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94 Paragraphs

AGE OLD BUILDERS PTY LTD v SWINTONS PTY LTD - BC200304749

SUPREME COURT OF VICTORIA COMMON LAW DIVISION
OSBORN J

4181 of 2003

26-27 June and 3 July 2003, 21 August 2003

Age Old Builders Pty Ltd v Swintons Pty Ltd [**2003] VSC 307**

APPEAL FROM VCAT -- Whether s14 and/or s132 Domestic Building Contracts Act 1995 render void reference to an expert/arbitrator of a dispute relating to a domestic building contract -- Distinction between arbitration and expert determination.

Osborn J

[1] This is an appeal pursuant to s148 of the Victorian Civil Administrative Tribunal Act 1998 against the decision of Deputy President Cremean made on 6 December 2002 with respect to preliminary questions stated in the proceedings before him. The proceedings in issue were heard in the Domestic Buildings List and this appeal raises threshold issues as to the proper construction of the Domestic Building Contracts Act 1995 ("the DBC Act") and its application to the facts of this case.

[2] The preliminary questions in issue were decided on the basis of an agreed statement of facts. This agreement was relatively detailed and incorporated reference to 37 agreed documents. The most salient background facts can be summarised as follows.

[3] On 28 April 1999 the appellant entered into a major domestic building contract (as defined under the DBC Act) with the respondent for the construction of four townhouses in Acland Street, South Yarra. The contract was a standard form contract but included special conditions, plans and specifications. It originally provided for practical completion by 20 March 2000. The appellant submitted a number of claims to the architect nominated in the contract seeking extensions of time. Not all of these were accepted but the date for practical completion was extended to 30 June 2000.

[4] On 24 July 2000 the architect gave notice to the appellant that liquidated damages of $1,100 per day would be provisionally withheld from the appellant's future claims from that date until practical completion was achieved.

[5] During the course of the works there were disputes between the parties as to alleged defects. In September 2000 the parties agreed to appoint a building consultant to conduct an independent assessment of the quality of work, and to provide a determination with respect to the alleged defects. The building consultant completed a determination ("the first determination") on 27 September 2000. On the same day the architect issued a notice of practical completion certifying that the date of practical completion was 27 September 2000.

[6] On 26 September 2000 the parties had agreed to have certain additional disputes with respect to extensions of time,

extension of time costs and liquidated damages determined by the building consultant. On 27 September 2000 the building consultant acknowledged and accepted his appointment. On 28 September 2000 the appellant provided written submissions to the building consultant for the purposes of the proposed second determination. On the same date it also submitted progress claim No 17 to the architect. The architect issued progress certificate No 17 for $7,321 on 12 October 2002. On 27 October 2000 the appellant submitted progress claim No 18 to the architect and on 3 November 2000 the architect issued progress certificate No 18 for $4,607.40.

[7] The respondent did not pay progress certificates 17 and 18 but provisionally withheld liquidated damages in reliance upon the architect's notice dated 24 July 2000. On 14 December 2000 the respondent provided its written submissions to the building consultant.

[8] It appears that substantial delay occurred thereafter and on 22 August 2001 the appellant issued the VCAT proceedings in which the preliminary decision forming the subject of this appeal was subsequently made. On 25 October 2001 the respondent also commenced proceedings at VCAT.

[9] On 30 October 2001 the appellant's solicitors wrote to the building consultant confirming their understanding that a determination would be made on or before 7 December 2001. On the same day the solicitors acting for the respondent wrote to the building consultant and advised him that the agreement for him to resolve disputes pursuant to the second determination agreement was void. Again on the same day the appellant's solicitors wrote further to the building consultant foreshadowing an application to VCAT that the building consultant now be appointed as a Special Referee pursuant to s95 of the DBC Act, and informing the building consultant it was appropriate that no determination be made pursuant to the second determination agreement pending an order of VCAT.

[10] On 9 November 2001 the appellant provided further written submissions to the building consultant for the purposes of the second determination.

[11] On 12 November 2001 the building consultant wrote to the solicitors for the parties advising them that he did not now have a clear understanding of the scope of his jurisdiction in relation to the second determination and asked if he was to proceed. On 15 November 2001 the appellant's solicitors wrote to the building consultant again foreshadowing an application to VCAT for either a declaration that the building consultant proceed with the second determination or alternatively seeking orders that he act as a referee under s77 of the DBC Act or s95 of the VCAT Act.

[12] On 17 December 2001 the solicitors for the respondent advised the building consultant that the respondent would not be responsible for the payment of the building consultant's fees after the date upon which he was notified that the agreement was void. The appellant's solicitors by letter of the same date advised the building consultant that the appellant would pay his fees if the respondent did not.

[13] On 31 December 2001 the building consultant wrote to the parties and advised that he believed he was bound by the agreement to complete the determination which he expected to complete "in the next few days". On 8 January 2002, the respondent's solicitors delivered further submissions on a without prejudice basis to the building consultant.

[14] On 11 January 2002 the building consultant wrote to the appellant and the respondent seeking further information. On 22 January 2002 the appellant responded in writing to the building consultant. On 5 March 2002 the appellant wrote to the building consultant requesting a determination. On 4 April 2002 the appellant wrote to the building consultant seeking confirmation as to the date for provision of the determination. On 11 April 2002 the appellant's solicitors wrote to the building consultant and advised him that unless the determination was finalised by 12.00 noon on Monday 15 April 2002 the contract for the expert determination would be deemed to be repudiated by the building consultant and that he would be liable to refund all fees paid to him.

[15] On 15 April 2002 the building consultant handed down a second determination and determined that:

(a) the appellant was entitled to 43 days extension of time in addition to the number of days already

granted by the architect;
(b) the date for practical completion was extended to 4 September 2002;
(c) the appellant was entitled to extension of time costs in the sum of $150,979.30; and
(d) the respondent was entitled to liquidated and ascertained damages in the sum of $25,300.

[16] On 29 April 2002 the appellant filed amended points of claim at VCAT to include the fact of the second determination and claim pursuant to it. Thereafter the respondent filed amended points of defence and counterclaim and in turn the appellant filed a reply. The respondent has not complied with the second determination and has not paid to the appellant the net sum of $125,679.30 determined to be due to the appellant pursuant to it.

The Threshold Issue

[17] The resolution of the dispute before the Tribunal necessitated a resolution of the question whether the second determination was binding upon the parties. Accordingly after hearing submissions the Tribunal formulated the following preliminary questions.

(a) Whether the expert determination agreement alleged to exist between the parties and made in or about September 2000 is or is not void in law having regard to the provisions of the Domestic Building Contracts Act 1995 and in particular s14 and s132 thereof?

(b) If such agreement is not void whether Swintons [the respondent in these proceedings] may in law allege that the determination made under such agreement or purportedly so or any aspect of such determination may be contradicted on any (and if so) upon what ground or grounds?

(c) Whether in law the appellant by commencing these proceedings did repudiate such agreement?

(d) If such agreement has been repudiated by the commencement of these proceedings, has such repudiation been accepted in law?

(e) In considering the provisions of the Domestic Building Contracts Act 1995 and the Victorian Civil and Administration Tribunal Act 1998, whether the Tribunal has jurisdiction to order that there be compliance by the parties with the expert determination agreement referred to in para18 to para22 of the Amended Points of Claim and with any determination made under such agreement?

