VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
DOMESTIC BUILDING LIST

VCAT REFERENCE NO.D618/2001

CATCHWORDS

Preliminary questions – advisory opinion – need for clarity – expert determination agreement – expert determination – jurisdiction of tribunal to order compliance under *Domestic Building Contracts Act* 1995 and *Victorian Civil and Administrative Tribunal Act* 1998

[2005] VCAT 2265

APPLICANT	Age Old Builders Pty Ltd (ACN 068 142 638)
RESPONDENT	Swintons Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President, C Aird
HEARING TYPE	Hearing
DATE OF HEARING	13 September 2005
DATE OF ORDER	3 November 2005

ORDER

1. I answer each of the preliminary questions as follows:

   (a) No

   (b) As the question seeks an advisory opinion it cannot be answered.

   (c) No.

   (d) Not relevant.

   (e) The Tribunal does have power to order compliance with the Determination.

   (f) The question lacks clarity and cannot be answered.

2. The parties may apply by consent for this proceeding to be referred to a Compulsory Conference. Any such request must be signed by or on behalf of both parties. Should such a request be received I direct the principal registrar to list it for compulsory conference with priority and to refer the file to Deputy President Aird for the making of orders in chambers for the conduct of the conference.

3. Costs reserved with liberty to apply.

4. **I direct the principal registrar to list this proceeding for directions on 7 December at 2.15 p.m. before Deputy President Aird – allow 2 hours Any application for costs should be listed at that time. Should the parties consider the time allocated to be insufficient they must advise the principal registrar in writing by 1 December 2005 so that alternative arrangements may be made.**

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Mr J Shaw of Counsel
For the Respondent	Mr K Oliver of Counsel

REASONS

1. On 28 April 1999 the parties entered into a domestic building contract for the construction of four residential units in South Yarra. During the construction period disputes arose in relation to certain alleged defects. The parties agreed to refer these disputes to John Coghlan for Expert Determination. Mr Coghlan handed down his First Determination on 27 September 2000 which the parties accepted and complied with.

2. On 26 September 2000 (the day before the First Determination was handed down) the parties agreed to refer a dispute about the Applicant's claim for extensions of time and extension of time costs and the Respondent's claim for liquidated damages ('the EOT dispute') to Mr Coghlan for further Expert Determination. Mr Coghlan accepted the appointment and set out the terms of the reference in his letter to the parties dated 27 September 2000 ('the expert determination agreement') which includes an annexure setting out the matters to be determined and the *Rules for Expert Determinations* ('the Rules') as set down by the Institute of Arbitrators and Mediators. The parties agreed that the Determination would be final and binding. It was agreed by the parties and Mr Coghlan that the referral would be conducted in accordance with the Rules. Of particular relevance is Rule 1 which provides:

> 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

3. The terms of the expert determination agreement were varied by agreement by the parties, and the matters set out under Item 6 of the annexure were removed from the reference. Unfortunately, for various reasons, the reference took longer than anticipated. The parties expected it to be completed in less than the 18 months it took. The Second Determination ('the Determination') was handed down on 15 April 2002

whereby it was determined that the date for Practical Completion be extended to 4 September 2000 (from 30 June 2000 being the date which the architect had approved as the date for Practical Completion) and that the Respondent was obliged to pay the sum of $125,679.30 to the Applicant in this proceeding. I note that in paragraph 2 of his Determination Mr Coghlan records:

> Other matters had been previously listed for determination but have, I understand, either been resolved or referred, by agreement, of the parties elsewhere for determination.

4. On 16 August 2001 the Applicant commenced this proceeding seeking payment of the balance of the contract price in the sum of $45,212.90. The Applicant submits the amount claimed did not include any claims that were the subject of the expert determination agreement. Although clear particulars of the amount claimed were not set out in the Application, it was specified that the claim was for *'…money owed under a domestic building contract.'* I accept the claim must include a claim for payment of the two outstanding progress certificates (which are considered later).

5. By counterclaim dated 25 October 2001 the Respondent sought payment in the sum of $24,372.13 for the cost of rectification works and liquidated damages.

