



Court of Appeal – Power of Building Surveyors (City of Port Phillip v Shout Rock Cafes Pty Ltd)

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City of Port Phillip v Shout Rock Cafes Pty Ltd (ACN 007 168 809) Anor

1. Building surveyors play a critical role in achieving the objects of the *Building Act 1993* (Vic) (**Act**), particularly to regulate building work and building standards.

Supreme Court Precedent the Subject of the Appeal to the Court of Appeal

2. The matter of *Shout Rock Cafes Pty Ltd v City of Port Phillip* [2022] VSC 615 in which Russell Kennedy Lawyers acted for Port Phillip City Council, raised an important question as to the proper construction of a power that may be exercised by building surveyors, namely, the issuing of a building order and a building order for minor work under section 111 and section 113 of the Act.

3. The principal issue for determination by the primary judge was whether a building order for minor work (**BOMW**) issued under section 113 by the Municipal Building Surveyor (**MBS**), which required the relevant owner of a building to carry out building work and to restrict access to certain parts of the building was valid. The primary judge held that the order was a “nullity” and therefore, not valid. The primary judge construed section 111 and section 113 and in particular the words “building work, protection work or other work required by the regulations”, as being read conjunctively such that “building work” and “protection work” are intended to refer to those types of work as “required by the” *Building Regulations 2018* (Vic) (**Regulations**). Construed in this way, the primary judge held that section 113 did not permit the issuing of an order which did not require building work specifically required by the Regulations and which had the effect of restricting access to or use of a building.

Appeal to the Court of Appeal

4. The issue that arose on appeal was whether the primary judge erred in construing the words “building work, protection work or other work required by the regulations” in section 111 and section 113 conjunctively such that “building work” and “protection work” are intended to refer to those types of work as required by the

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Regulations.

5. The Council represented by Russell Kennedy Lawyers respectfully submitted during the course of the appeal that the primary judge erred in reading down section 111 and section 113 of the Act such that the words “building work” and “protection work” are both qualified by the words “required by the regulations”, so that they are to be understood as referring to “building work required by the regulations” and “protection work required by the regulations”. This

construction of section 111 and section 113 did not in the view of the Council accord with the text, context or purpose of the provision and infringed fundamental rules of interpretation. On a proper construction of section 111 and section 113, in the view of the Council, the words “building work” and “protection work” should be given their ordinary meaning within the applicable statutory context and should not be confined in the way determined by the primary judge.

Judgment in the Court of Appeal

6. On 19 December 2023, the Court of Appeal handed down judgment in the appeal proceeding and found that section 113 of the Act did not empower the MBS to control occupancy of the balcony and adjacent areas. At paragraph 98 of the judgment the Court found as follows:

Section 113 is in marked contrast to the emergency order provisions and the building notice provisions contained in the Act. Section 113 contains no provision with respect to the evacuation of buildings or the entry, use or occupation of buildings. Further, unlike s 104(1)(b), it contains no ancillary power to require the works necessary to secure a building (including part of a building) from access.

7. Based on the Court of Appeal judgement a BOMW is not empowered under the Act to control or effect occupancy, use, entry or evacuation of a building or of part of a building and any BOMW (or item within a BOMW) having this effect will be a nullity and will be unenforceable.

8. In relation to the conjunctive construction question, the court the found that the conjunctive interpretation as found in the Supreme Court should not be accepted and found at paragraph 103 of the judgment that the:

“word ‘other’ contained in s 113 simply introduces the third category of work which may be the subject matter of a BOMW. i.e. ‘other work required by the regulations to be carried out’. This construction is supported by the factors to which we have referred, and in particular, the provisions of s 106 giving effect to the safety hazards objectives of the Act, the need to give s 111(5) full force and effect and the need to avoid anomalous outcomes.”

9. The factors the court referred to in its judgment which supported the above construction are briefly summarised as follows, noting that the substantive comments of the court are contained in paragraph 102 of the judgment:

- a. Part 8 of the Act is concerned with the enforcement of both safety and building standards;
- b. building orders may potentially be made with respect to buildings which are unfit for occupation or which are a danger to the life, safety or health of any member of the public or of any person using the building or land without reference to the Regulations. The purposes identified are ones of public interest and, the powers given to achieve them should be upheld and given full effect;
- c. it may be that the carrying out of building work will be the most cost effective solution to a given problem noting possible

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costs to an owner of closing a building or part of a building;

d. it is realistically possible that gaps in the applicability or adequacy of the Regulations may exist or may develop with the use of new construction methods or materials. These possibilities encourage the view that section 113 should be constructed so as to give effect both to the standards objective and the safety hazards of the Act;

e. the conjunctive construction would exclude the making of orders under section 111(5) or section 113 to carry out building work necessary to remedy breaches of the Act. Thus, building work commenced or undertaken without a building permit under the Act would not be caught;

f. Part 7 of the Act imposes protection work requirements both under the Act and the Regulations. The conjunctive construction makes the Regulations the exclusive legislative determinant of what may be required by way of protection work;

g. section 37E of the Act permits a direction to fix building work to be given to carry out building work so that building work 'wholly or substantially' complies with the Regulations, the Act or the relevant building permit. By contrast the conjunctive construction would not allow a building order to direct substantial compliance with the Regulations, it would only permit a building order directing works 'required by the Regulations';

h. the potential for ongoing controversy in the interpretation of the Act by reference to the Regulations if the conjunctive interpretation is adopted, namely, in general the Regulations to not 'require' building work but set out the standards for building work;

i. the building work required in circumstances where a danger is present (but the emergency order provisions are not met) will depend on the extent and nature of the danger in the circumstances of the case. The specific building work necessary in each case cannot realistically be prescribed by the Regulations; and

j. if the conjunctive construction is not adopted, the power under section 113 will still be qualified by a need to act for the purposes of the Act, the fact that the works must be minor, the right to seek amendment or cancellation and the right to appeal to the Building Appeals Board.

10. The effect of the judgment in the Court of Appeal is that there is now judicial guidance that a building order and a building order for minor work may direct building work (which is not limited to building work required by the Regulations), being work for or in connection with the construction, demolition or removal of a building. Importantly, a building order or a building order for minor work may direct building work including demolition, which in the view of the relevant building surveyor issuing the order is necessary to remedy a danger or a contravention of the Act (amongst other things).

11. The judgment of the Court of Appeal can be accessed via this link: [here](#)

Next Steps

12. MBS's should carry out an audit of properties within their municipalities which they are aware pose a danger. Appropriate enforcement powers under Part 8 of the Act should be exercised to mitigate the danger having regard to the fact that there is judicial guidance confirming that a building order and a BOMW may direct building work. Exercising appropriate enforcement powers under Part 8 of the Act is particularly important to Councils as the High Court established in the matter of *Pyrenees Shire Council v Day* (1998) HCA 3 that a Council has a duty of care in circumstances where a

property which is within its municipality likely poses a danger to the life, safety or health of any person and Council is aware of the facts and has power to act.

13. Building Appeals Board proceedings and prosecution proceedings regarding building orders and BOMW which do not require building work required by the Regulations may now be pursued.

14. Business prior to the Supreme Court decision which was the subject of the appeal to the Court of Appeal is essentially back to usual.

Further information

Please contact our Building Regulatory Team should you require any further advice: [Daniel Silfo](#), [Marcus Heath](#), [Ian Pridgeon](#), [Elizabeth Flanagan](#) and [Matt Taylor](#).

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