[18] After analysing and considering the first question the Tribunal answered it, "yes, it is void to the extent I have indicated". In consequence, the Tribunal found the further questions "not applicable". It answered the last question as to the jurisdiction of the Tribunal to order compliance with the expert determination agreement as follows:

"Not applicable. The agreement is void to the extent indicated. See answer to question (a). To the extent of its voidness, the second determination is not able to be enforced in the Tribunal: the Tribunal, owing to such voidness, lacks jurisdiction, to such extent, to order that there be compliance with the determination."

[19] The first question of law raised in the appeal before the Court is:

"Did the Tribunal err in deciding that the expert determination agreement between the parties, made in or about September 2000, is void in law by virtue of the provisions of s14 and/or s132 of the Domestic Building Contracts Act 1995?"

[20] The Tribunal's decision with respect to s14 was attacked on two primary bases. First it was said the agreement in issue was not caught by s14 because it was an agreement to refer an actual present dispute for determination (as distinct from an agreement requiring the reference of future disputes). Second it was said that the agreement was not caught by s14 because it was an agreement referring a dispute to expert determination and not to arbitration. It was further said

that s132 did not apply to an agreement which provided for the resolution of matters in issue between the parties but did not in terms purport to exclude, modify or restrict the provisions of the DBC Act.

S14 of the DBC Act

[21] S14 of the DBC Act provides:

"Any term in a domestic building contract or other agreement that requires a dispute under the contract to be referred to arbitration is void."

[22] The Tribunal concluded at [10] of its decision:

"In the end, I am persuaded by the submissions of the respondent to say without hesitation that the Agreement does fall prey to s14 of the Act. In my view the Agreement for expert determination, under which the second determination was made, is void to the extent to which it consists of any term that requires a dispute under a domestic building contract or other agreement to be referred to arbitration. It would seem to have operative effect otherwise, that is to the extent to which it does not require the dispute to be referred to arbitration, subject however to s132 of the Act. But the voidness brought about by s14 is far reaching."

[23] The appellant contends firstly that upon its true construction s14,

"is intended to catch only compulsory arbitration clauses, ie clauses which compel arbitration of any potential dispute arising out of or in connection with the domestic building contract. A clause in an agreement entered into by the parties subsequent to the building contract, by which the parties agree to arbitrate (or refer to an expert for the determination) specific disputes which have by then arisen, is not such a clause."

[24] Conversely, the respondent contends, "the plain words of s14 do not allow a distinction to be made between future and present disputes being referred to arbitration. The use of the phrase 'a dispute' in s14 means any dispute whenever arising."

[25] The concepts in issue can be elucidated by reference to the common law position as stated by Halsbury's Laws of Australia as follows:

"The requirement that there be a dispute or difference between the parties means that although an arbitration agreement may relate to present or future differences, an arbitration is a reference of actual matters in present controversy."[1]

[26] The appellant's position is that s14 relates to an agreement to refer future disputes to arbitration as distinct from an agreement referring actual present disputes to arbitration.

[27] Historically s3 of the Arbitration Act 1958 defined "submission" as follows:

" 'Submission' means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not."

[28] S4(1) of the Commercial Arbitration Act 1984 ("CA Act") defines arbitration agreement as follows:

" 'Arbitration agreement' means an agreement in writing to refer present or future disputes to arbitration;"

[29] It can be seen that both definitions were formulated to expressly embrace the distinction between agreements to refer present or future disputes.

[30] There is a difference of authority as to whether an agreement to refer disputes to arbitration arises in the case of an agreement that disputes will be referred to arbitration if one party so elects by giving stipulated notice. That issue does

not arise in the present case and it is sufficient to observe that both decisions which have taken the view that provisions creating an option to refer disputes to arbitration are not agreements to refer disputes to arbitration, and decisions which have taken the contrary view may be regarded as illustrating the application of the concept in issue in this case, although they differ as to its proper application. Thus in Turner Corp Ltd v Austotel Pty Ltd[2] after referring to the decisions of this Court in Hammond v Wolt[3] and Woolworths Ltd v Herschel Constructions Pty Ltd (In Liq.)[4] Giles J stated:

"I respectfully accept his Honour's analysis of cl13, but with equal respect I consider that in adopting the reasoning found in Hammond v Wolt and in his own language Smith J may not have given sufficient attention to whether there was an agreement to refer disputes to arbitration as distinct from an agreement referring disputes to arbitration. If there is a referral to arbitration upon receipt of the notice under cl13.02, how does that come about unless by the prior agreement of the parties? When his Honour observed that cl13.01 and cl13.02 did not create 'an agreement that refers disputes to arbitration', as distinct from an option to do so, there was left from consideration whether they created an agreement to refer disputes to arbitration in the sense of an agreement that they would be referred to arbitration if one party so elected by giving the necessary notices. As I earlier said that, it seems to me, is the question."[5]

[31] In the present case the question is whether the intention of s14 is to catch only agreements to refer to arbitration in the sense of an agreement that future disputes will be referred to arbitration. In my opinion the language of s14 is susceptible of each of the meanings for which the parties contend. In these circumstances s35 of the Interpretation of Legislation Act 1984 makes clear that a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object.

[32] S1 of the DBC Act commences:

"The main purposes of this Act are -

> (a) to regulate contracts for the carrying out of domestic building work; and
> (b) to provide for the resolution of domestic buildings disputes and other matters by the Victorian Civil and Administrative Tribunal; ..."

[33] S4 of the DBC Act relevantly provides:

"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; ..."

[34] Neither the general statements of purpose nor the objects of the Act materially assist in the resolution of the question before me.

[35] The respondent contended that the purpose stated in s1(b) of the Act is to be understood as reflecting an intention to provide for the referral of "all" domestic building disputes to VCAT. It is not so expressed and the extrinsic material, to which I will turn, does not favour this construction.

[36] The respondent further contended that the object of fairness contained in s4(b) favours a construction which maximises the jurisdiction of VCAT because of the power provided for in s53(1) which states:

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

[37] In my view it cannot be said to be inherently fair to preclude parties from agreeing to refer an actual present dispute to arbitration. Moreover the reference to fairness in the relevant object is as a qualification upon the primary object

stated namely "to enable disputes involving domestic building work to be resolved as quickly, as efficiently and as cheaply as is possible ..." This object is in my view assisted by preserving the right of parties to refer an actual present dispute to arbitration where they agree that such a process is likely to be the most effective form of dispute resolution.

[38] The relevance of the existence of an actual claim as bearing on the fairness of an agreement with respect to the resolution of such claim is implicitly reflected in the provisions of the DBC Act relating to implied warranties concerning domestic building work. S10 provides:

"A provision of an agreement or instrument that purports to restrict or remove the right of a person to take proceedings for a breach of any of the warranties listed in s8 is void to the extent that it applies to a breach *other than a breach that was known, or ought reasonably to have been known, to the person to exist at the time the agreement or instrument was executed*." (My emphasis)

[39] It can be seen that it is regarded as fair for a person to sign away a right to take advantage of a warranty if breach of that warranty is known or ought reasonably to have been known to that person.

[40] In Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation[6] Mason and Wilson JJ stated:

"The fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statute according to its terms and to legitimate aids to construction.

The rules [of construction], as DC Pearce says in his Statutory Interpretation, p14, are no more than rules of common sense, designed to achieve this object. They are not rules of law. If the judge applies the literal rule it is because it gives emphasis to the factor which in the particular case he thinks is decisive. When he considers that the statute admits of no reasonable alternative construction it is because (a) the language is intractable or (b) although the language is not intractable, the operation of the statute, read literally, is not such as to indicate that it could not have been intended by the Legislature.

On the other hand, when the judge labels the operation of the statute as 'absurd', 'extraordinary', 'capricious', 'irrational' or 'obscure' he assigns a ground for concluding that the Legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.

