**Winslow Constructors P/L & Lanigan Baldwin P/L v Mt Holden Estates P/L** [2004] Adj.L.R. 02/18

**JUDGMENT : HHJ Balmford** : Supreme Court of Victoria, Common Law Div. Melbourne: 18th February 2004

***Introduction***

1. These two matters are appeals under section 148 of the *Victorian Civil and Administrative Tribunal Act* 1998 ("the VCAT Act") against a decision delivered on 1 August 2003 by the Victorian Civil and Administrative Tribunal ("the Tribunal"), constituted by Deputy President Cremean. Leave to appeal was granted to both appellants on 29 September 2003 by Master Wheeler, who directed that both appeals be heard and determined at the same time and that on the hearing of the appeals the parties have leave to rely on affidavits already filed and served in the proceedings. The Master also ordered a stay of the proceedings in the Tribunal pending the hearing and determination of the appeals.

2. By an application filed in the Domestic Building List of the Tribunal on 25 October 2002 the respondent sought damages against each of the appellants under the *Domestic Building Contracts Act* 1995 ("the DBC Act") and the *Fair Trading Act* 1999 ("the Fair Trading Act"). By summonses filed respectively on 21 November 2002 and 17 December 2002 the first appellant ("Winslow") and the second appellant ("Lanigan") sought the dismissal or striking out of that proceeding under section 75 of the VCAT Act.

3. The hearing before the Tribunal was conducted on the basis of the following statement of agreed facts and facts in dispute:

   It is agreed between the parties as follows:-

   *1. The applicant ("Mt Holden") is and was at all material times the:*

   *(a) owner of the land known as Mt Holden Estate situated at 250 Reservoir Road, Sunbury ("the Land"); and*

   *(b) developer of a residential subdivision on the Land.*

   *2. The first respondent ("Lanigan") is and was at all material times a consulting engineer.*

   *3. The second respondent (whose correct name is Winslow Constructors Pty Ltd) ("Winslow") performed earthmoving and civil engineering works at all material times.*

   *4. The Land was to be the subject of a subdivision into residential lots by Mt Holden in four stages, namely Stages 1, 2, 3 and 4 ("the subdivision").*

   *5. Lanigan was retained by Mt Holden in relation to each Stage of the subdivision to:*

   *(a) design the construction of roads, drainage, water and sewer reticulation works upon the Land for each stage of the subdivision in accordance with the requirements of the Hume City Council and the relevant utility authorities ("the works"); (b) act as superintendent under the respective contracts for each stage of the subdivision.*

   *6. The works for Stage 1 of the subdivision are not in dispute in this proceeding (as someone other than Winslow performed them).*

   *7. Mt Holden engaged Winslow to carry out the works for Stage 2 of the subdivision on the Land.*

   *8. The engagement of Winslow to perform the Stage 2 works was pursuant to a written contract made on or about 13 February 2001 between Mt Holden and Winslow.*

   *9. The scope of the works for Stage 2 of the subdivision and the works to be performed under that contract by Winslow are set out in the contract documents, including the engineering drawings.*

   *10. The scope of works described for Stage 2 of the project in the contract is stated as `earthworks, roadworks, drainage, sewer and water reticulation construction' (section 4 paragraph 2 specification for contract No 3078/2).*

   *11. The Stage 2 works by Winslow for Mt Holden achieved practical completion on 12 December 2001, alternatively 16 November 2001 and a three month maintenance period in accordance with the Subdivision Act 1988 commenced.*

   *12. On or about 21 September 2001, Winslow was engaged by Mt Holden [to] carry out the works for Stages 3 and 4 of the subdivision on the Land.*

   *13. This engagement was pursuant to a written contract constituted by agreed contract documents.*

   *14. The scope of works for Stages 3 and 4 of the subdivision and the works to be performed under that contract by Winslow are set out in such contract documents, including the engineering drawings.*

   *15. The scope of works described for Stages 3 and 4 of the project in the contract is stated as `earthworks, roadworks, drainage, sewer and water reticulation construction' (section 4 paragraph 2 specification for contract No 3078/3).*

   *16. Practical completion of the Stage 3 and 4 works by Winslow was achieved on 23 July 2002 and a three month maintenance period in accordance with the Subdivision Act 1988 commenced.*

   *17. Winslow performed the works on the Land set out in the contract documents for Stage 2 and for Stages 3 and 4 of the subdivision, including performing the works set out on the engineering plans which form part of those contract documents.*

   *18. A statement of compliance in relation to each stage of the project to be issued under the Subdivision Act 1998, is a pre-condition to the issuing of titles by the Registrar of Titles in relation to a plan of subdivision.*

   *19. As at 25 October 2002, the date of the Application, no statement of compliance was issued under the Subdivision Act 1988 in respect of the Stage 2 or Stages 3 and 4 works performed by Winslow for Mt Holden and no Titles relating to Stages 2, 3 and 4 had been issued.*

*20. The works were carried out before the subdivision plan was approved and titles were issued by the Registrar of Titles.*

*21. Neither Winslow nor Mt Holden has built any homes on the Land.*

*22. There were:*

*(a) no homes on the Land; (b) no homes being constructed or completed on the Land; and (c) no contracts for the construction of any homes on the Land; in respect of that part covered by the Stage 2 works, at any time from the time when Winslow commenced those works until practical completion was achieved.*

*23. As at 28 February 2003 there was one home in the process of being constructed on the Land in respect of that part covered by the Stage 2 works. This home is a display home constructed by or on behalf of Mt Holden.*

*24. During the time that the works on stage 2 and stages 3 and 4 were performed by Winslow, there were:*

*(a) no homes on the Land; (b) no homes being constructed or completed on the Land; (c) no domestic building contracts for the construction of any homes on the Land; (d) no titles issued by the Registrar of Titles in relation to the land; and (e) no sales of any titles to any prospective homeowner.*

*25. As at 28 February 2003 there were still no homes, in the process of being constructed or completed, on the Land in respect of that part covered by the Stage 3 and 4 works.*

*26. The planning authorities, permits and regime applicable to the Land are set out in:*

*(a) amendment L10;*
*(b) planning permit P5644;*
*(c) the planning certificates; and*
*(d) the agreed extracts from the Hume planning scheme.*

It is also agreed that the following are in dispute:-

(a) Whether any part of the works carried out by either of the Respondents falls within section 5 of the Domestic Building Contracts Act 1995;

(b) Whether either of the Respondents is a builder as defined in such Act;

(c) Whether the dispute between the parties is a domestic building dispute as defined in such Act.

