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IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

No. S CI 2013 02191

PAUL SALTER — Plaintiff

v

BUILDING APPEALS BOARD — First Defendant
GIUSEPPE GENCO — Second Defendant
CITY OF MELBOURNE — Third Defendant

JUDGE:	BEACH J
WHERE HELD:	Melbourne
DATE OF HEARING:	23-24 May 2013
DATE OF JUDGMENT:	30 May 2013
CASE MAY BE CITED AS:	Salter v Building Appeals Board & Ors
MEDIUM NEUTRAL CITATION:	[2013] VSC 279

ADMINISTRATIVE LAW – Judicial review – Jurisdictional error – Error of law on the face of the record – Building Code of Australia, Parts A1 and A3 – *Building Regulations* 2006, regulations 109, 112 and 1101 – *Building Act* 1993, ss 9, 40, 102, 106, 111, 142 and 149.

WORDS AND PHRASES – Building Code of Australia – "Sole-occupancy unit" – Meaning of "dwelling" in Part A3 of the Building Code of Australia.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr R.M. Niall SC with Ms S.M.C. Fitzgerald	Fairweather Legal
For the First Defendant	No appearance	Victorian Government Solicitor's Office
For the Second and Third Defendants	Mr T.J. Margetts SC with Mr T.C. Wallwork	Toby Hayes

HIS HONOUR:

Introduction

1 Paul Kenneth Salter, the plaintiff, is an owner or manager of Unit 909, Level 9, 8 Waterview Walk, Docklands in the State of Victoria ("Apartment S909"); Unit 802, Level 8, 8 Waterview Walk, Docklands ("Apartment S802"); and Unit 1502, Level 15, 18 Waterview Walk, Docklands ("Apartment N1502").[1] Giuseppe Genco, the second defendant, is the Municipal Building Surveyor for the City of Melbourne, the third defendant.

2 On 14 and 15 April 2011, the second defendant issued building notices in respect of Apartments S909, S802 and N1502. Each building notice was issued pursuant to s 106 of the *Building Act* 1993 ("the Act"). The building notices were, in substance, identical. The building notice in respect of Apartment S909 provided:

> WHEREAS:
>
> …
>
> 3. Pursuant to section 106 of the Act, I am of the opinion that:
>
> 3.1 the use of the building contravenes the Act and Building Regulations 2006 in that:
>
> 3.1.1 Apartment S909 is currently being used for short term accommodation as a hotel (class 3 or [sic] defined by the building [sic] Code of Australia) within a residential apartment, which contravenes the Occupancy Permit for the building. Occupancy Permit no: (10035F11da) dated 4 October 2004, states the use of building is a class 2 apartment.
>
> 3.2 The building is a danger to the life and safety of any person using the building in that:
>
> 3.2.1 The occupant characteristic, fire safety needs and reaction to a fire or other emergencies have varied from that for which the building was originally designed, approved and intended to be used.

[1] The plaintiff is an owner and manager of Apartment S909 and the manager (under the business name "Docklands Executive Apartments") of Apartments S802 and N1502.

4. The above are the reasons why this Notice was issued.

NOW THEREFORE TAKE NOTICE THAT:

5. You are required to SHOW CAUSE within 30 days of the date of service of this Notice:

5.1 Why occupation of the building as short term hotel style (class 3) accommodation should not be prohibited.

3 Following the issuing of the building notices, written representations were made pursuant to s 109 of the Act in response to the building notices. However, the second defendant concluded in respect of each apartment that the representations made were insufficient to warrant the cancellation of the building notices. Accordingly, on 19 October 2011, the second defendant issued building orders pursuant to s 111 of the Act in respect of all three apartments. The building orders were in substance identical to one another. The building order in respect of Apartment S909 contained the following:

NOW THEREFORE TAKE NOTICE THAT:

6. You are required to evacuate the building within 30 days of the date of the service of this Building Order.

6.1 The use of apartment 909 as a short term commercial accommodation (hotel) or the like (Class 3 as defined by the National Construction Code) is prohibited within 30 days of the date of service of this Building Order. Please provide evidence that the apartment is being used by the owner or leased for a minimum 30 days.

OR ALTERNATIVELY,

7. You are required to carry out the following program of building work within 30 days as directed in the Order.

7.1 Engage a registered building practitioner in the category of a Architect or Draftsperson to prepare documentations/plans [sic] to convert from a Class 2 (apartment) to a Class 3 (hotel or serviced apartment) in accordance with the National Construction Code, and

7.2 Submit the above documentations [sic] (as listed on point 7.1) to a registered building practitioner in the category of a Building Surveyor to review and issue a building permit for the "change of use" from a Class 2 to a Class 3 in accordance with the Building Regulations 2006 and the National Construction Code (NCC) and specifying that a revised Occupancy Permit is required, and

7.3 Provide an interim Emergency Management & Evacuation plan to ensure the safety of the occupants in the case of a fire of (scil or) emergency.

4 Pursuant to ss 142(1)(b) and 142(2)(a) of the Act, the plaintiff appealed to the Building Appeals Board in respect of the issuing of the building notices and building orders.[2] The appeals were heard by the Building Appeals Board on 5, 7-9, 12 and 14 November 2012. On 22 March 2013, the Building Appeals Board dismissed the appeals.