Quite obviously questions of degree arise. If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended."

[41] In the present case three factors favour the interpretation for which the appellant contends:

(a) the choice of language utilised;
(b) the reports of proceedings in Parliament in which the purpose of the provision was stated; and
(c) the consequences of the construction contended for.

The Language of the Provision

[42] If it had been intended to embrace agreements to refer both future and present disputes to arbitration it would have been relatively easy to utilise words embracing a clause in an agreement which either "refers or requires a dispute to be

referred to arbitration", or were expressly formulated by reference to the alternatives of "present or future disputes" as is the definition of arbitration agreement in the CA Act. In these circumstances it is in my view proper to apply the principles stated in Craies on Statute Law[7] as follows:

"With regard to what is meant by the expression, 'the plain meaning of the words of the statute', it is necessary on all occasions to give the legislature credit for employing those words which will express its meaning more clearly than any other words; so that if in any particular instance it can be shown that there are two expressions which might have been used to convey a certain intention, but one of those expressions will convey that intention more clearly than the other, it is proper to conclude that, if the legislature uses one of the two expressions which would convey the intention less clearly, it does not intend to convey that intention at all, and in that event it becomes necessary to try to discover what intention it did intend to convey."[8]

[43] Having regard to accepted terminology the use of the phrase "requires a dispute ... to be referred to arbitration" is thus apt to describe an agreement to refer a future dispute.

The Extrinsic Materials

[44] The record of parliamentary proceedings relating to the implementation of the DBC Act illuminates the intention of Parliament with respect to the specific provision with which I am concerned. The Responsible Minister commenced her second reading speech as follows:

"This bill contains a package of unprecedented reforms to the home building and renovation industry in Victoria, which will be of significant assistance to home owners and builders alike.

The House Contracts Guarantee Act 1987 is outmoded and inefficient and has not keep pace with recommendations for change in this industry.

The bill currently before the house is the result of extensive industry and community consultation, and a detailed consideration of interstate domestic building systems, as well as reports by the Trade Practices Commission - Home building - consumer problems and solutions, November 1993 - and the Public Accounts and Estimates Committee of this Parliament - its eighth report to Parliament entitled Housing Guarantee Fund Ltd, September 1994."[9]

[45] The Minister stated further:

"The reforms contained in this bill constitute a comprehensive package comprising: first, a domestic building disputes tribunal, providing a means by which builder and consumer disputes can be expeditiously and inexpensively handled at any stage of the building process and after; secondly, registration under the HGF scheme will be replaced by an extension of the Building Act 1993 to cover domestic builders; thirdly, the insurance cover for building owners will be privatised; and finally, domestic building contracts will be required to contain certain minimum terms and conditions and statutory warranties.

The bill proposes the establishment of a Domestic Building Tribunal to resolve all domestic building disputes. The tribunal will be attached to the Department of Justice so that it can benefit from the support structure and expertise provided to a range of tribunals already attached to the department - that is, administrative appeals, small claims and residential tenancies tribunals.

The tribunal will be non-legalistic and deal with matters quickly and at minimal cost, a hearing of a domestic building dispute will be by a single, legally qualified person, who will be able to call such expert evidence and assistance as is necessary in the interests of justice. The tribunal will have a wide discretion in the awarding of costs so that the concept of fairness is clearly adhered to. Legal representation will only be permissible with the consent of all parties before the tribunal, or where directed by the tribunal due to the nature of the issues being considered.

The tribunal is to be established as a single point for the resolution of all domestic building disputes and courts will be required to refer matters brought before them to the tribunal for consideration unless the parties to the dispute explicitly request that the matter be dealt with by the courts."

[46] The Minister made the further specific statement with respect to arbitration clauses:

"The bill prohibits compulsory arbitration clauses. It is the Government's belief that far from being a quick and cost effective means of resolving building disputes, as was intended, arbitration has often become overly legalistic, time consuming and expensive. *Arbitration will be permissible only where both parties to a contract have explicitly evidenced a desire to follow this sort of dispute resolution. Arbitration will not be able to appear as a standard term in general domestic building contracts*."[10] (my emphasis)

[47] The reference to "compulsory arbitration" clauses can be traced back to the report of the Trade Practices Commission referred to in the Minsiter's opening remarks. That report stated at p28:

"Compulsory arbitration clauses appear in most standard form contracts in New South Wales, Victoria and Tasmania. In other States, for example South Australia and Western Australia, other conciliatory options are available for exploration before either party needs engage in arbitration. In Western Australia, as a result of the injury, a building disputes committee was set up (pursuant to the Home Building Contracts Act 1991). In some standard form contracts a clause is included which refers all future disputes under the contract to arbitration. These are referred to as 'mandatory arbitration clauses'.

It seems that in most jurisdictions the majority of disputes go to arbitration, despite widespread disenchantment with the process in the home building market.

Theoretically, arbitration offers a quick, flexible alternative to litigation. Other advantages claimed for arbitration are that it maintains privacy and brings to bear technical expertise in the resolution of disputes.

In fact, on the evidence available to the Commission, including the findings of other inquiries, it appears rarely to deliver such benefits. Consumers and builders alike are critical of the excessive costs and delays of arbitration and are concerned that potential financial liabilities cannot be predicted before parties submit to it.

The national Housing Industry Association's submission to this review said bluntly:

'HIA is of the view that arbitration has failed. Alternative mechanisms for dispute resolution, especially mediation, are likely to be cheaper, quicker, more effective and relevant.'

Another significant problem is the public perception that the process is not impartial. Arbitration clauses in standard form residential building contacts usually provide for an arbitrator to be nominated by the head of a building industry body. It is often the case that all parties except the consumer have been intimately linked in a professional way. A perception of bias, whether supported by facts or not, is enough to diminish the effectiveness of any dispute resolution process.

Both the Western Australian and Queensland inquiries found that arbitration was an inappropriate means of settling disputes. Accordingly, recommendations suggested introducing other means of resolving disputes in those jurisdictions. In Queensland, mandatory arbitration clauses have been declared void and disputes are heard by the Queensland Building Disputes Tribunal.

Compulsory arbitration involves a number of stages. After a Notice of Dispute is served on the other party, the industry body specified in the arbitration clauses nominates a person to act as arbitrator. A preliminary conference is then arranged, followed by discovery of documents and various interrogatory procedures. The formalities prior to the hearing of the matter can be lengthy, and the accompanying costs incurred by the inevitable delay of the building crippling for

one or both parties.

In many cases the proceedings will be as long and as expensive as litigation, with the potential for hearing days to occur intermittently over weeks or even months. On completion the arbitrator's role is to assess the evidence and write an award. Costs of $2000-$3000 per hearing for each party are not uncommon."[11]

[48] At p39 the Report specicically recommended with respect to dispute resolution that: "Mandatory arbitration clauses should be prohibited." It further stated the basis of this recommendation as follows:

"Forcing parties into compulsory arbitration unnecessarily restricts the dispute resolution avenues available. The Commission considers mandatory arbitration clauses are not appropriate in home building contracts. Most parties, including industry associations, who made a submission to this review, supported this view, raising such issues as prohibitive costs, delay and a perception of bias. Submissions to the Commission suggest that many consumers are motivated to settle a dispute by a fear of the anticipated financial consequences of arbitration, rather than by a genuine desire to reach a negotiated settlement.

Parties favouring the retention of arbitration argued that the arbitrators' expertise enabled them to handle disputes more efficiently than legally trained counterparts. They also cited the system's procedural flexibility and the fact that the costs of a properly run hearing were lower than for litigation.

