

Supreme Court

New South Wales

Medium Neutral

Citation:

The Owners - Strata Plan No 69312 v Rockdale City Council & Anor; Owners of SP 69312 v Allianz Aust Insurance [2012] NSWSC 1244

Hearing dates:

15 August 2012

Decision date:

18 October 2012

Jurisdiction:

Equity Division

Before:

Lindsay J

Decision:

Separate question answered in favour of the Plaintiff. Within the meaning of the Building Code of Australia, the "effective height" of the Plaintiff's proposed Building was 26 metres.

Catchwords:

ENVIRONMENT AND PLANNING - building control - definitions - Building Code of Australia - definition of "effective height" in the Building Code of Australia

EVIDENCE - admissibility and relevancy - in general - whether the Guide to Building Code of Australia should be admitted into evidence for the purpose of construing the text of the Building Code of Australia

EVIDENCE - admissibility and relevancy - opinion evidence - whether expert opinion was admissible for the purpose of construing the text of the Building Code of Australia

Legislation Cited:

Environmental Planning and Assessment Act, 1979 Interpretation Act 1987 (NSW)

Cases Cited:

NSW Food Authority v Nutricia Australia Pty Limited (2008) 74 NSWLR 148 at 161[68]
Allstate Life Insurance Co v Australia and New Zealand Banking Group Limited (No 6) (1996) 64 FCR 79 at 83 per Lindgren J
Faucett v St George Bank Limited [2003] NSWCA 43 at [48].

Texts Cited:

Guide to the Building Code of Australia companion manual to the Building Code of Australia

Category:

Separate question

Parties: The Owners SP 69312
Rockdale City Council
Allianz Australia Insurance

Representation: Counsel:
M Ashhurst SC (Plaintiff)
Martin J Walsh (Plaintiff)
JA Steel (Defendant Council)
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File Number(s): 2010 / 93443 2006 / 268634

JUDGMENT

INTRODUCTION

- 1 This judgment determines, in two sets of proceedings, a question ordered (pursuant to rule 28.2 of the Uniform Civil Procedure Rules 2005 (NSW)) to be decided separately from any other questions in the proceedings.
- 2 In both sets of proceedings, the plaintiff is The Owners - Strata Plan 69312. It is the Owners Corporation of a strata scheme referable to a mixed residential and commercial development located at 8-12 Market Street, Rockdale ("the Building").
- 3 It has sued Allianz Australia Limited ("Allianz") in proceedings numbered 2006/268634 in the records of this Court and Rockdale City Council ("the Council") in proceedings numbered 2010/93443. The proceedings against Allianz were commenced in the District Court of New South Wales.
- 4 Allianz issued a Home Warranty Insurance Policy, under the *Home Building Act* 1989 (NSW), to the builder of the Building. As a beneficiary of that policy, the plaintiff asserts a claim that it be indemnified by Allianz for loss and damage allegedly suffered by it in rectification of defects in construction of the Building.
- 5 The Council is the local government authority which approved development of the site, and the principal certifying authority for construction of the Building. The plaintiff asserts, *inter alia*, that it was negligent in the discharge of its duties, and claims damages against it.

- 6 For convenience, Allianz and the Council are collectively described in this judgment as "the Defendants".

THE QUESTION FOR SEPARATE DECISION

- 7 In each set of proceedings the Court ordered that the following question be decided as a separate question:

"Is the 'effective height' (as that term was defined in the version of the Building Code of Australia in force between 23 January 2001 and 26 October 2001) of the proposed building at 8-12 Market Street, Rockdale, as depicted on the plans stamped by Rockdale City Council as forming part of the construction certificate 269/02 issued by Rockdale City Council and signed by M. Azzi, Supervisor - Major Projects on 26 October 2001:

- a) 25 metres? or
- b) 26 metres?"

- 8 By virtue of s 103 of the *Supreme Court Act* 1970 (NSW), and subject to a grant of leave to appeal by the Court of Appeal, an appeal lies to the Court of Appeal from any decision of this question. However, each of the three parties interested in its separate determination has given an undertaking to the Court not to appeal any such decision which does not result in the final determination of the proceedings.
- 9 By consent of all three interested parties, the Court ordered that the trial of the separate question in the two sets of proceedings be heard together.
- 10 The practical significance of an answer to the separate question in the determination of the proceedings is not presently before the Court, and no party addressed it in any detailed way on the trial of the separate question.
- 11 In broad terms, however, the Court is entitled to notice that the fire control and safety features and systems required by the Building Code of Australia ("BCA") - compliance with provisions of which was required by the Development Approval and the Construction Certificate issued by the Council in connection with the Building - varied depending upon the "effective height" of the Building proposed to be constructed.
- 12 The parties are agreed that an effective height of 25 metres was the critical point, over which fire safety regulatory requirements applicable to the proposed Building became more onerous.
- 13 In paragraphs 12 and 19 of its List Statement (filed on 6 April 2010) in its proceedings against the Council - to which the Council has yet to file a Response - the plaintiff alleges that those more onerous requirements required a suitable sprinkler system for the whole Building; a minimum of two fire exits; automatic stair pressurisation systems; a fire control centre; and an early warning information system; or an alternative suitable fire safety

system.

- 14 I refer to the plaintiff's allegation for the limited purpose of demonstrating the nature of the case the plaintiff seeks to make in the principal proceedings. I make no assumptions about the correctness, or otherwise, of the allegation.

THE PARTIES' STATEMENT OF AGREED FACTS

- 15 On the conduct of the trial of the separate question, all three participating parties concurred in submission to the Court of a Statement of Agreed Facts. As a matter of record, it was marked as Exhibit "P1". The statements of fact it records are agreed "for all purposes" in the conduct of the proceedings.

- 16 The Statement of Agreed Facts is in the following terms:

"1. The dispute relates to a mixed residential and commercial development located at 8-12 Market Street, Rockdale in the State of New South Wales ("**Building**").

2. The Building is a strata scheme.

3. Rockdale City Council ("**First Defendant**") was the authority which approved the development application and was the principal certifying authority for the Building.

4. At all material times, Zimara Holdings Pty Limited (ACN 095 383 449) ("**Zimara**") was a company incorporated in Australia. Zimara was the developer and then owner of the land upon which the Building was built and remained so until registration of the strata plan.

