*Domestic Building Act*”). It is now common ground that the surplus funds are held by V.C.A.T. in its “trust account” pending the resolution of this proceeding.
2. The trustee originally commenced proceedings against the first respondent (“Mr. Bitcon”), Mr. Gaskell as second respondent and the Assistant Director, Asset Confiscation Operations, Infringement Management and Enforcement Services, Department of Justice and Regulation (the “A.C.O.”) as third respondent. The amended application removed the A.C.O. as third respondent and sought to join the fourth and fifth respondents. As set out below, Mr. Bitcon opposes any such joinder. Prior to the exchange of written submissions between the trustee and Mr. Bitcon, an order was made to remove the second respondent as a party to the proceeding.
3. Because of the COVID-19 pandemic, this matter was decided, with the consent of the parties, on the papers.

## The Legislative Provisions

1. The following provisions of the *Bankruptcy Act 1966* (Cth.) (the “*Bankruptcy Act*”) and the *Domestic Building Act* are relevant to the disposition of this matter.
2. Section 58(1) of the *Bankruptcy Act* provides:

**Vesting of property upon bankruptcy—general rule**

(1) Subject to this Act, where a debtor becomes a bankrupt:

(a) the property of the bankrupt, not being after-acquired property, vests forthwith in the Official Trustee or, if, at the time when the debtor becomes a bankrupt, a registered trustee becomes the trustee of the estate of the bankrupt by virtue of section 156A, in that registered trustee; and

(b) after-acquired property of the bankrupt vests, as soon as it is acquired by, or devolves on, the bankrupt, in the Official Trustee or, if a registered trustee is the trustee of the estate of the bankrupt, in that registered trustee.

1. The terms “property” and “the property of the bankrupt” are defined by s. 5 as follows:

***property***means real or personal property of every description, whether situate in Australia or elsewhere, and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incident to any such real or personal property.

*…*

***the property of the bankrupt***, in relation to a bankrupt, means:

(a) except in subsections 58(3) and (4):

(i) the property divisible among the bankrupt's creditors; and

(ii) any rights and powers in relation to that property that would have been exercisable by the bankrupt if he or she had not become a bankrupt; and

(b) in subsections 58(3) and (4):

(i) the property, rights and powers referred to in paragraph (a) of this definition; and

(ii) any other property of the bankrupt.

1. Section 58(3) provides:

Except as provided by this Act, after a debtor has become a bankrupt, it is not competent for a creditor:

(a) to enforce any remedy against the person or the property of the bankrupt in respect of a provable debt; or

(b) except with the leave of the Court and on such terms as the Court thinks fit, to commence any legal proceeding in respect of a provable debt or take any fresh step in such a proceeding.

1. Section 58A(1) and (2) provides:

**Vesting of property upon bankruptcy—effect of orders in force under the proceeds of crime law**

*If a restraining order or forfeiture order is in force*

(1) If property of a bankrupt is covered by a restraining order, or a forfeiture order, made before the date of the bankruptcy, subsection 58(1) does not apply to property that is covered by the order while that property is so covered.

*If a pecuniary penalty order is in force*

(2) If a pecuniary penalty order is made against a bankrupt before the date of the bankruptcy, subsection 58(1) does not apply to any of the property of the bankrupt while the order is in force.

1. Section 5 defines the terms “restraining order” and “proceeds of crime law” as follows:

***proceeds of crime law*** means:

(a) the Proceeds of Crime Act 2002; or

(b) the Proceeds of Crime Act 1987; or

(c) a corresponding law.

…

***restraining order*** means a restraining order made under a proceeds of crime law.

1. Section 60(1)(b) provides:

**Stay of legal proceedings**

(1) The Court may, at any time after the presentation of a petition, upon such terms and conditions as it thinks fit:

…

(b) stay any legal process, whether civil or criminal and whether instituted before or after the commencement of this subsection, against the person or property of the debtor:

(i) in respect of the non-payment of a provable debt or of a pecuniary penalty payable in consequence of the non-payment of a provable debt; or

(ii) in consequence of his or her refusal or failure to comply with an order of a court, whether made in civil or criminal proceedings, for the payment of a provable debt;

and, in a case where the debtor is imprisoned or otherwise held in custody in consequence of the non-payment of a provable debt or of a pecuniary penalty referred to in subparagraph (i) or in consequence of his or her refusal or failure to comply with an order referred to in subparagraph (ii), discharge the debtor out of custody.

1. Section 82(1) defines a provable debt as follows:

**Debts provable in bankruptcy**

Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy.

1. Section 116(1) sets out what constitutes property that is divisible amongst the creditors of the bankrupt. It provides:

**Property divisible among creditors**

(1) Subject to this Act:

(a) all property that belonged to, or was vested in, a bankrupt at the commencement of the bankruptcy, or has been acquired or is acquired by him or her, or has devolved or devolves on him or her, after the commencement of the bankruptcy and before his or her discharge; and

(b) the capacity to exercise, and to take proceedings for exercising all such powers in, over or in respect of property as might have been exercised by the bankrupt for his or her own benefit at the commencement of the bankruptcy or at any time after the commencement of the bankruptcy and before his or her discharge; and

(c) property that is vested in the trustee of the bankrupt’s estate by or under an order under section 139D or 139DA; and

(d) money that is paid to the trustee of the bankrupt’s estate under an order under section 139E or 139EA; and

(e) money that is paid to the trustee of the bankrupt’s estate under an order under paragraph 128K(1)(b); and

(f) money that is paid to the trustee of the bankrupt’s estate under a section 139ZQ notice that relates to a transaction that is void against the trustee under section 128C; and

(g) money that is paid to the trustee of the bankrupt’s estate under an order under section 139ZU;

is property divisible amongst the creditors of the bankrupt.