The Commission acknowledges that parties in dispute might on occasion prefer arbitration over other options. It suggests that, if arbitration is retained as an avenue for dispute resolution, the following three-tiered approach should be adopted.

o *Under the heading 'Dispute resolution' the contract should make it clear that arbitration is not mandatory but is an option that can be taken with the express agreement of both parties.*

o To aid informed choice, the proposed explanatory booklet should contain a detailed explanation of the arbitration process, including a realistic forecast of possible costs, time delays and consequences of the process.

o The arbitrator should be appointed by an independent body and not by the industry association which developed the building contract." (my emphasis)

[49] It is apparent from a reading of both the Minister's second reading speech and the Trade Practices Commission Report which informed the Bill's formulation that Parliament specifically contemplated arbitration would be permitted where both parties expressly agreed to the arbitration of an existing dispute. Regard may be had to the reports of proceedings in any House of Parliament as an aid to interpretation pursuant to s35(b)(i) of the Interpretation of Legislation Act 1984. Likewise regard can be had to the Trade Practices Commission Report pursuant to s35(b)(iv) which provides that:

"(b) Consideration may be given to any matter or document that is relevant including but not limited to -

(iv) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry or other similar bodies."

[50] The respondent argues that any reference to "compulsory arbitration clauses" is meaningless. It is submitted that an otherwise legally enforceable agreement containing a clause referring future disputes to arbitration has been freely entered into and is therefore no more "compulsory" than a freely entered into agreement to refer a present dispute to arbitration. As the preceding extrinsic material makes clear, however, the "compulsion" arises when parties are locked into arbitration of a dispute, the subject matter of which, for example, they may consider inappropriate for arbitration. There is a substantive difference between parties agreeing to arbitration when they know what particular dispute will be arbitrated, and a clause which commits parties to have all disputes which arise arbitrated. Therefore I do not accept that

the reference to "compulsory" arbitration clauses is meaningless.

[51] It is apparent from the extrinsic material that the intention of the Act is to prohibit "compulsory" arbitration clauses, that is clauses which commit parties to arbitration of future disputes.

The Consequences of the Tribunal's Construction

[52] In Metropolitan Coal Co of Sydney Ltd v Australian Coal and Shale Employees Federation[12] Isaacs and Rich JJ stated:

"In construing an instrument where its words are susceptible of two meanings, it is always legitimate to take into account reasonableness, justice and consistency on one hand, and unreasonableness, injustice and absurdity on the other."[13]

[53] The consequence of construing s14 in accordance with the view taken by the Tribunal is that parties could never validly agree to have an existing dispute under a domestic building contract arbitrated. This would very materially infringe on the right of the parties to contract when fully informed of all relevant considerations. It is not difficult to conceive of circumstances in which parties might agree that arbitration of a specific dispute was the most convenient means of resolving it. In these circumstances the construction adopted by the Tribunal may prevent disputes involving domestic building work being resolved as quickly, as efficiently and as cheaply as is possible having regard to the needs of fairness in accordance with the objects of the DBC Act stated in s4. As against this it might be contended that the construction adopted by the Tribunal results in a simple and effective prohibition of arbitration clauses and that the alternative construction put forward by the appellant would so complicate the effect of s14 as to detract materially from its effectiveness. In my opinion when the competing arguments are balanced against each other, although the argument as to the consequences of the construction for which the appellant contends is not decisive, nevertheless it supports the conclusion that this construction is correct.

[54] In Federal Commissioner of Taxation v Smorgon[14] Stephen J expressed the view that "a construction which interferes with the legal rights of the subject to a lesser extent and produces the less hardship is to be preferred to another, having the opposite effect."

[55] In the present case the consequences of the construction adopted by the Tribunal are draconian and should not be readily inferred to be the intention of Parliament when an alternative construction entirely consistent with the intention reflected in the parliamentary debates is clearly open.

[56] It follows that having regard to the language adopted in s14, the disclosed intention of Parliament as reflected in the second reading speeches relating to the relevant provision, and the consequences of the competing construction, I am of the view that s14 is intended to relate to terms in a domestic building contract or other agreement relating to any future dispute under the contract.

[57] For completeness I will expressly refer to two further matters raised in argument.

(a) Reference was made to s163 of the DBC Act which amended the House Contracts Guarantee Act 1987 by inserting a new s21A to the following effect:

"(1) If a provision of domestic building work contract [sic] requires any dispute to be referred to arbitration, that provision shall on and from the commencement of s163 of the Domestic Building Contracts and Tribunal Act 1995 be deemed to be a requirement to refer the matter for determination by the Tribunal ...

(3) Despite subs(1), if a dispute under a domestic building work contract had been referred to arbitration before the commencement of s163 of the Domestic Building Contracts and Tribunal Act 1995 and had not been determined before that commencement the arbitration may be continued and completed as if that section had not been enacted."

In my opinion these provisions are transitional provisions governing the effect of the House Contracts Guarantee Act and do not directly illuminate the interpretation of s14 of the DBC Act. Insofar as they distinguish between a provision of a contract which "requires any dispute to be referred to arbitration" on the one hand, and on the other hand a situation where a dispute "had been referred to arbitration", they do not assist the respondent.

(b) It was also specifically submitted that because s4 of the CA Act defines an arbitration agreement as one which "refers future and present disputes to arbitration", this suggests that when referring to arbitration in the DBC Act the legislation was referring to future and present disputes. For the reasons I have stated I am of the view that a comparison between the language of the DBC Act and the CA Act supports the view that s14 is not intended to apply to agreements which refer present disputes to arbitration.

Expert Determination

[58] The second threshold ground on which it was said the Tribunal erred in law was its conclusion that the referral to the building consultant should not be regarded as one to expert determination as distinct from arbitration. The appellant's case is that it is apparent from the terms of the referral that the building consultant was retained to conduct an expert assessment and not an arbitration.

[59] The distinction in issue was articulated by Lord Esher MR in Re Carus Wilson and Greene[15]. On a sale of land one of the conditions was that the purchaser was to pay for the timber on the land at a valuation to be made as follows:

"Each party shall appoint a valuer and give notice thereof by writing to the other party within 14 days from the date of the sale. The valuers thus appointed shall, before they proceed to act, appoint by writing an umpire and the two valuers, or, if they disagree, their umpire shall make the valuation. Each party shall pay the charges of his own valuer, and one half of the charges, if any, of the umpire. If either party shall neglect to appoint a valuer or to give notice to the other party within the time aforesaid, the valuer appointed by the other party shall make a valuation alone, which shall be binding on vendor and purchaser."[16]

Valuers were appointed by the parties under the condition. They did not agree on the price of the timber and the valuation was made by an umpire appointed by them. The Master of the Rolls said:

"The question here is, whether the umpire was merely a valuer substituted for the valuers originally appointed by the parties in a certain event, or an arbitrator. If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon the evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. Such cases must be determined each according to its particular circumstances. I think that this case was clearly not one of arbitration, and that it falls within the class of cases where a person is appointed to determine a certain matter, such as the price of goods, not for the purpose of settling a dispute which has arisen, but of preventing any disputes."[17]

[60] It is the appellant's case that the referral in issue in the present case was of the "intermediate kind" referred to "where, though a person is appointed to settle disputes that have arisen, still, it is not intended that he should be bound to hear evidence or arguments."

