SUPREME COURT OF QUEENSLAND

CITATION:	*AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 44
PARTIES:	**AAD DESIGN PTY LTD** ACN 090 793 570 (applicant) **v** **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	Appeal No 4375 of 2011 P & E Appeal No 3169 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	9 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	8 September 2011
JUDGES:	Chesterman JA, Margaret Wilson AJA, Philippides J Separate reasons for judgment of each member of the Court, Margaret Wilson AJA and Philippides J concurring as to the orders made, Chesterman JA dissenting
ORDERS:	**1. Leave to appeal granted.** **2. Appeal dismissed.** **3. The parties are to provide written submissions as to costs in accordance with Practice Direction No 2 of 2010 (paragraph 52).**
CATCHWORDS:	ENVIRONMENT AND PLANNING – DEVELOPMENT CONTROL – PLANNING TERMINOLOGY – OTHER TERMS – where applicant applied for three development permits – where each application sought permission to make a material change of use of the land to "residence not complying with house code" – where respondent would not proceed with applications – where applicant appealed to Building and Development dispute Resolution Committee – where Committee dismissed the appeal on basis application was not properly made – where applicant appealed to the Planning and Environment Court – where Planning and Environment Court dismissed appeal – where applicant seeks leave to appeal – whether student accommodation falls within

	the definition of house or multi-unit development under the Brisbane City Plan 2000 (as amended)
	Sustainable Planning Act 2009 (Qld), s 498
	BHP Billiton Iron Ore Pty Ltd v National Competition Council (2008) 236 CLR 145; [2008] HCA 45, cited *Brown v Idofill Pty Ltd* (1987) 64 LGRA 218, cited *Chiefari v Brisbane City Council* [2005] QPELR 500; [2005] QPEC 9, cited *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629; [1947] HCA 17, cited *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390; [1955] HCA 27, cited *Connaught Fur Trimmings Ltd v Cramas Properties Ltd* [1965] 1 WLR 892, cited *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; [1981] HCA 26, cited *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd* [2010] 1 Qd R 439; [2009] QCA 231, cited *Livingstone Shire Council v Brian Hooper & M3 Architecture & Ors* [2004] QPELR 308; [2003] QPEC 63, cited *Marana v Commissioner of Taxation* (2004) 141 FCR 299; [2004] FCAFC 307, cited *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449; [1925] HCA 5, cited *Pacific Seven Pty Ltd v City of Sandringham* [1982] VR 157; [1982] VicRp 14, cited *Pearson v Thuringowa City Council* [2006] 1 Qd R 416; [2005] QCA 310, cited *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28, cited *R v Berchet* (1688) 1 Show KB 106; [1794] EngR 1653, cited *Re BHP Billiton Petroleum Pty Ltd v Chief Executive Officer of Customs* (2002) 69 ALD 453; [2002] AATA 705, cited *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, cited *Tainui Pty Ltd v Brown* (1988) 65 LGRA 22, cited *The Commonwealth v Baume* (1905) 2 CLR 405; [1905] HCA 11, cited *Yu and Leung v Brisbane City Council & Anor* [2006] QPELR 102; [2005] QPEC 78, cited *Z W Pty Ltd v Peter R Hughes & Partners Pty Ltd* [1992] 1 Qd R 352, cited
COUNSEL:	R D Lister SC, with N Loos, for the applicant M D Hinson SC, with J G Lyons, for the respondent
SOLICITORS:	Synkronos Legal for the applicant Brisbane City Legal Practice for the respondents

[1] **CHESTERMAN JA**: The applicant applied to the respondent for three development permits in respect of parcels of land at Annerley, Woolloongabba, and Greenslopes. Each application sought permission to make a material change of use of the land to "residence not complying with house code". The structures on each parcel have multiple bedrooms; 10, 11 and nine respectively. The applicant's intention was to rent out the bedrooms to students.

[2] On 9 July 2010 the respondent by its Principal Urban Planner wrote to the applicant intimating that the respondent would not proceed with the applications. It wrote:

> "I … advise that the application is not a 'properly made application'. … The application is not properly made because:
>
> - Council considers that the proposal applied for is defined as a Multi-unit Dwelling (Boarding House – 10 Units) consistent with the definition of a Multi-unit Dwelling (Boarding House) in Chapter 3 of the *Brisbane City Plan 2000*.
>
> - The level of assessment for a Multi-unit Dwelling … is Impact Assessment."

In its application to be considered as "properly made" Council requires:

> "Amended IDAS Forms and planning reports for Impact Assessable Multi-Unit Dwelling …
>
> The fees … of $16,310 … ."

[3] The applicant appealed to the Building and Development Dispute Resolution Committee ("Committee"). On 24 August 2010 the Committee concluded:

> "Based upon the evidence provided by Council, the proposed 'student accommodation' should be defined as a 'multi-unit dwelling', not a 'house'. As a consequence the Committee should dismiss the appeal on the basis the applications are "Not Properly Made" until such time that the applications are lodged as Impact Assessable, and the correct fees, forms and supporting mandatory documentation is provided by the appellant for all 3 development applications. The applications should be for Material Change of Use – Multi-unit Dwelling."

[4] There is a difference in the level of assessment required by the *Brisbane City Plan* 2000 ("Plan") depending on whether the proposals were for a house or a multi-unit dwelling. If the Committee were correct that the proposed use was "Multi-unit Dwelling" then the applications were subject to impact assessment. A less rigorous code assessment was applicable if the applicant was correct that its proposed use was that of a house. There is also a difference in the amount of the fees to accompany the applications. That consideration may be ignored.

[5] The applicant then appealed to the Planning and Environment Court ("P & E Court") against the Committee's decision that its applications were not properly made. On 6 April 2011 the P & E Court dismissed its appeal. The applicant now seeks leave to appeal pursuant to s 498 of the *Sustainable Planning Act* 2009 ("the Act"). An appeal may only be brought with the leave of the Court of Appeal and then on a point of law only.

[6] The three applications are relevantly identical. For that reason the application in respect to the land at Annerley was chosen for particular analysis. The result of that application will determine the others.

