Court of Appeal
New South Wales

Case Title:	Blacktown Workers' Club Ltd v O'Shannessy
Medium Neutral Citation:	[2011] NSWCA 265
Hearing Date(s):	23 August 2011
Decision Date:	06 September 2011
Jurisdiction:	
Before:	Basten JA at 1; Handley AJA at 62; Sackville AJA at 72
Decision:	(1) Grant the appellant leave to appeal from the judgment and orders given in the Common Law Division on 14 October 2010. (2) Direct that the appellant file within 7 days a notice of appeal in accordance with the draft notice contained in the white folder. (3) Allow the appeal and set aside the orders made in the Common Law Division on 14 October 2010 and, in lieu thereof: (a) dismiss the prosecutor's appeal from the judgment and orders made in Blacktown Local Court on 7 December 2009, and (b) order the prosecutor to pay the costs of Blacktown Workers' Club Ltd of that appeal. (4) Order that the respondent pay the appellant's costs in this Court. *[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*

Catchwords:	APPEAL - offence - appeal limited to question of law alone - point not argued by parties - questions of construction of statute ENVIRONMENT - prosecution - smoke-free areas - enclosed public places - Smoke-Free Environment Act 2000 (NSW); Smoke-Free Environment Regulation 2007 (NSW) STATUTORY INTERPRETATION - purposes and objects of statute - statutory language to be given a meaning consistent with the purpose of the provision - statute not to be construed according to dictionary definitions of individual words - Smoke-Free Environment Act 2000 (NSW) WORDS & PHRASES - "walls"; "includes"; "directly"; "opens directly to the outside"; "gaps in walls" - Smoke-Free Environment Act 2000 (NSW); Smoke-Free Environment Regulation 2007 (NSW)
Legislation Cited:	Constitution, ss 7 and 24 Crimes (Appeal and Review) Act 2001 (NSW), s 56 Interpretation Act 1987 (NSW), s 33 Money-lenders and Infants Loans Act 1941 (NSW) Smoke-Free Environment Act 2000 (NSW), ss 3, 4, 6, 7, 8, 23; Sch 1 Smoke-Free Environment Regulation 2007 (NSW), cl 6
Cases Cited:	Cabell v Markham (1945) 148 F.2d 737 Collector of Customs v Agfa-Gevaert Ltd [1996] HCA 36; 186 CLR 389 Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280 Dubbo RSL Memorial Club Ltd v Steppat [2008] NSWSC 965; 160 LGERA 455 Insurance Commission of Western Australia v Container Handlers Pty Ltd [2004] HCA 24; 218 CLR 89 R v Brown [1996] AC 543 OV & OW v Members of the Board of the Wesley Mission Council [2010] NSWCA 155

	Residual Assco Group Ltd v Spalvins [2000] HCA 33; 202 CLR 629 YZ Finance Co Pty Ltd v Cummings [1964] HCA 12; 109 CLR 395
Texts Cited:	D C Pearce and R S Geddes, Statutory Interpretation in Australia (7th ed, 2011) at [6.61]-[6.64]
Category:	Principal judgment
Parties:	Blacktown Workers' Club Ltd - Applicant Leanne O'Shannessy and Department of Health - Respondent
Representation	
- Counsel:	Counsel: M J Leeming SC/A Hatzis - Applicant C P Hoy SC/N J Beaumont - Respondent
- Solicitors:	Solicitors: Thomsons Lawyers - Applicant Principal Legal Officer, Legal Branch, Department of Health - Respondent
File number(s):	CA 2009/325513
Decision Under Appeal	
- Court / Tribunal:	
- Before:	Harrison AsJ
- Date of Decision:	14 October 2010
- Citation:	[2010] NSWSC 1153
- Court File Number(s)	SC 2009/325513
Publication Restriction:	

HEADNOTE

HEADNOTE

[This headnote is not to be read as part of the judgment]

On 14 March 2008 the Blacktown Workers' Club Ltd was charged with an offence under the *Smoke-Free Environment Act 2000* (NSW). The charge alleged that on 26 November 2007 the Club, being the occupier of a smoke-free area known as the Western Terrace, did allow people to smoke in that area contrary to s 8(1) of the *Smoke-Free Environment Act* . On 7 December 2009, Dr R A Brown LCM, in the Blacktown Local Court, dismissed the charge on the ground that the Western Terrace was not an "enclosed public place" pursuant to the *Smoke-Free Environment Act* .

The Western Terrace was in effect an irregular oblong area with internal walls of the building forming three sides and the open area facing the rear of the building, covered by a mesh security screen and forming the five remaining areas. The magistrate found that the sides subject to mesh security screen were not "walls" for the purposes of the *Smoke-Free Environment Act* , and for this reason the Western Terrace was not an "enclosed public space"; smoking could therefore be allowed.