[61] In Hammond v Wolt[18] Menhennitt J considered a building contract which included the following provision:

"(b) Any arbitrator appointed under the provisions of this agreement shall at his own discretion act as arbitration or

assessor. Where he considers that any question arising out of the dispute refers to the quality or value of any work or material supplied he may act as an expert and arrive at and make his assessment in such manner as he considers fit. Where any question arising out of the dispute shall relate to the interpretation or existence of any agreement between the parties hereto then the arbitrator shall act as arbitrator and allow the parties to appear before him and to produce witnesses and give evidence to him relating to the dispute and on the evidence so given and on his own investigations and on any assessment which he may make arrive at his decision and make his award."

[62] In Hammond v Wolt the owner issued court proceedings for breach of the contract. The builder desired to submit the dispute to arbitration and sought a stay of the proceeding pursuant to s5 of the Arbitration Act 1958. The builder failed to obtain a stay in the first instance because the clause quoted gave to the person appointed a discretion as to whether he would act as an arbitrator or assessor. Consistently with the statement of Lord Esher and after referring to subsequent authority, his Honour emphasised that the first characteristic of an arbitration is that it involves an inquiry in the nature of a judicial inquiry. As a component of such inquiry the parties have a right to be heard if they so desire. If the parties have a right to call evidence that is an indication that the reference is to arbitration although it was unnecessary for the Court to decide whether such a right was an essential component of arbitration. It is, however, not inconsistent with an arbitration for the arbitrator to be entitled to rely upon his own expertise in making a determination.[19]

[63] Whilst Hammond v Wolt has been overruled or distinguished on other points,[20] the proposition that arbitration involves an inquiry in the nature of a "judicial inquiry" continues to be applied in more recent authority; see Goldflax Pty Ltd v Reefield Pty Ltd[21] where Jones J had to answer the "threshold question" of whether the process there in issue was an arbitration and Santos Ltd v Pipelines Authority of South Australia[22] where Debelle J stated "it is well established that an arbitration involves an inquiry in the nature of a judicial inquiry" and set out some indicia of such an inquiry:

> (a) the parties have the right to be heard if they so desire;
> (b) the parties are each entitled to see and hear the evidence advanced by their respective opponents;
> (c) the parties have the right to give evidence if they so desire;
> (d) each party is entitled to test by cross-examination or by other appropriate means the opposing case and to answer the opposing case.

[64] The Tribunal referred to and quoted from the judgment in Hammond v Wolt at para18 of its decision. It addressed the criteria identified in Hammond v Wolt at para19 and it concluded that the reference to the building consultant in the present case was a reference which contemplated an inquiry in the nature of a judicial inquiry because:

> (a) the building consultant was required to make a determination and this requirement contemplated a rational inquiry;
> (b) the determination was required to made according to law and such a decision was inconsistent with an expert determination;
> (c) the building consultant was required to proceed in accordance with the rules of procedural fairness which the Tribunal regarded as "an incorporation of the rules of natural justice" which arbitrators are required to observe;
> (d) the determination was agreed to be final and binding, which was also regarded as a hallmark of a judicial inquiry;
> (e) the referral was of an actual dispute and was made in terms which used the word "submitted" a word used in the Arbitration Act 1958.

[65] The Tribunal further concluded that there was a right to be heard in the relevant sense either as a consequence of the requirement to provide "procedural fairness" or as a result of the parties' right to make written submissions. Furthermore attendance was envisaged at conferences convened by the building consultant as "necessary and appropriate". The Tribunal noted the referral provided for no right to call evidence unless such right was subsumed in

the notion of "procedural fairness". The building consultant was, however, required to make his determination on the basis of the information received from the parties and Hammond v Wolt did not decide whether a right to call evidence was a necessary element of arbitration. The Tribunal further concluded that the requirement that the building consultant must make his determination on the basis of his own expertise was not inconsistent with an arbitration.

[66] The Tribunal went on to consider other indicia of the character of the referral to the building consultant to which I shall return but in my opinion the above analysis fails to properly apply the critical requirement of an inquiry in the nature of a judicial inquiry.

[67] The concept of an expert determination is a well recognised one. The Tribunal quoted from the decision of Einstein J in Heart Research Institute Ltd v Psiron Ltd[23] where he quoted from guidelines as follows:

"*Guidelines for Expert Determination*

[15] Business disputes can often be best resolved by the parties with the assistance of an independent third party. Expert Determination is a dispute resolution process which assists parties resolve disputes without the delay and expense of going to court or arbitration.

The parties agree by contract to be bound by the decision of the Expert who has expertise in the area where the dispute has arisen. The parties select the Expert from a panel of Experts provided by ACDC. The parties then present documentation relevant to the dispute to the Expert. The Expert considers the documentation and generally arranges to meet with the parties to discuss the dispute. The Expert then makes a determination which binds the parties."

Einstein J stated:

"*Expert Determination and Ouster of Jurisdiction*

[16] As the plaintiffs point out, in practice, Expert Determination is a process where an independent Expert decides an issue or issues between the parties. The disputants agree beforehand whether or not they will be bound by the decisions of the Expert. Expert Determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kinds.

[17] Unlike arbitration, Expert Determination is not governed by legislation, the adoption of Expert Determination is a consensual process by which the parties agree to take defined steps in resolving disputes. I accept that Expert Determination clauses have become commonplace, particularly in the construction industry, and frequently incorporate terms by reference to standards such as the rules laid down by the Institute of Arbitrators and Mediators of Australia, the Institute of Engineers Australia or model agreements such as that proposed by Sir Laurence Street in 1992. Although the precise terms of these rules and guidelines may vary, they have in common that they provide a contractual process by which Expert Determination is conducted."

[68] The Tribunal also set out the relevant "rules" for the expert determination of commercial disputes which the parties adopted in the present case as the basis on which the building consultant was retained. In my view a consideration of these rules demonstrates the following:

(a) The parties expressly agreed that the expert was not an arbitrator. They agreed:

"The expert is not an arbitrator of the matters in dispute and shall not be deemed to be acting in an arbitral capacity. The Process or any process conducted under or in any connection with these Rules is not an arbitration within the meaning of any legislation or rules dealing with commercial, industrial, court annexed or any other form of arbitration.

Any conference conducted under these Rules is not a hearing conducted under any legislation or rules dealing with commercial, industrial, court annexed or any other form of arbitration."

Such an agreement cannot be conclusive of the characterisation of the referral.[24] But it must be regarded as significantly indicative of the intention of the parties as to the nature of the task the building consultant was to undertake. In Badgin Nominees Pty Ltd v Oneida Ltd & Anor[25] Gillard J stated:

"[56] It is noted here that the parties expressly provided that the valuation should be by an expert and not an arbitrator. Clearly the parties intended that the procedure should not be by way of arbitration."

(b) Although the parties might be required by the building consultant to attend a preliminary conference the agreed Rules simply did not provide for any right to a hearing as to the substance of the dispute. The Rules provided a discretion to the building consultant to convene a preliminary conference "to make such procedural and administrative arrangements as are necessary."

(c) The core procedure provided for was simply the making of initial submissions in writing by one party, a submission in response by the respondent and a submission in reply. If, but only if, the building consultant decided "further information or documentation is required to determine the dispute" the building consultant might require further submissions or documentation and/or call a conference between the parties and the expert. If a conference were called it might take the form of a view and at the conference the expert might permit the making of further submissions and the provision of further information.