4. The Orders of the Tribunal were:

*1. The answers to the questions [being the matters said to be in dispute] are:-*

*(a) yes; the whole or as indicated;*

*(b) yes;*

*(c) yes.*

*2. Accordingly, I determine the Tribunal has jurisdiction.*

*3. The Summonses of the First and Second Respondents (dated, respectively, 21 November 2002 and 17 December 2002) are dismissed.*

*4. I reserve liberty to the Applicant to make application for costs.*

*5. I direct that this matter be returned to a directions hearing. Allow two hours.*

5. The appellants appealed against the whole of those orders.

6. Mrs Crennan, for the respondent, applied to file a further affidavit bringing the facts up to date. This application was rejected on the understanding that it could be assumed that, since the making of the agreement as to the facts, the facts would have changed; the situation on the land was clearly, as Mrs Crennan submitted, dynamic and not static.

7. The significant provisions of the DBC Act for present purposes are set out below. I was not referred by counsel to any relevant provision of the regulations.

*1. <u>Purpose</u>*

*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 building disputes and other matters by [the Tribunal]; and*
*(c) to require builders carrying out domestic building work to be covered by insurance in relation to that work; and*
*(d) to amend the House Contracts Guarantee Act 1987, and in particular, to phase out the making of claims under that Act.*

*3. <u>Definitions</u> (1) In this Act - . . .*

*`builder' means a person who, or a partnership which -*

*(a) carries out domestic building work; or*
*(b) manages or arranges the carrying out of domestic building work; or*
*(c) intends to carry out, or to manage or arrange the carrying out of, domestic building work; . . .*

*`building owner' means the person for whom domestic building work is being, or is about to be, carried out; . . .*

*"contract price" means the total amount payable under a domestic building contract and includes - . . .*

*(c) the amount any third person is to receive . . in relation to the domestic building work to be carried out under the contract -*

*(i) for conveying to the building site or connecting or installing services such as gas, electricity, telephone, water and sewerage . . . .*

*`domestic building dispute' has the meaning set out in section 54;*

*`domestic building work' means any work referred to in section 5 that is not excluded from the operation of this Act by section 6;*

*`home' means any residential premises and includes any part of a commercial or industrial premises that is used as a residential premises but does not include - . . . . . .*

*`major domestic building contract' means a domestic building contract in which the contract price for the carrying out of domestic building work is more that $5000 (or any higher amount fixed by the regulations) 4.* Objects of the Act *The objects of this Act are -*

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

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

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

5. Building work to which this Act applies

*(1) This Act applies to the following work –*

*(a) the erection or construction of a home, including –*

*(i) any associated work including, but not limited to, landscaping, paving and the erection or construction of any building or fixture associated with the home (such as retaining structures, driveways, fencing, garages, carports, workshops, swimming pools or spas); and*

*(ii) the provision of lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage to the home or the property on which the home is, or is to be;*

*(b) the renovation, alteration, extension, improvement or repair of a home;*

*(c) any work such as landscaping, paving or the erection or construction of retaining structures, driveways, fencing, garages, workshops, swimming pools or spas that is to be carried out in conjunction with the renovation, alteration, extension, improvement or repair of a home;*

*(d) the demolition or removal of a home;*

*(e) any work associated with the construction or erection of a building –*

*(i) on land that is zoned for residential purposes under a planning scheme under the Planning and Environment Act 1987; and*

*(ii) in respect of which a building permit is required under the Building Act 1993;*

*(f) any site work (including work required to gain access, or to remove impediments to access, to a site) related to work referred to in paragraphs (a) to (e);*

*(g) the preparation of plans or specifications for the carrying out of work referred to in paragraphs (a) to (f); (h) any work that the regulations state is building work for the purposes of this Act.*

*(2) A reference to a home in sub-section (1) includes a reference to any part of a home.*

6. Building work to which this Act does not apply *This Act does not apply to the following work-*

*(a) any work that the regulations state is not building work to which this Act applies;*

*(b) any work in relation to a farm building or proposed farm building (other than a home);*

*(c) any work in relation to a building intended to be used only for business purposes;*

*(d) any work in relation to a building intended to be used only to accommodate animals;*

*(e) design work carried out by an architect or a building practitioner registered under the Building Act 1993 as an engineer or draftsperson;*

*(f) any work involved in obtaining foundations data in relation to a building site;*

*(g) the transporting of a building from one site to another.*

54. What is a domestic building dispute?

*(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 (iv) an architect -*

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

*(b) between a builder and –*

*(i) another builder; or*

*(ii) a building practitioner (as defined in the Building Act 1993); or*

*(iii) a sub-contractor; or*

*(iv) an insurer -*

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

*(c) between a building owner or a builder and –*

*(i) an architect; or*

*(ii) a building practitioner registered under the Building Act 1993 as an engineer or draftsperson -*

*in relation to any design work carried out by the architect or building practitioner in respect of domestic building work.*

*(2) For the purposes of sub-section (1), a dispute or claim includes any dispute or claim in negligence, nuisance or trespass but does not include a dispute or claim related to a personal injury. (3) A reference to a building owner in this section includes a reference to any person who is the owner for the time being of the building or land in respect of which a domestic building contract was made or domestic building work was carried out.*

***Applications to rescind the grant of leave***

8. At the outset Mrs Crennan, for the respondent, submitted that the Master's orders granting leave to appeal should be rescinded. After some discussion as to the procedure to be adopted, I ruled that I would hear argument on both the application for rescission of the grants of leave and the substantive issue and reserve my decision on both.

9. It should be noted that the respondent was represented before Master Wheeler and at all other relevant times. No material was filed by the respondent in opposition to the applications for leave to appeal, and while the respondent did not consent, nor did it oppose those applications or the specific orders made. The order relating to Winslow was authenticated on 30 September 2003 and the order relating to Lanigan on 29 September 2003. No appeal has been lodged against either order under Rule 77.05 of the Supreme Court (General Civil Procedure) Rules 1996 ("the Rules").