5 In this proceeding, the plaintiff seeks:

(a) an order in the nature of *certiorari* quashing the decision of the Building Appeals Board;

(b) an order in the nature of *mandamus* requiring the Building Appeals Board to hear and determine the plaintiff's appeals in respect of the building notices and building orders; and

(c) a declaration that Apartments S909, S802 and N1502 "were designed, constructed and adapted to be used, and were being used, as a class 2 building on the days on which the building notices and building orders were issued".[3]

6 The second and third defendants resist the plaintiff's application. The Building Appeals Board, the first defendant, has taken no active role in the proceeding and has said that it will abide the decision of this Court in accordance with the principles enunciated in *R v Australian Broadcasting Tribunal & Ors; ex parte Hardiman & Ors*.[4]

The relevant legislative provisions

7 The Building Appeals Board identified the relevant legislative provisions to be ss 40, 106, 111, 142, 149 and clause 15 and 16 of Schedule 3, Part 3 of the Act, and

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2 See further, s 149 of the Act (and in particular sub-sections (1) and (2) of s 149).

3 See paragraphs 1 to 3 of the plaintiff's amended originating motion (although at the hearing of the proceeding the plaintiff did not pursue the claim for a declaration: see T 2.17 – T 3.2).

4 (1980) 144 CLR 13, 35.

regulations 108, 112 and 1011 of the *Building Regulations* 2006.

8 Section 40(1) of the Act prohibits a person from occupying a building "in contravention of the current occupancy permit" issued under Division 1 of Part 5 of the Act.

9 Section 106 of the Act (pursuant to which the building notices were issued) provides:

> Subject to section 107,[5] a municipal building surveyor or a private building surveyor may cause a building notice to be served on an owner of a building, land on which building work is being or is proposed to be carried out or a place of public entertainment if the building surveyor is of the opinion that any one of the following circumstances exists-
>
> (a) building work has been carried out on the building, land or place without a building permit required by this Act, or in contravention of a building permit or this Act or the building regulations;
>
> (b) the use of the building or place contravenes this Act or the building regulations;
>
> (c) the building or place is unfit for occupation or for use as a place of public entertainment;
>
> (d) the building, land or place or building work on the building, land or place is a danger to the life, safety or health of any member of the public or of any person using the building, land or place or to any property.

10 The language in s 106(d) is to be contrasted with the language in s 102(1) dealing with emergency orders. Section 102(1) provides:

> A municipal building surveyor may make an emergency order under this Division, if he or she is of the opinion that the order is necessary because of a danger to life or property arising out of the condition or use or proposed use of a building, the land on which building work is being or is proposed to be carried out or a place of public entertainment.

11 Immediately, one sees that in s 106(d), the relevant circumstances are that the building is a danger to specified people, whereas in s 102(1) the danger referred to is a danger arising out of the condition *or use or proposed use* of a building.

12 Section 111(1) of the Act provides:

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[5] Section 107 is irrelevant for present purposes.

Subject to section 107, a municipal building surveyor or a private building surveyor may make a building order under this section after the end of the time allowed by the building notice for making representations.

13 Regulation 112 of the *Building Regulations* 2006 provides:

(1) For the purposes of these Regulations, buildings must be classified as set out in the BCA.[6]

(2) If there is any doubt as to the classification of a building under the BCA, the relevant building surveyor must classify the building as belonging to the class it most closely resembles.

14 Regulation 1011(1) provides:

A person must not change the use of a building or place of public entertainment unless the building or place of public entertainment complies with the requirements of these regulations applicable to the new use.

The relevant provisions of the Building Code

15 Part A3 of the Building Code (headed "Classification of Buildings and Structures") deals with the classification of buildings and structures. The relevant clauses, so far as this proceeding is concerned, are as follows:

A3.1 Principles of classification

The classification of a building or part of a building is determined by the purpose for which it is designed, constructed or adapted to be used.

A3.2 Classifications

Buildings are classified as follows:

Class 1: one or more buildings which in association constitute –

(a) **Class 1a –** a single dwelling being –

(i) a detached house; or

(ii) one of a group of two or more attached dwellings, each being a building, separated by a *fire-resisting* wall, including a row house, terrace house, town house or villa unit; or

(b) **Class 1b –**

(i) a boarding house, guest house, hostel or the like –

(A) with a total area of all floors not exceeding

[6] Building Code of Australia.

300 m² measured over the enclosing walls of the Class 1b; and

(B) in which not more than 12 persons would ordinarily be resident; or

(ii) 4 or more single dwellings located on one allotment and used for short-term holiday accommodation, which are not located above or below another dwelling or another Class of building other than a *private garage*.

Class 2: a building containing 2 or more *sole-occupancy units* each being a separate dwelling.

Class 3: a residential building, other than a building of Class 1 or 2, which is a common place of long term or transient living for a number of unrelated persons, including –

(a) a boarding house, guest house, hostel, lodging house or backpackers accommodation; or

(b) a residential part of a hotel or motel; or

(c) a residential part of a *school*; or

(d) accommodation for the aged, children or people with disabilities; or

(e) a residential part of a *health-care building* which accommodates members of staff; or

(f) a residential part of a *detention centre*.

16 "Sole-occupancy unit" is defined in the Code to mean:

a room or other part of a building for occupation by one or joint owner, lessee, tenant, or other occupier to the exclusion of any other owner, lessee, tenant, or other occupier and includes –

(a) a dwelling; or

(b) a room or suite of rooms in a Class 3 building which includes sleeping facilities; or

(c) a room or suite of associated rooms in a Class 5, 6, 7, 8 or 9 building; or

(d) a room or suite of associated rooms in a Class 9c *aged care building*, which includes sleeping facilities and any area for the exclusive use of a resident.