[7] The relevant features of the proposed development in Annerley were that:

(a) The land was improved with a detached residential dwelling containing 10 bedrooms;

(b) The proposed use was the accommodation of more than five unrelated persons for the purpose of student accommodation;

(c) Each student (or student couple) would rent a bedroom under a separate tenancy agreement with the owner. Rent was payable weekly: $150-$160 for a single room and $220-$240 for a bedroom to be shared by a couple;

(d) Each student, or student couple, would have made available to them their own area for food storage;

(e) The length of the tenancy would not be less than six months;

(f) The owner would provide furniture and whitegoods in the common areas of the house. The owner would also pay the electricity consumed by the tenants;

(g) The rent charged to the students included a component for the cost of electricity;

(h) The owner would arrange for the cleaning of the common areas once per week and supplied cleaning products and toilet paper for the premises.

[8] The result of the applications depended on whether the proposed uses fell within the definitions of "House" or "Multi-unit Dwelling" in s 10.2 of the Plan. The definitions are critical to the outcome of the application.

[9] "House" is defined as:

> "a use of premises principally for residential occupation by a domestic group or individual/s, that may include a secondary dwelling, whether or not the building is attached, but does not include a single unit dwelling".

The concluding phrase may be ignored.

[10] A "Multi-unit Dwelling" is defined as:

> "a use of premises as the principal place of longer term residence by several discrete households, domestic groups or individuals irrespective of the building form. Multi-unit dwellings may be contained on one lot or each dwelling unit may be contained on its own lot subject to Community Title Schemes. Examples of other forms of multi-unit dwelling include boarding house, retirement village, nursing home, orphanage or children's home, aged care accommodation, residential development for people with special needs, hostel, institution (primarily residential in nature) or community dwelling (where unrelated people maintain a common discipline, religion or similar). The term multi-unit dwelling does not include a house or single unit dwelling as defined elsewhere".

[11] In its reasons the Committee noted the respondent's argument:

> "• The proposed student accommodation falls under both the definition of "House" and "Multi-unit Dwelling" …
> • … where two or more definitions cover the proposal the 'best fit' approach must be adopted.

- … the best fit for the proposed use is the definition for 'Multi-unit dwelling'.
- … ."

which it adopted. It found that the proposed development best fitted the definition of "Multi-unit Dwelling", and therefore determined the proposals were not for a "House".

[12] The P & E Court in dismissing the appeal to it effectively endorsed the Committee's reasoning. The court said:

> [22] The detailed submissions provided to the Committee on behalf of the appellant make it clear that the use of the proposed developments could fit within the definition of a house. The respondent does not disagree. It is also clear that the use to which the premises would be put would satisfy the definition of a multi-unit dwelling. That is, it involves the use of premises as the principle place of longer-term residents by several discrete households, domestic groups and/or individuals.
>
> [23] In *Yu [and] Leung v Brisbane City Council & Anor* Rackemann DCJ in paragraph 16 went on to say:
>
> > "… where there are two or more defined purposes which are apt to cover a particular proposal, a 'best fit' approach is appropriate …"
>
> In support of that proposition, his Honour cited the judgment of Robin QC DCJ in *Livingstone Shire Council v Brian Hooper & M3 Architecture & Ors*. In *Yu [and] Leung* Rackemann DCJ was concerned with, among other things, the commercial character of a building and the definition of "house" under City Plan 2000. The best fit approach was also cited with approval by Wilson SC DCJ (as he then was) in *Chiefari v Brisbane City Council*, where the court was concerned with the meaning of the definition "Farm" in Brisbane City Plan 2000. His Honour relevantly said:
>
> > "… where, on any view, those activities are engaged in for the purpose of the appellant's business of vegetable wholesaler they are logically and conveniently defined as a warehouse use.
> >
> > The same conclusion is reached if the 'best fit' approach to the definitions is adopted. It can be an appropriate method of construction where there are two or more defined uses, each of which is apt to cover the proposal. … Because the dominant activity here is storage, the best fit is 'warehouse'." (footnotes deleted)
>
> [24] According to the respondent, when the focus is put on the particulars of the use of the premises, the best fit is a multi-

unit dwelling and not a house. I agree. While some of the features usually associated with a "boarding house" or "hostel" are absent, for example the provision of services such as meals, room cleaning and/or washing, there are a number of significant similarities. The right of residency is associated with a commercial arrangement whereby in consideration for the payment of rent the tenant is entitled to exclusive occupation of one of the bedrooms (but no other room) and the right to share the common areas of the premises and appliances therein. The rent also includes electricity and the owner provides cleaning products and toilet paper and arranges and pays for cleaning of the common areas. There would be very little (if any) common purpose or organisation among the tenants. In circumstances where the use of the premises is exclusively for the residency of students, it has some of the characteristics of "*community dwelling (where unrelated people maintain a common discipline, religion or <u>similar</u>)*". In this regard it should be noted that boarding house, hostel and community dwelling are but examples of forms of multi-unit dwelling meant to be included under that definition. It is not an exhaustive list of uses. It is also not without significance that, as was conceded by Mr Litster, on the appellant's construction, all other things being equal, a premises having any number of bedrooms being let to individual students would still fall within the definition of "House".

[25] It is true that both definitions include reference to the use of premises by an individual and/or individuals. However, it seems tolerably clear that the emphasis of the definition of House is more focused on the entity of a domestic group whereas the emphasis of the definition of Multi-unit dwelling is more directed to the existence of multiple independent "*individuals*", "*domestic group<u>s</u>*" and "*discrete household<u>s</u>*". The proposed use falls more comfortably under the latter descriptions than the former.