6. Following filing and service of its Points of Counterclaim, the Respondent raised, for the first time, the question of the validity of the expert reference under ss14 and 12 of the *Domestic Building Contracts Act* 1995. By letter dated 30 October 2001 (to Mr Coghlan with a copy to the Applicant's solicitor) it gave notice that it considered the reference void by virtue of s132 of the *Domestic Building Contracts Act* 1995.The letter of 30 October provides:

> We advise that we act for Swintons Pty Ltd.

> The above matter was referred to you by the above parties for expert determination in September and December 2000. These matters are now the subject of proceedings between the parties at the Victorian Civil and Administrative Tribunal. As you would be aware, section 132 of the *Domestic Building Contracts Act* 1995 ('the Act") renders void any agreement to exclude, modify or restrict any rights conferred by that Act.
>
> As these matters are now the subject of VCAT proceedings, pursuant to the Act, the agreement by the parties to have you resolve this matter is void.

7. The Applicant provided written submissions to the expert in relation to the expert determination agreement on 14 December 2000 and further written submissions on 9 November 2001, some three months after commencing this proceeding. Further submissions were provided by the Respondent on a 'without prejudice' basis on 8 January 2002.

8. By letter dated 17 November 2001 the solicitors for the Respondent advised Mr Coghlan that the Respondent would not be responsible for his fees from the date on which they advised him they considered the expert determination to be void. On the same day the Applicant's solicitors advised Mr Coghlan the Applicant would pay his fees if the Respondent failed to do so.

9. On 31 January 2002 Mr Coghlan advised the parties that he considered himself bound by the expert determination agreement and would proceed to delivery of the determination.

10. Points of Claim dated 14 January 2002 were filed by the Applicant. In addition to claims for payment of the balance outstanding under the building contract, the Applicant also seeks return of the bank guarantee and reimbursement of monies it says were wrongfully deducted from progress payments by the Respondent as cash retentions.

11. Subsequently the Respondent filed and served Points of Defence and Counterclaim dated 11 February 2002 whereby it pleads the matters which were clearly the subject of the EOT dispute, as a defence to the claim for payment of the progress certificates. Under the counterclaim the Respondent seeks liquidated damages in the sum of $97,000.00 and a determination it was entitled to call upon the bank guarantee as it did. The Applicant submits this was the first time any of the matters the subject of the expert determination agreement were before the tribunal.

12. By Points of Defence to Amended Counterclaim dated 5 March 2002, the Applicant relies on the expert determination agreement as an absolute defence to the claim for liquidated damages. Subsequently, the Applicant filed and served Amended Points of Claim dated 29 April 2002 whereby it set out particulars of the Second Determination and the process and terms of reference of the expert determination agreement. It sought a declaration that the Determination was final and binding on the parties, and an order for payment of the sum of $219,815.70 which is the $125,679.30 Mr Coghlan determined was payable by the Respondent to the Applicant, plus the Applicant's other claims.

13. By its Further Amended Points of Defence dated 11 July 2002 the Respondent, in essence, sought to re-open the EOT dispute by alleging the expert determination agreement was void as a reference to arbitration, that Mr Coghlan had otherwise not made his Determination in accordance with the terms of the expert determination agreement and further that the Applicant had repudiated the expert determination agreement when it commenced these proceedings in August 2001, which repudiation '…*had been accepted by the Respondent by letter dated 30 October 2001 from the Respondent's solicitors to Mr Coghlan, copies to the Applicant's solicitors, or alternatively by filing and serving Points of Defence and*

Counterclaim on or about 11 February 2002' (which are referred to above).

14. The Applicant, through its solicitors, wrote to the Respondent's solicitor on more than one occasion indicating its intention to apply to the Tribunal for Mr Coghlan to be appointed as an expert under s95 of the *Victorian Civil and Administrative Tribunal Act* 1998. Unfortunately, in light of the history of this matter, the application was never made.

15. Subsequently the Tribunal set aside the following questions for preliminary hearing:

    (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 ("the Act") and in particular ss 14 and 132 thereof.

    (b) If such agreement is not void whether Swintons 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 AOB 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) Considering the provisions of the *Domestic Building Contracts Act* 1995 and the *Victorian Civil and Administrative 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 paragraphs 18 to 22 of the Amended Points of Claim and with any determination made under such agreement.

