

# SUPREME COURT OF QUEENSLAND

CITATION: *Robertson v Brisbane City Council & Ors* [2022] QCA 45

PARTIES: **MARK ROBERTSON**  
**FREYA ROBERTSON**  
(first applicants)  
v  
**BRISBANE CITY COUNCIL**  
(first respondent)  
**WEYERS DEVELOPMENTS PTY LTD**  
ACN 102 288 237  
(second respondent)  
**RD NOMINEES PTY LTD**  
ACN 109 341 791  
(third respondent)

FILE NO/S: Appeal No 12058 of 2021  
P & E Appeal No 607 of 2021

DIVISION: Court of Appeal

PROCEEDING: Application for Leave *Planning and Environment Court Act*

ORIGINATING COURT: Planning and Environment Court at Brisbane – [2021]  
QPEC 44 (Jones DCJ)

DELIVERED ON: 1 April 2022

DELIVERED AT: Brisbane

HEARING DATE: 23 March 2022

JUDGES: Fraser and McMurdo JJA and Freeburn J

ORDERS: **1. Grant leave to appeal.**  
**2. Dismiss the appeal.**  
**3. The appellants pay the respondents' costs of and incidental to the proceeding in this Court.**

CATCHWORDS: ENVIRONMENT AND PLANNING – BUILDING CONTROL – COUNCIL CONSENT AND APPROVAL – MATTERS FOR CONSIDERATION BY COUNCIL – ON APPLICATIONS FOR RESIDENTIAL FLAT BUILDINGS – NUMBER OF STOREYS – where the second and third respondents propose to develop land for the construction of a building containing three apartments, each to occupy an entire floor – where the rooftop of the building will be reached by a lift, or by stairs adjoining the lift, and where those going to the roof will arrive in a small area – where this area, together with the lift shaft and stairway, will be enclosed by external walls and a roof – where a delegate of the Council approved an application for a material change of use for this development – where

a development of more than three storeys is impact assessable pursuant to s 45(5) of the *Planning Act 2016* (Qld) – where the application raises a question of law, namely whether upon the facts as found, the subject area enclosed by external walls and a roof is a storey as defined in the City Plan – whether the subject area is not a storey as defined and the proposed development is a three storey and not a four storey building – whether the application for leave should be granted

*Planning Act 2016* (Qld), s 43

*Hope v Bathurst City Council* (1980) 144 CLR 1; [1980] HCA 16, cited

COUNSEL: S L Doyle QC, with S Spottiswood, for the first applicants  
G J Gibson QC, with N D Loos, for the first respondent  
D P O’Brien QC, with W D J Macintosh, for the second and third respondents

SOLICITORS: Connor O’Meara Solicitors for the first applicants  
City Legal (Brisbane City Council) for the first respondent  
HWL Ebsworth Lawyers for the second and third respondents

- [1] **FRASER JA:** I agree with McMurdo JA’s reasons and the orders proposed by his Honour. I propose to add only some brief reasons of my own.
- [2] The question of law in this application is whether a space on top of three storeys of a proposed building is itself a storey as defined in the *Brisbane City Plan 2014*. The circumstances giving rise to the question, the definition, and a description of the space are set out in McMurdo JA’s reasons. It is now uncontroversial that the space falls within the exclusion in (i) (“a space containing only a lift shaft, stairway ...”) from the definition of storey in the chapeau of paragraph (a) of the definition (“a space within a building between 2 floor levels, or a floor level and a ceiling or roof...”). The issue is whether the space is nonetheless within the inclusive part of the definition of storey in (ii) of paragraph (b) (“roofed structure that is on, or part of, a rooftop, if the structure does not only accommodate building plant and equipment”).
- [3] Paragraph (a)(i) is not aimed at lift shafts or stairways which are wholly below a building’s rooftop. No part of the space occupied within a building only by a lift shaft or a stairway that does not pierce the roof falls within the ordinary meaning of storey in the chapeau of paragraph (a). The space occupied only by such a lift shaft or stairway is one continuous space. It is not a sensible reading of the chapeau that a lift shaft or stairway adds one storey for each storey of the building it serves.
- [4] Such a lift shaft or a stairway conceivably might stop short of the height of a storey it serves. But even if the top of such a lift shaft or stairway ever might be described as a “floor level” within the meaning of the chapeau of paragraph (a), the space between it and the ceiling or roof above could not be the target of (i). That is so because that space would not contain the lift shaft or stairway. The lower space which is occupied within part of a storey by such a lift shaft or stairway also could not amount to an additional storey, for the reasons given in [3].