…

[28] Fundamental to whether or not a premises falls within the definition of "House", "Multi-unit dwelling" or "Single unit dwelling" is the use to which that premises is put. It is therefore necessary by reference to that use to appropriately characterise the premises in question. The last sentence of the definition of Multi-unit dwelling (as is indeed the case for the exclusions under House and Single unit dwelling) recognises that a premises may, at face value, be capable of falling under one or more of the definitions prescribed but than then makes it clear that it cannot be a house and/or a multi-unit dwelling and/or a single unit dwelling, or any combination thereof. It has to be one or the other. It is the characterisation of the use which determines under which definition the premises falls and once appropriately defined

> it is then prohibited from also being any one of the other defined uses under the plan.
>
> [29] Further, a premises with an abnormal number of bedrooms, each let on a commercial basis to individuals or couples of students on a relatively temporary basis does not sit comfortably with the common or normal understanding of what would constitute a house within a predominantly residential area. …
>
> …
>
> The construction of the definitions contended for by the respondent makes, with respect, most sense.
>
> [30] For the reasons given, the last sentence of the definition of Multi-unit dwelling does not prevent the application of the "best fit" test and, in this case, the best fit is under that definition."

[13] The applicant advances as grounds for a grant of leave to appeal that:

(a) The decision of the P & E Court is wrong and unless corrected will work an injustice on the applicant with respect to its proposed developments;

(b) The Court of Appeal should consider the proper application of the so called "best fit" test of construing planning schemes;

(c) The construction of the definitions of "House" and "Multi-unit Dwelling" in the Plan raise questions of general importance, at least to developers.

[14] There is sufficient substance in the grounds advanced to make it appropriate to grant leave to appeal. If the applicant makes good its point that its proposed developments fell within the definition of "House" then its applications will have been unfairly and improperly rejected. That is a substantial indication in favour of the grant of leave. In addition the determination of definitional difficulties in town planning schemes by reference to a "best fit approach" appears to be peculiar to the P & E Court and its authenticity and appropriateness are properly the subject of inquiry.

[15] The applicant's submissions take as their starting point the conclusion of the Committee, and the P & E Court, that the proposal satisfies both the definition of "House" and "Multi-unit Dwelling". The applicant did not dispute that its proposals were for multi-unit dwellings, as defined, but points to, and emphasises, the concluding phrase of the definition, "The term multi-unit dwelling does not include a house … defined elsewhere". The effect of this sentence, the applicant submits, is that where a development satisfies both definitions (i.e. is a "House" as defined and is also a "Multi-unit Dwelling" as defined) then by operation of the definitions themselves the development is a house and not a multi-unit dwelling. Primacy is given to the definition of "House". If a structure is a house but also a multi-unit dwelling then it is to be regarded as a house and not a multi-unit dwelling. Reliance was placed upon *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at 159 and *Re BHP Billiton v Chief Executive Officer of Customs* (2002) 69 ALD 453 at 472.

[16] The applicant submitted that in this situation the "best fit" canon of construing planning schemes had no place because the definitions in question themselves

determined how they were to operate. If a proposal was a house as defined it would be excluded from the definition of multi-unit dwelling by the express terms of that definition. The applicant submitted that the "best fit" test is "appropriate … where there are two or more defined uses, each of which is apt to cover the proposal"; citing as authority *Chiefari v Brisbane City Council* [2005] QLPR 500 at [24] and *Yu and Leung v Brisbane City Council* [2006] QPELR 102 at [16]. That is not this case, the applicant submitted because only one definition was satisfied. The proposed use could not be a multi-unit dwelling because it was (also) a house.

[17] It is not necessary to rehearse the arguments any further. Mr Hinson SC who appeared with Mr J Lyons for the respondent conceded that if the proposed developments satisfied both definitions then the excluding sentence of the definition of "Multi-unit Dwelling" would operate to make the proposed use a house. The respondent's argument was that when properly understood the development did not satisfy the definition of "House".

[18] Planning schemes, and the definitions found in them, often lack clarity, contain ambiguities and sometimes appear contradictory. The attempt to make sense of them gives rise, on occasions, to expressions of judicial exasperation. Nevertheless, Mr Hinson submits that the court should approach the task of construction in the manner described by Thomas J (with whom Ryan and McKenzie JJ agreed) in *Z W Pty Ltd v Peter R Hughes and Partners Pty Ltd* [1992] 1 Qd R 352 at 360:

> "To arrive at the so-called proper construction of such provisions involves a good deal of guess-work. In the end courts endeavour to give some meaning to such provisions and endeavour to adopt a commonsense approach, or the approach which seems to make the most sense out of provisions which may be contradictory as well as obscure (cf. *Pacific Seven Pty Ltd v City of Sandringham* [1982] VR 157, 162; *Brown v Idofill Pty Ltd* (1987) 64 LGRA 218, 227; *Tainui Pty Ltd v Brown* (1988) 65 LGRA 22, 27)."

[19] Mr Hinson drew attention to the High Court's admonition in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381, 382 and 384:

> "[69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> [70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will

> best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
>
> [71] Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent."
>
> …
>
> [78] However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning. …" (Footnotes omitted)

[20] Working from these propositions the respondent's argument is that the definitions may be seen as intended to apply to different developments, or uses of premises. The concluding, exclusionary sentence in the definition of "Multi-unit Dwelling" is an indication that the use defined is a different use to that which meets the definition of "House". While not forsaking the "best fit" approach the respondent's submission is that the approach has no application because the proposed use is not for a "House" but for a "Multi-unit Dwelling". The respondent, therefore, disavows the approach of the P & E Court that the application is to be determined by the "best fit" approach following on the conclusion, or concession, that both definitions, "House" and "Multi-unit Dwelling" apply to the proposal. The respondent accepts that it urged that approach on the Committee, but points out that no such submission was made to the P & E Court.

[21] The respondent's argument that the development was not for use of the premises as a house, but for a multi-unit dwelling, took this form:

> "12. There are three differences between a house and a multi-unit dwelling:-
>
> (a) the description of the use – "principally for residential occupation" (house) and "as the principal

place of longer term residence" (multi-unit dwelling);

(b) the description of the user – "a domestic group or individual/s" (house) and "several discrete households, domestic groups or individuals (multi-unit dwelling);

(c) the extent of the premises in which the relevant user or users carries on the relevant use.

…

15. The premises for which a development permit for making a material change of use was sought was the whole of the premises at 17 Wilkins Street i.e. the land and the 10 bedroom detached dwelling on the land.