[69] In my opinion the Rules simply do not provide for an inquiry in the nature of a judicial inquiry. After the conclusion of the initial submission process no adversarial process is envisaged. Further the process thereafter is at the discretion of the expert. Most significantly the parties do not have the fundamental right to a hearing. It is not to the point that this process requires a "determination", no referral to an expert for determination could be expected to do otherwise than envisage a rational determination. Nor is it to the point that the expert is required to make his determination according to law and in accordance with procedural fairness. The parties and the expert are entitled to agree as to these matters and they are subsidiary to his essential role. The notion of procedural fairness is a flexible one applicable to a process which falls short of an inquiry in the nature of a judicial inquiry.[26] Therefore, the fact an expert may be bound to accord procedural fairness (as that notion is applicable to the particular case) to the parties does not necessarily give the process the character of a judicial inquiry or an arbitration.[27] The fact that the process results in a determination which is agreed to be final and binding is also hardly surprising. An expert determination would be no more than an advisory opinion if it did not have this effect. In summary although the Rules provide for some matters which would be appropriate in an arbitration the essential character of the procedure was not that of an arbitration.

[70] There are three further aspects of the Tribunal's reasoning which deserve specific consideration.

(a) First, the Tribunal appears to give substantial weight to the fact that the dispute went beyond matters in respect of which the building consultant had apparent expertise. There are two factual observations to be made with respect to this. The first is that the curriculum vitae of the building consultant which was supplied by the respondent to the appellant as evidence of his appropriateness before his appointment, is in fact so extensive as to suggest he could properly be regarded as having expertise in assessing claims under a contract of the type in issue. An expert may become an expert through experience as well as through qualification. It is very far from clear that the building consultant's expertise should be regarded as necessarily limited in the manner contemplated by the Tribunal. Secondly, the respondent put forward the building consultant as an expert presumably precisely because it believed he did have appropriate expertise to make an appropriate determination. The essence of the agreement between the parties was that the expert would perform an agreed role. It was for the parties to that agreement to agree as to whether he was for their purposes sufficiently qualified to perform that role. In circumstances of this kind considerations of convenience and cost effectiveness may lead to an agreement that a person having some relevant expertise (only) is to be regarded as sufficiently expert by the parties. I can see nothing in such an agreement which is improper or transforms the character of the expert's role into that of an arbitrator. Once it is accepted as the Master of the Rolls said in Carus Wilson that there is an intermediate category which is not to be regarded as arbitration, where though a person is appointed to settle disputes that have arisen, it is still not intended he or she should enter into an inquiry in the nature of a judicial inquiry,

the extent of the expert's expertise cannot be decisive of the characterisation of his role.

(b) Secondly, the Tribunal expressed the view that the expert was not a preventor of disputes but a "settler" of them in terms of the principles stated by the Master of the Rolls. In Ajzner Pape J observed:

"I must confess to having some difficulty in understanding quite how far these observations in Re Carus Wilson and Greene in relation to avoiding disputes from arising go, for I find it difficult to imagine any case where a matter is referred to another for determination where there is not some dispute or difference. No reasonable man would incur the expense of referring a matter to the determination of another if both interested parties were in agreement with regard to the matter to be referred. However that may be, the important consideration is, in my view, not whether a dispute has arisen, but what the parties have referred to the determination of another. If there is a dispute and the parties have referred their differences to the determination of another, it may well be that the scope of the reference is limited by the extent and area of the dispute. This may be the position of an arbitration pursuant to cl18 of the lease. But if they have not referred their differences to the determination of an another, but have agreed upon an open reference and have merely referred an objective fact, such as a rental or a price, to him for determination in default of their agreement, then I fail to understand why the mere fact that they, at some stage, have disagreed should lead to the conclusion that an arbitration stricto sensu was intended. In this case the difference arising from the offer and counter offer has relevance only to show that there has been a default of agreement which brings the agreement to refer into operation."[28]

In the present case the initial terms of agreement and in particular the rules adopted, did not determine what was submitted to the expert. It might be an objective fact "such as a rental or price" or it might be a competing set of contentions. In turn it can be seen that it may not be entirely straightforward to characterise a claim for assessment of extension of time, consequential costs of the extension of time, and consequential liquidated damages payable as a result of the builder exceeding the completion date under the contract despite the extension of time. The matters to be assessed are essentially matters which were initially assessed by the architect under the contract and are fundamentally matters of "price". Nevertheless it was contemplated that the parties would have the opportunity to make written submissions with respect to these matters and they in fact did so. Accordingly the expert may be regarded as being retained to settle a dispute. Accepting that this is the correct view the critical characteristic which determines whether the role carried out by the expert was that of an arbitrator is whether the expert was retained to undertake an inquiry in the nature of a judicial inquiry. For the reasons I have stated the making of initial written submissions by the parties was not in my view sufficient to give rise to a judicial inquiry.

(c) Thirdly, the Tribunal identified a whole series of related ancillary procedural attributes of an arbitration. These included the lack of immunity being given to the expert [14], the propriety required of the expert [20], the powers given to make orders giving effect to the determination [21], the requirement to give reasons [22] and the power to govern his own proceedings [23]. Once again none of these matters in my view govern the fundamental character of the expert's role which was not that of an arbitrator simply because it did not have at its heart an inquiry in the nature of a judicial inquiry.

[71] It follows that in my view it has been established that the Tribunal erred in law in its conclusion that the referral to the building consultant should not be regarded as a referral to expert determination as distinct from arbitration. It remains to be considered whether the Tribunal's view that the expert determination agreement was void in law can be sustained on other grounds.

S132

[72] In concluding as it did as to the effect of the second agreement referring disputes to the building consultant, the Tribunal also relied on s132 of the DBC Act which provides:

"(1) Subject to any contrary intention set out in this Act -

(a) any term in a domestic building contract that is contrary to this Act, or that purports to annul, vary or

exclude any provision of this Act, is void; and
(b) any term of any other agreement that seeks to exclude, modify or restrict any right conferred by this Act in relation to a domestic building contract is void.

(2) However, the parties to a domestic building contract may include terms in the contract that impose greater or more onerous obligations on a builder than are imposed by this Act."

[73] The Tribunal stated:

"27. Because s132 of the 1995 Act is also called into question I should add that, in my view, the Agreement appointing Mr Coghlan also falls foul of s132(1)(b). I consider that it contains a term (as an 'other agreement' within the meaning of that paragraph) 'that seeks to exclude, modify or restrict a right conferred by the Act in relation to a domestic building contract.' The 'domestic building contract' in question is the one entered into between the parties. I consider that it may be said that they each had or have a permissive 'right' under s55 of the 1995 Act to make an application to the Tribunal to resolve any domestic building dispute between them. S55 reads as follows:

'55. Who can ask the Tribunal to resolve a building dispute?

The Tribunal may only make an order to resolve a domestic building dispute on the application of -

(a) a party to the dispute; or
(b) the director acting on behalf of one or more building owners who are parties to the dispute.'

In requiring them, however, to go to expert determination (which I consider to be arbitration as far as relevant) I regard the Agreement they made as excluding, restricting or modifying that right. They have, by the Agreement, bound themselves to proceed under the regime it provides for, rather than the regime provided for by the 1995 Act. I cannot see any 'contrary intention' (referred to in s132) in any other provision of the Act in which case, in my view, s132(1)(b) operates to make void any term of the agreement between the parties which requires them to go to expert determination (arbitration). Independently of s14 then, in my view, the agreement with Mr Coghlan is void to the extent to which it would 'exclude, modify or restrict' any right of the parties under s55 to make application to the Tribunal to resolve a dispute between them. But this voidness is fundamental as indeed it is also by virtue of s14. But insofar as the agreement is not void by virtue of s14, it is void, on this basis, by virtue of s132."