5. On 12 July 2000, the First Defendant received an Application for Development from Huntington & MacGillivray Architects, on behalf of Zimara and with the permission of the then owners of the land (Mr and Mrs Mousslimani, Mr & Mrs Becvarovski, Mr LG Dan and Mr DL Dan), for the demolition of the existing building and the construction of a multi-storey mixed residential and commercial building at 8-12A Market Street, Rockdale. The Development Application was allocated the reference 32/01 by the First Defendant.

6. On 6 December 2000, the First Defendant issued a Notice of Approval to Development under the provisions of Section 81(1)(A) of the *Environmental Planning and Assessment Act, 1979* that provided deferred commencement consent to DA 32/01.

7. On 23 January 2001, the First Defendant issued a Notice of Approval to Development under the provisions of Section 81(1)(A) of the *Environmental Planning and Assessment Act, 1979* that provided approved consent for the development of a ten storey mixed residential and commercial development comprising 58 units, 750m² commercial floor space and basement car parking in accordance with DA 32/01 ("**Development Approval**").

8. Condition 14 of the Development Approval provides that 'all new building work must be carried out in accordance with the provisions of the Building Code of Australia (BCA) in accordance with Clause 78A of the *Environmental Planning and Assessment Regulation 1994*.

9. Conditions 25-39 of the Development Approval required the applicant to ensure essential fire safety measures were provided in accordance with the relevant provisions of the BCA.

10. On or around 29 November 2000, the First Defendant received an Application for a Construction Certificate from Huntington and MacGillivray Architects for the Building. The Construction Certificate Application was allocated the reference 347/01 by the First Defendant.

11. On 31 January 2001, the First Defendant issued a Notice of Approval to a Construction Certificate under the provisions of Part 4(A) of the *Environmental Planning and Assessment Act, 1979* that approved Construction Certificate 347/01 in terms of the bulk excavation and footings only.

12. On 26 October 2001, the First Defendant issued a Notice of Approval to a Construction Certificate under the provisions of Part 4(A) of the *Environmental Planning and Assessment Act, 1979* that approved Construction Certificate 269/02 in terms of the mixed commercial / residential building with basement car park ("**Construction Certificate**").

13. The Construction Certificate included approval of the architectural drawings numbered 1 to 19 'Project Number 1217' prepared by Huntington and Macgillivray Architects and dated 7 July 2000 ("**Architectural Drawings**"). These plans, except for architectural drawing number 1, were stamped by Rockdale City Council as forming part of Construction Certificate 269/02 and were signed by M Azzi (Supervisor - Major Projects) on 26 October 2001.

14. On 30 December 2002, the strata plan for the Building was registered.

15. On 3, 17, 21, 23 and 29 January 2003 the First Defendant granted Interim Occupation Certificates for parts of the Building.

16. On 17 February 2003 the First Defendant granted the Final Occupation Certificate for the entire Building.

17. Clause A1.1 of the BCA (Amendment 9) that was in force between 23 January 2001 and 26 October 2001 defines *effective height* to mean:

"the height to the floor of the topmost storey (excluding the topmost storey if it contains only heating, ventilating, lift or other equipment, water tanks or similar service units) from the floor of the lowest storey providing direct egress to a road or open space"

18. For the purposes of measuring the effective height of the Building, the topmost storey of the Building is Level 9, which had a relative level of 43.19 metres.

19. Fire Stairs A as depicted on the Architectural Drawings numbered 4 entitled 'Level One Floor Plan' and 12 entitled 'Level Nine floor Plan' extends from level 9 at relative level of 43.19 metres to relative level of 18.19 metres."

17 The significance of this last paragraph is that it draws attention to the fact that the Fire Stairs within the proposed Building connected Level 9 (the topmost storey at RL 43.19) with the "Upper Ground Level" (RL 18.19) and each intermediate Level, but did not descend to the "Lower Ground Level" (which had, relevantly, a relative level of 17.19 metres) a few steps down from, and adjacent to, the "Upper Ground Level", both of which are depicted in the "Ground Floor" drawing in the plans for the proposed Building. A nearby, but separate, set of stairs connected the Upper Ground Level and the Lower Ground Level. The Building's lifts are depicted in the plans as servicing the same Levels as the Fire Stairs and, in addition, the Basement Level (at RL 15.39) beneath the Lower Ground Level. No lift stop at the Lower Ground Level (RL 17.19) is depicted.

18 Clause 78A(1) of the *Environmental Planning and Assessment Regulation 1994* (NSW), to which reference is made in paragraph 8 of the parties' Statement of Agreed Facts, was in the following terms:

"All building work (other than work relating to the erection of a temporary building) must be carried out in accordance with the requirements of the *Building Code of Australia* (as in force on the date of the application for the relevant construction certificate or complying development certificate was made)."

- 19 The *Environmental Planning and Assessment Regulation* 1994 was repealed, and replaced, by the *Environmental Planning and Assessment Regulation* 2000 (NSW), with effect from 1 January 2001.
- 20 The reference to clause 78A of the 1994 Regulation in the context of a Development Approval issued on 23 January 2001 may have been an error, but nothing turns on that possibility. The work done by clause 78A in the 1994 Regulation was, in substance, done by clause 98 of the 2000 Regulation.
- 21 In any event, it is plain that the Regulations, generally, required standards set by the BCA to be complied with, and the focus of attention in the Separate Question is squarely upon the definition of "effective height" in the BCA.
- 22 References to BCA standards in the Regulations were ubiquitous. That can be illustrated by reference to:
- (a) clause 130 of the 2000 Regulation (replacing clause 77 of the 1994 Regulation), which required a certifying authority not to issue a complying development certificate for building work unless satisfied that the proposed building (not being a temporary building) would comply with the relevant requirements of the BCA as in force at the time the application for a certificate was made.
- (b) clause 145 of the 2000 Regulation (replacing clause 79G of the 1994 Regulation) which required that a certifying authority not issue a construction certificate for building work unless satisfied, *inter alia*, that the proposed building (not being a temporary building) would comply with the relevant requirements of the BCA as in force at the time the application for a construction certificate was made.
- (c) clause 155 of the 2000 Regulation (replacing clause 79P of the 1994 Regulation), which required that an occupation certificate contain, *inter alia*, a statement to the effect that the building was suitable for occupation or use in accordance with its classification under the BCA.
- 23 References to the BCA in the Regulations also reflected specific provisions in the regulation-making powers conferred on executive government in the *Environmental Planning and Assessment Act* 1979 (NSW).
- 24 Section 105(4) of the Act, which authorised the making of regulations for the purposes of Part 4 of the Act (dealing with Development Assessment), provided in 2001:

"The regulations may provide for the adoption and application of the Building Code of Australia".