16. Each bedroom in that dwelling was be (sic) the subject of separate residential occupation by a student or student couple. Each bedroom was to be the subject of a separate tenancy. Each tenant was to have use of the common areas. Each tenant was the occupier of bedroom because the tenant would be able to control entry to the bedroom by excluding persons from the bedroom.

17. Accordingly, under the proposed arrangements there would be residential occupation by a domestic group or individuals of a bedroom. The premises which, so used, satisfy the "House" definition are each bedroom.

18. The premises as a whole i.e. the detached dwelling (being the premises to which the development application related) is intended to be used as a multi-unit dwelling. Application was not made, and approval was not sought, for use of a separate bedroom as a separate house, but for use of the entire premises. Use of the entire premises satisfies the "Multi-Unit Dwelling" definition because:-

(a) the premises are to be used as the principal place of longer term residence by multiple users;

(b) residence connotes only a place of abode, with no connotation of occupation in the sense of control and the power of exclusion of others;

(c) there are <u>several</u> discrete households, domestic groups or individuals using the entirety of the premises as their principal place of longer term residence.

19. The entirety of the premises are not being used principally for residential occupation (with relevant control and a power of exclusion) by <u>a</u> domestic group or individual/s, and so cannot be a "House" as defined.”

[22] The argument comes down to the proposition that houses and multi-unit dwellings are meant to be mutually exclusive. The definitions are meant to work so that a use which falls within one definition does not satisfy the other. The differences in the definitions of the two uses are those identified in paragraph [12] of the written submissions quoted above. The essential difference is said to be that the use of a house involves occupation of the whole premises, not part of them, while the occupation of a multi-unit dwelling may be of part of the premises.

[23] The respondent stresses that the student tenants will not occupy the whole premises in respect of which the applications for approval were made. They will, it is submitted, occupy only the bedrooms which are the subject of their individual tenancies: the premises as a whole will not be used "principally for residential occupation". Because the extent of the premises which will be occupied is limited the use falls within the definition of multi-unit dwelling, and not house.

[24] Although the respondent identified three differences between the two relevant uses, "House" and "Multi-Unit Dwelling", its counsel did not address the three suggested differences in oral argument. Rather, its point was that the three differences were to be regarded compendiously as showing that under the applicant's proposal "there would be residential occupation by a domestic group or individuals of a bedroom" but not of the premises, the whole structure, in respect of which the application was made.

[25] The three distinctions, or differences, identified in paragraph [12] of the respondent's written submissions are all, I think, illusory. There are differences in terminology, but not in meaning.

[26] As to the first distinction the respondent points to a difference in terminology between:

> "A use of premises principally for residential occupation" (house)
>
> and
>
> "A use of premises as the principal place of longer term residence" (multi unit dwelling)

[27] The words may differ but the notion described by the words, and their connotation, are identical. Relevantly, "occupation" means the exercise of physical control or possession of land, or having the actual use of land. Residential occupation is the control or possession of land for the purposes of residing on it, or living on it. "Residence" or even "longer term residence" is identical to residential occupation. One cannot reside on land, or in premises, without occupying them. If one is in residence one occupies the place of residence.

[28] The qualification "longer term" is irrelevant, at least for present purposes:

> "… words such as "residence", "reside" and "residential" … usually connote "a degree of permanent or long-term commitment to the occupation of the premises in question"."

Per Keane JA with whom McPherson JA and Dutney J agreed in *Pearson v Thuringowa City Council* [2006] 1 Qd R 416 cited with approval in *Hedley Commercial Property Services Pty Ltd v BRCP Oasis Land Pty Ltd* [2010] 1 Qd R 439 at 445. See also *Marana v Commissioner of Taxation* (2004) 141 FCR 299.

"Residential occupation" connotes "longer term residence".

[29] The second distinction has found favour with the other members of the Court who give it an importance it did not assume in the respondent's submissions. There is said to be a critical difference between the phrase which appears in the definition of "House", ie "a domestic group or individual/s" and that which appears in the definition of "Multi-Unit Dwelling", "several discrete … domestic groups or individuals". The adjective "discrete" is said to have a "distinguishing significance", so that there is a "critical distinction" between "individuals" and "several discrete individuals".

[30] I am, with respect, unable to see validity in the distinction. For a start I think it doubtful that the adjectival phrase "several discrete" can apply to "individuals" as it may do to "households" and "domestic groups". The phrase appears inapplicable to such a noun as "individuals". I cannot myself see any difference between "individuals", and "several discrete individuals". Individuals are, necessarily and by definition, several and discrete. If they were not they would constitute a group, such as a household.

[31] There is, in my opinion, no difference between what is meant by the word "individuals" in the phrases, a "domestic group or … individuals" and "several discrete … domestic groups … or individuals". The terms "domestic groups" and "individuals" describe different things. The word "individual" does not take on any special meaning from the term "domestic group". An individual is, self evidently, not a domestic group. A use of premises for residential occupation by individuals will be a house for the purposes of the Plan, so the applicant's proposal satisfies the definition of "house". It also satisfies the definition of "Multi-Unit Dwelling" because the use is longer term residence by individuals.

[32] Had the two definitions not included "individuals" as occupants or residents to describe the respective uses one could have discerned an intelligible difference between the definitions. Residential occupation by a domestic group is comprehensibly different from residence by several discrete households or domestic groups. By extending the definition to "individuals" the distinction is lost.

[33] One then turns to the third distinction, regarded as critical in the respondent's submissions; that the defined use of premises for a house requires occupation of the whole house while residence in a multi-unit dwelling may be for part of the dwelling.

[34] The Plan does not define "premises". The definition is found in Schedule 3 of the Act. Premises means *inter alia* a building. A building is defined in turn to mean "any part of a building". It follows that the use of premises for a house includes the use of part of a building for that purpose. The definitions do not distinguish between the extent of the premises in which residence or residential occupation is to occur. There is no difference in this respect between the two definitions.

[35] In addition the respondent's description of the occupation on which it relies for its submission is wrong. The student tenants will occupy the whole of the house structure. Individually, pursuant to their separate tenancies, they will occupy their own bedrooms. Collectively they will occupy the rest of the premises, common areas and, no doubt, the outdoor space.