17 During the hearing of this proceeding, senior counsel for the second and third defendants handed up what was said to be another page of the Building Code which

was relevant to the present proceeding. Under the heading "Part A3 Classifications of Buildings and Structures",[7] the following appeared:

> **A3.2 Classifications**
>
> | **Intent** |
> | --- |
> | To categorise buildings of similar risk levels based on use, hazard and occupancy. |
>
> Classification is a process for understanding risks in a building or part, according to its use. It must be correctly undertaken to achieve BCA aims as appropriate to each building in each circumstance.
>
> It is possible for a single building to have parts with different classifications. Part of a building can also have more than one classification. Where there is any conflict between what requirements the part should comply with, the more stringent requirement applies.
>
> Where it is unclear which classification should apply, appropriate authorities have the discretion to decide. They base their decision on an assessment of the building proposal.
>
> They will look at what classification the building most closely resembles. They will also take into account the likely fire load. Plus, the likely consequences of any risks to the safety, health and amenity of people using the building.

The Building Appeals Board's reasons

18 There were two central issues before the Building Appeals Board: first, whether apartments S909, S802 and N1502[8] fell to be classified as Class 2 or Class 3; and secondly, whether in any event there had been a changed use resulting in relevant danger. Dealing with the first issue, the Board said:

> One of the distinctions between the definitions of Class 2 and Class 3 is the use of the word "dwelling" for Class 2. Neither the Building Act, the Building Regulations 2006 or the Building Code of Australia contain a definition of "dwelling". However some guidance as to the definition of dwelling can be gained from not only the dictionary definitions but also the cases which were referred to in the closing submissions on behalf of the Owners Corporation and in particular the case of ***Derring Lane P/L v Port Phillip City Council (No 2) (1998) 108 LGERA 129*** (page 1201 of the Court Book) which refers to the definition of residential building which was defined

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7 But for the addition of the letter "s" on the end of "Classifications", the heading was identical to the heading referred to in paragraph 15 above.

8 The Court was told by senior counsel for the second and third defendants that when the appeal commenced approximately there were approximately 40 or so apartments in number (See T10.29, and see also the agreed statement of facts).

> as "a building constructed for the purposes of people dwelling there permanently or for a considerable period of time, or having in that building their settled or usual abode".

19 Having considered a definition of the expression "residential building", the Board went on to consider the definition of the word "home" in the *Domestic Building Contracts Act* 1995; the use of the word "dwelling" in the *Victorian Building Regulations* 1983; and the definition of the word "dwelling" in the *Building Control Act* 1981. Putting to one side the utility or otherwise of looking at definitions and uses of the word "dwelling" in other statutes and regulations, it is not immediately apparent what legitimate use the Board may have derived from an examination of the definitions and uses of the words "residential building" and "home" to which it referred in its reasons. Nevertheless, the Board went on:

> Having considered current and past definitions of Class 1, 2 and 3 buildings and the definitions of dwelling provided in past legislation and regulations, as well as dictionary definitions of "dwelling", the Panel has formed the view that a "dwelling" is not only defined by the physical characteristics required by the building codes, but also by a sense of connection by the occupants. The Panel is therefore of the view that the nature of the use is an important factor that a building surveyor considers when classifying a building. The Panel is also of the view that Class 2 apartments cannot be used for short term accommodation, such as the "serviced accommodation" which is offered by Docklands Executive Apartments.

20 The Board then referred to some of the evidence given before it. Without pausing to analyse the admissibility or relevance or otherwise of some of this evidence, the Board noted:

> Mr Genco gave evidence that in his view, the use had changed from Class 2 to a use which now resembled a Class 3.
>
> …
>
> Mr Gibson gave evidence that prior to issuing the building permits for all apartments and the buildings, he considered the intended use of the apartments and buildings and made inquiries from the designer and developer as to the intended use for the apartments and buildings. In his view, using the subject apartments for short term accommodation contravened the occupancy permits and was not permitted in a Class 2 classification. Mr Gibson stated that the use of some of the Watergate apartments for short term accommodation in the manner and style of a hotel is contrary to the building permit and the occupancy permit as it was not the intended use.