1. Critically, property divisible amongst a bankrupt’s creditors does not include property held on trust. Section 116(2)(a) thus provides:

(2) Subsection (1) does not extend to the following property:

(a) property held by the bankrupt in trust for another person;

1. I now turn to the *Domestic Building Act*. Section 1 provides that the Act’s main purposes are to regulate contracts for the carrying out of domestic building work, provide for the resolution of domestic building disputes and other matters by V.C.A.T., and require builders carrying out domestic building work to be insured.
2. Significantly, s. 124 of the *Domestic Building Act* imposes a statutory obligation on the Director to establish what is called the “Domestic Builders Fund”. It provides:

**Domestic Builders Fund**

(1) The Director must establish a fund to be called the Domestic Builders Fund.

(2) There must be paid into the Fund—

(a) all fees received or recovered by or on behalf of VCAT in respect of proceedings under this Act; and

(b) all fines and penalties recovered under this Act; and

(c) all money paid out of the domestic building account in the Building account of the Victorian Building Authority Fund under section 205B(1)(d) of the **Building Act 1993**; and

(ca) all money paid to the Fund out of the domestic building dispute account in the Building account of the Victorian Building Authority Fund under section 205B(5) of the **Building Act 1993**; and

(d) money appropriated by Parliament for the purposes of the Fund; and

(da) money ordered by VCAT to be paid into the Fund; and

(e) all other money authorised to be paid to the Fund by any body or person; and

(f) income from the investment of the Fund.

(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 VCAT in respect of proceedings under this Act; and

(ba) money ordered by VCAT to be paid out of the Fund; and

(c) the costs and expenses incurred by the Director in carrying out his or her functions under this Act; and

(ca) amounts determined by the Director for the purpose of providing advocacy services in relation to domestic building contracts and domestic building disputes; 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.

(4) 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.

1. Section 53(1) and (2)(bb) and (bc) provides:

**Settlement of building disputes**

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

(2) Without limiting this power, VCAT 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);

1. Section 4(b) sets out the following “object” of the *Domestic Building Act*:

to enable disputes involving domestic building work to be resolved as quickly, as efficiently and as cheaply as is possible having regard to the needs of fairness …

1. Finally, s. 57 provides:

**VCAT to be chiefly responsible for resolving domestic building disputes**

(1) This section applies if a person starts any action arising wholly or predominantly from a domestic building dispute in the Supreme Court, the County Court or the Magistrates’ Court.

(2) The Court must stay any such action on the application of a party to the action if—

(a) the action could be heard by VCAT under this Subdivision; and

(b) the Court has not heard any oral evidence concerning the dispute itself.

(3) This section does not apply to any matter dismissed by VCAT under section 77 of the **Victorian Civil and Administrative Tribunal Act 1998**.

(4) If an action is stayed under this section, any party to the action may apply to VCAT for an order with respect to the dispute on which the action was based.

(5) If a person applies to VCAT under subsection (4) VCAT must notify the Court and on such notification the Court must dismiss the action.

(6) Subsection (5) does not apply if VCAT refers the matter to the Court under section 77(3) of the **Victorian Civil and Administrative Tribunal Act 1998**.

## Procedural History

1. The procedural history in this matter is not in dispute but is important. Mr. Crespin was a builder. It would appear that prior to 2013 he was engaged to renovate the home of Mr. Bitcon. At some point there occurred a domestic building dispute. This was heard by V.C.A.T. Mr. Crespin was also charged with six counts of causing criminal damage to Mr. Bitcon’s house. The Director of Public Prosecutions for Victoria then made an application to the County Court of Victoria under the *Confiscation Act 1997* (Vic.) (the “*Confiscation Act*”) for a restraining order. Consequently, on 2 July 2013, Judge Parsons made the following relevant orders and declarations pursuant to ss. 15 and 18 of the *Confiscation Act* (called the “Restraining Order”):

**PURSUANT TO SECTION 18 OF THE CONFISCATION ACT 1997, THE COURT ORDERS THAT:**

1. No person shall dispose of or otherwise deal with the property specified below or with any interest in that property:

a) The property situated at 125 Warren Road, Parkdale more particularly described in Certificate of Title Volume 08270 Folio 304;

…

**THE COURT DECLARES** pursuant to section 15(3)(a) of the *Confiscation Act* 1997 that the property specified in paragraph 1 of this order be restrained for the following purposes:

a) To satisfy any order for restitution or compensation that may be made under the *Sentencing Act* 1991.

1. In 2017, Mr. Crespin was found guilty in relation to each of the six counts. This led Mr. Bitcon to make an application for a compensation order pursuant to s. 86 of the *Sentencing Act 1991* (Vic.). On 12 May 2017, the County Court ordered Mr. Crespin to pay Mr. Bitcon compensation in the sum of $80,000 (the “Compensation Order”). Subsequently, in July 2017, the County Court ordered that the Commonwealth Bank garnish money from Mr. Crespin’s bank account to pay Mr. Bitcon’s costs, interest and the Compensation Order (in aggregate $88,756.27). Mr. Bitcon received $82,742.04 in part payment of Mr. Crespin’s liability.
2. The Commonwealth Bank was the mortgagee of the Property, and in 2018 it took steps to enforce its security rights. On 27 February 2018, the County Court varied the Restraining Order by giving directions for the sale of the Property pursuant to a particular timetable. Judge Cohen made the following order about the how the proceeds of sale were to be disbursed:

1. Pursuant to section 26(1) of the *Confiscation Act 1997*, [the Restraining Order] be varied to permit the … Commonwealth Bank of Australia, to sell the [Property], subject to compliance with each of the following conditions:

…

(g) upon completion of the sale of the Property, the proceeds of the sale are to be disbursed as follows:

(A) firstly, in payment of all reasonable costs, charges and expenses incurred in the sale of the Property or otherwise payable in respect of the sale of the Property pursuant to the terms of Loan Agreement and the Mortgage; and

(B) secondly, in payment of monies owing to Commonwealth Bank of Australia pursuant to the Loan Agreement and the Mortgage; and

(C) thirdly, the balance of the proceeds of the sale of the Property (if any) is to be paid by bank cheque to ACO at settlement of the sale, to be held on trust and restrained until further order of this Court (‘**the Surplus Funds**’).

1. I adopt the reference to the “Surplus Funds.”
2. The County Court also made the following further orders:

2. Upon compliance with each of the conditions specified in order l of these orders above, but not otherwise, the Property shall be discharged from the operation of the restraining order; and

3. The ACO pay to Mr Spencer Bitcon’s Solicitors, namely Meerkin & Apel from the Surplus Funds the amount owing on the compensation order made by His Honour Judge Meredith on 12th May 2017, namely $6,014.23 together with interest that has accrued from 21st July 20 l7 (‘**the Outstanding Amount**’); and

4. Upon payment in full of the Outstanding Amount, the Restraining Order is set aside pursuant [to] section 27(9) of the *Confiscation Act 1997*.

1. On 27 March 2018, in the V.C.A.T. proceeding between Messrs. Bitcon and Crespin, the Tribunal joined the A.C.O. as a party and made the following order:

The ACO must pay into the Domestic Builders Fund pending resolution of the dispute the balance standing in the trust account of the ACO of the Surplus Funds referred to in the Orders made by Her Honour Judge Cohen of the County Court of Victoria in proceeding CI-13-03276 on 27 February 2018, once the Outstanding Amount referred to in those Orders has been paid.

1. On 3 April 2018, V.C.A.T. directed the A.C.O. to pay the “Surplus Funds” less the Outstanding Amount (the “Residual Surplus Funds”) by bank cheque to the Principal Registrar of V.C.A.T., made payable to the D.B.F. That order was apparently varied on 16 December 2019 to require the A.C.O. to make payment by delivering to that Principal Registrar a Departmental cheque made payable to the D.B.F.
2. Following a final hearing, on 1 October 2018 V.C.A.T. ordered Mr. Crespin to pay Mr. Bitcon the sum of $560,472.
3. On 28 March 2019, the estate of Mr. Crespin was sequestrated and the applicant was appointed trustee in bankruptcy. The Property was then sold on 25 July 2019 for approximately $849,000. Settlement took place on 8 January 2020. After paying out the Commonwealth Bank, $7,498.84 was paid to Mr. Bitcon on account of the remaining amount owing from the making of the Compensation Order. The balance remaining of $202,710.89, constituting the Residual Surplus Funds, was paid to the A.C.O.
4. The trustee commenced this proceeding in December 2019 to clarify whether the Residual Surplus Funds formed part of Mr. Crespin’s estate pursuant to s. 58 of the *Bankruptcy Act* following satisfaction of the Restraining Order and the Compensation Order*.*
5. On or about 3 February 2020, the A.C.O. sent to V.C.A.T. the sum of $202,710.89. On 7 February 2020, Mr. Bitcon made an application for payment of this sum to him pursuant to ss. 53(2)(bc) and 124(3)(ba) of the *Domestic Building Act*. The terms of the relief sought by Mr. Bitcon are important and were as follows:

That pursuant to Sections 53(2)(bc) and 124(3)(ba) of the Domestic Building Contracts Act 1995, the funds held in the Domestic Builders Fund in this proceeding, be paid to [Mr. Bitcon].

1. As Mr. Bitcon’s counsel pointed out, at no stage did the trustee make any application to vary the orders made by the County Court in February 2018, or the orders made in March 2018 by V.C.A.T.
2. On 5 March 2020, V.C.A.T., amongst other things, joined the trustee as a party to the V.C.A.T. proceeding. The outcome of Mr. Bitcon’s application, as I understand it, awaits the judgment of this Court.

## The Submissions of the Parties

### The trustee’s submissions

1. In written submissions filed on 15 April 2020, the trustee contended that the following issues required determination:

(a) whether the [Residual Surplus Funds] are held by VCAT or by the DBF;

(b) whether the [Residual Surplus Funds] vested in the Trustee after satisfaction of the Restraining Order and the Compensation Order on about 8 January 2020;

(c) whether, notwithstanding that the [Residual Surplus Funds] have been paid to VCAT, the [Residual Surplus Funds] remain property of the Bankrupt’s estate to be dealt with pursuant to the provisions of the *Bankruptcy Act*;

(d) whether, in the event that the [Residual Surplus Funds] are or have been paid to the DBF, the [Residual Surplus Funds] remain property of the Bankrupt’s estate to be dealt with pursuant to the provisions of the *Bankruptcy Act*; and

(e) whether, pursuant to ss 58(3)(a) and or 60(1)(b) of the *Bankruptcy Act*, the VCAT Judgment and the VCAT Costs Orders and Bitcon’s application to VCAT under the *Domestic Building Contracts Act* filed 7 February 2020 are stayed.