[36] The respondent's reasons for contending that the proposed use will not constitute a house as defined, i.e. that the residential occupation will not be of the whole premises, and (perhaps) that the occupation will not be residential occupation, should not be accepted.

[37] The starting point in the task of construing statutes and like instruments remains, I think, that explained by Gibbs CJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304-5:

> "It is an elementary and fundamental principle that the object of the court, in interpreting a statute, "is to see what is the intention expressed by the words used": *River Wear Commissioners v Adamson*. It is only by considering the meaning of the words used by the legislature that the court can ascertain its intention. And it is not unduly pedantic to begin with the assumption that words mean what the say: cf. *Cody v JH Nelson Pty Ltd*. Of course, no part of a statute can be considered in isolation from its context – the whole must be considered. If, when the section in question is read as part of the whole instrument, its meaning is clear and unambiguous, generally speaking "nothing remains but to give effect to the unqualified, words": *Metropolitan Gas Co v Federated Gas Employees' Industrial Union*. There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case: see per Lord Reid in *Connaught Fur Trimmings Ltd v Cramas Properties Ltd* … However, if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust. To say this is not to insist on too literal an interpretation, or to deny that the court should seek the real intention of the legislature."

[38] Following this approach one then looks to the terms of the definition of "House" to see what meaning may be derived from the words chosen by the respondent to identify the concept. Is the proposed use a "House" as defined? Relevantly, a house is a use of premises (part of a building) principally for residential occupation by:

(i) A domestic group; or
(ii) An individual; or
(iii) Individuals.

The proposed use of the applicant's properties falls naturally within (iii). The buildings in question are to be used principally (indeed entirely) for residential occupation by individuals. The definition does not require that each individual occupy the whole of the premises. Such a definition would in fact conflict with the statutory definition of "premises". That observation apart the individuals will occupy the whole premises in common with others as to part and exclusively as to other parts.

[39] There is nothing particularly unusual about such shared usage in the ordinary conceptions of a house. Examples come readily to mind. Matrimonial law is familiar with the concept of a couple who live separately and apart under the same roof: each occupying separately and exclusively their own bedroom/bathroom and sharing uneasily such rooms as kitchens and living rooms. Less unhappily the concept of an elderly parent exclusively occupying a suite of rooms in a house but sharing, the

degree of toleration depending on the family, in the occupation of living areas of the house, is quite common. A house, the householder of which takes in a boarder, provides another example.

[40] These are all cases in which there is occupation and control of a house by occupants though the whole of the house is not occupied by all.

[41] There is no warrant in the Plan definition of house for concluding that all residents must occupy the whole of the premises. It was this requirement which underpinned the respondent's argument. Without it one is left with the words of the definition which apply, naturally, to the applicant's proposal.

[42] I would accept the respondent's general proposition that the definitions were meant to apply to different residential uses so that houses and multi-unit dwellings describe different manners of residential occupation. Nevertheless the concluding sentence of the definition of multi-unit dwelling appears to recognise that both definitions may be satisfied by the one mode of occupation. The general proposition only goes so far. If both definitions when read according to the appropriate principles of statutory interpretation apply to a proposed use then that consequence must be accepted. In this case the consequence is that the definition of multi-unit dwelling does not apply and the use will be that of a house.

[43] The P & E Court should have so concluded. It was wrong to find that a multi-unit dwelling was the "best fit". That principle of construing planning scheme definitions, if it exists and if it deserves to be called a principle, had no application according to its own terms. There was no need to find the "best fit" because there was only one fit. The P & E Court should have allowed the appeal to it and made the declarations sought.

[44] The difficulty which this case has exposed is, I think, partly a result of the definition of "Multi-Unit Dwelling" extending to any form of building, whether it contains one lot or several lots. The concept of distinct (or "several discrete") households, or groups, or individuals more readily fits the notion of each group or individual occupying a distinct lot or premises and not cohabiting in the one premises. The Court must, however, deal with the definition as it is. As I mentioned the draftsman recognised that the same residential use of premises will sometimes satisfy both definitions.

[45] It is not strictly necessary to consider the legitimacy of the "best fit" as a canon of construction but this Court should, I think, express considerable doubt about its validity. It appears to have been first mentioned in a judgment of the P & E Court, *Livingstone Shire Council v Brian Hooper & M3 Architecture and Others* [2004] QPELR 308. Addressing the difficulty which arises when a development proposal might fit a number of definitions in a planning scheme the solution was proposed that one should search for the definition which best fits the proposal. The court expressed the view (at 315):

> "… a "best fit" approach appears … appropriate where … there are two defined uses (or more) each of which is apt to cover the proposal."

[46] This particular canon of construction appears unique to the Queensland P & E Court. While it may have practical attractions it offends the legal principle applicable to statutory construction pronounced by courts of the highest authority, and facilitates planning appeals by reference to intuitive judgments by those who specialise in that

jurisdiction rather than by an objective and logical examination of the words of the statutory instruments in question, according to established legal doctrine. All statutes in all jurisdictions should be construed according to the same established legal principles.

[47] Planning schemes confer rights and obligations; on the public, developers and local authorities. When a question arises as to the extent of a right or obligation it is to be answered by the application of legal principle to the construction of the instrument the words of which give rise to the rights and obligations. It is not to be determined by judicial intuition, even where the judge is a member of a specialist court.

[48] If a proposed development satisfies two definitions, the rights and obligations which would follow from the conclusion that both definitions apply, are not to be abrogated because the judge has a preference for one result over another, or thinks that the local authority which drafted the planning scheme might have preferred the other. If two or more definitions are satisfied then the legal consequence set out in the planning scheme for a proposal which meets those definitions will all apply, and the developer may follow the path which suits its purposes best.

[49] The result that several definitions may be satisfied by the one proposal with different or inconsistent consequences may be a powerful reason for construing the definitions to avoid the inconsistency or conflict. The construction must however occur in accordance with orthodox legal principles. If the application of those principles leads to the conclusion that more than one definition is satisfied the conclusion must be given legal effect.