25 The general regulation-making power in s 157 of the Act, during the same period, included s 157(3) in the following terms:

"A regulation may apply, adopt or incorporate any publication as in force from time to time".

26 Section 4(1) of the Act, during the same period, included the following definition of "Building Code of Australia":

"Building Code of Australia" means the document of that name published on behalf of the Australian Building Codes Board in October 1996, together with:

- (a) such amendments made by the Board, and
- (b) such variations approved by the Board in relation to New South Wales, as are prescribed by the regulations."

27 The extracted provisions of ss 105(4) and 157(3) remain, in those terms, in the Act as currently in force.

28 The definition of "Building Code of Australia" in s 4(1) of the Act, in its current form, has been modified so that it now reads as follows:

"Building Code of Australia" means the document, published by or on behalf of the Australian Building Codes Board, that is prescribed for purposes of this definition by the regulations, together with:

- (a) such amendments made by the Board, and
- (b) such variations approved by the Board in relation to New South Wales, as are prescribed by the regulations."

29 Clause 7 of the *Environmental Planning and Assessment Regulation 2000* (which had a counter-part in clause 5A of the 1994 Regulation) currently provides as follows:

"7 Building Code of Australia

(1) For the purposes of the definition of "Building Code of Australia" in section 4 (1) of the Act:

(a1) the document referred to in that definition is:

(i) the document published in October 1996 under the title *Building Code of Australia*, or

(ii) if the document referred to in subparagraph (i) (or any replacement document under this subparagraph) is replaced by another document published under a title that includes the words "Building Code of Australia" together with a reference to the year 2004 or a later year, that other document, and

(a) all amendments to that Code that are from time to time made by the Australian Building Codes Board are prescribed, and

(b) all variations of that Code that are from time to time approved by the Australian Building Codes Board in relation to New South Wales are prescribed.

(2) Any such amendment or variation comes into effect on the adoption date specified in that regard for New South Wales in the document by which the amendment or variation is published on behalf of the Australian Building Codes Board."

- 30 Whether nuanced changes in the language of this legislation could have significance in other contexts, nothing appears to turn on them in these proceedings. It is sufficient, for these proceedings, to make three general observations. First, the BCA is and was at all material times a publication of the Australian Building Codes Board rather than a form of subordinate legislation in its own right. Secondly, at all material times the BCA had express legislative recognition. Thirdly, regulations under the *Environmental Planning and Assessment Act 1979* made within power have, at all material times, provided for "the adoption and application" of the BCA.

THE FOCUS OF DEBATE

- 31 With an agreed starting point on Level 9 of the proposed Building (with a relative level of 43.19 metres) as the height of the floor of the "topmost storey", the focus for attention in addressing the Separate Question is whether "the floor of the lowest storey providing direct egress to a road or open space", within the meaning of the definition of "effective height", as depicted on the plans dated 26 October 2001 (which have been admitted into evidence as Exhibits "P3", "P4" and "P5") was:
- (a) at the height of the pedestrian entrance to (and, more importantly, exit from) the "Upper Ground Level" of the Building (at a relative level of 18.19 metres), *via* doors, under cover and five or so steps up from the footpath on Market Street; or
 - (b) at the height of the vehicular entrance to (and exit from) the Building (at a relative level of 17.19 metres), at the level of that footpath, leading down a slight gradient to a car parking area on what here may be described as the "Lower Ground Level" of the Building.
- 32 Although, for convenience, I have here used the expressions "Upper Ground Level" and "Lower Ground Level", both areas are depicted on the one "Ground Floor Plan" admitted into evidence as Exhibit P3. On one view, the Ground Floor was split into these two Levels.
- 33 Although, for convenience, reference may be made to points of "entrance" to the proposed Building, the focus of the definition of "effective height" is, by virtue of the word "egress", on points of exit. For the most part, this distinction may not be important. However, I do not exclude the possibility that it may have some importance, for example, in the regulation of the types of doors or other barriers that might affect the flow, or direction, of movement through a point of entrance/exit.
- 34 If (as the Defendants contend) the lower point of measurement is the pedestrian entrance, the proposed Building had an effective height of 25 metres.

- 35 If (as the plaintiff contends) the lower point of measurement is the vehicular entrance, the proposed Building had an effective height of 26 metres.
- 36 Debate about the meaning, and application, of the expression "effective height" focussed largely upon the definition of that term as set out in paragraph 17 of the Statement of Agreed Facts.
- 37 Some reference was, however, also made to the definitions of "Storey" and "Open space" contained in the version of the BCA the subject of construction.
- 38 Those terms were defined as follows:

"**Storey** means a space within a building which is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above, but not -

(a) a space that contains only -

(i) a lift shaft, stairway or meter room; or

(ii) a bathroom, shower room, laundry, water closet, or other sanitary compartment; or

(iii) accommodation intended for not more than 3 vehicles; or

(b) a mezzanine.

Open space means a space on the allotment, or a roof or similar part of a building adequately protected from fire, open to the sky and connected directly with a public road."

- 39 As an aid to understanding the plans referred to in the Separate Question, photographs of key features of the Building, as constructed, were admitted into evidence (as Exhibit P2) without objection. The focus for attention remains, however, on the plans - which depict the Building as proposed to be constructed.

A DIFFERENCE IN PERSPECTIVE

- 40 In the course of the trial of the separate question the competing contentions of the parties demonstrated a fundamental difference in perspective on three topics: First, the evidentiary, or persuasive, value (if any) to be attributed to observations about the concept of "effective height" published in the *Guide to the Building Code of Australia* ("the Guide"), which is said to be a companion manual to the BCA; secondly, the relevance of the internal features of the proposed Building to exposition of the word "egress" in the definition of "effective height"; and, thirdly, the admissibility of an expert opinion as to the meaning, and application, of the expression "effective height";

THE GUIDE TO THE BCA

- 41 The Guide and the BCA are both published by the Australian Building Codes Board, a public body supported by all three tiers of government (national, state and local) in Australia.
- 42 Subject to relevance, a copy of extracts from the Guide was admitted into evidence as Exhibit "PX6".
- 43 The following extract from the introductory paragraphs of the Guide explains the relationship between the Guide and the BCA:

"The Guide to the Building Code of Australia (the Guide) is a companion manual to the Building Code of Australia 1996 (BCA). It is intended as a reference book for people seeking clarification, illustrations, or examples, of what are sometimes complex BCA provisions.