1. I note that none of the foregoing enumerated issues raise whether V.C.A.T. and the Director should be joined as parties to this application, even though this issue had been raised by the trustee with the Court. As set out below, Mr. Bitcon opposes any such joinder.
2. The trustee submitted that the Residual Surplus Funds became the property of Mr. Crespin, and thus vested in the trustee, on or about 8 January 2020, when settlement of the sale of the Property took place. That was the date when, it was submitted, the Compensation Order was discharged and the Restraining Order came to an end. Before this date, it appears to have been accepted that the Property did not form part of Mr. Crespin’s bankrupt estate, because the Restraining Order constituted a “restraining order” for the purposes of s. 58A of the *Bankruptcy Act*. However, it was said, s. 58A ceased to apply from about 8 January. The trustee also submitted that V.C.A.T.’s orders, and Mr. Bitcon’s application to have the Residual Surplus Funds transferred to him under the *Domestic Building Act*, had been “automatically stayed” when the sequestration order was made. He contended that Mr. Crespin’s liabilities to Mr. Bitcon were provable debts for the purposes of the *Bankruptcy Act*. Any other outcome would be “contrary to the public policies of the *Bankruptcy Act*” which provide for the “equal sharing of property in the bankrupt estate among creditors”. The trustee also submitted that it had not been proven that the Residual Surplus Funds had been paid into the D.B.F.; the evidence only demonstrated that the A.C.O. had paid those funds to V.C.A.T.
3. The trustee put his case in the following way:

The applicant’s contentions are simple:

(a) At the time of the bankruptcy:

(i) The property had not sold;

(ii) The sale was subject to the County Court order;

(iii) Following satisfaction of the County Court order and division of the proceeds under that order, there was a live dispute regarding the [Residual Surplus Funds];

(iv) [Mr. Bitcon] had received judgment in VCAT, but that was merely a crystallization of their alleged claim against [Mr. Crespin] which they presumably would rely on in support of their claim for the [Residual Surplus Funds] to be determined in the Domestic Builders Fund;

(v) The bankrupt’s rights in the [Residual Surplus Funds] were subject to that dispute – which was to be heard in Domestic Builders Fund. If it were not for that dispute, the bankrupt would be entitled to the [Residual Surplus Funds] and [Mr. Bitcon] would be entitled to enforce its judgment by ordinary means.

(b) The VCAT direction for payment of the [Residual Surplus Funds] into the DBF was merely to preserve the [Residual Surplus Funds] until the hearing of the dispute in the Building Dispute Fund. However, it had not been executed prior to the bankruptcy and therefore the bankrupt’s rights were still as per (iv) above at the time of the bankruptcy.

(c) Upon the bankruptcy of [Mr. Crespin], the VCAT/DBF proceeding and dispute is stayed, therefore the funds are no longer subject to the dispute and should therefore no longer be subject to payment into DBF. There are distinct policy reasons for this – that all disputes over bankrupt’s property are to be resolved in the context of the bankrupt estate.

(d) Accordingly, the proper course is for the [Residual Surplus Funds] to be paid into the bankrupt estate and for [Mr. Bitcon] to prove in the bankrupt estate in relation to its judgment debt. Otherwise, [Mr. Bitcon], as an unsecured creditor in the estate, will gain an advantage over other creditors.

(Footnotes omitted.)

### Mr. Bitcon’s submissions

1. In written submissions filed on 8 May 2020, Mr. Bitcon submitted that it did not matter whether or not the Residual Surplus Funds were in the possession of V.C.A.T. or had actually been deposited into the D.B.F. However, if it did matter, he submitted that the better view was that the funds were held within the D.B.F. He referred to a letter written by the A.C.O. to the trustee’s solicitors on 17 January 2020 which noted the following:

We advise that a cheque for the [Residual Surplus Funds] referred to in the County Court orders made by Her Honour Judge Cohen in proceeding Cl-13-03276 dated 27 February 2018 has been paid to the Domestic Builders Fund on 17 January 2020 in compliance with the VCAT orders dated 27 March 2018.

1. Mr. Bitcon also relied upon orders made by V.C.A.T. on 10 February 2020 which noted the following in “other matters”:

B. On 3 April 2018 the Tribunal, noting that Order 2 of the Tribunal’s Orders made 27 March 2018 that the ACO must pay monies into the Domestic Builders Fund, directed the ACO to forward a cheque for the relevant sum to the Principal Registrar made payable to the Domestic Builders Fund, when it is in a position to do so.

C. On 16 December 2016 the Tribunal varied the order made on 3 April 2018 so that the ACO could make payment of the [Residual Surplus Funds] by delivering to the Principal Registrar a Departmental cheque made payable to the Domestic Builders Fund.

D. On or about 3 February 2020 the ACO sent to the Tribunal the sum of $202,710.89.

1. Following the filing of final submissions and the agreement of the parties that this matter should be determined on the papers, the solicitors for the trustee sent to my Chambers, without leave, a letter obtained from V.C.A.T. dated 29 May 2020 (the “V.C.A.T. letter”). The letter states that “VCAT has received and paid into the Tribunal’s trust account the sum of $202,710.89” in respect of proceeding “D700/2013” (being the domestic building dispute proceeding). The V.C.A.T. letter also states:

The Tribunal will continue to hold the money in trust until further order from the Federal Court of Australia in proceeding VID 1400/2019.