21 Under the heading "Conclusions", the Board said:

> The Panel finds that the use of the apartments for commercial short term stays is not a use which is permitted under the existing occupancy permit for Class 2 (which involves the operation of a business).
>
> The operation of such an enterprise within a residential Class 2 building is deemed a change of use according to Regulation 1011 and therefore a new occupancy permit is required. The municipal building surveyor can exercise his discretion under Regulation 112 of the Building Regulations to classify a building to what it most closely resembles (R112(2)). In this case, based on the evidence and information before it and based upon the Panel's view of the statutory scheme, the Panel is not persuaded that the classification of the MBS that the subject apartments had become Class 3 as a result of their use for short term stays is incorrect and therefore the Appeal is dismissed.
>
> The Panel is of the view that the definition of dwelling does not include the use by short term guests resulting from a commercial enterprise which is conducted in a hotel style.
>
> …
>
> That is not to say that the use of an apartment for short term accommodation can never be defined as a dwelling. However, based on the facts of this case, the use of the apartments is not permitted under Class 2.
>
> The Panel notes that the original fire engineering report (the Arup report dated 20 June 2002) which the relevant building surveyor relied upon to approve the development contains numerous qualifications (refer sections 5.1 and 5.2) which indicate that any changes, including to building fabric and layout, fire load, occupancy characteristics or building classification may invalidate the findings contained in the report and would require review (by a fire engineer). It is considered that this type of qualification would be necessary when a municipal building surveyor assesses building enforcement action such as in this case.
>
> …
>
> The Panel does consider stays less than 3 days (which comprised 65.7% of guests who occupied the subject apartments) to be short term stays. However it does not deem it necessary to specify a particular duration associated with short term stays. The Panel further relies on the intended use and the nature of the occupant in determining that the subject apartments the subject of this appeal are being used in a short term manner.
>
> The Panel is of the view that the defined time frame of 30 days referred to in the Building Orders does not necessarily impact upon the Municipal Building Surveyors' [sic] decision to issue the Building Orders (which is the decision appealed against) or the building classification referred to in the Building Orders with respect to the subject apartments. In any event, the Panel did not understand that the appellants were objecting to this reference being contained in the Building Orders.
>
> Even if the Panel did not uphold the decision of the MBS, the Panel would

> still be of the view that the Building Notices were validly issued as the changed use results in a danger to the life and safety of any person using the building in that the occupant characteristics, fire safety needs and reaction to fire or other emergencies have varied from that for which the building was originally designed, approved and intended to be used.

Plaintiff's submissions

22 In support of his application for relief, the plaintiff contended that the Building Appeals Board:

(a) misconstrued the definition of Class 2 in the Building Code by importing into the word "dwelling" in that definition, a temporal requirement; and

(b) erred in law when it concluded that the building notices were also validly issued because "the changed use results in a danger to the life and safety of any person using the building …".[9]

23 Each of these errors was submitted to constitute not only an error of law on the face of the record, but also jurisdictional error.

The second and third defendants' submissions

24 The second and third defendants submitted that, rather than looking at the precise words of the definition of "Class 2" in Part A3 of the Building Code, the correct approach was to consider the issue of use. It is immediately to be observed that the word "use" is not found in the definition of Class 2.

25 In support of these submissions, the second and third defendants tendered the one page document to which I have referred in paragraph [17] above. This was tendered as being "section A3 of the Building Code of Australia".[10] On the second day of the hearing, when it was pointed out to senior counsel for the second and third defendants that, on its face, the document could not be a page of the Building Code, the Court was told that the page was an extract from "the" guide to the Building Code ("the guide").

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9 See p 14 of the Board's reasons.

10 T8.19.

26 It was then submitted that the guide fell to be construed and applied as required by the Act and the Regulations. That submission must be rejected. Neither the Act, nor the Regulations, give any statutory or regulatory force to the guide. Specifically, regulation 109 of the *Building Regulations* 2006 provides:

> The BCA is adopted by and forms part of these regulations as modified by this Part.[11]

27 While the second and third defendants were unable to point to any provision that gave the guide statutory or regulatory force, in answer to this difficulty, the second and third defendants submitted that the guide provides that the guide should be read together with the Building Code. Accepting that is so, the short answer is that neither the Act, nor the Regulations, nor the Building Code contain a provision saying that the Building Code should be read together with the guide.

28 However, that was not the end of this issue so far as the second and third defendants were concerned. In further support of their submissions, the second and third defendants tendered a draft discussion paper published by the Queensland Government in July 2008.[12] This document was tendered because the second and third defendants wanted to show what they said was the proper and accepted way of construing and applying the Building Code. Of interest in this draft discussion paper was a statement that "it is not appropriate to classify or approve a building as Class 2 simply because it meets the requirements for a Class 2 building …".

29 It would, of course, be wrong to allow the draft discussion paper tendered (or indeed any other like document) to be used to alter the proper construction and application of the Building Code. To do so would contravene basic and well known principles concerning the approach to be taken when construing documents of this kind. The same point may be made in respect of the guide.[13]

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11 See further, s 9 of the Act.

12 This document was tendered in support of the second of the second and third defendants' points made on the second day of the hearing of this proceeding (T60.24).

13 *The Owners – Strata Plan Number 69312 v Rockdale City Council & Anor* [2012] NSWSC 1244 [40], [61] and [95]-[96] (Lindsay J).

30 In support of their arguments about the concept of use being of primary importance in classifying buildings and apartments, the second and third defendants relied upon the Queensland Court of Appeal judgment of *Kazakova v Queensland Fire and Rescue Service ("Kazakova")*.[14] In my view, this authority is of little (if any) relevance in this proceeding. Two points may be made: first, *Kazakova* is not a case concerning whether or not a building or dwelling or the like is to be classified as Class 2; and secondly, in *Kazakova*, the Court proceeded on the basis that the Code contained different provisions from those presently under consideration.

31 Next, the second and third defendants submitted that such expert opinion evidence as was given before the Building Appeals Board as to the classification of the apartments was admissible because it was only people with relevant experience or expertise who were capable of categorising buildings by reference to risk based on use, hazard and occupancy. However, this submission falls away once it is understood that the Board's task was to properly construe the Code and then determine whether the facts as found (including matters about which relevant opinion evidence may have been given) led to one classification or another. While it might be accepted that, relevant opinion evidence might be given on some issues where it is unclear which classification should apply because the facts might be borderline, no opinion could govern the proper construction of the Building Code.