The prosecutor appealed to the Supreme Court against the order dismissing the charge pursuant to s 56(1) of the *Crimes (Appeal and Review) Act 2001* (NSW) "on a question of law alone". On 14 October 2010, Harrison AsJ upheld the appeal, finding that the Western Terrace was in fact an "enclosed public space", in which smoking was prohibited, on the primary basis that the mesh security screens constituted "walls" within the ordinary meaning of the word. Her Honour set aside the decision of the magistrate and remitted the matter to the Local Court. The Club sought leave to appeal from the judgment and orders of her Honour. The concurrent hearing proceeded on a common assumption that this was a 'test case'.

The issues for determination on appeal were:

(i) if it were open to the primary judge to adopt a construction of the word "wall", contrary to that contended by either party and to the original finding of the magistrate, was she correct to do so?

(ii) if the screens were not "walls", were they "gaps in walls"?

(iii) whether her Honour erred in holding that the mesh screens did not open "directly to the outside"?

The Court held, allowing the appeal:

In relation to (i)

1. Although impermissible for the Court to decide an issue which was not raised for its consideration, the judgment was not challenged on that basis: [31]-[32]. Further, the case was run on the basis that the legal test was to be found in the Smoke-Free Environment Regulation 2007 (NSW), cl 6, and not the Act: [10]; [65]-[67] and [74].

2. The correct approach to construing the Act was not by reference to dictionary meanings of individual words, but by reading the words in their statutory context, having regard to the purpose of the provision: [36]-[38]. The magistrate did not err in law in finding that the screens were not "walls".

Collector of Customs v Agfa-Gevaert Ltd [1996] HCA 36 applied; 186 CLR 389; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 ; *Cabell v Markham* (1945) 148 F.2d 737; *Residual Assco Group Ltd v Spalvins* [2000] HCA 33; 202 CLR 629 applied.

3. The definition of "walls" in the Regulation, although adopting the term "includes", was an exhaustive description.

4. The question whether the areas covered by mesh screens, not being walls, were also not "gaps in walls" was a question of law, involving the proper construction of the phrase in its statutory context: [44]-[45]. Her Honour correctly held that they were not.

R v Brown [1996] AC 54; *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155

In relation to (ii)

5. The primary judge did not err in concluding that if the screens were not "walls", they were also not "gaps in walls": [45], [47].

In relation to (iii)

6. No error of law was revealed in the adoption, by the magistrate, of a purposive approach to the construction of the term "opens directly to the outside", in accordance with the objects of the *Smoke-Free Environment Act* : [52]-[54].

Judgment

1 **BASTEN JA** : On 14 March 2008 the Blacktown Workers' Club Ltd ("the Club") was charged with an offence under the *Smoke-Free Environment Act 2000* (NSW) ("the Act"). The charge was laid by the present respondent, an officer with the New South Wales Department of Health. It was alleged that, on 26 November 2007, the Club, being the occupier of a smoke-free area, did allow a person to smoke in that area, contrary to s 8(1) of the *Smoke-Free Environment Act* .

2 On 7 December 2009, the charge was dismissed by Dr R A Brown LCM, in the Blacktown Local Court, on the ground that the area within the Club in respect of which the charge was laid was not an "enclosed public place" for the purpose of the Act.

3 The prosecutor appealed to the Supreme Court against the order dismissing the charge, pursuant to s 56(1)(c) of the *Crimes (Appeal and Review) Act 2001* (NSW) ("the *Appeal and Review Act* "). The appeal was limited to a ground that "involves a question of law alone". The summons came before Harrison AsJ who, on 14 October 2010, upheld the appeal, set aside the decision of the magistrate and remitted the matter to the Local Court to be determined according to law. The Club now seeks leave to appeal from her Honour's judgment and orders.

4 The respondent submitted that leave should be refused, but agreed there should be a concurrent hearing. The application proceeded on a common

assumption that this was a "test case". As it appears to be the first matter which has reached this Court under the Act, it may be so categorised. (The only other superior court decision in relation to this legislation appears to be that of McClellan CJ at CL in *Dubbo RSL Memorial Club Ltd v Steppat* [2008] NSWSC 965; 160 LGERA 455. The parties prepared a statement of agreed facts in the Local Court, which course allowed the hearing to proceed expeditiously and the Court to decide what the parties regarded as issues of principle. These factors militate in favour of a grant of leave to appeal. On the other hand, for reasons which will be explained below, there was also a degree of agreement as to the legal basis upon which the prosecution was to be determined which has had the effect of limiting artificially the issues of law. That in turn has caused difficulties in construing the Act and the Smoke-Free Environment Regulation 2007 (NSW) ("the 2007 Regulation") in an appropriately holistic manner.

5 Although the important issues of construction which underlay the prosecution may not be fully resolved by this case, it is nevertheless an appropriate case in which to grant leave to appeal.