1. An affidavit exhibiting the V.C.A.T. letter was filed, without leave, on 1 June 2020. None of this should have occurred. The trustee did not have the Court’s permission to file this evidence after the completion of the timetable for the filing of written submissions. I subsequently granted leave to the respondent to file an affidavit or submissions in reply to this new evidence.
2. On 5 June 2020, Mr. Bitcon filed supplementary submissions. In essence, Mr. Bitcon submitted that the Residual Surplus Funds “are held on trust for the DBF and are held pending further order from VCAT in the VCAT proceeding”. He contended that the Residual Surplus Funds are not held at large for V.C.A.T. to treat or disburse in whatever way it so desires. Specifically, Mr. Bitcon submitted that by the V.C.A.T. order made on 27 March 2018, the Residual Surplus Funds were:

… cloaked with a particular purpose. Whilst they are held in VCAT’s *trust* account, they must notionally be held on trust for the DBF pending further order from VCAT in the VCAT proceeding [citing *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] A.C. 567].

1. As will become apparent, in my view, for the reasons set out below, it makes no difference to the outcome of this proceeding whether V.C.A.T. or the D.B.F. is the holder of the funds in dispute. In any event, both parties now accept that the Residual Surplus Funds are being held by V.C.A.T. in a “trust account”. I now turn to Mr. Bitcon’s other substantive submissions.
2. *First*, Mr. Bitcon submitted that V.C.A.T. has, practically speaking, the exclusive jurisdiction to determine domestic building disputes. For that purpose, pursuant to ss. 53(1) and (2)(bc) and 124 of the *Domestic Building Act*, V.C.A.T., and no one else, had the power to order the payment of funds out of the D.B.F. In particular, it was submitted that this Court, exercising jurisdiction under the *Bankruptcy Act*, had no authority to make orders for the disbursement of funds paid into the D.B.F. In his written submissions he thus made the following contention:

The power to make an order for payment out of the DBF manifestly is not vested in the Federal Court by, nor does not arise under, a federal law: refer section 19 of the *Federal Court of Australia Act* 1976 (Cth) and section 39B of the *Judiciary Act* 1903(Cth). Such a power also is not “picked up” by reason of section 79 of the *Judiciary Act* 1903 and section 39B(1A)(c) of the *Federal Court of Australia Act*: e.g. see *Von Arnim v Group 4 Correctional Services Pty Act* [(2002) 117 F.C.R. 346 at [29]].

Further, there is no cross-vested jurisdiction of a State Tribunal to the Federal Court: *Re Wakim*; *Ex parte McNally* [(1999) 198 C.L.R. 511].

1. It followed, it was said, that this Court has no jurisdiction to make the orders sought by the trustee, and it is not authorised to join as parties either V.C.A.T. or the Director. That was so, even though Mr. Bitcon acknowledged that this Court’s powers pursuant to ss. 27 to 31 of the *Bankruptcy Act* are “undoubtedly wide.”
2. *Secondly*, Mr. Bitcon contended that when the Residual Surplus Funds were paid to V.C.A.T. for the benefit of the D.B.F., this was equivalent to a payment of monies into Court. In such circumstances, the monies vest in the fund, and the payor ceases to retain any legal or equitable interest in those funds. Mr. Bitcon referred to a number of authorities in support of this proposition, one of which was *Harmer v. Federal Commissioner of Taxation* (1991) 173 C.L.R. 264. In that case there had been a payment made into Court pending resolution of certain competing claims. The Court directed the funds to be deposited into an interest-bearing account. The Commissioner of Taxation assessed the claimants on the basis that they were “presently entitled” to the interest thereby earned. The Court rejected that proposition. At 272‑273, the Court said:

Upon payment into court, the $198,195 owed by Riverhall became “trust moneys” in the broad sense that neither the Accountant of the Crown Law Department nor the court itself was beneficially entitled to them. They were received by the court (through the Accountant as the appropriate officer) pursuant to the statutory provisions or Rules of Court under which they were paid in. After payment in, the claimants acquired an interest in the moneys in the sense that they were entitled to insist that they be properly administered and applied for the purposes for which they were paid in. However, no claimant was beneficially entitled to either the whole or any part of the moneys paid into court or of the interest earned thereon. The moneys were received and held by the Accountant to be applied in accordance with the orders ultimately made by the Supreme Court. The respective interests of the individual claimants were, at best, contingent. None had an entitlement to the capital or the income of the fund which was vested either in interest or in possession. *A fortiori*, none had a present legal right to demand or receive payment of either capital or income. It follows that none of the claimants was “presently entitled” to the income of the fund for the purposes of s. 99A of the Act during the period between the time of the payment in of the moneys and the time when they were received by In Residence’s solicitors to be deposited with the Building Society.

(Footnotes omitted.)

1. Mr. Bitcon also relied upon a decision of his Honour Judge Bowman, sitting as a vice-president of V.C.A.T., in *Moutidis v. Housing Guarantee Fund (Domestic Building)* [2006] VCAT 417. That matter involved a domestic building dispute. Mr. Moutidis, before being declared a bankrupt, had apparently paid $10,000 into the D.B.F. pursuant to s. 53 of the *Domestic Building Act*. The trustee in bankruptcy was given leave to intervene and claimed that the funds formed part of the bankrupt’s estate. After considering the nature of the power conferred by s. 53, Judge Bowman made the following observations at [4]-[6]:

…it can be seen that [s. 53] 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.

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 [2004] SASC 389; (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.”

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.”

1. Judge Bowman decided that when Mr. Moutidis made the payment into the D.B.F., he parted outright with that money. Those funds accordingly did not form part of the estate in bankruptcy. His Honour reasoned at [9]-[11] as follows:

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.