10. Some time was spent at the hearing before me on the question as to whether there was jurisdiction in the Court to make the orders sought by Mrs Crennan. In ***Ewart v Audehm***[1] Ashley J had before him what he described as "very useful written submissions" from all counsel on the question of whether it was open to him to rescind a grant by a Master of leave to appeal from the Tribunal under section 148 of the VCAT Act. Having decided to deal with the substance of the appeal, His Honour did not need to decide the question, but he considered it at some length, referring to a number of the authorities which were cited before me. His Honour's conclusion reads (with his footnotes included in square brackets):

*I incline to the view that, notwithstanding the existence of a right of appeal from a Master's decision to a judge of the Trial Division [and, for that matter, to the Court of Appeal from refusal by a judge of the Trial Division to grant leave to appeal, see **The Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue** [2001] HCA 49], a judge of the Division does have power to rescind a Master's grant of leave to appeal. I think such power could be said to be part of the armory necessary to prevent abuse of process. It is, however, another question as to what circumstances would justify the exercise of that power. [Perhaps an analogy could be established with the circumstances in which a court would entertain an application to re-open an application for special leave; as to which see **Re Sinanovic's Application** [2001] HCA 14 at para 7].*

11. In ***Sinanovic*** **Kirby** J found that the High Court, in its own special situation, had power to reopen an application for special leave, although unexplained delay or other fault on the part of those seeking reopening would be a discretionary reason for refusing to entertain a request for such a reopening. Given the desirability of finality in legal proceedings, he concluded:

*The only basis for ordering the reopening of a special leave hearing would, in my opinion, be where it is affirmatively shown that exceptional circumstances exist and new circumstances have arisen that require a reopening to prevent a serious miscarriage of justice because an error of fact or law has occurred in the earlier determination of the application, which error demands correction.*

12. Mrs Crennan submitted that leave to appeal should not have been granted. The decision of the Tribunal was interlocutory only. Courts, she submitted, were reluctant to grant leave to appeal from interlocutory decisions, and the principles applicable to the grant of leave to appeal from an interlocutory decision were those set out in ***Niemann v Electronic Industries Ltd.***[2] No evidence had been led by the applicants before the Master on any relevant substantial injustice to them by leaving the decision of the Tribunal unreversed, as required by the Full Court in that case.

13. However, in **Secretary to the Department of Premier and Cabinet v Hulls** [3] Phillips JA, with whom Tadgell and Batt JJA agreed, said: *. . . although in argument what was said in Niemann was referred to as laying down "principles" or "rules", that is not so. What was said should be taken to do no more than provide guidelines. . . The discretion to grant leave, which is conferred by the statute in untrammelled terms, cannot be fettered, and should not be fettered, by judicial decision. From time to time a case will arise in which any preconceived guidelines will be found not wholly sufficient. In the end, whether leave is granted or not must always depend upon the justice of the case, as it appears to the court from whom leave is sought.*

14. Mrs Crennan's principal submission was that a finding that the Tribunal did not have jurisdiction under the DBC Act would be useless. The decision sought to be appealed from the Tribunal related to applications by Winslow and Lanigan to strike out the substantive proceeding before the Tribunal. As stated in paragraph 1 of the Tribunal's Reasons for its decision ("the Reasons"), that substantive proceeding was brought under both the DBC Act and the Fair Trading Act, but this had not been brought to the attention of Master Wheeler. It was not in issue that the Tribunal had jurisdiction under the Fair Trading Act to deal with the substantive proceeding brought by the

[1] [2001] VSC 380 at [34].
[2] [1978] VR 431.
[3] [1999] 3 VR 331 at 335.

respondent. Thus if the Court were to find that the answers given by the Tribunal to the three questions were wrong, and accordingly that the Tribunal did not have jurisdiction under the DBC Act, it would still have jurisdiction under the Fair Trading Act, and the appeal, albeit successful, would have achieved nothing. Further, she submitted that to proceed with the appeal would be to fragment the proceedings, which was undesirable.

15. Mr Zappia, for Lanigan, referred to the judgment of Phillips JA, in ***Hulls***.[4] In that case the Court of Appeal was concerned with the principles applicable to the determination of an application for leave to appeal from the Tribunal and made clear that leave to appeal from an interlocutory order may be granted, although less freely than leave to appeal from a final order. Mr Zappia relied on the following passage:

*Moreover, though never a necessary factor in this court, sometimes the public or general importance of the question of law which has been identified may be a consideration on the application for leave.* [5]

16. Mr Jeffrey, the Executive Director of the Victorian Branch of the Civil Contractors Federation ("CCF"), deposed that the 550 contractor members of that Branch were involved in all aspects of civil construction. He believed that civil contractors had not regarded themselves as builders for the purposes of the DBC Act. Civil contractors were primarily involved with constructing things on or below the ground; builders primarily built buildings above ground. He had been advised by the solicitors for the CCF of certain legal consequences which might possibly flow from civil works contracts being defined as domestic building contracts for the purposes of the DBC Act. As a result of that possibility the decision of the Tribunal had created uncertainty in the industry, and a need for retraining. Nearly all civil works contracts were based upon certain standard form contracts which did not comply with the DBC Act. The monetary value of the works affected by the Tribunal's decision might be presently in the vicinity of $500 million per year. Mr Gardiner, President of the CCF, in his affidavit agreed that the Tribunal decision would create uncertainty in the civil contractors industry.

17. Both Mr Golvan, for Winslow, and Mr Zappia submitted that the Tribunal's answers to the three questions as to matters said to be in dispute [6] raised issues of considerable public or general importance. Those questions were, in the words of Mr Golvan, "*the real matter for issue before this Court*". The existence of jurisdiction under the Fair Trading Act was not, they submitted, relevant to the consideration of those questions.

18. Mrs Crennan submitted that the findings of the Tribunal as to the effect of the DBC Act were not of public or general importance because they were made in respect of an agreed statement of facts and related only to those agreed facts, which in any event had changed since the statement was prepared, and were continuing to change. However, it is apparent, from the submissions of Mr Golvan and Mr Zappia and the affidavit material cited in [16] above, that the matters which concern their clients arise from the finding that the Tribunal had jurisdiction in the context of those agreed facts. I am satisfied that the matter which concerns the appellants is the effect of the answers given by the Tribunal to the three questions, that those answers relate to a matter of public or general importance, and that a finding that the answers were wrong and accordingly that the Tribunal did not have jurisdiction under the DBC Act, would not be, as Mrs Crennan submitted, useless. It is not in issue that the answers to the questions involve questions of law, as required by section 148 of the VCAT Act.