16. Deputy President Cremean, as he then was, determined that the referral was an arbitration in contravention of s14 of the *Domestic Building Contracts Act* 1995. His answer to question (a) having been 'Yes,' all other questions were not considered. This decision was reversed, on

appeal, by Justice Osborne who ordered that questions (b) through (e) were remitted to be heard by a differently constituted tribunal. An appeal to the Court of Appeal from this decision was dismissed.

17. At a directions hearing before Judge Bowman an additional preliminary question – question (f) which follows, was included following application by the Applicant that it be substituted for question (b).

> (f) Whether the determination made under the said agreement is or is not impugned or in any way affected on the assumption that the particulars and facts alleged in paragraphs 23.1, 23.2, 23.3 and 23.4 of Swintons' Further Amended Points of Defence and Counterclaim dated 11 July 2002 are correct or otherwise arising out of the Statement of Agreed Facts and Agreed Documents dated 9 October 2002.

18. Statements of Agreed Facts and Documents, agreed for the purpose of considering the preliminary questions only, were filed in 2002. I am asked by the Applicant to assume they are correct only for the purposes of considering these questions.

19. Mr Oliver of Counsel, who appeared on behalf of the Respondent, submitted that the questions should not be answered at all because by their very nature they will not dispose of the proceeding. Mr Shaw of Counsel submitted on behalf of the Applicant that it is appropriate and desirable for me to answer each of the questions so there is certainty as to whether the Expert Determination is valid and enforceable. Further the Applicant submits that if my answers to the preliminary questions were as suggested by it, the Applicant would be entitled to judgement in the sum of $125,679.30 being the amount Mr Coghlan determined was payable by the Respondent to the Applicant and various other consequential orders. I accept it is appropriate that the questions be considered, although whether they can be answered is another matter altogether. If I were to find that the Second Determination is final and binding on the parties, I accept this

would leave two relatively small claims to be heard and determined in this proceeding – approximately $35,000.00 by the Applicant and $13,000.00 by the Respondent.

20. However, I should first make the following observation. Although the seeming intent of the preliminary hearing is to determine the validity and enforceability of the Expert Determination and further whether it can be set aside because of the conduct of the parties, or otherwise, these are not the questions before me. It is the preliminary questions as drafted that I must consider.

Question (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 ("the Act") and in particular ss 14 and 132 thereof.

21. The answer to this question has been determined on appeal and is 'no'.

Questions (b) - If such agreement is not void whether Swintons 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.

22. Mr Shaw in his written submissions has dissected Question (b) as follows:

(i) whether Swintons may in law allege that the determination made under such agreement or purportedly so …may be contradicted on any ground or grounds;
(ii) (and if so upon what) ground or grounds;
(iii) whether any aspect of such determination may be contradicted on any ground or grounds;
(iv) (and if so upon what) ground or grounds.

23. He submits that parts (ii) and (iv) (of question (b) as dissected), if given their literal interpretation, are clearly hypothetical and any answer would be in the nature of an advisory opinion. He suggests that parts (ii) and (iv) of his dissected question should be read down so that they refer to the facts set

out in paragraphs 19.1, 19.2 and 23.1 to 23.4 of the Respondent's Amended Points of Defence and Counterclaim. By dissecting the question in this way, the Applicant is effectively seeking to substitute alternate questions for consideration and determination.

24. The courts have made it quite clear that hypothetical questions or questions seeking advisory opinions should not be answered. This was considered by Justice Byrne in *Bayston v Scotch College* [2002] VSC 516 at para 25 where he said:

> The attitude of the court, informed by long experience, is that its function is to determine disputes which are attached to specific facts. Otherwise, the dispute is characterised as "not a real question", as "hypothetical" or as "academic" (*In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 82, per Lord Goff). This is not to say that the facts upon which a declaration may be made must be uncontentious or even presently existing. It is rather that, unless so directed by statute, the court shrinks from giving an advisory opinion. This attitude has been recently affirmed by the High Court *(Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334 at 356-7) which quoted with approval the following passage: "If ... the dispute is not attached to specific facts, and the question is only whether the plaintiff is *generally* entitled to act in a certain way, the issue will still be considered theoretical. The main reason for this is that there may be no certainty that such a general declaration will settle the dispute finally. Subsequent to that declaration a person (the defendant himself or someone else) may be adversely affected by a particular act of the plaintiff. It may then be doubtful whether this act is covered by the declaration. In such a case the affected person will probably be entitled to raise the issue again on its special facts. Indeed, such a declaration will in effect be a mere advisory opinion." (Zamir & Woolf, *The Declaratory Judgment* (2nd ed, 1993) p.132)

I also note the observations of the High Court in *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334 at para 47

> 'courts have traditionally refused to provide answers to hypothetical questions or to give advisory opinions'.