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.

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.

1. I interpose that the trustee submitted that *Moutidis* was distinguishable because in that case the payment into the D.B.F. had taken place *before* Mr. Moutidis had been bankrupted. Alternatively, the trustee submitted that I should not follow *Moutidis* because doing so would result in an outcome contrary to the “public policies” of the *Bankruptcy Act*.
2. *Thirdly*, Mr. Bitcon also submitted that when the Restraining Order was discharged upon payment of the Residual Surplus Funds to the A.C.O., those funds did not for the first time become an asset of the bankrupt estate. That is because the Residual Surplus Funds were then required by the V.C.A.T. orders to be paid into the D.B.F. Those funds were thus never held by Mr. Crespin, and he never had any right to them. Mr. Bitcon referred to s. 116(1)(b) of the *Bankruptcy Act* for the proposition that the trustee “stands in the shoes” of Mr. Crespin’s rights and powers; those rights and powers did not include any interest in, or right to, the Residual Surplus Funds.
3. *Finally*, in relation to the trustee’s contention that V.C.A.T.’s orders had been automatically stayed, Mr. Bitcon submitted that he was not seeking to enforce any order against the bankrupt and, further, was not seeking any order against the “property of the bankrupt” for the purposes of s. 58 of the *Bankruptcy Act*. Rather, Mr. Bitcon’s application in V.C.A.T. was limited to an order for the payment to him of the Residual Surplus Funds out of the D.B.F. Because those funds did not form part of the bankrupt’s estate, ss. 58(3)(a) and 60(1)(b) were not engaged in this dispute and have no application.

### The trustee’s submissions in reply

1. In his reply, the trustee submitted that when the Restraining Order and Compensation Order were satisfied in January 2020, the Restraining Order was set aside and the Residual Surplus Funds thereby came to be vested in the trustee. The previous orders made by V.C.A.T. were of no moment. Those orders were directed at the A.C.O.; they did not require the trustee to make any payment into the D.B.F. His interest in those Residual Surplus Funds thus remained unaffected. The A.C.O. instead held the funds on trust for the trustee. None of the authorities relied upon by Mr. Bitcon about the making of a payment of money into Court were applicable; none of those cases had dealt with the situation here where money has been paid into Court (or here V.C.A.T.) *after* the sequestration of a party’s estate.
2. In any event, it was said, those V.C.A.T. orders “[are], or ought to be” stayed pursuant to ss. 58(3)(a) and 60(1)(b) of the *Bankruptcy Act*. I note, however, that no order to stay those proceedings has yet been made by this Court. Although the trustee appears now to seek such a stay by his written submissions, notwithstanding his prayer for interim relief does not include any such request. In other parts of the trustee’s submissions he appears to assert that a stay of the V.C.A.T. orders and proceedings has already taken place.
3. As to the question of this Court’s jurisdiction, the trustee submitted that the seeking of a declaration about whether the Residual Surplus Funds had vested in the trustee, and the making of a consequential order for the funds to be paid to the trustee, were matters that were within the jurisdiction of this Court. The trustee submitted that Mr. Bitcon wrongly characterised the relief sought as relief in the way of an order for payment out of the D.B.F., presumably pursuant to the *Domestic Building Act*.
4. The trustee also disagreed with Mr. Bitcon’s contention that the Residual Surplus Funds were not property of Mr. Crespin. The trustee submitted that V.C.A.T.’s order was made to preserve the Residual Surplus Funds pending resolution of the domestic building dispute. That order was premised on Mr. Crespin being the owner of those funds, at least until their payment into the D.B.F. In other words, between the discharge of the Restraining and Compensation Orders and the payment to V.C.A.T., the monies belonged to Mr. Crespin, and thus vested in the trustee.

## Disposition

1. For the reasons which follow, I would dismiss the trustee’s application.

### The D.B.F.

1. Something should first be said about the D.B.F. The Explanatory Memorandum which accompanied the Bill which became the *Domestic Building Act* describes the function and purpose of the D.B.F. in the following terms:

*Clause* 124 provides that the Director must establish a Domestic Builders Fund into which must be paid all fees received or recovered by the Tribunal, money transferred from the Building Administration Fund (under the **Building Act 1993**), Parliamentary appropriations, all fines, any money authorised to be paid to the Fund by any person or body and income from the investment of the Fund. Money is to be paid from the Fund to administer/enforce this Act and the regulations, to pay the Tribunal and mediators, and to provide for education programs and advice to building owners and builders. The Director may invest any part of the Fund not immediately required in any approved manner.

1. Section 124 identifies what monies are to be paid into the D.B.F. They include fees received by V.C.A.T. in respect of domestic building proceedings, fines and penalties payable under the *Domestic Building Act* and monies paid out of the former domestic building account. Section 124(2)(da) also authorises V.C.A.T. to order the payment of money into the D.B.F. This is a supplemental power which may be exercised by V.C.A.T. It is not qualified by any express words of limitation, although one would imply that the power can only be exercised for the purposes of the *Domestic Building Act*. Section 4 of that Act sets out its objects as follows:

**Objects of the Act**

The objects of this Act are—

(a) to provide for the maintenance of proper standards in the carrying out of domestic building work in a way that is fair to both builders and building owners; and

(b) to enable disputes involving domestic building work to be resolved as quickly, as efficiently and as cheaply as is possible having regard to the needs of fairness; and

(c) to enable building owners to have access to insurance funds if domestic building work under a major domestic building contract is incomplete or defective.