The two books should be read together. However, the comments in this Guide should not be taken to override the BCA. Unlike the BCA, which is adopted by legislation, this Guide is not called up into legislation. As its title suggests, it is for guidance only. Readers should note that State and Territories may have variations to BCA provisions. This Guide does not cover those variations. ...

The Guide generally explains the intent behind the provisions [of the BCA], and why building proponents, need to meet such standards. For example, the Guide clarifies why certain fire-resistance levels (FRLs) are required. It also assists readers by referring them to other related topics or sections in the Guide.

Not all the clauses and sub-clauses in the BCA are covered in the Guide. Those not dealt with have been found to be self-explanatory. The guide contains a number of examples - some written, others in diagram form - which help illustrate provisions. These examples are not absolute, as they cannot take into account every possible permutation of a building proposal. Again, they are intended as a guide only. Other clauses of the BCA must be complied with.

The information in this Guide is provided by the Australian Building Codes Board (ABCB) and is intended as an information service primarily for building professionals. It is published in conjunction with CCH Australia Limited.

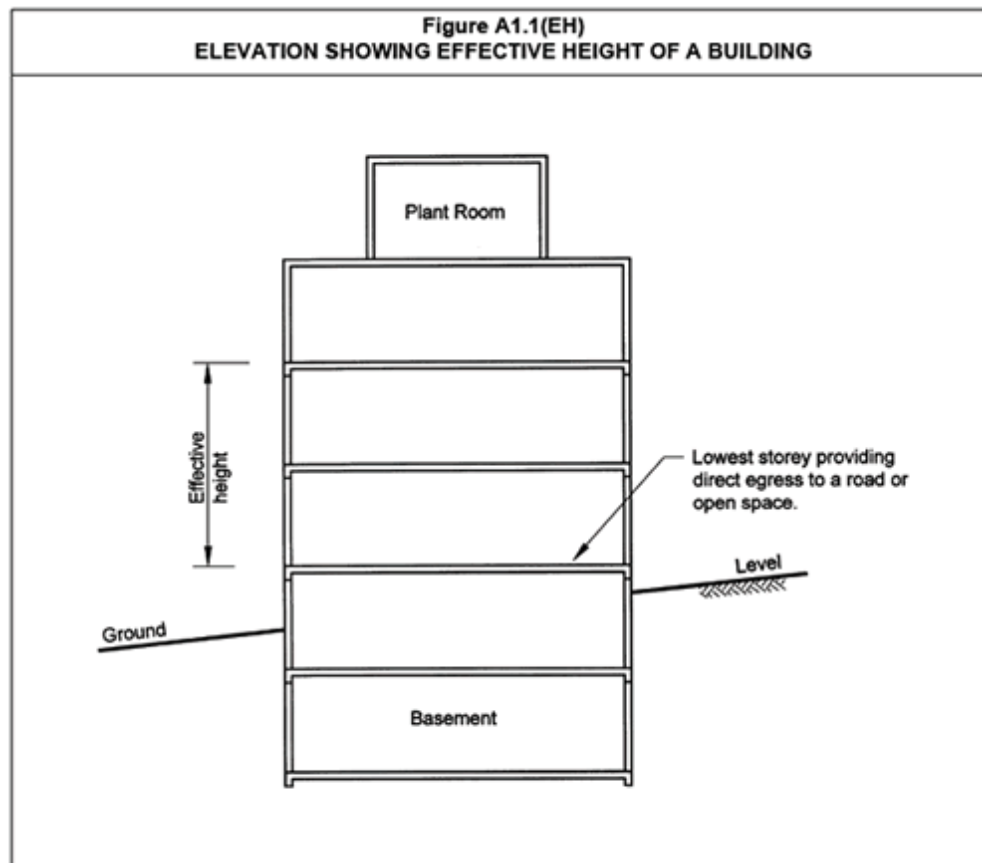
Because the Guide does not have regulatory force, neither the ABCB nor CCH Australia Limited accept any responsibility for its contents when applied to specific buildings or any liability which may result from its use..."

- 44 The Defendants contend that the Court's construction of the text of the definition of "effective height" in the BCA can, and should, be informed by the commentary on that concept in the Guide. They draw strength from the fact that the Guide expressly addresses the meaning of "effective height" in the BCA. That fact provides confirmation, they submit, that the BCA definition of "effective height" was not regarded as "self-explanatory" by the Australian Building Codes Board, the publisher of both the BCA and the Guide. They rely on this to contend that reference to the Guide is indispensable to a correct construction of the expression "effective height", and to contend that something other than a "literal" or "grammatical" interpretation of the expression is required. They characterise their approach as a "purposive" interpretation, an appellation they deny to the approach of the plaintiff.
- 45 In their reliance upon the Guide the Defendants point particularly to the following extract (on page 2054):

"Effective height

Measures the height of a building for safety purposes. Effective height is measured from the lowest storey providing direct egress to a road or open space (this will usually be the level at which the fire brigade would enter) - to the floor of the topmost storey. Plan rooms and spaces at the top of the building used for maintenance purposes are not included in effective height. See Figure A1.1(EH)."

46 Figure A1.1(EH) was depicted in the Guide as follows:



47 This illustrative diagram, "Figure A1.1(EH)", is not particularly helpful to an understanding of how the definition of "effective height" might operate, despite the Defendants' reliance upon it. It does not, for example, depict any point of "direct egress to a road or open space". Its focus appears to be upon a demonstration of what is meant by the expression "the floor of the topmost storey (excluding the topmost storey if it contains only heating, ventilating, lift or other equipment, water tanks or similar service units)". There is no issue in the present proceedings about identification of the material high point of the building. Identification of the low point is at the heart of the controversy here.

48 It is common ground between the parties that exclusion of equipment areas from "the topmost storey" illustrates an emphasis in the definition of "effective height" upon the safe evacuation of people from buildings. The storeys encompassed within the parameters of the definition are those likely to be routinely occupied by people; people who, in an emergency, may need to be evacuated to a place of safety, "a road or open space".