25. As parts of question (b) are hypothetical and any answer would be in the nature of an advisory opinion, the whole question is clearly compromised. For the purposes of this preliminary hearing, the question must be read as

a whole and not in its dissected version. It is therefore inappropriate to answer question (b).

Question (f) - Whether the determination made under the said agreement is or is not impugned or in any way affected on the assumption that the particulars and facts alleged in paragraphs 23.1, 23.2, 23.3 and 23.4 of Swintons' Further Amended Points of Defence and Counterclaim dated 11 July 2002 are correct or otherwise arising out of the Statement of Agreed Facts and Agreed Documents dated 9 October 2002.

26. Attempts were made by the Applicant's solicitor to overcome the difficulties with question (b) by suggesting question (f) which was included as an additional (rather than a replacement) question by Judge Bowman at a directions hearing on 5 September 2005. Mr Shaw, Counsel for the Applicant, (and certainly his instructor) seemed surprised on the first day of the preliminary hearing when I indicated I thought it lacked clarity. However at the commencement of the second day of the preliminary hearing Mr Shaw sought leave to replace question (f) with the following:

> Whether the determination made under the said agreement is or is not impugned or in any way affected by:
>
> (i) any facts contained in Part A of the Statement of Agreed Facts and Agreed Documents dated 10 October 2002 and in the Statement of Agreed Facts and Agreed Documents dated 24 June 2003;
>
> (ii) the documents listed in Part B of the Statement of Agreed Facts and Agreed Documents dated 10 October 2002 and in the Statement of Agreed Facts and Agreed Documents dated 24 June 2003, the parties having agreed to the tender, by consent, of the documents listed therein.
>
> (iii) Any of the following facts, such facts being assumed to be true:
>
> A. that AOB commenced this proceeding on or about 16 August 2001;
>
> B. that on or about 30 October 2001 Swintons' solicitors sent, and John Coghlan received shortly thereafter, the letter in

the Statement of Agreed Facts and Agreed Documents dated 10 October 2002 from Swintons' solicitors to John Coghlan bearing the date 30 October 2001;

C. that Swintons filed and served Points of Defence and Counterclaim on or about 11 February 2002;

D. that on or about 27 September 2000 John Coghlan sent, and AOB and Swintons' received shortly thereafter, the letter in the Statement of Agreed Facts and Agreed Documents dated 10 October 2002 from John Coghlan to AOB and Swintons bearing the date 27 September 2000;

E. that AOB delivered its final submissions to Mr Coghlan on or about … 2000 *(sic)*;

F. that Mr Coghlan failed to take into account, or properly construe, relevant provisions of the domestic building contract entered into by AOB and Swintons on 28 April 1999, including special conditions 9.2 and clauses 9.04, 10.09 and 10.10;

G. that on or about 11 April 2002 AOB's solicitors sent, and John Coghlan received shortly thereafter, the letter in the Statement of Agreed Facts and Agreed Documents dated 11 April 2002 from AOB's solicitors to John Coghlan bearing the date 11 April 2002.

27. Although the suggested question seemed clearer, I accepted Mr Oliver's submission that the application to substitute the above question for question (f) was unsatisfactory and that the Respondent would have been at a disadvantage had I allowed the substitution, having prepared to address me on question (f) as currently drafted. I also accept that the apparent difficulties in drafting a clearly understood question demonstrates the difficulties of considering such matters as a preliminary issue. Leave to substitute a revised question (f) was therefore denied.

28. It became apparent when I raised the lack of clarity of question (f) that Counsel for both parties and I all had different understandings of what I was being asked to assume for its purposes. It requires:

> The assumption that the particulars and facts alleged in paragraphs 23.1, 23.2, 23.3 and 23.4 of Swintons Further Amended Points of Defence and Counterclaim dated 11 July 2002 are correct.