1. Section 124 also identifies what monies may be paid out of the D.B.F. It includes the costs and expenses incurred in the administration and enforcement of the *Domestic Building Act* and the costs and expenses incurred by V.C.A.T. in respect of domestic building disputes. There is also a general power contained in s. 124(3)(ba), which authorises V.C.A.T. to make payments out of the D.B.F. Again, one would imply that the power can only be exercised for the purposes of the *Domestic Building Act.*
2. Section 124(2)(da) and (3)(ba) were inserted into the *Domestic Building Act* by the *Licensing and Tribunal (Amendment) Act 1998* (Vic.) That same Act inserted s. 53(2)(bb). Section 53(2)(bb) gives V.C.A.T. the power to order a payment of money “representing the amount of any money in dispute (including an amount on account of costs) to be paid into the [D.B.F.] pending the resolution of [a] dispute”. Section 53(2)(bc) then authorises V.C.A.T. to order the payment of money “out of the [D.B.F.] representing the amount of any sum paid into the [D.B.F.] in accordance with an order under paragraph (bb)”. The Explanatory Memorandum which accompanied the Bill that became the *Licensing and Tribunal (Amendment) Act*, describes these two provisions as permitting V.C.A.T:

… to order the payment of money in dispute into the Domestic Builders Fund, and to order repayment of money in dispute out of that fund.

1. The foregoing suggests that the D.B.F. is a blended fund composed of monies derived from various sources and which can be used to make a variety of different payments. One such purpose is for it to be a fund to hold disputed monies. These may be repaid to the payor if she, he or it is successful in disputed proceedings in V.C.A.T. Alternatively, if the payor is unsuccessful, the monies might be paid to the other party to the domestic building dispute. Either way, once paid into the D.B.F., in my view the payor ceases to enjoy any proprietary interest in the funds paid in, or otherwise enjoy any interest in that fund. Nor does the payor enjoy any contingent right to any monies in the D.B.F. That is because the ultimate destiny of those monies is a matter entirely within the discretionary powers of V.C.A.T. I therefore respectfully agree with the conclusion of his Honour Judge Bowman in *Moutidis*. I do not consider it a distinguishing factor for the purposes of this application that the relevant payment, which remains subject to an order that the monies be paid into the D.B.F., was made *after* Mr. Crespin had been bankrupted, as the payment was made pursuant to V.C.A.T’s order made *before* his bankruptcy. Here, of course, before the Residual Surplus Funds had been paid to the A.C.O., there existed V.C.A.T.’s order that Mr. Crespin was liable to pay Mr. Bitcon $560,472. I note that this sum greatly exceeds the Residual Surplus Funds; as such, and as a practical matter, Mr. Crespin was probably never going to receive any payment back out of the D.B.F.

### The Ownership of the Residual Surplus Funds

1. When the sequestration order was made on 28 March 2019, the Property which was owned by Mr. Crespin was at that time subject to the Restraining Order made by the County Court. As such, and pursuant to s. 58A of the *Bankruptcy Act*, the Property did not then vest in the trustee under s. 58.
2. When the Restraining Order was discharged in January 2020, s. 58A ceased to apply. However, by then Mr. Crespin had ceased to be the owner of the Property. The Property had been sold. It follows that the Property never vested in the trustee.
3. Prior to the payment to V.C.A.T., the Residual Surplus Funds were then held by the A.C.O. in accordance with the orders made by the County Court and by V.C.A.T. In my view, at that time Mr. Crespin, and thus the trustee, did not have any proprietary interest in those funds. They were entirely subject to V.C.A.T.’s order that they be paid into the D.B.F. Mr. Crespin, and thus the trustee, could not call for them in any way. They were wholly pledged to be deposited into the D.B.F., and to be held thereafter in accordance with the statutory regime created by the *Domestic Building Act*. In my view, the Residual Surplus Funds were not held by the A.C.O. on trust for Mr. Crespin. They were burdened absolutely with the obligation that they be paid into the D.B.F. In that respect, the payment to the A.C.O. is relevantly analogous to a payment into Court.
4. No different result would have occurred if the Residual Surplus Funds had *not* been held by the A.C.O., but had instead been paid to Mr. Crespin. If that had occurred, Mr. Crespin would probably have held the funds on trust on behalf of the Director, being the effective manager of the D.B.F. The Residual Surplus Funds would thus not have been divisible property: s. 116(2)(a) of the *Bankruptcy Act*. In *Jones v. Daniel* (2004) 141 F.C.R. 148, the Family Court made orders pursuant to s. 79 of the *Family Law Act 1975* (Cth.) for the transfer to a wife of the husband’s interest in certain land. The husband then became a bankrupt. The Full Court of this Court held that because of the Court order, the wife thereby became the beneficial owner of the interest in the land and this relevantly defeated the rights of the trustee in bankruptcy. Moore J. (with whom Hill J. and Allsop J. (as his Honour then was) agreed) said at 154‑155 [14]:

The members of the Full Court in [*Official Trustee in Bankruptcy v. Mateo* (2003) 127 F.C.R. 217] did conclude that when an order (of the type presently under consideration) is made under s 79 ordering that a person presently holding a legal interest in the property transfer that interest to another person, a beneficial interest is thereby vested in the other person. Wilcox J described the order as vesting an equitable interest (at [62]) and Merkel J as transferring an equitable estate or interest (at [136]). Branson J expressed her conclusion in qualified terms (at [102]) when she spoke of it being “*probably* implicit in the terms of the order that the interest of the parties to the marriage in the [property] were altered by operation of the order” (emphasis added) vesting in the wife all the husband’s beneficial interest in the property. It appears Branson J viewed that as the preferable construction of the order and its [e]ffect. In any event the views of a majority were clear and an equitable interest was, by the order, transferred. A trust was created for the benefit of the other person.