49 Of greater significance to the contentions of the Defendants than the diagram in

the extract from the Guide is probably the reference to the fire brigade. The Defendants contend that the most likely point of entry for the fire brigade, in the event of a fire in the building, would be the Upper Ground Floor pedestrian entrance, not the vehicular entrance to the Lower Ground Floor car park. Against that contention, it should be noted that the definition of "effective height" speaks of "egress", without reference to its converse "ingress", and makes no reference to the fire brigade.

- 50 The plaintiff contends for construction of the text of the definition of "effective height" in the BCA, without reference to the Guide.
- 51 To reinforce the Defendants' case, the Council (over the objection of the plaintiff) adduced expert, opinion evidence, from a Building Surveyor, Mr Michael Wynn-Jones. His qualifications as an expert were not challenged. However, the admissibility of his opinions was.
- 52 His evidence was received, subject to a general objection as to relevance, as on a *voir dire*, on the basis (accepted by all parties) that a ruling on the admissibility of the evidence would be incorporated in the Court's determination of the Separate Question. Expediency, and the absence of opposition to its adoption, commended this procedure (for which *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Limited* (2002) 25 WAR 511 at 541 [100] stands as a precedent) despite the risk, identified in *Clark v Ryan* (1960) 103 CLR 486 at 492 and 507, that a witness engaged as an expert may be deployed as an advocate.

THE PROVINENCE AND NATURE OF THE BCA

- 53 The defendants' heavy reliance upon the Guide and the opinion evidence of a Building Surveyor - either as evidence or submissions - invited debate about the legal status of the BCA and whether, in the course of construing the BCA, the Court can, or should, have recourse to extrinsic materials.
- 54 That debate extended to a consideration of whether the BCA was an "instrument" within the meaning of s 3 of the *Interpretation Act* 1987 (NSW) - so as to attract the operation of the Act by virtue of s 5(1) - or, more particularly, a "statutory rule" within the meaning of s 21 of that Act so as to engage ss 33 and 34 of the Act.
- 55 This debate was, at heart, a manifestation of the parties' different perspectives of the case.
- 56 Section 33 of the *Interpretation Act* has, at all material times, provided that, "[in] the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule... shall be preferred to a construction that would not promote that

purpose or object".

- 57 Section 34(1) has, at all material times, provided that "[in] the interpretation of a provision of an Act or statutory rule, if any material not forming part of the Act or statutory rule is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material" either to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision or to determine the meaning of the provision if the provision is ambiguous or obscure or the ordinary meaning conveyed by the text leads to a result that is manifestly absurd or unreasonable.
- 58 As a counter balance to that, s 34(3) has, at all material times, provided that, "[in] determining whether consideration should be given to any material, or in considering the weight to be given to any material, regard shall be had, in addition to any other relevant matters, to ... the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision ... and the need to avoid prolonging legal or other proceedings without compensating advantage".
- 59 It is not necessary for the determination of the current proceedings to decide whether the BCA was, or was not, in 2001 (or at some other time) a legislative "instrument" or "statutory rule" so as to engage ss 33 and 34 of the *Interpretation Act*.
- 60 As was observed of a different form of "standards code" in a different legislative context, in *NSW Food Authority v Nutricia Australia Pty Limited* (2008) 74 NSWLR 148 at 161[68], the BCA appears always to have been something of a hybrid.
- 61 Whatever side of the line it might be thought to fall on for the purposes of the definitions of "instrument" and "statutory rule" in the *Interpretation Act*, the task for the Court in these proceedings is to construe it as a formal document designed to define standards, for the promotion of public safety, in the construction of buildings. As will become apparent, I have formed the view that the text of the definition of "effective height" in the Code is clear in its intendment, and the clarity that attaches to it can generally be justified by reference to either a "literal" or "grammatical" approach to construction or a "purposive" one, whether or not recourse is had to ss 33-34.
- 62 In the context of these proceedings, debate about different approaches to interpretation is an arid distraction. It does not resolve any substantive controversy. It simply relocates the same underlying controversies to a higher level of abstraction. Debate about the meaning of words becomes a debate about the purpose, or purposes, they serve.

CONFIGURATION OF THE BUILDING AND CONSTRUCTION OF "EFFECTIVE HEIGHT" IN THE BCA

- 63 A second fundamental difference in the perspectives of the parties (in addition to that relating to the evidentiary or persuasive value of the Guide) focuses upon the relevance, or otherwise, of the internal configuration of the proposed Building.
- 64 The plaintiff contends that the internal configuration was irrelevant beyond identification of a point of "egress" from the Building "to a road or open space."
- 65 The defendants contend that the internal configuration of the Building was of critical significance because the word "egress", located in a context that connects references to "the topmost storey" and "a road or open space", required consideration of how an evacuee of the topmost storey would exit the Building (*via* Fire Stairs) in an emergency.
- 66 In the final analysis, the question becomes one of degree. In common usage, the word "egress" (derived from the Latin noun "egressus", related to the verb "egredior") means "a way out". That invites the question, "Way out from where?". The Plaintiff answers that question, "the building"; the defendants, "the topmost storey of the building". Either answer might be thought to have been available.
- 67 The word "direct" (in the expression "direct egress") does not, of itself, resolve the debate. It too can be read, in the context of the definition of "effective height", as directed towards the point at which a person could exit (or enter) the building or the route that connected that point and the topmost storey.
- 68 Ultimately, a choice between these competing perspectives depends on a purposive construction of the definition of "effective height", at least to this extent. The height of a building was used to determine the content of the fire safety regulatory requirements required for it, including its internal features. The purpose of the definition of "effective height" was to provide an objective measure to permit an assessment to be made of fire safety regulatory requirements that would, or may, have a bearing on the internal configuration of the building the subject of measurement.
- 69 For this reason, the internal configuration of a building could not be the principal driver of the meaning of "effective height" and accordingly, in my opinion, the definition of that term looked principally to the points of egress (exit) from a building rather than a line of march between the topmost storey and the point(s) of egress (exit).