[50] I would:

(a) Grant leave to appeal;
(b) Allow the appeal and set aside the orders of the P & E Court made on 6 April 2011 which dismissed the appeal to it;
(c) Instead it should be ordered that the appeal to the P & E Court be allowed and that it be declared that the applications for the use of premises at 17 Wilkins Street (Annerley), 178 Cornwall Street (Greenslopes) and 32 O'Keefe Street (Woolloongabba) were properly made;
(d) The respondents should pay the costs of the application and of the appeal on the standard basis.

[51] **MARGARET WILSON AJA**: I agree with the orders proposed by Philippides J and with her Honour's reasons for judgment.

[52] **PHILIPPIDES J:**

Background

[53] The applicant seeks leave to appeal, under s 498 of the *Sustainable Planning Act* 2009, from a decision of the Planning and Environment Court ("the P & E Court") dismissing appeals from decisions of the Building and Development Dispute Resolution Committee ("the Committee") refusing to declare three development applications to have been properly made.

[54] The development applications concern premises at Annerley, Greenslopes and Woolloongabba, the proposed use of each of the premises being to provide student

accommodation by renting out individual bedrooms (the premises containing 10, 11 and nine bedrooms respectively).

[55] Because the proposed use, having more than five unrelated residents, did not comply with the provisions of the House Code (Acceptable Solutions 8 of s 4.1), each application was lodged as Code (Notifiable) on the basis of a change of use of the premises to a "non conforming house". However, the respondent declined to process the applications on the basis that they were not properly made, taking the view that each "proposal applied for multi-unit dwelling (boarding house) consistent with the definition of a multi-unit dwelling (boarding house) in Chapter 3" of the *City Plan* 2000, and advising that as such the level of assessment required "impact assessment".

[56] The dispute between the parties centres on whether the applicant's proposed use of premises was a "multi-unit dwelling" as defined by *City Plan* 2000, as the primary judge found, upholding the determination of the Committee.

[57] For the reasons given by Chesterman JA, I agree that the applicant should be granted leave to appeal.

Grounds of appeal

[58] The applicant's grounds of appeal are that, in upholding the Committee's determination, the primary judge erred in law in two respects:

(a) in failing to give the words of the last sentence of the definition of "multi-unit dwelling" contained in s 10.2 of the *City Plan* 2000 their ordinary meaning;

(b) in applying the so called "best fit" test to determine that the relevant use of premises met that definition.

[59] It was common ground that, in respect of each development application, the proposed use is materially identical. Accordingly, the relevant features of one of the proposed developments (that in Annerley), was put forward as a test case in this appeal. The features of that proposed development are:

(a) the land was improved with a detached residential dwelling containing 10 bedrooms;

(b) the proposed use was the accommodation of more than five unrelated persons for the purpose of student accommodation;

(c) each student (or student couple) would rent a bedroom under a separate tenancy agreement with the owner. Rent was payable weekly: $150-$160 for a single room and $220-$240 for a bedroom to be shared by a couple;

(d) each student, or student couple, would have made available to them their own area for food storage;

(e) the length of the tenancy would not be less than six months;

(f) the owner would provide furniture and whitegoods in the common areas of the house. The owner would also pay the electricity consumed by the tenants;

(g) the rent charged to the students included a component for the cost of electricity;

(h) the owner would arrange for the cleaning of the common areas once per week and supplied cleaning products and toilet paper for the premises.

Definitions

[60] The pertinent definitions are contained in s 10.2 of the *City Plan* 2000 as follows:

"Multi-unit dwelling" is defined as:

> "Multi-unit Dwelling: a use of premises as the principal place of longer term residence by several discrete households, domestic groups or individuals irrespective of the building form. Multi-unit dwellings may be contained in one lot or each dwelling unit may be contained on its own lot subject to Community Title Schemes. Examples of other forms of multi-unit dwelling include boarding house, retirement village, nursing home, orphanage or children's home, aged care accommodation, residential development for people with special needs, hostel, institution (primarily residential in nature) or community dwelling (where unrelated people maintain a common discipline, religion or similar). The term multi-unit dwelling does not include a house or single unit dwelling as defined elsewhere."[1]

"House" is defined as:

> "House: a use of premises principally for residential occupancy by a domestic group or individual/s, that may include a secondary dwelling, whether or not the building is attached, but does not include a single unit dwelling."[2]

"Single unit dwelling" is defined as:

> "Single unit dwelling: a use of premises as a principal place of longer term residence by a household, domestic group or individual/s, whether or not in a building that is attached or detached, and the dwelling (including any land and building/structures that may be associated with the dwelling or part of the dwelling) is contained entirely on a lot that has:
>
> - an average width of less than 10m and/or an area less than 400m^2 (but does not include small corner lots with a minimum lot size of 350m^2 as provided by Table 2 Lot Layout in the Subdivision Code), or
> - an area less than 600m^2 (excluding access way) if a rear lot.
>
> For the purposes of applying this definition and corresponding provisions in the Plan, the term freehold lot is a Standard Format Plan only. Excluded from this definition are lots subject to Community Titles Schemes, Building Format and/or Volumetric Format Plans.
>
> The definition of single unit dwelling does not apply to:
>
> - any existing dwellings approved as another use (eg. an existing house on a lot below the sizes stated above). Extensions or alterations to these existing dwellings will be assessed according to the relevant provisions for that use (eg. an extension to an existing house on a lot below the sizes stated above will be assessed as a small lot house), or

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1 See ARB 149.

2 See ARB 148.

- houses or multi-unit dwellings on existing vacant lots of the size stated above."

The P & E Court's decision

[61] The primary judge rejected the crux of the submissions advanced by the applicant, that the effect of the last sentence of the definition of multi-unit dwelling was that "once the use satisfies the definition of house that is the end of the matter"; it cannot fall within the definition of multi-unit dwelling because within the definition of that term, "house" as defined in the *City Plan* 2000 is excluded. The trial judge referred to *BHP Billiton Petroleum Pty Ltd v Chief Executive Officer of Customs* (1992) 69 ALD 453 at 472, cited by the applicant in support of its contention, but held that it was not of assistance, as the exclusionary part of the definition of multi-unit dwelling was quite different from the statutory provisions under consideration in that case.