32 Having concluded that it was the actual words of the Code that fell to be properly construed and applied, the dispute between the parties hinged next on the meaning of the word "dwelling" in the Class 2 definition. The second and third defendants submitted that the Board determined that the word "dwelling" was used in its natural and ordinary meaning in the Class 2 definition. They then submitted that the natural and ordinary meaning of a word does not involve a question of law – but rather, a question of fact. In support of this submission, the second and third defendants relied upon the judgment of Phillips JA[15] in *S v Crimes Compensation*

14 [2011] QCA 328.

15 With whom Callaway JA and Hedigan AJA agreed.

Tribunal.[16]

33 Two answers may be given to this submission. First, it is far from clear that the Board limited itself to the natural and ordinary meaning of the word "dwelling", or what might be said to be "the common understanding of the word".[17] In its reasons, the Board said that it had "formed the view that a 'dwelling' is *not only defined by the physical characteristics required by building codes,* but also by a sense of connection by the occupants".

34 Secondly, as Phillips JA noted in *S v Crimes Compensation Tribunal*, the proper meaning, as a matter of construction, of a statutory description which is relevant to a claimant's success or failure, is a question of law.[18] Further, as Phillips JA also noted, the proposition that where words are used in their natural and ordinary sense, what they mean is a question of fact, "perhaps … elide[s] the twin problems of construction and application".[19]

35 It follows that in my view, the proper construction of the Class 2 definition contained in the Building Code is a question of law.

36 The second and third defendants next submitted that the Building Appeals Board was correct when it concluded that the word "dwelling" in the Class 2 definition did not encompass apartments used for short term accommodation by different and unconnected groups of people.

37 In support of this submission, the second and third defendants relied upon *Longo Investments Pty Ltd*[20] and *Prowse v Johnstone & Ors*.[21] These cases involved applications for modification of different restrictive covenants. In *Longo Investments Pty Ltd*, the restrictive covenant was in terms "… will not erect or cause to suffer to

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16 [1998] 1 VR 83, 88.
17 *Federal Commissioner of Taxation v Broken Hill South Limited* (1941) 65 CLR 150, 155 (Starke J).
18 *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 88; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, 287 (Neaves, French and Cooper JJ).
19 See further, *Life Insurance Company of Australia Limited v Phillips* (1925) 36 CLR 60, 78 (Isaacs J).
20 [2003] VSC 37.
21 [2012] VSC 4.

be erected or placed upon the said lot more than one main dwelling house …".[22] In *Prowse v Johnstone*, the covenant included the words "… will not erect more than one house on each of the said lots …".[23]

38 The second and third defendants relied upon the following passages from *Longo Investments Pty Ltd*:

> In *Bakes v Huckle* Barry J stated:
>
> > "Whether particular premises are a dwelling house is a question to be decided on the facts of each case … In deciding that question the test is whether at the material time the premises possessed the characteristics ordinarily found in buildings used or let for human habitation as homes."
>
> In *Downie v Lockwood* Smith J said:
>
> > "The word 'dwelling house' is capable of a wide meaning in which it extends to any building or part of a building used as the place of abode of one or more persons.
> >
> > It has been used in this sense in the criminal law and in relation to parliamentary franchise: cf *Thompson v. Ward* (1871) LR 6 CP 327, at pp.358-9; *Hollyhomes v. Hind* [1944] KB 571; [1944] 2 All ER 8. It has been so used in bankruptcy law: see *Re Hecquard* (1889) 24 QBD 71 at pp.75-6. It has been held to apply to buildings not of a private character. Thus in *South-West Suburban Water Co. v. St. Marylebone Guardians* [1904] 2 KB 174, it was held to cover residential workhouse schools occupied by children and by those in control of them. And in *London County Council v. Davis* (1897) 77 LT 693, it was held to cover a hotel for poor men which was a public building. It has also been held applicable to a building comprising a number of separate dwellings: see *Kilpatrick v. Maxwelltown Town Council* [1912] SC 228; *Hollyhomes v. Hind* [1944] KB 571; [1944] 2 All ER 8. The use of the word in its wide sense is illustrated by Lord Atkinson's statement in *Lewin v. End* [1906] AC 299 at p.304, that by the term 'dwelling-house' he understood 'a house in which people actually live or which is physically capable of being used for human habitation.'
> >
> > In popular speech the term is commonly used in a narrower sense derived, perhaps, from an abbreviating of the expression 'private dwelling-house'. In this narrower sense it covers, I think, only those places of abode which are either separate structures or else divided from other buildings by vertical walls, and which, in addition, are occupied, or adapted for occupation, by persons living in one household. But for premises to be used 'only as a dwelling-house', in this narrow sense of the word, it is not necessary that the person residing therein should be members of the one family, or related to

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22 [2003] VSC 37 [3]

23 [2012] VSC 4 [9].

each other. For example, if half a dozen students rented a house such as I have described and made it their place of abode, living in it in one household, they would be using it as a 'dwelling-house' even in this narrower sense."[24]