1. Allsop J. (as his Honour then was) also noted the following (at 156 [20]):

Section 79 of the *Family Law Act 1975* (Cth) deals, as the High Court said in *Mullane v Mullane* (1983) 158 CLR 436 at 445, with orders which work an alteration of the legal or equitable interests in parties or either of them. Thus, an express and immediate vesting order could be made. There was nothing to suggest in the reasons for judgment of Coleman J in the Family Court (or of the Family Court in *Mateo*, as far as can be gleaned from the judgment of the Full Court in *Mateo*) that any suspension of effect of the orders made was intended. It would perhaps have been clearer if the immediately dispositive effect of the orders here had been identified expressly. Nevertheless, the orders here, though not expressly dispositive, made as they were against the background of s 79 and in light of the reasoning in *Mateo*, should be taken to have the effect found by the primary judge.

1. Here, of course, the Residual Surplus Funds were paid to the A.C.O. and not to Mr. Crespin. It follows from *Jones*, that if the Residual Surplus Funds were held on trust for any other person, they were held on trust for the Director as the effective manager of the D.B.F. For my part, however, it may be doubted whether equity is needed here to impress a trust on the A.C.O.: c.f. *Commissioner of Taxation v. Linter Textiles Australia Ltd (In Liquidation)* (2005) 220 C.L.R. 592. The better view is that the monies were held absolutely by the A.C.O., but subject to V.C.A.T.’s order that the funds be paid into the D.B.F.
2. Accepting that the funds are now held by V.C.A.T. in its trust account, no different result arises. The funds remain pledged to be paid into the D.B.F. The order requiring this to occur remains extant. In my view, Mr. Crespin, and thus the trustee, enjoys no proprietary interest in those funds. They are not property which can vest in the trustee.
3. If the funds had been paid into the D.B.F., I would have formed the view that the Director as effective manager of the D.B.F. did not and does not hold any part of those funds on trust for Mr. Crespin. The Residual Surplus Funds would have been subject to the absolute control of V.C.A.T. which is authorised to distribute those funds in accordance with both ss. 53 and 124 of the *Domestic Building Act*. V.C.A.T.’s powers of dispersal denied Mr. Crespin, and thus the trustee, any proprietary interest in the Residual Surplus Funds, and precluded him, and thus the trustee, from enjoying even a contingent interest in those funds. In my view, at best and following payment to the A.C.O., Mr. Crespin had no more than a mere expectancy in relation to the Residual Surplus Funds given that the funds were burdened wholly by V.C.A.T.’s order and were destined to be paid into a fund controlled by V.C.A.T. Mere expectancies, however, do not sound in legal rights: see *Norman v. Federal Commissioner of Taxation* (1963) 109 C.L.R. 9.
4. The trustee placed great reliance upon s. 58(3) of the *Bankruptcy Act,* as set out above. However, in my respectful view, that provision does not assist the trustee. That is because:
	1. *First*, Mr. Bitcon does not seek any remedy against Mr. Crespin; he seeks a remedy against the Director in his capacity as effective manager of the D.B.F. Nor does Mr. Bitcon seek any remedy against the property of Mr. Crespin, for the reasons I have given;
	2. *Secondly*, Mr. Bitcon does not seek to “commence” any legal proceedings in respect of any relevant provable debt; and
	3. *Thirdly*, whilst I accept that the orders presently sought in V.C.A.T. by Mr. Bitcon probably constituted a “fresh step” (c.f. *Gertig v. Davies* (2003) 85 S.A.S.R. 226), I am not satisfied that this step took place in legal proceedings “in respect of a provable debt” of Mr. Crespin. I accept that the phrase “in respect of” should be construed liberally (c.f. *Iron Mountain Mining Ltd v. K & L Gates* [2016] WASCA 166). However, the order sought against V.C.A.T. and the Director is one directed at a made against a fund of monies to be held by the Director for the purposes prescribed by ss. 53 and 124 of the *Domestic Building Act*, and subject to the control of V.C.A.T. Subject to this Court finding in favour of the trustee, there is a present likelihood that the monies to be paid into the D.B.F. will be paid to Mr. Bitcon in part discharge of the judgment obtained by him against Mr. Crespin prior to Mr. Crespin’s bankruptcy. But until that takes place, Mr. Bitcon will enjoy no proprietary interest in the fund. Nor, for reasons already given, will Mr. Crespin and thus the trustee enjoy any similar interest. In my view, Mr. Bitcon’s action to seek payment from a third party for the amount owed to him by Mr. Crespin is not a step in a proceeding in respect of a provable debt, but a step in a proceeding in respect of the enforcement of an award made in a domestic building dispute *prior* to the act of bankruptcy. It would, with respect, be anomalous for Mr. Crespin’s other creditors to receive rateable distributions from monies which Mr. Crespin does not own or control in any way. Of course, if V.C.A.T. were ever to order the distribution of those monies to Mr. Crespin, those monies would then vest in the trustee.
5. For these reasons, and with great respect, the trustee’s claim must fail. It is also unnecessary for me to address the submissions made concerning the jurisdiction of this Court. I also agree with Mr. Bitcon’s submissions that because the Residual Surplus Funds did not form part of the bankrupt’s estate, s. 60(1)(b) is not engaged in this dispute.

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| I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Steward. |

Associate:

Dated: 28 July 2020