29. There was some discussion as to what exactly the 'facts and particulars' set out in the relevant paragraphs might be. This was particularly the case in relation to paragraph 23.3 pursuant to which Mr Oliver indicated he understood I was being asked to assume that undue influence had been exerted on John Coghlan by the Applicant. Mr Shaw indicated this was a legal conclusion and not a fact or particular and submitted that I was simply being asked to accept the letter was sent. Counsel's differing interpretation of the parameters of the question only serve to reinforce my view that it lacks clarity. It is helpful in understanding my concerns to set out the relevant paragraphs in full (omitting the Particulars):

> 23.1 Further if, which is denied, the Applicant, the Respondent and John Coghlan entered into the expert determination agreement, the Tribunal does not have jurisdiction to hear and determine the matters raised with respect to the expert determination agreement referred to in paragraphs 18 to 22 of the Amended Points of Claim, as the expert determination agreement is not a domestic building contract as defined in the *Domestic Building Contracts Act 1995.*
>
> 23.2 Further and in the alternative if, which is denied, the Applicant, the Respondent and John Coghlan entered into the expert determination agreement, there were terms, inter alia of the expert determination agreement, as follows:
>
> (a) Mr Coghlan would deliver his determination within a reasonable time of the parties delivering their submissions to him;
>
> (b) Mr Coghlan would apply the provisions of the Agreement in making his determination; and
>
> (c) neither the Applicant nor the Respondent would apply any undue pressure on Mr Coghlan.
>
> …
>
> 23.3 In breach of the expert determination agreement:

(a) Mr Coghlan did not deliver his determination a reasonable time after the Applicant and the Respondent delivered their submissions to him

…

(b) Mr Coghlan failed to take into account or properly construe relevant provisions of the Agreement, including:

(i) Special Condition 9.2 regarding extensions of time
(ii) Clause 9.04 regarding deemed extensions of time; and
(iii)Clauses 10.09 and 10.10 regarding delay costs; and

(c) the Applicant applied undue pressure on Mr Coghlan

…

23.4 By reason of the matters referred to in paragraphs 23.2 – 23.3 the expert determination was not made in accordance with the expert determination agreement, and the Tribunal should not give effect to the expert determination.

30. Interestingly the revised question (f) which Mr Shaw sought to have substituted seeks to include the allegations made in paragraphs 19.1 and 19.2 of the Counterclaim but seemingly omits those set out in paragraphs 23.1 and 23.4 – no doubt because they do not include any 'facts or particulars'. Rather, each of those paragraphs sets out a conclusion of law. Similarly there is no reference to paragraphs 19.1 and 19.2 in question (f) although they seem to me to contain facts, which, if correct, are pivotal to a proper consideration of the question.

31. As indicated to Counsel during the hearing, it is my view that the meaning and intent of preliminary questions must be obvious to all – not just to the person/s who drafted them. I adopt the observations by Brooking J, as he then was, in *Jacobson v Ross* [1995] 1 VR 337 where he said

> 'precision is essential in the statement of any question ordered to be tried… in the statement both of the question to be decided and of the facts on which it is to be.'

32. That test is clearly not met here. Where a preliminary question lacks clarity it is inappropriate for the presiding member to be asked to accept

submissions from the bar table as to its proper interpretation. I am obliged to answer the question as it is put. Given the lack of clarity of question (f) I am unable to answer it. However, I must note in passing that it is with some reluctance that I reach this conclusion. Given the history of this matter it is desirable that it be disposed of as quickly as possible, but the lack of clarity of question (f) does not facilitate this. The Respondent has gone to great lengths to have the Determination set aside or reviewed by the tribunal. There should be no assumption that when this case is finally heard and determined that the tribunal will be any less reluctant than the courts to interfere with an expert determination.

Question (c) - Whether in law AOB by commencing these proceedings did repudiate such agreement.

33. It is submitted on behalf of the Respondent that the Applicant in commencing these proceedings repudiated the expert determination agreement. The Applicant argues that its only obligations under the agreement were to comply with the Rules and make payment of Mr Coghlan's fees as and when they became due and payable – which it has done - and to be bound by the Determination.

34. The Respondent relies on a letter from the Architect to the Applicant dated 24 July 2000 where the Architect gives notice to the builder that (omitting the formal parts):

> In accordance with Clause 10.14 of the contract together with Section 15 – Special Conditions, Clauses 9.06A, 9.08A.02 and 9.09.03 for the above project, we advise that you have failed to reach Practical Completion by the approved date of 30th June 2000.
>
> Consequently we have been instructed by our clients that in accordance with Clause 10.15 of the contract, liquidated and ascertained damages will be provisionally withheld from your future claims from that date until Practical Completion is reached and a Certificate is issued by this office.