39 The second and third defendants relied upon the following passages from *Prowse v Johnstone*:

> Although "house" can have various meanings, its primary meaning, according to the Oxford English Dictionary, is:
>
> > 1. A building for human habitation, esp. a building that is the ordinary dwelling place of a family.
>
> The first meaning for "house" given in the New Shorter Oxford Dictionary is:
>
> > A building for human habitation, a dwelling, a home; especially a self-contained unit having a ground floor and one or more upper stories (as opp. to a bungalow, or flat, etc.).
>
> The second meaning given in that dictionary is:
>
> > A part of a building occupied by one tenant or family.
>
> …
>
> In my opinion, *Longo* does not assist the plaintiff in this regard. Quite the opposite. Osborn J referred to the judgment of Smith J in *Downie v Lockwood*, in which Smith J had said that the expression "dwelling house", though capable of a wide meaning extending to any building or part of a building used as the place of abode of one or more persons, including a public building, was more commonly used in popular speech in a narrower sense. In the narrower sense it covered "only those places of abode which are either separate structures or else divided from other buildings by vertical walls, and which, in addition, are occupied, or adapted for occupation, by persons living in one household". Osborn J considered that the meaning to be attributed to "dwelling house" in *Longo* was this narrower, colloquial one. The hostel in question was comprised of individual bedrooms and communal facilities. It was designed and intended to operate as one "household". This was to be distinguished from those cases in which bedsitting rooms which were individually occupied had been regarded as separate dwelling houses.
>
> In the result, I see nothing in the six cases relied upon by the plaintiff that would prevent me from giving effect to my understanding of the ordinary, everyday meaning of the words of the covenant - in particular, that for a building to be "one house" within the meaning of the covenant it must be designed for occupation by one single household. Indeed, there are additional cases which tend to confirm that my interpretation is at least open.
>
> In *Cobbold v Abraham* the owner of a suburban property, who was bound by a covenant not to build more than one house or dwelling on the property,

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24 [2003] VSC 37 [7]-[8] (citations omitted).

> proposed to erect a building comprising four residential flats intended for occupation by separate households. Lowe J held that the erection of the building would constitute a breach of the covenant and granted an injunction accordingly. However the parties and the Court concentrated on the meaning of the word "dwelling" rather than the word "house", the latter being at least no narrower than "dwelling". On the other hand Lowe J said that the general notion of a "dwelling" was plain; that the word signifies a place of abode; and that it is sometimes used as equivalent to "house". His Honour had been referred to many of the cases mentioned above. His Honour drew from those cases that one building may contain more than one dwelling - for example a terrace or a building in which separate dwellings are superimposed one above the other. His Honour continued:
>
> > I think the authorities show that the crucial test is the degree of separation of the parts of the building in question. In my opinion, where one portion of the building is structurally so separated from the rest of the building as to be capable of occupation by a separate family or household it may constitute a separate dwelling. I am satisfied on the evidence in the present case that the building proposed will be constructed in such a manner that different portions of it will be capable of occupation by separate families, and that it will constitute "more than one dwelling".[25]

40 In my view, the decisions of *Longo Investments Pty Ltd*[26] and *Prowse v Johnstone & Ors*[27] are of little (if any) relevance to the present proceeding. Principally, *Longo Investments* concerned the words "dwelling house", and *Prowse v Johnstone* concerned the word "house". Neither case provides much assistance as to the meaning of the word "dwelling" in the Class 2 definition contained in the Building Code.

41 Further, if anything, these cases run counter to the second and third defendants' case. If, as appears to have been submitted, the expressions "dwelling house" and "house" are to be regarded as synonymous with "dwelling", then, if one accepted the second and third defendants' submissions as to dwellings being places which could not be used for short term accommodation, the restrictive covenants in each of the authorities relied upon (and indeed in each case involving a single dwelling covenant) could have been circumvented by the relevant applicant simply asserting that what was being constructed was not caught by the restrictive covenant as it was going to be used as a short term accommodation facility. Self-evidently, any such argument in those cases would have been, and is, absurd.

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25 [2012] VSC 4 [60], [76]-[78] (citations omitted).
26 [2003] VSC 37.
27 [2012] VSC 4.

42 Finally, the second and third defendants submitted that, in any event, there was an alternative basis upon which the Building Appeals Board upheld the building notices (and by implication, the building orders). This alternative basis was to be found at the foot of p 14 of the Building Appeals Board's reasons:

> Even if the Panel did not uphold the decision of the MBS, the Panel would still be of the view that the Building Notices were validly issued as the change results in a danger to the life and safety of any person using the building in that the occupant characteristics, fire safety needs and reaction to fire or other emergencies have varied from that for which the building was originally designed, approved and intended to be used.

43 Having made the arguments referred to above, senior counsel for the second and third defendants then encapsulated his client's position in eight points.[28] It is not necessary to set out all of the second and third defendants' eight points. Some have been dealt with above, others will be dealt with below. That said, it is convenient to deal now with the second and third defendants' first and sixth points.

44 The first of the second and third defendants' eight points was expressed as follows:

> Counsel: Number one, to use the words of the appellant, both before the board and here - sorry, before the board, the appeal itself constituted a test case, and the test case was to try and identify how short term accommodation could be accommodated within the definitions and the classification process required under the code. And, therefore, obviously, this decision has wide policy implications as to the use of serviced apartments in otherwise multistorey apartments.
>
> And, further, it obviously has a direct effect on those residents that move into a multistorey apartment building who are permanent/long term residents who therefore may find themselves, depending on the outcome obviously of this appeal, living next door to short term occupants who, we've dealt with yesterday, have different lifestyle characteristics. So, Your Honour, that's the first point.