[62] His Honour noted at [22] that in respect of the proposed use of the premises:

> "The detailed submissions provided to the Committee on behalf of the [applicant] make it clear that the use of the proposed developments could fit within the definition of a house. The respondent does not disagree. It is also clear that the use to which the premises would be put would satisfy the definition of a multi-unit dwelling. That is, it involves the use of premises as the principle (sic) place of longer term residents (sic) by several discrete households, domestic groups and/or individuals."

[63] His Honour referred to a number of decisions of the P & E Court concerning the so called "best fit test", including *Yu & Leung v Brisbane City Council & Anor* [2006] QPELR 102 where Rackemann DCJ at [16] described the approach as follows:

> "Where there are two or more defined purposes which are apt to cover a particular proposal, a 'best fit' approach is appropriate."

[64] His Honour observed at [25]:

> "It is true that both definitions include reference to the use of premises by an individual and/or individuals. However, it seems tolerably clear that the emphasis of the definition of House is more focused on the entity of a domestic group whereas the emphasis of the definition of Multi-unit dwelling is more directed to the existence of multiple independent '*individuals'*, '*domestic group<u>s</u>'* and '*discrete household<u>s</u>*'. The proposed use falls more comfortably under the latter descriptions than the former."

[65] His Honour considered that it was fundamental to the question of whether the premises fell within the multi-unit dwelling or house definition to have regard to the use to which the premises were put and by reference to such use to characterise the premises, stating at [28]:

> "… The last sentence of the definition of Multi-unit dwelling (as is indeed the case for the exclusions under House and Single unit dwelling) recognises that a premises may, at face value, be capable of falling under one or more of the definitions prescribed but than (sic) then makes it clear that it cannot be a house and/or a multi-unit dwelling and/or a single unit dwelling, or any combination thereof. It has to be one or the other. It is the characterisation of the use which determines under which definition the premises falls and once

> appropriately defined it is then prohibited from also being any one of the other defined uses under the plan."

[66] His Honour noted the respondent's submissions that, when the focus was put on the particulars of the use of the premises, the best fit in respect of the use of the premises was as a multi-unit dwelling and not a house. His Honour accepted that submission, observing at [24] that:

> "While some of the features usually associated with a 'boarding house' or 'hostel' are absent, for example the provision of services such as meals, room cleaning and/or washing, there are a number of significant similarities. The right of residency is associated with a commercial arrangement whereby in consideration for the payment of rent the tenant is entitled to exclusive occupation of one of the bedrooms (but no other room) and the right to share the common areas of the premises and appliances therein. The rent also includes electricity and the owner provides cleaning products and toilet paper and arranges and pays for cleaning of the common areas. There would be very little (if any) common purpose or organisation among the tenants. In circumstances where the use of the premises is exclusively for the residency of students, it has some of the characteristics of '*community dwelling (where unrelated people maintain a common discipline, religion or <u>similar</u>)*' [Part of the definition of Multi-unit dwelling]. In this regard it should be noted that boarding house, hostel and community dwelling are but examples of forms of multi-unit dwelling meant to be included under that definition. It is not an exhaustive list of uses. It is also not without significance that, as was conceded by Mr Litster, on the appellant's construction, all other things being equal, a premises having any number of bedrooms being let to individual students would still fall within the definition of 'House'." (footnotes omitted)

[67] Thus, his Honour, having rejected the applicant's submission that the last sentence of the definition of multi-unit dwelling precluded the application of the "best fit" test, concluded at [30] that the best fit was under that definition.

Applicant's submissions

[68] Before this Court, the applicant conceded that the proposed use of the premises fell within the definition of multi-unit dwelling (the premises being used as the principal place of longer term residence by several individuals) but argued that the use also fell within the house definition, in that the premises would be used "principally for residential occupancy by … individuals".

[69] Reiterating the submission made before the P & E Court with a reference to *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145, the applicant argued that once the definition of "house" was met, the premises no longer fell within the definition of "multi-unit dwelling" because of the effect of the last sentence of that definition. Accordingly, if the premises came within the "house" definition, they were necessarily excluded from the definition of "multi-unit dwelling". The best fit test did not, therefore, arise for consideration.

Respondent's submissions

[70] The respondent contended that, while it had accepted before the Committee that the relevant use of premises met the house definition, in addition to the definition of multi-

unit dwelling, that was not a submission made before the primary judge, who, it was argued, observed only that the use "could" fit within that definition, without finding that it did. Before this Court, the respondent's primary argument was that the best fit test did not apply because the application was not one for a house, but rather one for a multi-unit dwelling.

[71] The respondent accepted the argument that the result of the last sentence of the definition of multi-unit dwelling was that, if the premises fell within the meaning of house, it would not come within the definition of multi-unit dwelling. However, in contending that the proposed use fell within the latter definition, the respondent identified three pertinent areas of difference between the two definitions.

[72] The areas of distinction between the two definitions were said to be:

> "(a) the description of the use – 'principally for residential occupation' (house) and 'as the principal place of longer term residence' (multi-unit dwelling);
>
> (b) the description of the user – 'a domestic group or individual/s' (house) and 'several discrete households, domestic groups or individuals' (multi-unit dwelling);
>
> (c) the extent of the premises in which the relevant user or users carries on the relevant use."

Discussion

Best fit test

[73] On the submissions made before this Court, neither side submitted that the so called best fit test governed the construction of the provisions in question. Mr Hinson contended that the best fit test should be understood as no more than an application of the approach enunciated by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70]:

> "A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme."

[74] There are a number of long established principles of construction recognised by the courts and I endorse the reservation expressed by Chesterman JA about the validity of the best fit test as a recognised canon of construction falling within that category. The applicant submitted before this Court that, in construing the provisions of the *City Plan*, the established principles and canons of statutory construction should be applied. I agree with that submission.