- [5] On the other hand, where a lift shaft or stairway pierces the roof of the building to facilitate access between the rooftop and the building below, the necessity to protect the interior of the building (most obviously, the lift shaft or stairway itself) from the elements makes it commonplace to find a roof and walls (one with a doorway) covering and surrounding the top of the lift shaft or stairway, and in some cases, a small landing area. The subject space is of that kind. Since it has a roof and is separated from adjacent rooftop by walls, its base falls within the ordinary meaning of the word “floor”. It is aptly described as being “within” the building for the same reasons and because it is inseparably connected with the rest of the interior by the lift shaft or stairway. The expression in the chapeau of paragraph (a) “a space within a building between ... a floor level and a ceiling or roof” is an apt description of such a space.
- [6] Such a space is the only target of the exception for lift shafts and stairways in (i) of paragraph (a) of the definition of “storey”. That makes it very difficult to accept that paragraph (b) of the same definition could reflect a legislative policy of including that same kind of space in the definition of “storey”.
- [7] As McMurdo JA explains, the language of paragraph (b) is also not apt to comprehend the subject space because, that space being “within” the building in terms of paragraph (a), it cannot at the same time be “on” or “part of” the building’s rooftop in terms of (ii) of paragraph (b).
- [8] **McMURDO JA:** The issue in this case is what is meant by the word “storey”, as it is defined in the planning scheme for the City of Brisbane.<sup>1</sup>
- [9] The second and third respondents propose to develop land at Toowong for the construction of a building containing three apartments, each to occupy an entire floor. On the rooftop of the building will be an area containing a swimming pool, a pergola and a garden. The rooftop will be reached by a lift, or by stairs adjoining the lift. Either way, those going to the rooftop will arrive in a small area, measuring about 15 square metres, where there will be a door leading to the outdoor rooftop. This area, together with the lift shaft and the stairway, will total about 30 square metres, and will be enclosed by external walls and a roof. I will call this the subject area and the question is whether it is a storey under the City Plan.
- [10] The issue arose in this way. A delegate of the Council approved an application for a material change of use for this development. The applicants are the owners and occupiers of a neighbouring property. They made an application under s 11(1) of the *Planning and Environment Court Act 2016* (Qld), seeking a declaration that the Council’s decision was invalid and of no effect. They said that the Council’s decision was affected by several errors, one of which is the subject of their proposed appeal to this Court. Under the City Plan, a development that is three storeys and does not exceed 11.5 metres in height is code assessable pursuant to s 45(3) of the *Planning Act 2016* (Qld). A development of more than three storeys is impact assessable pursuant to s 45(5) of that Act.<sup>2</sup> If the subject area is a storey, the Council erred in deciding that it was code assessable rather than impact assessable. The primary judge (Jones DCJ) dismissed the application.

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<sup>1</sup> *Brisbane City Plan 2014* (City Plan).

<sup>2</sup> City Plan, Table 5.5.2.

- [11] The applicants apply for leave to appeal against that decision, arguing that his Honour erred in law in concluding that the proposed development was for three storeys only.
- [12] The application raises a question of law, namely whether upon the facts as found, the subject area is a storey as defined in the City Plan.<sup>3</sup> The point has a general importance for other developments.
- [13] The applicants' argument in this Court differs from that which they made to the primary judge, but the question that remains is whether the judge was wrong to hold that this was a three storey building. Despite the protests of the respondents, the fact that a different argument is now made for the determination of the same legal question provides no good reason, at least in this case, for refusing leave to appeal. Nor is there a reason to refuse leave because of the respondents' suggestions, made at least until the hearing, that the new argument raises questions of fact. Instead the facts are clear.

- [14] The City Plan defines "storey" as follows:

"Storey –

- (a) means a space within a building between 2 floor levels, or a floor level and a ceiling or roof, other than -
  - (i) a space containing only a lift shaft, stairway or meter room; or
  - (ii) a space containing only a bathroom, shoe room, laundry, toilet or other sanitary compartment; or
  - (iii) a space containing only a combination of the things stated in subparagraph (i) or (ii); or
  - (iv) a basement with a ceiling that is not more than 1 m above ground level; and
- (b) includes –
  - (i) a mezzanine; and
  - (ii) a roofed structure that is on, or part of, a rooftop, if the structure does not only accommodate building plant and equipment."

- [15] The primary judge found that the subject area was "a 30/33 m<sup>2</sup> walled and roofed structure situated above the roof line of the third storey", of which about one half would be occupied by a lift and stairwell, with the balance of "some 14/16 m<sup>2</sup> ... provid[ing] nothing more than a space for people to wait for the lift or to otherwise step into when exiting the lift or walking up the steps."<sup>4</sup> That area of 14/16m<sup>2</sup> was described in drawings for the building as "stair access". His Honour rejected a suggestion that this balance space could be used for another purpose, finding that it was "abundantly clear that this space is not to be part of the entertainment area on

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<sup>3</sup> The question whether facts fully found fall within the provision of a statutory enactment properly construed is a question of law: *Hope v Bathurst City Council* (1980) 144 CLR 1 at 7.