> The amount deducted from any future claims will be calculated at the rate of $1,100 per calendar day as per item O of the appendix to the contract.

35. On 27 September 2000 the date of the first Determination, the Architect issued a Notice of Practical Completion and certified the Date of Practical Completion as 27 September 2000. On 28 September 2000 the Applicant submitted Progress Claim 17 to the Architect who issued Progress Certificate No. 17 on 12 October 2000. Progress Claim 18 was submitted on 27 October 2000 and Progress Certificate No 18 issued by the Architect on 3 November 2000. Without reproducing the Certificates, I note that the amount '$0.00' is inserted next to the following provision:

> Amount to be paid into the joint account by the Proprietor in accordance with clause 10.14

36. As noted above the Architect relied on Clause 10.14 when giving Notice to the Applicant on 24 July 2000 that liquidated damages would be withheld from future payments under progress certificates up until the date of practical completion. Seemingly, as the Progress Certificates were issued after the date the Architect had certified as the Date of Practical Completion, no provision was made for the deduction of liquidated damages in accordance with the 24 July notice. Although the date for Practical Completion was a disputed item contained in the expert determination agreement the 24 July Notice makes it clear that liquidated damages will be deducted until the Date **of** Practical Completion is certified by the architect not until the date **for** Practical Completion is finally determined (emphasis added). It is irrelevant that Mr Coghlan subsequently determined the date **for** Practical Completion (emphasis added) as 4 September 2000 and not 30 June 2000 as previously approved by the architect, hence significantly reducing the amount of the liquidated damages payable by the Applicant to the Respondent.

37. The question is whether seeking payment of the amounts set out in Progress Certificates 17 and 18, by making this application, amounted to a repudiation of the expert determination agreement. It is clear when considering the history of the dispute that even after the commencement of this proceeding, the Applicant was concerned to maintain and further the expert reference. It even indicated to Mr Coghlan that it would be prepared to meet his fees after the purported termination of his reference by the Respondent. In fact, it was the Respondent who sought to bring the dispute in relation to the EOT claim before the Tribunal in its counterclaim filed on 25 October 2001, which includes a claim for liquidated damages, and then more expansively in relation to the EOT claim in its Points of Defence and Counterclaim dated 11 February 2002. The Respondent argues that by filing its counterclaim it has accepted the Applicant's repudiation of the expert determination agreement. However, I am of the view that including the EOT dispute in the counterclaim was little more than an attempt, by the Respondent, to change forums for the resolution of the EOT dispute. It was the Respondent who sought to bring that issue before the Tribunal, not the Applicant.

38. Whether it was reasonable for the Applicant to commence these proceedings before Mr Coghlan delivered his Determination is not the question. Having considered the Agreed Facts and Documents, the pleadings and the submissions on behalf of both of the parties I cannot be satisfied the Applicant, in commencing these proceedings, evinced an intention not to be bound by the expert determination agreement, or the Determination. The answer to this question must therefore be 'no'.

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

39. As I have found the Applicant did not repudiate the Agreement by commencing this proceeding this question is not applicable. I note in

passing the Respondent's submission that it accepted the Applicant's repudiation by the letter of 30 October 2001 or by filing its Points of Counterclaim (both referred to above). However, although a copy of this letter was sent to the Applicant, it was addressed to Mr Coghlan. It is difficult to see how it could be regarded as an acceptance of the Applicant's alleged repudiation. Not only is the letter not addressed to the person alleged to have repudiated the contract, but there is no mention of a repudiation or its acceptance. Further, although the Respondent alleges the agreement is void the letter does not purport to terminate the referral.

Question (e) - Considering the provisions of the *Domestic Building Contracts Act* 1995 and the *Victorian Civil and Administrative 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 paragraphs 18 to 22 of the Amended Points of Claim and with any determination made under such agreement.