19. Assuming, without deciding, that I have jurisdiction to rescind the order of Master Wheeler granting leave to appeal, and adopting the suggestion of Ashley J that an analogy with the principles in *Sinanovic* be established, I do not consider that this is an appropriate case for the exercise of that jurisdiction.

20. I should say, in addition to the matters to which I have already referred, that I cannot but give weight, in considering the exercise of my assumed discretion, to the absence of any opposition by the respondent to the making of the orders which it now seeks to have rescinded.

21. For the reasons I have given, and in accordance with what appears to me to be the justice of the case, the application for rescission of the Master's orders granting leave to appeal against the orders of the Tribunal fails.

***The substantive question***

22. The essential question in this appeal is the first of the three questions which were before the Tribunal, in that the answers to the other two questions follow from the answer to the first. That question is, whether the work carried out, managed or arranged by each of the appellants, as described in the statement of agreed facts, and in the circumstances there described, is "*domestic building work*" as defined in sections 3, 5 and 6 of the DBC Act. If so, then each of the appellants is a "*builder*" for the purposes of the DBC Act, by virtue of paragraphs (b) and (c) of the definition of that word in section 3; the respondent is a "building owner" for the purposes of the DBC Act by virtue of the definition of that expression in section 3; the dispute between each of the appellants and the respondent is a "*domestic building dispute*" by virtue of section 54(1)(a)(i); and the Tribunal has jurisdiction to deal with the dispute by virtue of the provisions of Division 2 of Part 5.

23. That question essentially turns on the application to the work in question of the provisions of section 5 and 6. The position of the two appellants is not identical, as appears from the statement of agreed facts. The greater part of the statement relates specifically to Winslow, while paragraphs 2 and 5 describe the specific position of Lanigan, and certain passages deal with the general background to the works. The appellants were separately represented, and at this point it is convenient to deal separately with the two disputes.

[4] [1999] 3 VR 331.
[5] at 335-6.
[6] see [3] and [4] above.

**Winslow v Mt Holden**

24. The grounds of appeal appearing in the amended Notice of Appeal filed in this matter by Winslow on 29 October 2003 read as follows:

*1. The Tribunal was wrong or erred in law in its construction of sub-sections 5(1)(a), 5(1)(e) and 5(1)(f) of the DBC Act in holding that these sub-sections had the effect that infrastructural works carried out by the Appellant to enable possible future homes or buildings to be constructed on the land, in circumstances where there was no actual or contemplated home or a building on the land and there were no residential lots, were "domestic building works" within the meaning of sections 3, 5 and 54 of the DBC Act.*

*2. The Tribunal was wrong or erred in law in its construction of sub-sections 5(1)(a)(i) and 5(1)(e) of the DBC Act by failing to construe the meaning of "associated work" in those sub-sections as meaning works which were accompanying, concomitant or allied to erecting or constructing a home or a building.*

*3. The Tribunal was wrong or erred in law in its construction of sub-sections 5(1)(a)(i) and 5(1)(e) of the DBC Act by construing the meaning of "associated work" in those sub-sections as meaning works merely "related to" the erection or construction of future possible homes or buildings on the site.*

*4. The Tribunal was wrong or erred in law in its construction of sub-sections 5(1)(a)(i) and 5(1)(e) of the DBC Act by further construing references to "associated work" in those sub-sections as only excluding works which were wholly unrelated to the erection or construction of future possible homes or buildings, whether or not an actual or contemplated home or a building was being or was to be constructed or erected on the land.*

*5. The Tribunal was wrong or erred in law in its construction of sub-section 5(1)(a)(ii) of the DBC Act in determining that the Appellant was engaged to carry [out] works which included "water supply, sewerage or drainage" within the meaning of the sub-section.*

*6. The Tribunal was wrong or erred in law in its construction of sub-section 5(1)(a)(ii) of the DBC Act in failing to determine that the sub-section only applied to the provision of "water supply, sewerage or drainage" accompanying the erection or construction of an actual or contemplated home or to the property on which an actual or contemplated home is or is to be erected or constructed.*

*7. The Tribunal was wrong or erred in law in its construction of sub-section 5(1)(e) of the DBC Act in determining that a "building" within the meaning of sections 3 and 5(1)(e) of [the Act] included a "home".*

*8. The Tribunal was wrong or erred in law in its construction of sub-section 5(1)(e) of [the Act] in holding that sections 5(1)(e)(i) and (ii) of the DBC Act were satisfied, in circumstances where:*

*(a) the relevant land was not "zoned for residential purposes"; and/or*

*(b) there was no building being constructed or erected on the land which would require a building permit under the Building Act 1993.*

*9. The Tribunal was wrong or erred in law in its construction of sub-sections 5(1)(a) and 5(1)(e) of the DBC Act by misconstruing the submissions of the Appellant by stating in his decision that the Appellant submitted that "the actual existence of a home or building `is a precondition to the operation of the DBC Act' (see paragraphs 9, 17, 19, 20, 23 of its decision). The Appellant submitted that the existence or construction of an actual or contemplated home or a building was a precondition to the operation of those sub-sections. By this error the Tribunal misdirected itself and erred in law as to the proper construction of the sub-sections.*

*10. The Tribunal was wrong or erred in law in its construction of sub-section 5(1)(f) of the DBC Act:*

*(a) in holding that the infrastructure works by the Appellant were "site works" as contemplated by the sub-section; and*

*(b) in holding that the works related to work referred to in paragraphs (a) to (e) of section 5(1) of the DBC Act.*

*11. The Tribunal erred in law in determining that the Appellant was a "builder" as defined in section 3 of the DBC Act.*

*12. The Tribunal erred in law in determining that the dispute between the Appellant and the Respondent as alleged in the VCAT Proceeding was a "domestic building dispute" as defined in sections 3 and 54 of the DBC Act.*

**Ground 1**

25. Mr Golvan submitted first that the specificity of the expressions *"a home"* and *"a building"* in section 5(1)(a) and (e) indicated that the section was intended to refer to an actual or contemplated home or building, not to the hypothetical future homes or buildings possibly to be built in the future on the land where his client had carried out the construction of roads, drainage, sewer and water reticulation works. Works done before there was a specific actual or contemplated home or building were not intended to be included in the expression *"associated work"*. That expression, in his submission, was intended to refer to such matters as connecting the specific home, or the lot on which it was to be erected, into the main sewer and drainage system. It was not intended to refer to the construction of that main sewer and drainage system.

