

IN THE MAGISTRATES COURT OF VICTORIA  
AT RINGWOOD  
Criminal Division

Case No. H12586906

Warren Brooker

Informant

v

Panchakumaran Chelvadurai

Accused

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MAGISTRATE: M.WIGHTON  
WHERE HELD: Ringwood  
DATE OF HEARING: 28 June 2018  
DATE OF DECISION: 16 July 2018  
CASE MAY BE CITED AS: Brooker v Chelvadurai

REASONS FOR DECISION

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Catchwords: Building Act 1993 – Obligations of Building Inspectors – Offences – Meaning of 'Building Work'

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APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the informant	Mr Dellar	
For the Accused	Mr Silver	

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HIS HONOUR:

- 1 The accused, Panchakumuran Chelvadurai ('the accused') is charged with an offence under S.16 (4) of the *Building Act 1993* ('the Act'), that between 31 March and 25 May 2017, as a building practitioner engaged to carry out building work, he failed to ensure that a building permit in relation to the work had been issued and was in force.
- 2 The Informant is Mr Warren Brooker, an officer of Maroondah City Council ('the Council') authorised to bring a prosecution of this type.
- 3 The hearing of the charge amounted to what is known as a 'submissions contest'. No evidence was led by either the prosecution or defence, as the essential facts alleged by the prosecution are not in issue. Rather, a statement of agreed facts was tendered by the prosecution as part of a court book that also included various additional materials such as; extracts of the relevant sections of the *Building Act* and the relevant Minister's second reading speech regarding the amending *Building Legislation Amendment (Consumer Protection) Bill 2015*, a number of certificates of compliance issued by the accused regarding the subject building works and copies of the building permits that were eventually issued by the Council. Both counsel for the prosecution and defence made oral submissions but Mr Silver for the accused also submitted written argument.
- 4 The issue for the Court to determine is one of statutory construction of certain provisions of the Building Act. If the Court adopts the construction urged by the prosecution, then the accused is guilty of an offence under s.16 (4) of the Act. If the Court adopts the construction urged by the accused, then no offence will have been committed and the charge must be dismissed.
- 5 The gist of the prosecution case is that the accused is a building practitioner as defined by the Act. He is a civil engineer and building inspector. He was engaged by the builder to firstly design and later inspect and certify for

compliance with regulations, the engineering elements of the building of new residential apartments in Croydon. The accused inspected the building works at different stages of completion on 11 occasions in March and May 2017 and on each occasion he produced and signed certificates of compliance for the relevant stage of works. It is agreed by the prosecution and defence that at no stage when these inspections were conducted and the relevant certificates issued by the accused, had a building permit been issued and was in place.

6 Section 16 (4) of the *Building Act 1993* states (emphasis added):

A **building practitioner** or an architect who is engaged to carry out **building work** must ensure that a building permit in relation to **the work** has been issued and is in force under this Act.

Penalty: 500 penalty units, in the case of a natural person;

2500 penalty units, in the case of a body corporate.

'Building work' is defined in two places in the Act. In S.3, the Act provides a definition which applies to the whole Act

building work means work for or in connection with the construction, demolition or removal of a building;

Later, in s.129, the Act specifies a definition of building work that applies only to Division 2:

building work includes the design, inspection and issuing of a permit in respect of building work.

The definition of 'building work' that appears in S.129 does not apply to Division 1 of Part 3 – where the offence provision in S.16 (4) is to be found - of the Act

7 The prosecution alleges that the accused is a building practitioner. So much is

agreed by the parties. The prosecution say that the work the accused performs - ie, inspection and certification services, is 'building work' for the purposes of S.3 (1) and therefore he was required by s.16 (4) to ensure that there was a permit in place for the building works that he was engaged to inspect.