- 70 However, the definition of "effective height" assumed certain things, one of which was that a building had a point of "egress" to a road or open space. In its context the word "egress" needed to be located across a spectrum of potential meanings. At one end, an external door leading from, and to, a storeroom, with no accessible pathway within a building to or from the rest of the building, or a substantial part of the building, could not reasonably have been counted as a point of "egress" within the contemplation of the definition of "effective height". In my opinion, there must have been at least one such pathway.
- 71 At the other end of the spectrum, the concept of "egress" (qualified or not by the word "direct") did not, of itself, require that there be a clear and unimpeded pathway along a dedicated route from the topmost storey to an open space or road.
- 72 In my opinion, the word "egress" implied identification in the features of a building of: (a) at least one, and possibly more than one, point at which occupants of the building could exit it to a road or open space; and (b) the existence within the building of a pathway, or pathways, reasonably accessible, from the point of egress to the whole of the building or, at least, a substantial part of it.
- 73 A feature of the proposed Building that allowed both the Upper Ground Level and the Lower Ground Level to satisfy this requirement in terms of access to the whole building was the short stairway that connected the two levels. It allowed for pedestrian movement from the Upper Ground Level down to the Lower Ground Level or upwards in the opposite direction. In any event, both the pedestrian entrance at the Upper Ground Level and the vehicular entrance at the Lower Ground Level provided access to a substantial part of the proposed Building.
- 74 With an understanding of the word "egress" as a point of exit rather than an escape route, the language of the definition of "effective height" sits comfortably with identification of the Lower Ground Level as "the lowest storey providing direct egress to a road or open space" at the point of intersection between the vehicular entrance to the proposed Building and the footpath on Market Street.
- 75 The Lower Ground Level falls within the definition of "storey". It was a "space within a building which was situate between one floor level and the floor level next above". It provided accommodation for well in excess of three vehicles. The fact that paragraph (a)(iii) of the exclusions from the definition contemplated "accommodation of not more than three vehicles" confirms that a larger car parking area, such as that of the proposed Building, was capable

of falling within the definition.

- 76 That same paragraph also distinguishes this case from *The Owners - Strata Plan No. 75903 v Dix* (2011) 80 NSWLR 186, where Hall J contrasted a definition of "storey" in the BCA (slightly different from the definition under consideration here) and a definition of "storey" in clause 57BC(5) of the Home Building Regulation 1997 (NSW): see 80 NSWLR 186 at [29], [32], [97]-[98], [100] and [108].
- 77 The Lower Ground Level had "direct egress" to Market Street, patently both a "road" and an "open space". It could hardly have been more direct. The entrance to, and exit from, the Lower Ground Level accommodated vehicles driven into, and out of, the car park. No awning covered the point of entrance/exit.
- 78 On the other hand, the language of the definition of "effective height" does not sit altogether comfortably with identification of the pedestrian entrance to the Upper Ground Level of the Building as "the floor of the lowest storey providing direct egress to a road or open space". It plainly fell within the definition of "storey", but other features call for comment.
- 79 The pedestrian entrance to the Building, *via* doors that divided a Foyer area (inside the doors) from a covered verandah area (outside the doors), was several steps up from the footpath on Market Street. If one were to focus attention on the "space" either side of the doors, the existence of the covered verandah raises a question whether that space could be said to have been "open to the sky" within the definition of "open space" in the BCA. No attention has been given in the evidence to whether it could be said to have been "adequately protected from fire" within the meaning of the definition of "open space". I am prepared to assume so, but the correctness of that assumption is not self-evident.
- 80 Moreover, the fact that egress from the Building *via* these doors required a person to pass through the verandah area and down steps before reaching the footpath on Market Street gives the word "direct" in the definition of "effective height", and the expression "connected directly" in the definition of "open space", more work to do in their application to the pedestrian entrance to the Upper Ground Floor than they would have had to do in relation to the vehicular entrance to the Lower Ground Level.
- 81 Nevertheless, the floor level was the same (RL18.19) on either side of the entrance doors on the Upper Ground Level; the covered verandah area was not large; and the steps to the footpath were not many. That being so, the Upper Ground Level could reasonably have been characterised as a "storey providing direct egress to a road or open space" within the definition of "effective height". It might also be noted that, at the Upper Ground Level,

and immediately adjacent to the Foyer doors, was a single door that opened out to the covered verandah area from an area marked on the Ground Floor Plan as "Fire Passage".

82 To meet difficulties for their case arising from the language of the definition of "effective height", the Council, with the concurrence of Allianz, advanced the following contentions:

(a) The proposed Building should be characterised as having two parts - a high rise part and a low rise part - each with its own egress system and each physically separated from the other. The low rise part comprised a basement level and a car park below Upper Ground Level. The high rise part comprised 10 levels above ground, and accommodated car parking, commercial and residential units.

(b) In order to determine the "effective height" of the proposed Building, as defined by the BCA, it was "necessary" to have recourse to the Guide as "[the] Guide clarifies the definition in the BCA and shows that in determining effective height at the relevant time it was necessary to analyse the diagram" shown in the Guide (Figure A1.1 (EH)).

(c) By reference to that diagram:

(i) the ground level of the earth (being the level of the street) has no bearing on the calculation of "effective height". The diagram shows that a building can have an "effective height" of 25 metres even though it is much taller when its height is measured from the Upper Ground Level.

(ii) for the purposes of determining "effective height", **the lowest storey is calculated by reference to how an occupant would exit from the topmost storey**. This is why the height is "effective" because it is the distance that an occupant would, in effect, have to travel.

(iii) the car parking storey of the proposed Building (that is, the Lower Ground Level and the associated Basement area beneath it) is not taken into account in the determination of the lowest storey for "effective height". The diagram does not depict the exits from the basement level and level above the basement. However, as a matter of commonsense and experience, every building has fire exits from the car park. These fire exits from the car park are not depicted in the diagram as they are irrelevant in determining "effective height".

(iv) the positioning of fire fighting equipment and fire trucks is not considered in determining "effective height".

(d) The Guide also recognises that the lowest storey providing direct egress to

a road or open space would usually be the level at which the fire brigade would enter. The fire brigade would not enter the proposed Building *via* the car park, which had its own exit system separate and distinct from the fire isolated exit serving the occupants inside the Building, including those at the topmost storey. The fire brigade would enter the Building *via* the pedestrian entrance to the Upper Ground Level, that being the level of the lift and fire isolated exit serving the topmost storey. The plans of the Building show that fire brigade services were proposed to be installed with access from the street and egress to the high rise part of the Building.

(e) In summary, the Guide makes clear that "effective height" is calculated by reference to the storey at which people exit the Building from the topmost storey, and not by reference to car parking levels, street levels or the location of fire fighting equipment.