26. However, section 37 of the Interpretation Act provides that unless the contrary intention appears, words in an Act in the singular include the plural. There is no indication in section 5(1) or elsewhere in the Act of a contrary intention.[7] If the words, "*home", "building"* and *"site*" are read in the plural, section 5(1)(a), (e) and (f), appear as follows (with those readings underlined):

*5. <u>Building work to which this Act applies</u> (1) This Act applies to the following work - (a) the erection or construction of <u>homes</u>, including - (i) any associated work including, but not limited to, landscaping, paving and the erection or construction of any building or fixture associated with the <u>homes</u> (such as retaining structures, driveways, fencing,*

[7] see [64] below.

*garages, carports, workshops, swimming pools or spas); and (ii) the provision of lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage to the homes or the property on which the homes are, or are to be; . . . (e) any work associated with the construction or erection of buildings - (i) on land that is zoned for residential purposes under a planning scheme under the Planning and Environment Act 1987; and (ii) in respect of which a building permit is required under the Building Act 1993; (f) any site work (including work required to gain access, or to remove impediments to access, to sites) related to work referred to in paragraphs (a) to (e);*

27. The works carried out by Winslow are described in paragraphs 10 and 15 of the statement of agreed facts as *"earthworks, roadworks, drainage, sewer and water reticulation construction"* on land which in paragraph 4 is stated as "to be the subject of a subdivision into residential lots by Mt Holden". Those works must, in my view, together fall within sections 5(1)(a)(ii), 5(1)(e) and 5(1)(f) if those provisions are read literally and in the terms set out in the preceding paragraph. On that basis, *"earthworks and roadworks*" carried out on such land fall within paragraph (f), and "*drainage, sewer and water reticulation construction*" on such land fall within sub-paragraph (a)(ii).

28. Mr Golvan submitted further that it was not appropriate to relate the "associated works" referred to in the section to the construction of hypothetical future homes; they must be associated with the erection of a specific actual or contemplated home. I do not find support for that proposition in the words of the section, particularly when it is read as appearing in [26] above.

29. In this context, Mr Golvan also submitted that until the procedures provided for in sections 3, 5, 6, 15 to 17, 21, 22 and 24 of the Subdivision Act 1988 ("*the Subdivision Act*") had been complied with, culminating in the registration of the plan of subdivision by the Registrar of Titles, it could not be said that there was any "*property on which the home . . . is to be*" in terms of section 5(1)(a)(ii). The works carried out by Winslow were intended to satisfy the planning permit conditions and requirements, so that parts of the land would be suitable for the later construction of houses. It was the Subdivision Act, not the Act, which regulated the provision of basic infrastructure, such as roads and utilities. In his submission, it could not have been the intention of Parliament that the DBC Act would apply to work entirely anterior to the construction of homes on the lots in the subdivision after the approval of the plan.

30. However, the fact that the provision of infrastructure is regulated by the Subdivision Act does not necessarily mean that it cannot also be affected by other legislation. Examples come readily to mind. It appears from clause 32 of the Hume Planning Scheme [8] that registration of the plan of subdivision is a prerequisite to the construction of homes on the lots on the plan. Nevertheless, that does not, in my view, mean that infrastructure work intended to enable that construction and carried out prior to the registration of the plan of subdivision is not associated with the intended future construction of those homes. For the reasons given, ground 1 fails.

**Grounds 2 to 4**

31. Mr Golvan submitted that the test adopted by the Tribunal for the meaning of "*associated",* and referred to in grounds 2 to 4, was too wide. He referred to the fourth meaning of "*associate*" given in the Oxford English Dictionary as "*Of things: accompany, join",* the ninth meaning in the Macquarie Dictionary, "an accompaniment or concomitant" and the eleventh meaning in the Macquarie Dictionary, "*allied, concomitant*". The latter two, however, are meanings given respectively to the noun and adjective "associate", rather than to the verb of which *"associated"* is the past participle.

32. The dictionary definitions are not of great assistance, and the question as to the proper interpretation of *"associated*" is really a matter of degree. Mr Golvan submitted that, on the test applied by the Tribunal, activities associated with the erection or construction of homes, and thus falling within section 5(1)(a) would include timber production for housing, domestic house brick manufacture and home roofing material manufacture. My own view would be that those activities are too remote from the erection or construction of homes to fall within that section; while that cannot be said of the works carried out by Winslow. A line is to be drawn somewhere, and it is not necessary for present purposes to make any finding as to where that line should be. In my view grounds 2 to 4 must fail.

**Grounds 5 and 6**

33. Mr Golvan's submissions as to these grounds have already been dealt with, save for one. He submitted that there was a distinction between the connection of the subdivision as a whole to the main water supply, sewerage and drainage systems, which was not "*domestic building work*" and the connection of individual homes to those systems which was "*domestic building work*". While there is a clear distinction between the two, the question is whether that distinction is relevant to the issue in hand. Mr Golvan referred to the definition of "*public works*" in section 3 of the Subdivision Act where the distinction is clearly expressed. However, a definition for the purpose of one Act, unless specifically incorporated in another Act, can be used in the interpretation of that other Act only in very limited circumstances, which are not present here .[9]

34. Mr Golvan also relied on the definition of "*contract price*" in section 3 of the DBC Act, the relevant portion of which is set out in [7] above. However, while that provision indicates a legislative intention that connection of services to an individual home is to be regarded as domestic building work, it does not draw the clear distinction on which Mr Golvan seeks to rely. I do not find that distinction to be made out in the DBC Act. Grounds 5 and 6 accordingly fail.

[8] included in the agreed extracts referred to in paragraph 26 of the agreed statement of facts.

[9] see the discussion in Pearce and Geddes *Statutory Interpretation in Australia* 4th edition paragraph 3.21.

**Ground 7**

35. In support of this ground Mr Golvan cited the judgment of Byrne J in ***Fletcher Construction Australia Limited v Southside Tower Developments Pty Ltd*** [10] as finding that the word "building" in section 5(1)(e) did not include a home, but referred to structures of a non-residential character. However, as I read His Honour's judgment, I am satisfied that he was concerned [11] only to emphasise that the use of the word "*building"* meant that *"the residential flavour introduced by the definition of "home" in section 3 is not present"* and that "*building"* in paragraph (e) cannot be restricted to a residential building".[12] That second passage makes clear that he did not intend to suggest that the word "*building*" in section 5(1)(e) was not intended to encompass a residential building as well as any other kind of building. The word "*building"* in section 5(1)(e) has its normal wide meaning.[13] Ground 7 accordingly fails.