- 8 The prosecution argument is that the definition of building work, as contained in S.3, ie, work that is 'for or in connection with the construction, demolition or removal of a building' is intended to include all activity that is required for building work to take place. This, say the prosecution, includes professional services work, such as that performed by the accused, such as the inspection of building works and the issuing of certificates of compliance.
- 9 The accused's submission is that while he is a building practitioner, he does not carry out 'building work' as defined by S.3. The definition in S.3, says the accused, is limited to the work involved in the actual construction, demolition or removal of a building, ie, the physical aspects of that work and is not intended to extend to professional services such as those performed by the accused.
- 10 The accused points out that the Act contains two definitions of 'building work'. The first, in S.3 which applies to the whole Act, and an extended definition in S. 129, extracted above. This extended definition, which applies only to Part 9 of Division 2 of the Act (dealing with limitation of actions) includes design, inspection and certification. These are activities not specifically referred to in the general definition in S.3. This, says the accused, means that Parliament did not intend design, inspection and certification to be caught by the definition in S.3 and therefore, nor by the offence provision in S.16(4).
- 11 Further, the accused submits, even if inspection and certification is 'building work', building work of that type does not itself require a permit before it can be undertaken, and that 'the work' to which S.16 (4) refers is building work

that is the subject of a building permit, ie, actual building or construction work.

- 12 The accused also argues that an inspection, of the type carried out by the accused on the 11 occasions in question, cannot be considered to be 'building work' of the type envisaged by S.16 (4), because an inspector is not required to carry out the actual physical inspection personally but instead may rely on a certificate of compliance issued by the registered builder. An inspection conducted in that fashion becomes an essentially administrative function. The Act provides for immunity of the inspector if anything is done or omitted to be done (by the registered builder) if the inspector relies on such a certificate – so, the argument goes, a separate duty to ensure that a building permit is in place prior to performing that function does not make sense.
- 13 The prosecution submitted that the Court should not be distracted by the fact that the Act contains two different definitions of 'building work', and submit that the extended definition in S.129 was enacted for the sake of clarity and so to ensure that design and inspection work was included in the extended limitation periods that the Act provides.
- 14 The accused countered that argument by submitting that if Parliament had intended S.3 to include inspection and certification in the definition of 'building work', it could have done so, exactly as it did in S.129 and for the same reasons; for clarity and certainty.
- 15 On the one hand, the definition of 'building work' urged by the prosecution – that inspection and certification is work 'for or in connection with construction, demolition or removal of a building' - is compelling on a common sense basis. Most building work is conducted in stages and, usually, each stage is required to be inspected and the work certified for compliance before the next stage can be commenced. On that simple analysis, inspection and certification is 'in connection with' construction'. It might be assumed that an inspector would first check that a building project was being conducted pursuant to a building

permit, before proceeding to conduct an inspection. Inspectors do not, however, inspect permits; they inspect building work. Whether S.16 (4) creates a requirement that an inspector first check that a building permit in place is one of the central issues in this matter.

- 16 On the other hand, there is the issue of the existence of two different definitions of building work in the Act, and the submission by the accused that if Parliament has intended an extended definition of 'building work' it could have done so by placing it in S.3 and then that definition would have covered both the obligations of building practitioners in S.16 and the limitation of actions provisions in Division 9 of Part 2.
- 17 A further issue arises in considering what S.16 intends to achieve with regards to the obligations of building practitioners. Does the provision mean that the accused had an obligation - assuming that the work he performs is 'building work' - to ensure that the construction he was engaged to inspect and certify was covered by a building permit? Or is the obligation to ensure that the discrete work that he was engaged to perform - inspection and certification - was covered by a permit?
- 18 The prosecution referred to the Second reading speech made by the Minister for Planning on 10 December 2015 in relation to the provisions pursuant to which this prosecution was initiated; S.16 (4). The Minister stated:

'Each building practitioner in the chain must ensure that the building work that they are engaged to perform is compliant and covered by a building permit. Every building practitioner or professional involved in a building project should be held accountable for their actions and input. We have seen, following the investigation into tragic deaths from the wall collapse in Swanston Street, that the current system does not provide sufficient incentives for people who control the carrying out of building work to effectively oversee compliance with regulatory requirements.

This will be rectified with a new provision that prohibits an

owner of land from permitting any building work to be carried out on their land which requires a building permit, unless a building permit has been issued and is in force, and that the building work is carried out in accordance with the Building Act, the building regulations and the building permit.

However an owner of land will not commit an offence if the owner engages a building practitioner or architect to carry out the building work on their land.

A building practitioner or architect who is engaged to carry out building work, whether by an owner of land or by another building practitioner or architect, must ensure that, in respect of building work for which they have been engaged, a building permit has been issued and is in force, and the building work is carried out in accordance with the Building Act, the building regulations and the building permit.