83 Allianz supplemented the Council's submissions by advancing the following contentions:

(a) If the text of "effective height" is read without regard to context or purpose (ie, in a literal or grammatical sense), then the inclusion or addition of any (part of a) storey can increase the effective height of a building, so long as that (part of a) storey has "direct egress to a road or open space", regardless of whether that (part of a) storey is below ground and regardless of whether its inclusion is relevant to fire (fighting, rescue, access, egress).

(b) The purposive meaning of "effective height" is the vertical distance from the floor of the topmost storey to the floor of the storey providing the most direct egress (and hence also access) therefrom to a road or open space.

(c) Such a legal meaning is achieved by reading (or reading down) the text in the following way:

(i) "Effective height" means the height to the floor of the topmost storey... from the floor of the lowest storey providing **most** direct egress to a road or open space"; or (if thought necessary, to avoid further ambiguity)

(ii) "Effective height" means the height to the floor of the topmost storey ... from the floor of the ... storey providing **most** direct egress to a road or open space".

84 The reference to a "grammatical" meaning in the first of these contentions was accompanied by a reference by counsel for Allianz to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] and [78] in support of a submission in favour of a purposive construction.

- 85 Allianz also referred to DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (Lexis Nexis Butterworths, Australia, 7th ed, 2011) at paras [2.32] - [2.36] in support of submissions made about ascertaining the "legal meaning" of words in circumstances in which the text of an instrument needs to be read in a manner sympathetic to its underlying purpose, if need be by implying words or reading them down.
- 86 I find, as a fact, that the proposed development depicted in the plans identified in the Separate Question comprised a single building. The two "parts" of which the defendants speak were both part of the same structure. They were connected, internally, by stairs, albeit that the Fire Stairs (and lifts) did not service the Lower Ground Level. Their "egress systems", to use the defendants' language, were, to that extent, integrated. Their presentation in a single "Ground Floor Plan" is consistent with characterisation of the Lower Ground Level and the Upper Ground Level as conjoined parts of the same building.
- 87 If that characterisation can, or should, take into account the accessibility of the two areas to people, or evacuation of people from them in the event of a fire or other emergency, those factors reinforce the conclusion that we are here dealing with a single building. The plans contemplated that people could, and no doubt would, move between the two "parts" of the Building in the ordinary course.
- 88 Whatever might be the precise legal status of the BCA, in the context in which it falls for consideration in these proceedings, I do not find any material assistance in either: (a) the defendants' distinction between a "literal" or "grammatical" approach, on the one hand, and a "purposive" approach, on the other hand, to construction of the expression "effective height"; or (b) reference to the treatment of that expression in the Guide.
- 89 In my opinion, the language used in the text of the BCA is clear. That clarity is no less for the plaintiff's construction of it being criticised by the defendants as the product of a "literal" or "grammatical" approach to construction, if that is the process from which it has emerged.
- 90 Both sides of the records appeal, more or less, to a purposive approach. Both set the definition of "effective height" within the context of a need to facilitate the safe evacuation of people from buildings. The defendants derive comfort from the word "height", inviting the Court to give emphasis to the possibility of evacuees descending from higher storeys to the Upper Ground Level as their first point of egress and to the possibility of members of the fire brigade entering the Building through the Upper Ground Level doors and moving upwards rather than entering the Building *via* the car park. The plaintiff invites the Court to notice the possibilities that people might need to be vacated from

the car park no less than from higher storeys, and that, if the Upper Ground Floor area were for some reason to be blocked, the Lower Ground Level might remain accessible to evacuees from all quarters.

- 91 The construction for which the defendants contend could possibly, if adopted, carry the consequence that the proposed Building required less stringent fire safety and control measures than if the plaintiff's contentions were to prevail. That bears, at least, a touch of irony that does not readily remain unnoticed. At the end of the day, however, nothing turns on it given the way the parties conducted the trial of the Separate Question. There was no detailed consideration of the fire safety regulatory requirements applicable to the proposed Building.
- 92 Returning to the text of the BCA, I note that there is no suggestion on either side of the record that the language used in the definitions of "effective height", "storey" and "open space" in the BCA was anything other than common English. This is not a case in which the language to be construed had a special trade, or technical, meaning justifying the reception of evidence to explain it. Evidence about the meaning of an ordinary English word in a statute or document is generally inadmissible: *The Australian Gas Light Company v The Valuer-General* (1940) 40 SR (NSW) 126 at 137; *Dyson v Pharmacy Board of NSW* (2000) 50 NSWLR 523 at 532; DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (Lexis Nexis Butterworths, Australia, 7th ed, 2011), paragraphs [4.15]-[4.19].
- 93 In deciding how to construe the BCA, and what (if any) guidance might be obtained from the Guide, I place no store in the possibility that one or both of those documents may have been drafted by non lawyers. In *NSW Food Authority v Nutricia Australia Pty Limited* (2008) 74 NSWLR 148 at 162[71] Simpson J took into account, as a factor in favour of "a more liberal, or more purposive, approach" to construction of a standards code, that it was a document drafted, apparently, by non lawyers. The defendants invite the Court to proceed here on the same basis. I see no justification for doing so. There is no evidence before the Court as to whether or not the BCA or the Guide were drafted by non lawyers or by people who had no access to legal assistance.
- 94 In any event, the BCA is a public document, intended to be relied upon by members of the public who cannot have imposed upon them any burden of inquiry as to the legal qualifications or otherwise of the person, or persons, responsible for drafting it.