**Ground 8**

36. In *Fletcher* [14] Byrne J considered the meaning of the expression "land that is zoned for residential purposes" in section 5(1)(e) and concluded that:

> *What appears to be intended is that the [DBC] Act should apply to work of a non-residential character but which is carried out on land which itself has a residential character. . . . It is common enough to hear in ordinary speech reference to "a Residential Zone" or to "land zoned Residential". Such an expression in common speech is a reference to those zones which have long been called "Residential" of one kind or another in planning schemes notwithstanding that other uses may be permitted and notwithstanding that residential uses may be permitted in other zones. To my mind this is the meaning which should be given to "zoned for residential purposes" in paragraph (e).*
>
> *. . . The requirement of paragraph (e) is therefore satisfied only where residential use or uses of the land are the principal or predominant purpose for land use permitted by the zone.*

37. The Tribunal found that the land was zoned residential under a planning scheme under the *Planning and Environment Act* 1987. Mr Golvan's submissions proceeded on the basis that the effect of the relevant zoning controls and planning instruments was that the land would not acquire zoning "for residential purposes" until after approval of the plan of subdivision. Mrs Crennan's submissions proceeded on the basis that it was agreed that the land was already zoned residential at the time when the contract between Winslow and the respondent was entered into. Mr Golvan in reply did not challenge that assertion. The exhibits attached to the second affidavit of Mr Sartori include the material agreed in paragraph 26 of the statement of agreed facts to be relevant to the planning status of the land. However, I was not taken through that material by counsel, and it is not possible to determine, from that material, what that status is.

38. Section 16 of the *Building Act* 1963 ("the Building Act") provides that a person must not carry out building work unless a building permit in respect of the work has been issued and is in force. [15] "Building work" is relevantly and widely defined in section 3 as "work in connection with the construction . . . of a building". On a literal interpretation of that provision and section 5(1)(e)(ii), consistently with the interpretation I have applied to section 5(1)(a), the work carried out by Winslow must fall within section 5(1)(e)(ii).

39. It would seem therefore *that, adopting the finding of the Tribunal that the land was at the relevant time "*zoned for residential purposes", then the work carried out by Winslow must be "domestic building work" in terms of section 5(1)(e) and ground 8 accordingly fails.

**Ground 9**

40. This ground relates to what is claimed by Winslow to be a misapprehension of a submission made by it before the Tribunal, which is said to have led to the Tribunal's rejecting an argument which had not been put. It does not appear that I can make any finding on this issue or that I need to do so.

**Ground 10**

41. This ground depends on submissions which I have rejected above.

**Grounds 11 and 12**

42. These grounds refer respectively to the Tribunal's answers to questions 2 and 3 and as has been said [16] the answers to questions 2 and 3 follow directly from the answer to question 1. Accordingly it is not necessary to consider grounds 11 and 12 specifically.

**Lanigan v Mt Holden**

43. The grounds of appeal appearing in the Notice of Appeal filed by Lanigan on 30 September 2003 read as follows:

> 1. The Tribunal erred in holding that the appellant was a "builder" within the meaning of section 3 and section 54 of [the DBC Act].

[10] unreported, decided on 9 October 1996.
[11] at 7.
[12] at 15.
[13] which is expanded, in a manner not here relevant, by the definition in section 3.
[14] at 15-16.
[15] That provision does not apply to building work exempted by or under the Building Act or the regulations made thereunder (section 16(2). However, none of those exemptions appears to be relevant to the present matter.
[16] see [22] above.

2. The Tribunal erred in holding that the respondent was a "building owner" within the meaning of section 3 and section 54 of the Act.
3. The Tribunal erred in holding that the work carried out by the appellant for the respondent, which is the subject of the respondent's claim in the Tribunal, was "domestic building work" within the meaning of section 3 of the Act.
4. The Tribunal erred in holding that the contract by which the respondent engaged the appellant was a "domestic building contract" within the meaning of section 3 of the Act.
5. The Tribunal erred in holding that the claim brought by the respondent against the appellant in the Tribunal was a "domestic building dispute" within the meaning of section 54 of the Act.
6. The Tribunal erred in holding that it had jurisdiction to determine the claim brought by the respondent against the appellant in the Tribunal.
7. The Tribunal erred in holding that work in the nature of earthworks, roadworks, drainage, sewer and water reticulation construction carried out for a proposed residential subdivision (infrastructural work) constituted "domestic building work" within the meaning of section 3 of the Act.
8. The Tribunal erred in holding that a contract for the performance of infrastructural work was a "domestic building contract" within the meaning of section 3 of the Act.

These grounds say no more than that the Tribunal was wrong, and it is not appropriate to deal with them separately.

44. The first of Mr Zappia's submissions additional to those of Mr Golvan was that the Tribunal's equation of "associated" with "related" was incorrect. He pointed out that both expressions were used in section 5 of the DBC Act, and accordingly they must be meant to have different meanings. He relied on the judgment of the Full Court in ***Scott v Commercial Hotel Merbein Pty Ltd.***[17] However, whether or not that equation of meaning is appropriate, the question is, whether the work performed by Lanigan, and described in paragraphs 2 and 5 of the statement of agreed facts, can be regarded as "associated" with the erection or construction of homes on the land in terms of sections 5(1) (a)(ii) and 5(1)(e). Lanigan is a consulting engineer, and was retained to design the construction and to act as superintendent under the contracts for the subdivision. It is clear from those contracts, which are before the Court, that the duties of the superintendent are considerable.

45. Mr Zappia submitted that the expression *"associated work"* in section 5(1)(a) was limited by the examples following that expression, namely *"landscaping, paving and the erection or construction of any building or fixture associated with the home"*. However, those expressions are not examples of "associated work", but rather extend the meaning of that expression.

46. In my view, consistently with my earlier findings, the work performed by Lanigan was associated with the erection or construction of homes on the land.