[74] S132(1) is expressed in broad terms but it is introduced by the words "subject to any contrary intention set out in this Act". If the Tribunal's reasoning is correct then s14 is superfluous. In my view s14 is intended by Parliament to specifically govern the operation of arbitration clauses. The general provisions of s132 do not govern the efficacy of such clauses. Provisions such as s10 and s14 have effect according to their own terms. The principle to be applied was stated by Megarry J in No 20 Cannon Street Ltd v Singer and Friedlander Ltd[29]:

"The proper principle to apply if an enactment contains two similar prohibitions, one wide and the other applying only to a limited class of case wholly within the wide prohibition, is to treat the wide prohibition as not applying to cases within the limited prohibition, especially if the limited prohibition is made subject to some exception and the wide prohibition is not."

[75] S132 is further to be construed in accordance with the common law principles stated in Dobbs v National Bank of Australasia Ltd[30]. In that case Rich, Dixon, Evatt and McTiernan JJ stated:

"*A clear distinction has always been maintained between negative restrictions upon the right to invoke the jurisdiction of the courts and positive provisions giving efficacy to the award of an arbitrator when made or to some analogous definition or ascertainment of private rights upon which otherwise the Courts might have been required to adjudicate.* It has never been the policy of the law to discourage the latter. The former have always been invalid. No contractual provision which attempts to disable a party from resorting to the Courts of law was ever recognised as valid. It is not

possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the courts to enforce them. Parties may agree in the sense of arriving at a common intention as to their future action but, because they do not contemplate legal relations, avoid the creation of rights and thus preclude resort to the courts.

Parties may contract with the intention of affecting their legal relations, but yet make the acquisition of rights under the contract dependent upon the arbitrament or discretionary judgment of an ascertained or ascertainable person. Then no cause of action can arise before the exercise by that person of the functions committed to him. There is nothing to enforce; no cause of action accrues. But the contract does not attempt to oust the jurisdiction.

What no contract can do is take from a party to whom a right actually accrues, whether ex contractu or otherwise, his power of invoking the jurisdiction of the courts to enforce it. Accordingly a contract providing for arbitration did not, apart from statute, prevent the institution of an action or suit even although an actionable breach of contract was committed by the refusal to refer. But if, before the institution of an action, an award was made, it governed the rights of the parties and precluded them from asserting in the Courts the claims which the award determined. By submitting the claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them. That authority enables him to extinguish an original cause of action. His award will do so if it negatives the existence of liability. It will do so if it operates not merely to ascertain the existence and measure of the original liability, but to impose a new obligation as a substitute, whether the obligation results from the tenor of the award or from an antecedent undertaking of the parties to give effect to the determination it embodies. The award given under authority of the parties operates as a satisfaction pursuant to their prior accord of the causes of action awarded upon. ...

Any issue might be submitted to arbitration, and upon that issue the award would be as conclusive upon the parties as an award upon the whole cause of action if that had been submitted. *What at common law could not be done was to abandon by contract the power of invoking the Court's jurisdiction before the cause of action had been extinguished by an award and the power of countermanding the authority of the arbitrator. But it was never considered that the Court's jurisdiction was ousted by an award, notwithstanding that it concluded the parties with respect to matters which otherwise would be determined by the Court.* It is therefore a mistake to suppose that the policy of the law exemplified in the rule against ousting the jurisdiction of the Court prevents parties giving a contractual conclusiveness to a third person's certificate of some matter upon which their rights and obligations may depend ...

There are many familiar kinds of contracts containing provisions which make the certificate of some person, or the issue of some document, conclusive of some possible question. The most conspicuous example, perhaps, is the certificate of the engineer or architect under contracts for the execution of works or the construction of buildings."

(Emphasis inserted, citations omitted)

[76] Starke J, after referring both to the submission of disputes to arbitrators and to "conclusive evidence" provisions under a variety of contracts stated:

"In none of these cases is the jurisdiction of the court ousted: all that has been done or attempted is to provide for the ascertainment of rights or facts by the parties or by some agreed person or tribunal, and to leave the enforcement of the parties' rights, so ascertained or flowing from the facts so found, to the determination of the Courts of law."[31]

[77] In Fletcher Constructions Australia Ltd v MPN[32] Rolfe J applied the above principles to an expert determination clause under a building contract and stated:

"The parties cannot exclude the jurisdiction of the court, but because of their agreement they have limited the matter for consideration by the Court to the question whether the agreed decider has acted conformably with the agreement of the parties and not in such a way as to vitiate his or her decision."[33]

[78] In my view s132 should be interpreted in light of the above well accepted principles. Firstly, the "clear distinction"

identified in Dobbs case should be recognised between "negative restrictions upon the right to invoke the jurisdiction of (the Tribunal)" and positive provisions for the ascertainment of rights. The present case is not concerned with a negative restriction. The agreement for referral to the building consultant simply provided:

"*1. Agreement to be bound*

By submitting the dispute to expert determination in accordance with these Rules ('the Process') the parties have agreed to participate in good faith in the Process and that the determination of the dispute by the expert will be final and binding upon them."

[79] Secondly, the decision of the High Court in Dobbs makes clear that referral of a dispute to a third party for the purpose of ascertaining rights may result in accord and satisfaction with respect to pre-existing claims. In British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd[34], Scrutton LJ stated:

"Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative."[35]

[80] An analysis of the DBC Act itself supports the view that where there is accord and satisfaction with respect to disputes that might otherwise have been referred to the Tribunal, reliance upon the accord and satisfaction thereafter does not affect a "right conferred by this Act" within the meaning of s132.

[81] The DBC Act relevantly provides for both substantive and procedural rights. Insofar as substantive rights result from implied warranties then as I have already observed, s10 expressly envisages such rights may be modified by agreement in the circumstances there specified. At a more fundamental level it was agreed in the present case that the building consultant would determine the matters in issue according to law and it cannot be said that such an agreement detracts from provisions of the DBC Act as to implied warranties.

[82] Insofar as procedural rights are concerned such rights arise with respect to a domestic building dispute. A domestic building dispute is a dispute arising between the parties nominated in s54 in relation to a domestic building contract or arising out of domestic building work. A domestic building contract is defined to mean "a contract to carry out or to arrange or manage the carrying out of, domestic building work other than a contract between a building and a sub-contractor." Domestic building work is defined to mean "any work referred to in s5 that is not excluded from the operation of this Act by s6." Such work includes the erection and construction of a home, (which concept is elaborated by an inclusive definition); the renovation, alteration, extension, improvement or repair of a home; the demolition or removal of a home; and any work associated with the construction of a building on land that is zoned for residential purposes under a planning scheme under the Planning and Environment Act 1987 and in respect of which a building permit is required under the Building Act 1993.

[83] S53 of the DBC Act gives the Tribunal power to make any order it considers fair to resolve a domestic building dispute. S55 provides as to whom may make application to the Tribunal for such an order.

[84] In my view s132 does not preclude the resolution of a domestic building dispute by agreement. If it did so, no dispute arising during the course of domestic building work could ever be resolved by variation of a relevant contract. This would be an absurd result. Likewise s132 does not preclude the reference of a dispute to a third party for final determination. In cases of disputes arising in relation to a domestic building contract such a reference may be regarded as a modification of the original agreement. Where a dispute involves a claim in negligence, nuisance or trespass pursuant to s54(2) of the DBC Act such a reference will not have this character. Nevertheless whether the dispute or claim arises in contract or in negligence, nuisance, trespass or otherwise the jurisdiction of the Tribunal presupposes a continuing dispute. If the dispute is concluded by accord and satisfaction no continuing right remains to refer it to the Tribunal. If the reference to a third party does not result in accord and satisfaction then the underlying dispute will remain justiciable by the Tribunal. The respondent's position in the present case is that the reference of matters in

dispute to the building consultant did not result in a binding determination and this question remains to be resolved.