Statutory framework

6 The circumstances in which the prosecution arose may be briefly stated. The Club, as its name indicates, is a registered club operating premises at Blacktown in western Sydney. It provided an area, known as the Western Terrace, in which patrons could smoke. There were poker machines in the area. The area was, again as the name suggested, a terrace which formed part of the Club's premises, facing the rear and positioned, in part, over the loading dock, to which access was to be had from Flushcombe Road, Blacktown. Above the terrace were the upper storeys of the building; it was in effect an irregular oblong area with interior walls of the building forming three sides and the open area facing the rear of the building covered by a mesh security screen.

7 Section 7 of the Act makes it an offence for any person to smoke in a smoke-free area. Section 8 then provides:

" **8 Occupier not to allow smoking in smoke-free area**

(1) If a person smokes in a smoke-free area in contravention of section 7, the occupier of the smoke-free area is guilty of an offence."

8 The Club accepted that it was an occupier and that people smoked within the Western Terrace. Indeed, it was established for that very purpose. In broad terms, the question for resolution was whether the Western Terrace was a "smoke-free area". The Act defined that concept in s 6:

" **6 Smoke-free area**

(1) In this Act, *smoke-free area* means any enclosed public place, but does not include an exempt area."

9 The Western Terrace was not an exempt area. Examples of places, the whole or any part of which, could constitute a smoke-free area were provided in Schedule 1 to the Act. Clubs were listed in the schedule. It was not in dispute that the Western Terrace was part of the Club and that it was a "public place", being a place to which a section of the public had access and which it was entitled to use. The critical question was whether it was an "enclosed public place". The Act defined "enclosed" in s 4:

" **4 Definitions**

In this Act:
...
enclosed , in relation to a public place, means having a ceiling or roof and, except for doors and passageways, completely or substantially enclosed, whether permanently or temporarily."

10 On one view, the prosecution might have proceeded by asking whether the Western Terrace was "completely or substantially enclosed", within the terms of the definition in s 4. That did not happen. Instead reliance was placed on "guidelines" made pursuant to the power conferred on the Governor to make regulations not inconsistent with the Act. The relevant subject was identified in s 23(2)(e) in unusual terms:

" **23 Regulations**
...
(2) In particular, the regulations may make provision for or with respect to the following:
...

(e) guidelines in relation to determining what is an enclosed public place and when a covered outside area is considered to be substantially enclosed for the purposes of this Act ...."

11 At the date of the alleged offence, the 2007 Regulation included cl 6, which had a predecessor in similar terms, but which itself commenced on 1 September 2007. (Clause 6 has since been amended, but only in respect of locked-open doors or windows, which are not presently relevant.) Thus, as in force at the time of the alleged offence, cl 6 provided:

" **6 Guidelines for determining what places are enclosed**

(1) The provisions of this clause prescribe guidelines in relation to determining what is an enclosed public place and when a covered outside area is considered to be substantially enclosed for the purposes of the Act.

(2) A public place is considered to be substantially enclosed if the total area of the ceiling and wall surfaces (the *total actual enclosed area*) of the public place is more than 75 per cent of its total notional ceiling and wall area.

(3) The *total notional ceiling and wall area* is the sum of:
(a) what would be the total area of the wall surfaces if:

(i) the walls were continuous (any existing gap in the walls being filled by a surface of the minimum area required for that purpose), and
(ii) the walls were of a uniform height equal to the lowest height of the ceiling, and

(b) what would be the floor area of the space within the walls if the walls were continuous as referred to in paragraph (a).
(4) The following are to be included as part of the total actual enclosed area:

(a) any gap in a wall or ceiling that does not open directly to the outside,

(b) any door, window or moveable structure that is, or is part of, a ceiling or wall, regardless of whether the door, window or structure is open (other than the area of any locked-open door or window),
(c) the area of any locked-open doors or windows, but only that part of the total area of all such doors and windows that exceeds 15 per cent of the total notional ceiling and wall area.

(5) A gap in a wall or ceiling that opens directly to the outside (other than a gap caused by a door, window or moveable structure being open) is not to be included as part of the total actual enclosed area.

(6) A gap, door, window or moveable structure required to be included as part of the total actual enclosed area is to be included as if the wall or ceiling were continuous and the gap, or the space occupied by the door, window or moveable structure, were filled by a surface of the minimum area required for that purpose.

(7) In this clause:

ceiling includes a roof or any structure or device (whether fixed or moveable) that prevents or impedes upward airflow.

locked-open door or *locked-open window* means a door or window that opens directly to the outside and is locked fully open (that is, secured in its fully open position by means of a key operated lock).

moveable structure includes a retractable awning, umbrella or any other moveable structure or device.

wall includes any structure or device (whether fixed or moveable) that prevents or impedes lateral airflow."