THE RELEVANCE OF THE GUIDE AND THE ADMISSIBILITY OF OPINION EVIDENCE

- 95 **The Ruling on Admissibility:** Having deferred ruling on the admissibility of the opinion evidence proffered by the defendants in elaboration of both the BCA and the Guide, I turn to the third fundamental difference in the perspectives of the parties: the evidentiary value of the Guide and expert opinion relied upon by the defendants.
- 96 In that context, I formally rule that the Guide is not relevant to a determination of the proper construction of the definition of "effective height" in the BCA, and the opinion evidence of Mr Wynn-Jones should not be admitted into evidence. None of that material has evidentiary value, whatever use might be (and is) made of it as an aid to submissions.
- 97 **Admissibility of Expert Evidence:** The opinions expressed by Mr Wynn-Jones in the Report that embodied his evidence in chief were not limited to questions about the meaning of the definition of "effective height" and the application of that definition to the proposed Building. They extended to a consideration of whether (upon an assumption that the proposed Building had an effective height of 26 metres) the Council's assessment of the effective height as 25 metres was undertaken "in a manner that would be widely accepted in Australia by peer professional opinion as competent professional practice at the relevant time".
- 98 That extended discussion may be relevant to a later stage of the principal proceedings (when the focus may shift to whether the Council was negligent); but it cannot be relevant to a determination of the separate question presently before the court. On any view, it must be excluded from the evidence on the trial of the separate question.
- 99 In what follows, references to the opinion evidence of Mr Wynn-Jones relate to his expressions of opinion about the meaning, or application, of the definition of "effective height".
- 100 I distinguish Mr Wynn-Jones' opinion evidence (which I do not admit into evidence) from evidence given by him by way of a descriptive explanation of plans of the proposed Building (which I do admit).
- 101 The latter category of evidence is admitted as an aid to reading the plans referred to in the Separate Question, and understanding the parties' competing contentions. It is not admitted for any other purpose or in substitution for the plans referred to in the Question and themselves admitted into evidence.
- 102 Mr Wynn-Jones' descriptive explanations of the plans of the proposed buildings comprise: first, diagrams, and a photograph, that simplify and highlight particular features of the proposed Building as depicted in the plans referred to in the Separate Question; and, secondly, narrative statements that describe

those features, as a matter of observation, without overtly trespassing on the field of opinion.

- 103 To ground those parts of the evidence, to the extent that they might be thought to include (contrary to my intention) an element of opinion (interpretation), I also admit into evidence Mr Wynne-Jones' *Curriculum Vitae* and related statements (to establish his expertise) and his summary of the primary materials upon which his report was based. The balance of the Report, and the oral evidence given by Mr Wynn-Jones referable to the Report generally, is not admitted into evidence, with one exception.
- 104 That exception relates to his formal identification of the stairway between the Lower Ground Floor and the Upper Ground Floor. That stairway did not form part of the Fire Stairs that were proposed to service the Upper Ground Level and all Levels up to and including Level 9. But it did contemplate pedestrian movement between the Lower and Upper Ground Floors. The fact, and character, of those stairs is apparent in the Ground Floor Plan (admitted into evidence as Exhibit P3) and the Section A-A drawing (admitted into evidence as Exhibit P5), which are amongst the plans referred to in the Separate Question.
- 105 This internal stairway between the Lower and Upper Ground Levels might be thought to have some bearing on an application of the concept of "egress" in the definition of "effective height". The Plaintiff relies upon the existence of the stairway, so far as any internal features of the proposed Building might be regarded as relevant, as indicative of the connection between the Lower and Upper Ground Levels. The Defendants contend that the stairway is not relevant because it was not proposed as part of either the Fire Stairs or the lift system (although proximate to both) and, unlike the Fire Stairs, it was not planned as a fire-isolated stairway.
- 106 In a document accompanying these Reasons for Judgment I provide a detailed ruling on the admissibility of evidence to Mr Wynn-Jones' evidence.
- 107 If (contrary to my primary ruling) the opinion evidence of Mr Wynn-Jones were otherwise admissible, I would (pursuant to s 135 of the *Evidence Act* 1995 (NSW)) refuse to admit it on the basis that its probative value is substantially outweighed by the danger that it might be unfairly prejudicial to the plaintiff (within the meaning of s 135(a) or misleading or confusing (within s 135(b))).
- 108 In terms of relevance, Mr Wynn-Jones' evidence is generally one step removed from the Guide insofar as it comprises statements of opinion. His opinion about the meaning of the BCA, or the application of the BCA to the facts of the case before the Court, has no evidentiary value, helpful though that "evidence" has been as an elaboration of the defendants' submissions. Ascertainment of the law relevant to a matter before a court and its proper

application to the facts of the particular case are of the essence of the judicial function and duty; although those processes are properly the subject of submission, evidence of opinion, whether as to the identification of the relevant law or as to its proper application, is not admissible: *Allstate Life Insurance Co v Australia and New Zealand Banking Group Limited (No 6)* (1996) 64 FCR 79 at 83 per Lindgren J, approved by the Court of Appeal in *Faucett v St George Bank Limited* [2003] NSWCA 43 at [48].

- 109 **Relevance of the Guide:** The Guide adds nothing material to the language of the text of the BCA under consideration or, if it does (for example, in its reference to the fire brigade) that addition is a gloss on the language of the BCA. The introductory paragraphs of the Guide expressly disclaim any pretence of the Guide rising higher than the text of the BCA.
- 110 At the end of the day, it is that text that must be construed. It is that text, not anything in the Guide, that was incorporated by reference in the Development Approval identified in paragraph 8 of the Statement of Agreed Facts. It is that text, not anything in the Guide, that was the subject of "adoption and application" by regulations made under the *Environmental Planning and Assessment Act, 1979*.

CONCLUSION

- 111 The focus of attention is, and should remain, on the text of the BCA. The task of the Court is to construe the definition of "effective height" according to law, not by reference to what may, or may not, be the opinion of an expert or an assumption about the practical operation of the BCA amongst fire control experts.
- 112 In my opinion, the text of the BCA is clear and is capable of ready, reasonable application to the plans identified in the separate question. That flows from construction of the words "direct egress" as referring to a point of exit rather than a line of march from the top storey of the proposed Building and, to a lesser extent, from the internal connection, *via* stairs, between the Lower Ground Level and the Upper Ground Level on the Ground Floor. The existence of the internal stairway between the Upper and Lower Ground Levels reinforces, but is not essential to, characterisation of the vehicular entrance to, and exit from, the proposed Building (at RL17.19) as a point of egress. That point was lower than the pedestrian entrance/exit at RL18.19.
- 113 In my opinion, the fact that, in the abstract, the pedestrian entrance to the proposed Building at the Upper Ground Level could have qualified as a point of egress to which the definition of "effective height" referred, does not detract from the fact that the vehicular entrance to the car parking area at the Lower Ground Level also fell within that description. The definition of "effective

height" was not inconsistent with a building having points of egress at more than one level.

114 In my opinion, the Lower Ground Level was "the lowest storey providing direct egress to a road or open space" of the proposed Building. Accordingly, the "effective height" of the proposed Building was 26 metres.

115 The Separate Question should be answered accordingly.

116 Subject to any submissions that might be made to the contrary, the costs of determination of the Separate Question should be paid by the defendants.

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Decision last updated: 19 October 2012