[85] For the sake of completeness I note that the Tribunal stated at para28 of its Reasons:

"28. There is an additional reason for impugning the Agreement also it seems to me, although it does not appear to arise directly on the facts of this case. A particular dispute referred to Mr Coghlan may be over the quality of workmanship or materials etc. A dispute of that nature is not excluded from the ambit of the Agreement. But a dispute of that nature would or could well call in the implied warranty provisions in s8 of the 1995 Act. Those warranties run with the building: s9. Yet except in the case of certain breaches of warranty, a provision of an agreement (which would include the Agreement with Mr Coghlan in that his determination is said to be 'final and binding') that purports to restrict or remove the right of a person to take proceedings (which in my view, means proceedings in the Tribunal) the breach of any of those warranties is void. As I have said, it is my view that s55 of the 1995 Act gives a permissible 'right' sufficient for this purpose."

[86] The Tribunal's reasoning fails to properly take account of the express provisions of s10 to which I have already referred. It is quite clear that the Act envisages that there may be an agreement to sign away a right to take advantage of a warranty if it is entered into when a breach of that warranty is known or ought reasonably to have been known to the person giving up such right.

[87] For the above reasons I am of the view that the Tribunal erred in finding that the expert determination agreement was void in law having regard to the provisions of the DBC Act and in particular s14 and s132 thereof.

The Further Questions of Law

[88] Because the answers given by the Tribunal to the remaining preliminary questions before it resulted directly from the Tribunal's answer to the first question, it follows that they too are vitiated by a finding that the Tribunal erred in law in the answer given to the first question.

[89] The further grounds of appeal seek to have the Court give substantive answers to the remaining preliminary questions of law. The notice of appeal seeks to address preliminary questions 2 and 5 which were before the Tribunal. In addition the appellant has sought leave to amend its notice of appeal to address preliminary questions 3 and 4, and with the consent of the respondent the question of leave has been heard together with the substance of the appeal.

[90] In my view the Court should not embark upon questions to which the Tribunal has not as yet given substantive answers:

(a) it is Parliament's intention that the Tribunal exercise its powers as a specialist tribunal exercising the primary jurisdiction with respect to domestic building disputes. The Tribunal's discretionary power under s53 extends beyond that ordinarily exercised by a court of law.

(b) the questions concerned involve questions of mixed fact and law, and the jurisdiction of this Court is limited to appeals on questions of law.

(c) the Tribunal is not a court of pleading and the definition of the issues raised by open-ended questions is not necessarily straightforward. The second question of law stated in the notice of appeal demonstrates this problem of definition. It seeks to formulate a specific answer to the second preliminary question before the Tribunal in terms which would require the Court to itself embark on an attempt to comprehensively identify the issues which were before the Tribunal.

(d) this is not a case where the obvious interest in achieving finality should override the clear statutory scheme and encourage the Court to in effect exercise the Tribunal's powers at first instance.

(e) the proceedings before this Court are not by way of "rehearing"[36] and statements of the High Court concerning such appeals are not to point.[37] The Court does not have the powers and duties of the Court on the hearing of such an appeal with respect to the drawing of inferences and the making of findings of fact.

(f) this is not a case in which the primary tribunal has expressed any substantive view as to the questions of mixed fact and law now in issue and the facts are thus also clearly distinguishable from cases such as Fox v Percy. This Court is and should be assisted by the views of the Tribunal in reaching its own conclusions as to material matters, even in those cases in which it ultimately takes a different view from the Tribunal.

Order

[91] The appeal is allowed for the above reasons and the decision of the Deputy President made on 6 December 2002 is set aside.

[92] Having regard to all the circumstances of the case I am of the view that the proceeding should be remitted to a differently constituted division of the Tribunal in accordance with s148(8) of the Victorian Civil Administrative Tribunal Act 1998.

[93] I will accordingly direct that the matter be remitted for further hearing in accordance with law by a division of the Victorian Civil Administrative Tribunal constituted by a different member or members from that which made the decision of 6 December 2002.

[94] I will hear counsel on the question of costs.

Counsel for the appellant: Mr J Digby QC with Mr J Shaw

Solicitors for the appellant: Mason Sier Turnbull

Counsel for the respondent: Mr E Magee QC with Mr K Oliver and Ms P Neskovin

Solicitors for the respondent: Hoeys Lawyers

1 Halsbury's Laws of Australia, 025-Arbitration [25-20]

2 (1992) 27 NSWLR 592

3 [1975] VR 108

4 Supreme Court of Victoria 19 June 1991 unreported

5 (1992) 27 NSWLR 592 at 598

6 (1981) 35 ALR 151 at 169-70

7 7th ed, p92

8 See Attorney-General v Sillem (1864) 2 H & C 431 per Pollock CB at 526-7: "If this had been the object of our legislature it might have been accomplished by the simplest possible piece of legislation; it might have been expressed in language so clear that no human being could entertain a doubt about it, instead of the awkward, difficult, and doubtful clause, which it is admitted on the part of the Attorney and Solicitor-General we have to deal with." See also Waugh v Middleton (1853) 8 Ex 352, at 358.

9 Second Reading Speech Legislative Assembly, 24 October 1995, the Honourable Jan Wade, Minister for Fair Trading.

10 Almost identical statements were made when the bill was presented by way of Second Reading Speech to the Legislative Council on 15 November 1995.

11 Home building - consumer problems and solutions November 1993

12 (1917) 24 CLR 85

13 Ibid at 99

14 (1977) 16 ALR 721 at 729

15 (1886) 18 QBD 7

16 Ibid

17 Ibid at 9

18 [1975] VR 108

19 Ibid at 112

20 For example Manningham City Council v Dura (Australia) Constructions Pty Ltd [1999] 3 VR 13; PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service (1995) 184 CLR 301.

21 Supreme Court of Queensland, unreported decision, 6 September 1999

22 (1996) 66 SASR 35 at 46-47

23 [2002] NSWSC 646, 25 July 2002

24 See Ajzner v Cartonlux Pty Ltd [1972] VR 919

25 [1998] VSC 188 (unreported decision 18 December 1998)

26 cf Kioa v West (1985) 159 CLR 550 at 585 per Mason J: "In this respect the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case."

27 Sutcliffe v Thackrah [1974] AC 727; Arenson v Casson Beckman Rutley & Co [1977] AC 405

28 [1972] VR 919 at 930

29 (1974) 1 Ch 229 at 235

30 (1935) 53 CLR 643 at 652-4

31 Ibid at 657

32 Unreported decision, Supreme Court of New South Wales Common Law Division, 14 July 1997 (BC 9705205 at 15)

33 Applied in Badgin Nominees Pty Ltd v Oneida Ltd & Anor [1998] VSC 188 (18 December 1998); and Heart Research Ltd v Psiron Ltd [2002] NSWSC 646 (25 July 2002)

34 (1933) 2 KB 616 and see Fraser v Elgen Tavern Pty Ltd [1982] VR 398

35 Ibid at 643-4

36 Fox v Percy (2003) 77 ALJR 989 at 993

37 Ibid eg per Gleeson CJ, Gummow and Kirby JJ at 997: "A principle purpose of providing for an appeal by way of 'rehearing' is to ensure, within the appellate process, finality of litigation, correctly decided."