<sup>4</sup> *Robertson & Ors v Brisbane City Council & Ors* [2021] QPEC 44 at [20], [24] (Judgment).

the roof, being segregated from that entertainment area by a wall which can only be accessed by a door which would seem to be of only conventional dimensions.”<sup>5</sup>

- [16] The argument which the applicants (through different counsel) advanced to the primary judge was that the subject area (of 30/33 m<sup>2</sup>) was a storey as defined in paragraph (a) of the definition, because it was a space within a building between a floor level and a ceiling or roof, and it was not “a space containing only a lift shaft, stairway or meter room.” The contest before the judge was whether this was a space which contained more than the lift shaft and the stairway, because it contained that balance area of 14/16 m<sup>2</sup>. The judge said that the applicants’ argument was “entirely misconceived”,<sup>6</sup> and that it was a space necessarily required for the use of the lift and stairs. The judge said that “it would be nonsensical not to have some covered space, be it a foyer or a lobby, to accommodate those waiting for a lift, exiting a lift or walking up the stairs.”<sup>7</sup> Consequently, his Honour held that this was, in the terms of paragraph (a)(iii) of the definition, a space containing only a combination of a lift shaft and stairway, so that it was specifically excluded from paragraph (a) of the definition.
- [17] There is no challenge to the reasoning of the primary judge as to that specific exclusion. What is now argued is that the judge should have held that this is a storey as defined in paragraph (b)(ii), in that it is a roofed structure that is on, or part of, a rooftop (and does not only accommodate building plant and equipment).
- [18] Some time was occupied in this Court with arguments about whether the application of paragraph (b) had been argued by the applicants before the primary judge. Despite a reference to paragraph (b) in one paragraph of the applicants’ written submissions to the judge, my impression is that the present argument was not advanced by counsel then appearing for the applicants. A complaint that his Honour did not give adequate reasons for judgment, because he did not explain why he rejected an argument based upon paragraph (b), must fail for the reason that the argument was not made.
- [19] I go then to the relevant definition. The differences in the terminology within the two paragraphs of the definition are readily apparent. Paragraph (a) refers to a *space within a building*, and a space being *between two floor levels, or a floor level and a ceiling or roof*. Paragraph (b)(ii) refers to a *roofed structure*, and a structure that is *on, or part of, a rooftop*.
- [20] As the applicants’ argument accepts, the “rooftop” (in (b)) is the rooftop of a building, and a space within a building (in paragraph (a)) cannot be, at the same time, a space which is on or part of that rooftop. It follows, as the applicants themselves submit, that a roofed structure within (b)(ii) cannot also be a space as described in the chapeau in paragraph (a).
- [21] The applicants argue that this is not a space within paragraph (a) because this is not a space between a floor level and a ceiling or roof. The terms “floor level”, “ceiling” and “roof” are undefined and are to be given their ordinary meaning. Clearly the subject area is under a roof; it is the roof over part of the building. It is

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<sup>5</sup> Judgment [25].

<sup>6</sup> Judgment [24].

<sup>7</sup> Judgment [29].

also a space defined by a floor level, which is the level that is reached by the lift or the stairway.

- [22] Consequently, the subject area is a space within a building between a floor level and a ceiling or roof. Subject to the exclusions to paragraph (a), this would be a distinct storey of the building. But as I have said, the judge concluded that the subject area fell within the exclusion in paragraph (iii). That conclusion is not challenged, and in my view it was correct.
- [23] The applicants' argument is that the subject area is itself a "roofed structure" within paragraph (b)(ii). That description cannot be accepted. It is not a distinct structure; rather, it is part of the building. The suggested "structure" includes part of the lift shaft, although that runs through the height of the building. It is awkward, to say the least, to describe the lift shaft as part of a structure that is on or part of the rooftop once it reaches the height of the rooftop terrace. Similarly, the stairway occupies a shaft between the level of the rooftop terrace and that level of the building which is immediately below it. That stairwell is not on or part of the rooftop.
- [24] For these reasons, the subject area is not a storey as defined and the proposed development is a three storey and not a four storey building. The Planning and Environment Court was correct to dismiss the application which was made to it.
- [25] I would order as follows:
1. Grant leave to appeal.
  2. Dismiss the appeal.
  3. The appellants pay the respondents' costs of and incidental to the proceeding in this Court.
- [26] **FREEBURN J:** I agree with the reasons for judgment of Fraser and McMurdo JJA, and the orders proposed by McMurdo JA.