- 19 The first paragraph of the extract states that the intention of the new provisions (S.16(4)) is to require each building practitioner engaged in a building project to ensure that the building work that they are engaged to perform is compliant and covered by a building permit. It is assumed that 'compliant' means compliant with relevant building regulations, codes and the permit itself. That is one of the functions of an inspector such as the accused. But is an inspector also intended to be responsible for ensuring that a permit is in place for the work that they are inspecting?
- 20 The last paragraph is particularly relevant to this matter, as the Minister describes the persons and the activity at which the new provision (s.16 (4)) is directed. This does not assist the prosecution submission. The Minister expands slightly on the actual wording of S.16 (4), but does so in a manner which reinforces what I regard to be a plain reading of the provision -ie, that the obligation owed by a building practitioner who is engaged to carry out building work must ensure that 'in respect of building work for which they have been engaged, a building permit has been issued or is in force'. The

prosecution's submission is that the work performed by the accused is 'building work'. That building work is inspection and certification of various stages of construction. Assuming for the sake of the argument that the work the accused performs is correctly characterised as building work (for the purposes of the definition in S.3), then it follows that the building work for which the accused was engaged was inspection and certification.

- 21 Inspection and certification services do not require a building permit. Further, inspections are not carried out to check for compliance with a building permit. A plain reading of the text, even without recourse to the second reading speech extracted above, suggests that the provision is aimed at building practitioners who are engaged to perform functions or carry out work that cannot, lawfully, be performed without a permit. If the provision was to extend to all building practitioners who are engaged to work on a particular building project – to use the example mentioned in the hearing before me, a fencing contractor whose function is to construct a fence around a building site – then it would follow that every building practitioner involved at any stage of a project would have a duty to inquire upon whether a building permit for the project had been granted and was in force. That may have been the intention of the Parliament, but the legislation does not state that.
- 22 The prosecution urged the Court to adopt a purposive construction of the relevant provisions. In this matter, it should be noted, the builder responsible for the construction of the apartments was prosecuted in this Court for carrying out building work without a permit. That offending was detected by an authorised officer of the City of Maroondah. It cannot be said, therefore, that without the construction urged by the prosecution, the purpose of the legislation is not achieved. The accused's submission argued that there is no obvious purpose in extending the definition of 'building work', so that an inspector has the same obligations regarding their work being conducted under a building permit as does the actual builder.



23 This is particularly so, says the accused, when regard is had to the fact that the Act provides, in S.238 for an inspector such as the accused to be able to rely on a certificate issued by a registered builder, and not actually carry out any physical inspection himself. This ability to rely on a certificate issued by a registered builder does not sit easily with a duty, urged by the prosecution, to first ensure that a building permit is in place before issuing a certificate. Rather, it supports the contention that the duty in s.16 (4) applies to a building practitioner who carries out building work that requires a permit.

#### 24 **Conclusions**

It is not clear that the definition of 'building work' in S.3 includes the type of work performed by an inspector such as the accused. The extended definition in S. 129 creates an ambiguity that should not be resolved by reading words into the definition in S.3 or by attempting to divine what Parliament may have intended. It is a well-established principle of statutory interpretation that ambiguous provisions in criminal legislation should be read narrowly. Given that the definition in S.129 refers to inspection and certification and S.3 does not, I find that the definition of 'building work' that applies to part 3 of the Act, and therefore S.16, does not include inspection and certification such as that carries out by the accused in relation to the subject property.

Further, if I am wrong in relation to the definition of 'building work' in S.3, I find that S.16 (4), is ambiguous as to the obligations that building practitioners have. In this matter, the accused, a building practitioner) was engaged to carry out inspections of the building work performed by a registered builder. The duty, expressed in sub-section (4) (a) appears to refer to ensuring that a permit has been issued in relation to the work that the building practitioner is engaged to perform. A permit is not required to carry out inspections or certification services. A literal reading of the section, such as the one I have expressed here, would mean that no offence has been committed by the accused. It would be necessary to stretch the meaning of the words 'the work'

and 'work' in S.16 so as to mean the building project that the inspections relate to, rather than the work that the building inspector has been engaged to carry out. Given the doubt I have expressed about the meaning of the provision, the issue should be resolved in favour of the accused. Accordingly, the charge is dismissed.