47. Mr Zappia also submitted that the Tribunal was incorrect in finding that the design work carried out by his client fell within section 5(1)(g) of the DBC Act. He referred to section 6(e) and submitted that that provision had the effect that the DBC Act did not apply to design work carried out by an engineer. However I was not directed to any evidence that his client was "an architect or building practitioner registered under the Building Act as an engineer or draftsperson" so as to fall within section 6(e).

48. To this point, as is apparent, I have, in respect of both proceedings, interpreted the DBC Act literally, according to what I have found to be the ordinary meaning of its terms, as did the Tribunal. However, both appellants argued strongly that a literal interpretation led to a result which was inconsistent with the purpose of the DBC Act and should not be adopted. I now turn to consider those submissions.

**Both proceedings: the purposive approach**

49. Section 35 of the *Interpretation of Legislation Act* 1984 ("the Interpretation Act) provides that in the interpretation of an Act a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose or object, and consideration may be given to all indications provided by the Act and to reports of proceedings in Parliament.

50. In ***Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation***[18] the High Court considered the principles relevant to the interpretation of statutes. Gibbs CJ said:

> *. . . if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust. To say this is not to insist on too literal an interpretation, or to deny that the court should seek the real intention of the legislature. The danger that lies in departing from the ordinary meaning of unambiguous provisions is that "it may degrade into mere judicial criticism of the propriety of the acts of the Legislature" as Lord Moulton said in Vacher & Sons Ltd v London Society of Compositors [1913] AC 107, at p 130; it may lead judges to put their own ideas of justice or social policy in place of the words of the statute. On the other hand, if two constructions are open, the court will obviously prefer that which will avoid what it considers to be inconvenience or injustice. Since language, read in its context, very often proves to be ambiguous, this last mentioned rule is one that not infrequently falls to be applied.*

[17] [1930] VLR 25 at 30.
[18] (1981) 147 CLR 297 at 305, 320-321.

Mason and Wilson JJ said:

*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. . . .*

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.

In that case the majority of the Court [19] found that the draftsman had made a mistake in the provision with which they were concerned, and the intention of the legislature was sufficiently clear for it to be permissible to depart from the literal meaning of the words in question.

51. In ***Metropolitan Coal Co of Sydney Ltd v Australian Coal and Shale Employees Federation*** [20] 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.*

52. Sections 1 and 4 of the DBC Act set out respectively the purposes and the objects of that legislation, but give little guidance for the determination of the issue before me, namely whether the Tribunal was correct in finding that the work carried out, managed or arranged by each of the appellants, as described in the statement of agreed facts, and in the circumstances there described, is "domestic building work" as defined in sections 3, 5 and 6. There is little material extrinsic to the terms of the DBC Act itself which can assist in the ascertainment of the purpose of the legislation in the context of these proceedings.

53. In the Second Reading Speech on the Domestic Building Contracts and Tribunal Bill [21] the Attorney-General, referring to the intention of sections 57 and 134 to alter or vary section 85 of the *Constitution Act* 1975 made a statement which included the following:

*The public policy rationale for this proposal is the intention to provide a single, inexpensive, time-efficient and expert forum for the resolution of domestic building disputes. Domestic building disputes are a special category of dispute where timeliness of resolution is critical, and where less formal proceedings are more likely to reach the heart of the matter than the full panoply of the law. . . .*

*The government believes this significant set of proposals sets forth a new and fairer relationship between builders and homeowner. The proposals are built on the concepts of equity and simplicity. Bureaucratisation is minimised and processes have been made as speedy and cost efficient as possible.*

However, there is nothing in the Second Reading Speech directly related to the definition in section 5 of "domestic building work", although a reference to "the building owner, the average Victorian family", is not without relevance.

54. There has been some judicial exegesis of the purpose of the Act. In ***HIA Insurance Services Pty Ltd v Davy*** [22] Eames JA, with whom Callaway and Vincent JJA agreed, cited with approval in the following terms a passage from *Fletcher*:

*In **[Fletcher]** Byrne J, as judge in charge of the Building List, said of this legislation that it was the intention of Parliament "to provide a legislative framework for contracts and disputes concerning building work of a more modest character and to protect parties to more conventional domestic building projects from the consequences of an inequality of bargaining power rather than to interfere with major commercial transactions.".*

Eames JA said of the purpose of the DBC Act with respect to insurance [23]: *. . . the purpose [of the DBC Act and the Ministerial Order] is self-evident; it being obvious that the legislators were concerned about the disastrous impact on home buyers when their builders become insolvent and were unable to complete construction of the home . . .*

[19] Aickin J dissenting.
[20] (1917) 24 CLR 85 at 99.
[21] Hansard, Legislative Assembly, 24 October 1995 pp 695-7. The title of the DBC Act was changed by section 35 of the *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act* 1998 No 52/1998 when the Domestic Building Disputes Tribunal created under the DBC Act was abolished and its jurisdiction conferred on the Tribunal.
[22] [2003] VSCA 73 at [38].

and after citing from Byrne J in ***Fletcher*** as set out above: *It is equally plain that Parliament intended that the protection which would be provided by a scheme of compulsory insurance was to apply not to developers - who might be assumed to be conducting a business for profit upon re-sale - but to small home owners. The distinction between a "developer" and other home owners was addressed by the definition. It may be taken that it was the intention of Parliament, that the developers could look after themselves and take out their own insurance.*

It should be noted that the Court of Appeal in that case was concerned with a contract of insurance made in accordance with the terms required by a Ministerial Order, which included the definition referred to by His Honour. *"Developer"* was defined as (in summary) a person for whom three or more homes were to be built. However, although that definition does not appear in the Act, its inclusion in the Ministerial Order, with the effect described by Eames JA, is an indication of an executive, if not a Parliamentary, intention.

55. In ***Fletcher*** [24] both parties accepted that *"home*" in the DBC Act covered a multi-residence building or multi-storey residential building, since such a building consisted of a number of homes, and by virtue of section 37 of the Interpretation Act, the singular word *"home*" included the plural "*homes*". Byrne J commented that there was much to be said for that view, but that there were "some indications in the DBC Act and in the Second Reading Speech which suggest that the definition may not be so wide" and continued with the passage cited by the Court of Appeal in ***HIA v Davy***. However, he expressed himself as being content to proceed on the basis accepted by the parties before him "expressing no view on the broad question". It is clear that that passage was not the basis of his decision.