12 In opening the appeal, senior counsel for the Club identified what he described as common ground between the parties, namely that the prosecution was run on the basis that the guidelines contained in cl 6 of the Regulation were prescriptive, exhaustive and valid. That description encompassed two propositions. First, the inter-relationship of cl 6 and the Act need not be addressed. Secondly, if the prosecutor failed to establish that, in respect of the Western Terrace, the criterion identified in sub-cl 6(2) was not satisfied, the charge should be dismissed.

13 The case for the Club in this Court was that the area covered by the mesh security screen did not constitute a "wall"; that was so because the mesh did not "impede lateral airflow" for the purposes of the definition of "wall" in cl 6(7). That conclusion rested on a factual finding of the magistrate that there was no discernible diminution in airflow through the screen, sufficient to constitute impeding airflow: Local Court judgment, at [21]. If the areas covered by the mesh security screen did not constitute "wall surfaces" for the purposes of sub-cl 6(2), the Western Terrace was not "substantially enclosed" and, therefore, the charge was properly dismissed.

14 In order to understand the position of the prosecutor fully, it will be necessary to explain the context in which the present appeal came to be decided. However, the short response of the prosecutor to the submission noted above was that the definition of "wall" did not involve any qualification in respect of the impedance to lateral airflow, by terms such as "significant". Once some level of impedance was established, the definition was satisfied.

15 The prosecutor adopted an alternative approach, in the event that the mesh security screen was held not to be a "wall". She submitted that the area covered by the screen constituted a "gap" in a wall for the purposes of sub-cl 6(4)(a). If, as she further submitted, the gap did not "open directly to the outside" then the area was nevertheless to be included in calculating the total actual enclosed area, with the result that the Western Terrace was "substantially enclosed" for the purposes of sub-cl 6(2). Because the Western Terrace opened on to a covered area at the rear of the building which constituted either a walkway to the rear of the building or the roofed cavern created by the entry to the loading dock, it could not be said that the Western Terrace opened directly to the outside.

16 The Club's response to the alternative argument also had two parts. It contended that the total absence of a wall along the rear of the Western Terrace did not constitute a "gap in a wall" for the purposes of sub-cl 4(a). Secondly, the Club argued that even if that were wrong and the rear of the

Western Terrace did constitute a "gap in a wall", it nevertheless opened upon a cavern which was directly connected to the outside air, without any intervening structure, and was properly described as opening "directly to the outside".

17 This simplified statement of the issues was complicated by the time the matter reached this Court in a way which requires reference to the proceedings in the Local Court and in the Common Law Division.

Proceedings in Local Court

18 A number of features of those proceedings need to be identified. First, before the Local Court there was debate as to the effect of "guidelines" provided by way of regulation. The magistrate concluded that "a party who complies with the guidelines will definitely not commit an offence, whilst non-compliance with a guideline will probably, but not necessarily, found a conviction": at [9]. That question also received significant attention from the primary judge, who concluded the guidelines were "mandatory": at [47]. As noted above, the effect of the guidelines was not in issue in this Court: the parties accepted that they were both prescriptive and exhaustive, so that the case was to be determined by their application to the facts as found.

19 Secondly, the Club, which sought to uphold the finding of the magistrate that the Western Terrace was not "substantially enclosed", accepted that there was a step missing from the reasoning of the magistrate in relation to the key question. The calculation required by cl 6(2) of the 2007 Regulation resulted in a figure for the total area of the ceiling and wall surfaces. The ceiling was not controversial; the issue concerned the area of the wall surfaces. His Honour referred to the definition of "wall" in sub-cl 6(7) and identified the issue as whether the mesh screens impeded lateral airflow. However, in order to identify that issue, it was necessary to consider whether the use of the term "includes" in the definition rendered what followed illustrative, expansive or exhaustive. The Club submitted

that it should be read as exhaustive, and thus equivalent to "means and includes".

20 The potential uncertainty surrounding the word "includes" is widely appreciated, at least by lawyers: D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (7 th ed, 2011) at [6.61]-[6.64]. Senior counsel for the Club submitted that the magistrate had treated the definition as exhaustive, and was justified in so doing, in accordance with the reasoning in *YZ Finance Co Pty Ltd v Cummings* [1964] HCA 12; 109 CLR 395 at 398-399 (McTiernan J, Taylor and Windeyer JJ agreeing) and at 401-402 (Kitto J). *YZ Finance* was a strong case: it involved a question as to whether a promissory note, undoubtedly a "security" in the common sense of the term, constituted a "security" within the *Money-lenders and Infants Loans Act 1941* (NSW), which contained a definition of "security" as including a long list of instruments, but with no reference to promissory notes. The statutory context was held to exclude from the definition, which purported to be inclusive only, a member of the class defined, when used in its ordinary sense. It is not necessary to go so far in the present case. The definition of "wall" does not list members of the class, but rather provides a description of the class which would seem to encompass all members within the ordinary meaning of the term.