40. As I have declined to answer questions (b) and (f) the jurisdiction of the Tribunal to consider the disputes in relation to the expert determination agreement have not been considered. However, in considering whether the Tribunal has jurisdiction to order compliance with expert determination agreement and/or the Determination, jurisdiction, generally, will be addressed. The Applicant relies on ss53(1) and s54 of the *Domestic Building Contracts Act* 1995 ('DBC Act') as supporting its position that any dispute regarding the expert determination agreement or the Determination must properly be regarded as a domestic building dispute. The Tribunal's powers are set out in s53 of the DBC Act. Of particular relevance here is s53(1) which enables the tribunal to *'make any order which it considers fair to resolve a domestic building dispute'*. The Tribunal's jurisdiction is enlivened under s54(1) of the DBC Act which provides:

> (1) A "domestic building dispute" is a dispute or claim arising—

(a) between a building owner and—
  (i) a builder; or
  (ii) a building practitioner (as defined in the Building Act 1993); or
  (iii) a sub-contractor; or
  i. an architect—

in relation to a domestic building contract or the carrying out of domestic building work;

…

41. The Respondent's position is that as the expert determination agreement is not a domestic building contract the Tribunal does not have jurisdiction to consider any dispute arising under it or to order compliance with it, or the Determination.

42. It is my view that by entering into the expert determination agreement the parties have done no more than agree that the EOT dispute be determined by an alternative method of dispute resolution to that provided in the DBC Act or the VCAT Act. They have not, and could not have agreed to oust the jurisdiction of the tribunal - *Dobbs v National Australia Bank of Australasia Ltd.* (1935) 53 CLR 643 at 652-4.

43. It is submitted on behalf of the Applicant that the Tribunal has jurisdiction to enforce the Determination in the same way as it enforces Terms of Settlement reached at mediation or Compulsory Conference. Section 93 of the VCAT Act enables the Tribunal to make orders giving effect to any settlement reached at any time during a proceeding. Generally, terms of settlement will include default provisions which specifically anticipate that the parties can apply to have a proceeding reinstated should another party default in its obligations. That situation is, on the face of it, quite different to the enforcement of an expert determination. The expert determination agreement was entered into prior to the commencement of this proceeding, without reference to the Tribunal. and not in accordance

with the provisions of the DBC Act or the VCAT Act. Further, I have accepted that the application did not include matters which were the subject of the expert determination agreement.

44. However, the dispute which was the subject of the expert determination agreement giving rise to the Determination was clearly a domestic building dispute. Whilst there is any dispute about the effect and enforceability of that Determination it cannot be said that the domestic building dispute has been resolved. It is clear that it was the intention of Parliament that the tribunal should be primarily responsible for the resolution of domestic building disputes (Second Reading Speech, 24 October 1995) which, in my opinion, must include the power to order compliance with an alternative dispute resolution outcome if the Tribunal is satisfied it is proper to do so having regard to all the circumstances. I am satisfied that the powers under s53(1) of the DBC Act are sufficiently wide to enable the tribunal to consider whether the Determination was made in accordance with the expert determination agreement, and, if so satisfied, order compliance with the Determination.

45. As this question specifically relates to the jurisdiction of the tribunal under the DBC Act and the VCAT Act (although I was not referred to any specific provisions of the VCAT Act) I have not considered whether there may be jurisdiction under the *Fair Trading Act* 1999.

Conclusion

46. At the commencement of the preliminary hearing I enquired whether, in light of the history of the proceeding and the costs which must have been incurred by the Respondent, particularly in relation to the two appeals, the parties were interested in me referring the matter to a Compulsory Conference. This offer was declined by the Applicant. As the parties will be aware s83(1) of the VCAT Act provides:

> (1) The Tribunal or the principal registrar may require the parties to a proceeding to attend one or more compulsory conferences before a member of the Tribunal or the principal registrar before the proceeding is heard by the Tribunal.

Although I am somewhat hesitant about referring a proceeding to a Compulsory Conference if the parties are unwilling, I am mindful of the Tribunal's obligations under s98 of the VCAT Act and will consider such a referral at the next return date. The parties may request referral to a compulsory conference by consent and I will direct that the principal registrar list any such request with priority.

47. I will therefore answer each of the questions as follows:

(a) No

(b) As the question seeks an advisory opinion it cannot be answered.

(c) No.

(d) Not relevant.

(e) The Tribunal does have power to order compliance with the Determination.

(f) The question lacks clarity and cannot be answered.

DEPUTY PRESIDENT C. AIRD