56. The only other authority bearing on the purpose of the DBC Act which was cited to me was the passage in the judgment of Harper J in ***LGH Administration Pty Ltd v Kyranakis*** [25] where His Honour found, on grounds not here relevant, that a dispute about the validity of a building permit, including a permit to demolish, was not a "domestic building dispute" in terms of the DBC Act.

57. I now turn to consider the questions before me in the light of those authorities and that material.

58. Mr Golvan submitted that there were certain of the provisions of the DBC Act with which his client and similar construction companies could never comply. He instanced section 31(1)(d) providing that a builder must not enter into a major domestic building contract unless the contract includes the plans and specifications for the work and those plans and specifications contain enough information to enable the obtaining of a building permit; and section 42(b) providing that a builder must not demand final **payment** under a major domestic building contract until the building owner is given a copy of the occupancy permit under the Building Act or the certificate of inspection.

59. He submitted further that there were a number of provisions of the DBC Act which, if applied to his client, would lead to a result which was absurd, irrational, illogical, inconvenient, improbable or unjust, and which could not have been intended by Parliament. The DBC Act, in his submission, should not be interpreted in such a way that those provisions bound his client. He listed:

section 11, limiting the amount of the deposit payable under a domestic building contract;

section 13, considerably limiting the use of cost plus contracts by a domestic builder;

section 14, prohibiting arbitration clauses in domestic building contracts;

section 29, requiring that a person who carries out domestic building work must not enter into a major domestic building contract unless it is registered as a builder under the Building Act;

section 31, prescribing a number of formal requirements for a domestic building contract;

section 33, providing that a domestic building contract must, if the price is subject to change, contain a warning to that effect or else the price may only be decreased;

section 35, providing that the building owner may withdraw from the contract if the contract does not contain a notice advising of the owner's rights to a cooling-off period;

sections 37 and 38, regulating variations to the plans and specifications;

section 40, providing for limits on the amounts of **progress payments** under a domestic building contract;

section 132, prohibiting contracting out of domestic building contracts;

the inspection regime set up under Part 4 in the case of disputes; and

the provisions of Part 9 of the Building Act, requiring a person who carries out domestic building work to maintain prescribed insurance.

60. Mr Golvan referred to the affidavit of Mr Sartori, who deposes that his client had, at the time of swearing that affidavit in August 2003, some 81 contracts for works on residential subdivisions in Victoria, based on standard contracts used in the construction industry which were similar to the contract to which the original proceeding between the parties [26] relates. Those standard contracts do not comply with the DBC Act. He referred also to the evidence of Mr Jeffrey and Mr Gardiner which appears at [16] above, and submitted that if the construction industry as a whole were required to comply with the DBC Act when engaged in work on land proposed to be

[23] at [36].
[24] at 3-4.
[25] (1998) 100 LGERA 339 at 343.
[26] see [2] above.

used for residential subdivision, there would be widespread uncertainty about earlier contracts and additional costs, which would inevitably be passed on to consumers, contrary to the purpose of the DBC Act.

61. On a similar basis, Mr Zappia submitted that there were a number of provisions in the DBC Act which could not have any sensible application to his client's contract for the design and superintendence of infrastructure works. He listed:

section 8, implying detailed warranties into a domestic building contract;

section 11, limiting the amount of the deposit payable under a domestic building contract;

section 31(g) to (i), requiring that a domestic building contract state the date when the work is to start, or how that date is to be determined, and relating to the date of finishing;

sections 31(n) and (q), requiring that a domestic building contract include a notice relating to a cooling off period and setting out the warranties implied into the contract by sections 8 and 20;

section 32, requiring a domestic builder to make prescribed allowances for delays in time estimates;

section 40, providing for limits on the amounts of **progress payments** under a domestic building contract;

section 42, providing that a builder must not demand final **payment** under a major domestic building contract until the work is completed and the building owner is given a copy of the occupancy permit under the Building Act or the certificate of inspection;

the inspection regime set up under Part 4 in the case of disputes; and

the provisions of part 9 of the Building Act requiring a person who carries out domestic building work to maintain prescribed insurance.

62. I accept that any of the provisions enumerated in [59] to [61] above, if applied to the work with which these cases are concerned which was performed by the appellants, and to the normal conduct of their operations in a similar context, would cause inconvenience and expense to them. However, it appears to me that there are very few of those provisions which would actually be impossible for the appellants to carry out.

63. No doubt the introduction of the DBC Act in 1995 caused additional expense and inconvenience to the builders, electricians, plumbers, installers of swimming pools, and other people who carry out work which is defined in the DBC Act as domestic building work. That would have been an inevitable result of the enactment of what is, however, clearly intended as remedial legislation. The purpose of the DBC Act is to protect homeowners dealing with such people *"from the consequences of an inequality of bargaining power"* as Byrne J said in *Fletcher*. [27] It does not seem to me to be inconvenient or unjust, in the light of that purpose of the legislation, that its provisions should apply, as in my view is required by the words used by Parliament, to the work carried out by the appellants, which can be equated with the work carried out by those builders, electricians, plumbers, installers of swimming pools and the like.

64. The submission of the appellants was, in effect, that the DBC Act is intended to govern only contracts for the construction of a single home, entered into between a builder and *"the average Victorian family*.[28] However, it is difficult to find that purpose in the DBC Act itself or in the extrinsic materials which are available. If Parliament had intended the DBC Act to apply only to such one-on-one transactions, it could have said so, by the inclusion of a provision that section 37 of the Interpretation Act should not apply to the words in section 5; although the inclusion of such a provision would no doubt have facilitated arrangements intended to avoid the operation of the DBC Act.

65. I do not find, in the submissions of the appellants, any ground, in terms of the passages cited above from ***Cooper Brookes,*** on which to depart from what I have found to be the natural meaning of the words used by Parliament in the DBC Act.

66. For the reasons given, there will be orders that the decision of the Tribunal be affirmed, and each of the matters be remitted to the Tribunal for further hearing and determination. Counsel may wish to make submissions as to the form of the orders and as to costs.

Mr G Golvan QC with Mr G Fitzgerald for the first appellant instructed by I F Sartori
Mr P Zappia for the second appellant instructed by Herbert Geer & Rundle
Mrs S Crennan QC with Mr J Bolton for the respondent instructed by Rossi Ryan & Raniga

[27] see [54] above.
[28] a phrase used in the Second Reading Speech, see [54] above.