Nature of residential use

[75] As to the first distinction raised by the respondent, particular emphasis was placed on the use of the word "occupation" in the expression "residential occupation" used for the house definition which was contrasted with the term "residence" in the multi-unit dwelling definition. "Residence" was said to connote only a place of abode, with no connotation of occupation in the sense of control and the power of exclusion of others.

[76] That argument is undermined by the fact the definition of "multi-unit dwelling" includes, as examples of premises coming within that term, "residential development for people with special needs", which in turn is defined as "a use of premises exclusively for *residential occupation* by the elderly, young or people with disabilities, with services provided to cater for particular needs, e.g. nursing home, children's home, hostel and institution". The concept of "residential occupation" is therefore not one exclusively used in describing the residential use of premises as a "house", but also one employed in describing examples of residential use of premises as a multi-unit dwelling. This tells against a too legalistic construction of the word "occupation".

[77] In the circumstances, I am unable to accept that there is a relevant distinction to be made in respect of the concept of residential occupation (used for house) and a principal place of residence (used for multi-unit dwelling). On this matter I agree with the reasons given and conclusion reached by Chesterman JA.

Extent of use

[78] As mentioned, the respondent argued that there was another area of difference between the definitions. This was that, in order that premises satisfy the "house" definition, what was required was that there be "residential occupation" of the *entirety* of the premises in question by "a domestic group or individual(s)". That, it was submitted, was not the case here, even accepting that premises may include a part of the premises, because each bedroom was the subject of a separate tenancy, yet the application was for the entire house. In relation to this matter, I also agree with Chesterman JA.

[79] There is nothing in the express words of the definition of "house" that requires that each individual residing at the premises occupy the whole of the premises. In any event, since the concept of "residential occupation" is one used in the context of both definitions, I cannot see how the extent of occupation is a relevant distinction.

Nature of user

[80] However, I am unable to agree with Chesterman JA that the second distinction relied on by the respondent, that concerning the description of the user in the definitions, is irrelevant to the case.

[81] On the applicant's approach, it is sufficient for the purpose of the house definition that the premises are to be used for residential occupation by "individuals", where such individuals occupy the whole premises in common as to parts, and exclusively as to other parts. However, if that approach is adopted, it is difficult to see what room is left for the definition of multi-unit dwelling insofar as the premises are structurally in the form of a house, ie a detached dwelling (remembering that that definition applies irrespective of the building form).

[82] Taking the approach urged by the applicant would render meaningless the distinction between a "multi-unit dwelling" (insofar as it is structurally a house) and a "house". Indeed, it would be difficult to see how the examples specified in the definition of "multi-unit dwelling" would not also qualify for the house definition where the building form is that of a house. On the applicant's construction the examples given in

the definition of "multi-unit dwelling" would, in such cases, be excluded from that definition, notwithstanding that they are given as express examples.

[83] It may be assumed that the distinction between the definitions is regarded as having significance, given the different consequences which follow from the designation of a dwelling as a house as opposed to a multi-unit dwelling for Council planning purposes, in terms of the more stringent assessment requirements. As the High Court stated in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355:

> "[70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. …
>
> [71] Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent.'"

[84] While on a superficial level, all multi-unit dwellings (that are structurally houses) can be viewed as coming within the definition of house – because a use of premises principally for residential occupancy by "individuals" is involved, such an approach fails to give proper regard to the context in which the word "individuals" appears in each definition. In that regard, it is pertinent that, for the purposes of the multi-unit dwelling definition, the words "several discrete" qualify the words "households, domestic groups or individuals"; they inform the meaning to be given to the word "individuals" in that definition. That is to be contrasted with the house definition which is concerned with residential occupation by "a domestic group or individual/s". The relevant differentiation is thus between "a domestic group or … individuals" and "several discrete … domestic groups or individuals".

[85] The approach taken by the applicant equates the meaning to be given to the word "individuals" in the multi-unit dwelling definition with its use in the house definition and fails to accord the word "discrete" its distinguishing significance in qualifying the meaning to be given to the term "individuals". It is not to the point that a number of "individuals" may reside at the premises; the critical distinction that arises between the definitions is whether the individuals can be characterised as being several "discrete" individuals in respect of their residential occupation.

[86] The house definition is not concerned with multiple individual residents who are properly described as being "discrete". That "house" is not intended to cover residential use by several discrete individuals is made clear by the fact that examples of such use are specified in the multi-unit dwelling definition. Such examples are not given in the house definition where the expression "discrete" does not qualify the word "individuals". The term "house" is not intended to encompass several individuals residing "discretely" in the same dwelling. By the same token, the house definition

does allow for the situation of a householder who, for example, takes in a boarder, by providing that the use of the premises must be "*principally* for residential occupancy by a domestic group or individual/s". Whether the extent and nature of the sharing of accommodation renders the use within that of "house" or "multi-unit dwelling" may thus, in some circumstances, be a matter of degree.

[87] Given that there is no relevant distinction to be drawn between the nature of the residential use in the definitions of "multi-unit dwelling" and "house", if the reference to individuals in the two definitions is construed as urged by the applicant as in effect having the same meaning, then the definition of "multi-unit dwelling" becomes internally inconsistent – individuals are at the same time included in the first part of the definition but excluded by virtue of the last sentence. The respondent's approach concerning the description of the user in the two definitions in question results in a construction which renders the definitions meaningful and harmonious.

[88] In the present case, the proposal is not one involving a number of individuals combining to enter into a single tenancy with a landlord. Rather, the proposed use involves individuals under separate tenancy agreements renting a particular room (albeit that they have access to some common areas). In those circumstances, they must be characterised as several "discrete" individuals and as such not "individuals" meeting the house definition.

[89] It follows that the respondent's contention that in the present case the proposed use fell within the multi-unit dwelling definition and not the house definition is correct. In so far as the primary judge reached that conclusion approaching the matter on the basis of the best fit test, he was in error.

Orders

[90] Although the applicant should be granted leave to appeal, for the reasons outlined, its appeal should be dismissed.

[91] The parties are to provide written submissions as to costs in accordance with Practice Direction No 2 of 2010 (paragraph 52).