21 The reason it was necessary to address this issue was that the primary judge found that the magistrate had erred, as a matter of law, in failing to consider whether the mesh screens were "walls" in the ordinary sense of the term, before considering whether they met the expanded definition in sub-cl 6(7). It will be necessary to return to her Honour's approach below.

22 Thirdly, there was expert evidence before the Local Court from a member of a firm of fire safety engineers who had conducted what was described as "computer-based smoke modelling": Local Court judgment, [18]. His Honour accepted the expert's conclusion that whilst the mesh screens did have "some impact" on the lateral movement of cigarette smoke within the

space, such impact was "extremely minor". The magistrate then addressed the construction to be given to the word "impede" and concluded at [21]:

> "As a matter of basic principles of construction there seems to be no reason to not accord the word its normal English meaning. It is clearly the evidence of [the expert] that the screens do not obstruct or hinder the airflow, and whilst any solid, however minor, in an airstream, could be said to be an 'obstacle', it would need to have some discernable diminishing impact on the airflow before it could be said to 'impede' that airflow. No such impact is demonstrated in the present case."

23 It followed that, in the view of the magistrate, the mesh screens did not constitute "walls". That was not, however, an end to the prosecution. In calculating the total actual enclosed area it was necessary to include "any gap in a wall", if the gap "does not open to directly to the outside": cl 6(4)(a). Thus, if the areas covered by mesh screens could be characterised as gaps in a wall, and did not open directly to the outside, the area of the mesh screens would be included in the calculation of total actual enclosed area, with the same result as if they had been walls.

24 The magistrate identified as a single issue whether the mesh screens constituted "gaps" or "walls": at [12]. The primary case for the prosecutor was that they were walls and therefore not gaps. Although the prosecutor relied upon sub-cl (4)(a), her submissions in the Local Court did not address the question of "gaps", but rather assumed that an absence of a wall constituted a "gap in a wall". The magistrate appears to have operated on the same basis, although he did not need to make a finding in that respect in any event, because he concluded that each of the areas covered by screens opened directly to the outside: at [16].

25 Fourthly, the final step in this argument was that the Western Terrace opened onto a covered walkway and the entrance to the loading dock, both of which were within the footprint of the building, but each of which connected directly with the outside air. His Honour stated at [15]:

> "Each case will, of course, be a matter of degree. The fact that household windows have eaves, or open onto verandas, does not in my view mean that they do not open 'directly to the outside'. In the present context, given that the purpose of the regulations is clearly to ensure that cigarette smoke does not enter areas where smoking is prohibited, and is not trapped nor allowed to stagnate or concentrate in areas where smoking is permitted, opening 'directly' to the outside carries the connotation of unobstructed movement of air (and smoke) to the outside air without being trapped, stagnant or concentrated, and without passing through other places occupied by people. If this is correct, the direction which each screen faces is of little moment provided unobstructed and otherwise permissible airflow is sustainable."

26 The magistrate concluded that "the screens all 'open directly to the outside' and, provided they otherwise are properly classified as 'gaps', and not as 'walls', are not included in the [total actual enclosed area]": at [16].

Appeal to Common Law Division

27 The charge having been dismissed, the prosecutor appealed to the Common Law Division. The summons, as filed on 23 December 2009, accepted that the finding that the mesh screens were not "walls" involved a question of fact and was not appellable. The error of law relied upon related to the finding that the areas covered by mesh screens opened directly to the outside. The contention was that the walkway and the loading dock were themselves "substantially enclosed" areas and were not therefore "outside" within the meaning of cl 6.

28 An amended summons, filed on 7 June 2010 recast the error identified in the first summons and added a separate ground, identifying error in the failure of the magistrate to find that the guidelines were "prescriptive and mandatory" and that the application of their provisions conclusively determined whether a public place was "substantially enclosed" within the meaning of s 4 of the Act. (There was also a challenge to the adequacy of his Honour's reasons.) Accordingly, there remained no challenge to the finding in the Local Court that the mesh screens were not "walls".

29 Ground 3 in the amended summons, dealing with sub-cl (4)(a), stated that his Honour had found the mesh screens to be "gaps", which does not

appear to be correct - see [26] above - but nothing turns on that fact. The written submissions in the Common Law Division, which were before this Court, faithfully followed the issues identified in the amended summons. The transcript of the oral argument was not before this Court, but it was not suggested that it expanded the issues relevantly for present purposes. The only additional issue, which arose from a notice of contention filed by the Club, sought to raise the point that the areas covered by the mesh screens had not been found by the magistrate to be "gaps": 2010 NSWSC 1153 at [22].