45 The second and third defendants' so-called first point does not assist in the resolution of this proceeding. It may be assumed that the case before the Building Appeals Board was important. It may also be accepted that the case before the Building Appeals Board was a test case. However, none of that impacts upon the

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28 Point 1, T59.27 – T60.12; Point 2, T60.12 – T63.29; Point 3, T63.30 – T64.29; Point 4, T64.29 – T65.18; Point 5, T65.20 – T66.27; Point 6, T66.29 – T69.21; Point 7, T69.23 – T70.30; and Point 8, T70.30 – T72.7.

approach the Board was required to take in construing and then applying the Act, the relevant regulations and the relevant provisions of the Building Code.

46 The second and third defendants' sixth point was to say that the "expert Board made a determination that [the apartments] were used more like a hotel". From this proposition, the Court was then taken to the judgment of Croft J in *Stringer & Ors v Gilandos Pty Ltd*.[29] Specifically, the second and third defendants referred to and relied upon paragraphs [40], [42], [43], [52], [53] and [68] of this judgment. It suffices to say that nothing in this judgment (which concerned the *Retail Tenancies Act* 1986, the *Retail Tenancies Reform Act* 1998 and the *Retail Leases Act* 2003, and whether premises, which were used as motel or serviced apartments, were used as "retail premises") is of any assistance in the resolution of the present proceeding.

The resolution of this proceeding

47 In my view, the Building Appeals Board misconstrued the Building Code when it imported into the word "dwelling" contained in the definition of a Class 2 building set out in clause A3.2, the temporal requirements set out in the Board's reasons for determination.

48 The word "dwelling" is used in two places in clause A3.2 of the Building Code. It is used in the definition of Class 1b buildings and again in the definition of Class 2 buildings.[30] The construction of the word "dwelling" adopted by the Building Appeals Board in the Class 2 definition would result in the word "dwelling" being interpreted differently within the same clause of the Building Code. In the definition of Class 1b buildings, paragraph (ii) provides for a Class 1b building to be:

> 4 or more single dwellings located on one allotment and used for short-term holiday accommodation.

49 In the Class 1b definition, the concept of "dwelling" encompasses short-term holiday accommodation. In my view, there is no rational basis for giving the word

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29 [2012] VSC 361.

30 Although the plural form of the word is used in the Class 1b definition, whereas the singular version of the word is used in the Class 2 definition.

"dwelling" a more limited meaning in the Class 2 definition.[31] The fact that paragraph (ii) may have been inserted into the Code at a different time from the Class 2 definition does not justify the same word being given different meanings unless there is a basis for saying that this was what was intended.[32]

50 Senior counsel for the second and third defendants submitted that if the plaintiff's construction was correct, then there was no work for the words "each being a separate dwelling" to do in the Class 2 definition. I reject that submission. The definition of "sole-occupancy unit" contains a number of possible alternative objects. The definition is inclusive and refers to a dwelling as one possible alternative and rooms or suites in other classes of building as other possible alternatives. The use of the words "each being a separate dwelling" in the Class 2 definition emphasises a requirement for separateness and distinguishes such a building from the other possibilities referred to in different paragraphs[33] of the definition of "sole-occupancy unit". Thus the words "each being a separate dwelling" have work to do on the construction contended for by the plaintiff.

51 During the course of their submissions, the second and third defendants emphasised that the Building Appeals Board is an expert tribunal and that the Court should therefore be slow to interfere with its expert determination. All of that may be accepted. However, the short answer to this submission is that, as expert as the Building Appeals Board may be, it does not have jurisdiction to commit errors of law. The Building Appeals Board, like every other tribunal, must apply the law. No amount of respect for its expertise can overcome an error of law on the face of the record or any jurisdictional error committed by it.

52 I turn now to two further construction issues. First, the uncertainty of the extent and

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31 See generally, *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450, 452 (Hodges J). See further, *Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW* (2005) 145 FCR 523 [14] and [72]; *Brown v Coal Mines Australia Pty Ltd* (2010) 76 NSWLR 473 [64]; *R v Nolan* (2012) 267 FLR 1 [69].

32 It was asserted on the second day of the hearing by counsel for the second and third defendants that paragraph (ii) of the Class 1b definition was inserted into the code in May 2011 (after the date of the building notices, but before the date of the building orders and the appeals conducted before the Building Appeals Board).

33 (b) – (d).

duration of the temporal requirement that the Board held to be part of the proper construction of the word "dwelling" in the Class 2 definition is an additional reason for rejecting the second and third defendants' construction submissions. While the building orders contemplate the apartments being used in conformity with the Building Code if they are leased for a minimum of 30 days, there is nothing in the Building Code that justifies this proposition. It was not explained by the second and third defendants why an apartment might be classified as Class 2 if it is let out for a minimum of 30 days on the one hand, but Class 3 if it is let out for 29 days (or some lesser period). It is clear that nothing in the text of the Code supports such a conclusion. Further, one was left to wonder how the second and third defendants' construction of clause A3.2 might work in practice if there were tenancies of more than 30 days intermingled with the occasional tenancy of less than three days. Would such an apartment be classified as Class 2 for some periods, but Class 3 for other periods? In my view, this would be an unlikely construction of the Building Code.