30 The primary judge commenced her reasons by referring to the question whether the mesh screens were "walls" as a "preliminary issue", while noting that the prosecutor did not challenge "this crucial finding": at [24] and [30]. Despite that acknowledgment, the primary judge stated at [31]:

> "However, the proper construction of the term 'wall' is a question of law. Although such an error was not pleaded, if the Magistrate adopted an incorrect interpretation of the term, which led his Honour to reach a factual finding that the mesh screens were not walls, then the error is one of law and attracts the jurisdiction of this Court."

31 This course was impermissible. There are undoubtedly circumstances where an appeal court, in seeking to determine issues presented to it by the parties, may legitimately canvass factors which have not been addressed in those precise terms. On occasion, the Court may refer to authorities not relied upon by either party. Similarly, it will often formulate its conclusions in terms which reflect the reasoning of neither party. In adversarial litigation, that is not unexpected. It may also happen that factors accorded little weight by the parties are treated as determinative by the Court. All of that may be accepted: it does not follow, however, that the Court is entitled to decide an entirely different issue which was not raised for its consideration, at least in the absence of notice being given to the parties that it proposed to take that course. The boundary dividing that which is permissible from that which is not cannot be identified by a bright line; however, in the present case, her Honour's approach was clearly on

the impermissible side of the line. Not only was the issue she determined not raised by the prosecutor, but it was expressly adverted to in the original summons and eschewed as an issue which fell beyond the jurisdiction of the court.

32 Ironically, the judgment cannot be set aside on that ground, because, while both parties accept that the issue was not raised, the judgment below is not challenged on that basis. Although the approach adopted was undoubtedly procedurally unfair to the Club, and may thus be characterised as involving jurisdictional error, the judgment of a superior court remains valid until set aside. That error may properly be ignored.

(a) "wall"

33 Rather, the draft notice of appeal, which provided the focus of the hearing, on the basis that leave would be granted, engaged with her Honour's reasoning in relation to whether the mesh screens were "walls", alleging that the primary judge was in error in the way in which she dealt with the issue. The first ground in effect accepted the prosecutor's original position that the finding of the magistrate in respect of "walls" was not a question of law alone but involved questions of fact, or mixed fact and law. This submission should be accepted.

34 The primary judge commenced with the proposition that the definition, using the word "includes" was not exhaustive, but expansive: at [32]. Thus she concluded:

> "It is due to cl 6(7) that structures not falling within the conventional definition of 'walls' may still be classified as such when determining whether an offence has occurred under the legislation."

35 The primary judge accepted that the magistrate had made a factual finding that the screens neither prevented nor impeded lateral airflow: at [34]. However, she concluded that the magistrate erred in law in failing to consider whether the screens were "walls" on a commonsense interpretation of the term: [34] and [39]. She then reached her own

conclusion that the screens were "walls" within the ordinary meaning of the word. This approach calls for comment in three respects.

36 First, it may be accepted that the question whether a word in a statute is to be given its ordinary meaning or a technical or defined meaning is a question of law: *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; 186 CLR 389 at 395, referring to the first proposition in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287. Thus, if the magistrate gave the word a limited meaning in circumstances where, as a matter of law, it had a broader meaning, there would have been an error of law. However, as noted above, the definition in cl 6(7) does not, on its face, purport to exclude any object which would fall within the category of "walls", in the ordinary sense of that word. Nor did the primary judge expressly explain how a structure which would be a wall in the ordinary sense, would not fall within the defined term. Further, and secondly, had she done so, she should have remitted the matter to the magistrate for him to determine whether or not the mesh screens fell within the ordinary meaning of the term "wall". That is because the ordinary meaning of the word is a question of fact: *Agfa-Gevaert* at 395, second principle identified in *Pozzolanic* . The only circumstance in which it would have been appropriate for her Honour to determine the question would have been if only one answer were available. Her Honour did not so hold.

37 Thirdly, her own reasoning was erroneous. For the ordinary meaning, her Honour turned to definitions of "wall" in the *Macquarie Dictionary* and in the *Oxford Dictionary* . The value of a dictionary in providing common (and indeed uncommon) uses of words is undeniable; the pitfalls with respect to their use in statutory construction derive from their strengths. A common word may have a core meaning, but it may also be used analogically, figuratively, metaphorically and sometimes merely to raise illuminating associations. The danger was famously identified by Judge Learned Hand in *Cabell v Markham* (1945) 148 F.2d 737 at 739:

> "But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

38 The importance of this approach, cited with approval in *Residual Assco Group Ltd v Spalvins* [2000] HCA 33; 202 CLR 629 at [27], is reflected in the obligation to adopt a construction of a statute which would "promote the purpose or object underlying the Act": *Interpretation Act 1987* (NSW), s 33. As the Club submitted, walls have many purposes and effects; the Act is concerned with their effect in aggravating the exposure of both smokers and other persons to tobacco and other smoke where they operate to enclose a public place: s 3, Object of Act. That purpose must be borne steadfastly in mind in determining the meaning of the language in the statute, both generally and in relation to the word "wall". Her Honour did not adopt that approach, as appears from the conclusion reached at [37]:

> "The first-listed definition from the Macquarie Dictionary is relevant in the present case. Importantly, it defines a wall by reference to functions going beyond the prevention or inhibition of lateral airflow (i.e. enclosure, division, support, protection, etc). When this definition is adopted, it is clear that the mesh screens were, collectively or individually, a wall or walls. They were upright metal structures designed to divide or enclose the Western Terrace from the loading dock area."

39 This approach, relying on the great variety of functions that can be served by a wall, fails to focus on the particular function served in respect of a public place having a ceiling or roof. By contrast, and assuming that one is only concerned with the language of the 2007 Regulation for present purposes, there is good reason to accept the submission of the Club that a structure or device which does not, in a discernable way, impede lateral airflow, is not a wall for the purposes of the Act.

40 It follows that her Honour was wrong to set aside the decision of the magistrate on the ground that he erred in finding that the mesh security screens were not walls. Properly in the circumstances, and particularly given the acknowledgement that this ground was not relied upon by the

prosecutor, the primary judge proceeded to consider the other grounds of appeal. She did this by addressing first the question of whether there was an error of law infecting the conclusion of the magistrate that the areas covered by mesh screens opened directly to the outside. She held that there was. However, her conclusion in that regard would not have led to the decision being set aside because she also accepted (without reasoning) that the mesh screens were not "gaps in any wall or ceiling": [63]. Both issues were agitated in this Court.

(b) "any gap in a wall"

41 Logically, it is convenient to deal first with the question whether the areas covered by mesh screens, not being walls, involved gaps in a wall.

42 The Western Terrace was not a rectangle. As described by the magistrate, it had three solid walls and five floor to ceiling mesh screens. Nevertheless, each of the areas was at right angles to the adjoining areas and, like a four-sided room, it would involve no departure from ordinary usage to describe each area as having, or not having, a wall. Such usage would be consistent with the language and structure of cl 6.

43 Although the primary judge stated that the magistrate had found them to be gaps, for reasons already explained, there was no such finding. The contention raised before the primary judge was also raised in this Court, inviting a finding that the mesh screens were "gaps in walls". There is a degree of ambiguity in the formulation of the contention raised by the prosecutor in this Court; however, the preferable reading is that the contention can only succeed if, on the facts found by the magistrate, it was not open to him to find that the areas of the mesh screens were not "gaps". Were it otherwise, the notice of contention would not be available to the prosecutor on an appeal limited to questions of law. If, as the primary judge thought, the magistrate had found that the areas were "gaps", that finding could only have been challenged before her on the basis of an error of law. Although she reached the conclusion that they were "not gaps in any wall or ceiling" the reasoning is not set out. She could only have

reached that conclusion, however, if it were the only one available, as a matter law, on the facts as found. That being so, the prosecutor, as respondent in this Court, cannot invite the Court to approach the question on a different basis.

44 The proper construction of the phrase "any gap in a wall or ceiling" is a question of law. The phrase can only properly be construed by reference to its statutory context, rather than by identifying the ordinary meaning of each of the words and thus constructing a meaning for the whole phrase. Such an approach involves the fallacy identified by Lord Hoffmann in *R v Brown* [1996] AC 543 at 561, being "one common among lawyers, namely to treat the words of an English sentence as building blocks whose meaning cannot be affected by the rest of the sentence". As he further explained, in passage cited with approval in *Agfa-Gevaert* at 397, the "unit of communication by means of language is the sentence and not the parts of which it is composed": see also *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 at [30]-[32].

45 In the present case, the reference to "gap" in sub-cl (4)(a) applies to both wall and ceiling. That is because it is the total area of the ceiling and wall surfaces which are to be calculated. However, unless the area has a ceiling or roof, it will not be "enclosed" for the purposes of the definition in s 4 of the Act. The absence of a ceiling cannot, therefore, be treated as a gap in a ceiling. The 2007 Regulation envisages, no doubt correctly, that to be an enclosed public place, there must be a wall or walls of some kind. If the building were circular, it might be appropriate to say that it had a single wall. However, with a rectangular space one would usually say that it had four walls, rather than a single wall. The absence of a wall on one side would be just that, and not a gap in a wall. Where a building is partly constructed and a room has three walls of an intended four walls, it may be sensible to speak of a gap in "the walls" but again, not a gap in "a wall". To speak of a gap in "a wall" only makes sense in respect of an area which is partly covered by a wall, although part is absent, either because not yet

constructed, or because it contains a door, window, passageway or similar void.