53 Secondly, to the extent that the second and third defendants submitted that the apartments more naturally satisfied the definition of Class 3, I reject that submission. The definition of Class 3 buildings in clause A3.2 of the Building Code commences with the words "a residential building other than a building of Class 1 or 2 …". By definition, if a building satisfies the Class 2 definition, then it cannot satisfy the Class 3 definition.

54 For these reasons, I conclude that the Board erred in law in its construction of clause A3.2 of the Building Code.

55 I turn now to the Building Appeals Board's alternative basis for upholding the building notices. This conclusion also cannot stand. First, there was no evidence of any "changed use" as referred to in the Building Appeals Board's reasons.[34] There being no evidence of any such changed use, a finding to the contrary was an error of

[34] Cf regulation 1011(1) of the *Building Regulations* 2006.

law.[35]

56 Secondly, s 106(d) of the Act did not permit a building notice to be served unless the *building* was a danger to relevant people. In this case, while there might have been some evidence of a relevant danger as a result of the use of apartments, there was no evidence that the apartments themselves constituted a relevant danger. In cross-examination before the Building Appeals Board, the building surveyor (the second defendant) was asked and answered the following questions:

> But you don't say the building's a danger?---No. If it was a danger then we would have been issuing emergency orders.
>
> And you haven't done that?---We haven't done that.[36]

57 While senior counsel for the second and third defendants relied upon some re-examination of the building surveyor in an attempt to answer the evidence to which I have just referred,[37] the only conclusion open to the Board was that such references as there may have been to the building being a danger fell properly to be understood to be references to the building being a danger "in that" the use had been said to be changed – a matter about which I have already said there was no evidence.[38]

58 In different circumstances, it may have been open to the building surveyor to make an order under s 102 of the Act if there was a danger to life arising out of the use of an apartment. However, that was not this case. Further, in this regard, the Board's reasons and the second and third defendants' submissions in this proceeding simply did not pay close enough attention to the differences between the text of s 102 of the Act and the text of s 106(d) of the Act.

59 Finally, during the hearing of this proceeding, much was made by the second and

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35 *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, 348 [91] (Hayne, Heydon, Crennan and Kiefel JJ).

36 T222.10 – T222.12 of the hearing before the Building Appeals Board.

37 T223 – T224 of the hearing before the Building Appeals Board.

38 See, for example, paragraph 3.2 and paragraph 3.2.1 of the Building Notices, and the use of the words "in that" at the end of paragraph 3.2. Further, it is to be remembered that there were a number of apartments that were the subject of these appeals, and the hearing before the Building Appeals Board was conducted without any analysis of the safety or otherwise of each of the individual apartments the subject of this proceeding – but rather by reference to the use of all of the apartments in respect of which appeals had been brought and which were said to have been heard as a test case.

third defendants of what was said to be the undesirability of apartment owners in multi-apartment buildings letting out those apartments for very short periods for holiday and the like purposes. All of what the second and third defendants say in this regard may, for present purposes, be accepted. However, it is not the function of this Court, on judicial review proceedings, to express a view one way or the other about the desirability of apartments, in apartment complexes, being let out for short-term use. The function of this Court is to identify whether an error of law on the face of the record or jurisdictional error has been committed by the tribunal below, and then to make orders accordingly.

60 I have little doubt that if there are true safety issues in respect of the short-term occupancy of apartments in multi-storey complexes, then those issues are capable of being dealt with on a number of different levels by a number of different regulatory authorities. The short point in the present case is that any such identified difficulties are not dealt with according to law if the solution involves torturing and misconstruing the provisions of the Building Code.

61 The errors of law I have identified above were errors of law on the face of the record.[39] The errors of law also constituted jurisdictional error.[40]

Conclusion

62 The decision of the Building Appeals Board made on 22 March 2013 must be quashed and the appeals remitted for re-hearing and determination in accordance with law.

63 The plaintiff submitted that the appeals should be heard and determined by a differently constituted panel of the Building Appeals Board. In *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal & Anor*,[41] Davies and Foster JJ said:

> If a decision has been set aside for error and remitted for re-hearing, it will generally seem fairer to the parties that the matter be heard and decided again by a differently constituted tribunal. This is because the member

39 See s 10 of the *Administrative Law Act* 1978.
40 *Kirk v Industrial Court of New South Wales & Anor* (2010) 239 CLR 531.
41 (1990) 26 FCR 39.

> constituting the tribunal in the original inquiry or hearing will already have expressed a view upon facts which will have to be determined in the re-hearing. The aggrieved party may think that a re-hearing before the tribunal as originally constituted could be worthless, for the member's views have been stated. … There are, of course, cases where it is convenient for the tribunal as previously constituted to deal with the matter. And occasionally the court itself expresses such a view, so as to make it clear that it would not be improper for the tribunal as previously constituted to consider the matter again.

64 When I put this issue to senior counsel for the second and third defendants, senior counsel responded that he was in the Court's hands "in relation to that particular issue".[42] In all the circumstances, I am persuaded that the matter should be remitted to a differently constituted Building Appeals Board.

65 The orders of the Court will be:

(1) The decision of the Building Appeals Board dated 22 March 2013 be set aside.

(2) The appeals, including any questions of the costs of those appeals, be remitted to the Building Appeals Board differently constituted for hearing and determination in accordance with law.

(3) The second and third defendants pay the plaintiff's costs of this proceeding, including reserved costs.

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42 T77.5.