46 There are further questions which could arise on a full analysis of sub-cl (4). For example, paragraph (b) (as in force at the time of the offence) referred to "any door, window or moveable structure that is, or is part of, a ceiling or wall ...". Such structures are excluded from the reference to " wall or ceiling" in the definition of "enclosed" in s 4 of the Act. This, and related, issues do not arise in the present case. Further, the prosecutor suggested that the existence of an architrave or columns intruding into the area which lacked the wall might give rise to a question as to whether there was in that case a wall, with a very large gap. Again the question does not arise for determination on the facts agreed and found in this case.

47 The conclusion reached by her Honour that the areas covered by the mesh screens were not gaps in a wall, should be accepted. No other conclusion was open as a matter of law, on a proper construction of the language of the regulation.

(c) "open directly to the outside"

48 On the conclusions reached above, it is unnecessary to determine whether the magistrate made an error of law in reaching a conclusion that each of the five areas subject to screens opened directly to the outside. However, as the matter was expressly addressed by the primary judge and was argued in this Court, some of the issues may be identified.

49 The magistrate adopted a purposive approach. After describing the manner in which the five mesh screens faced onto the open walkway or the drive to the loading dock, he adopted the reasoning set out at [25] above.

50 The primary judge found that the proper construction of the words "opens directly to the outside" to be a question of law. For reasons already given

in the respect of the previous phrase, that approach should be accepted. Indeed, the two phrases cannot be read in isolation from each other. However, her Honour then took issue with two aspects of the reasoning of the magistrate set out at [25] above. First, she thought there was error in stating that the application of the principle involved a matter of degree, because the language of cl 6(5) "does not import any notion of degree": at [55].

51 Secondly, after referring to the rest of the magistrate's reasons set out above, her Honour concluded at [57]:

> "With respect, his Honour appears to have misunderstood the question for determination. The construction of clause 6(5) did not require his Honour to assess the ease with which air could pass through or escape from the building or structure, or the path it was required to take through a space before it was dispersed. Rather, it required an assessment of whether the building or structure said to constitute the 'gap' (i.e. the mesh screens) led directly to the outside. In my view, this misunderstanding caused his Honour to introduce unnecessary complexity into the construction of clause 6(5) and ultimately, to err."

52 The first complaint does not in terms reveal an error of law. In ordinary usage, the word "directly" is to be contrasted with "indirectly". It may well have different connotations in different contexts: compare the *Constitution* , ss 7 and 24 requiring that members of Parliament be "directly chosen by the people"; *Insurance Commission of Western Australia v Container Handlers Pty Ltd* [2004] HCA 24; 218 CLR 89, discussing "injury ... directly caused by, or by the driving of, the vehicle". In relation to an opening in a wall, the term suggests a lack of space between the place in question and "the outside". The context does not permit a precise meaning for the phrase taken as a whole. Clause 6, in common with s 23 of the Act, appears to distinguish between "an enclosed public place" and "a covered outside area": cl 6(1). In relation to a public place within a building, it may be, as the magistrate appears to have assumed, that "the outside" means outside the building. Even if the outside is beyond the limits of a building, there may well be, as the magistrate explained, practical considerations,

such as those created by an opening onto a verandah or an area under eaves.

53 In respect of an opening, "directly" could have different meanings depending on its purpose. The Act and the 2007 Regulation are concerned with access to the open air. A door opening onto a verandah may or may not be described as opening to the outside, depending upon whether one has in mind access to fresh air or to an area giving protection from the weather. Thus, the "outside" may not necessarily be beyond the external limits of the building. A person standing on the driveway to the loading dock, sheltering from rain, could sensibly say, 'I am outside the Club'.

54 Before the primary judge, the prosecutor argued, in part, that the error adopted by the magistrate was a failure to identify the "gap" in the wall as that which must be in immediate proximity to "the outside". The prosecutor also emphasised the need to give work to the word "directly". However, the narrow meaning sought to be attracted is that the gap must be in an external ceiling or wall. The language of being "open directly to the outside" is not so precise. For example, a ceiling might have a gap leading into a roof cavity or even an area covered by an awning or other form of weatherproofing. It would appear that the drafter adopted less precise language than might otherwise have been used in order to allow a degree of flexibility with respect to circumstances which might not be foreseen.

55 While it might be thought that a literal reading of the language of cl 6(4) would be inconsistent with the approach adopted by the magistrate, his Honour's purposive approach does not demonstrate any patent error of construction. Whether the Court would reach the same conclusion on the facts is not a relevant question, unless it can be said that only one conclusion was open. That was not the reasoning adopted by the primary judge, nor was it the reasoning proposed in this Court. Had it been necessary to resolve this question, the court would need to have been satisfied that the prosecution had demonstrated error on a question of law

alone, in respect of the construction given by the magistrate to the statutory phrase.

56 There are other possible issues noted by Handley AJA.

Conclusions

57 The judgment of the primary judge should be upheld in respect of her conclusion that if the mesh screens were not "walls" they were not "gaps in a wall" and thus were not to be counted in the calculation of the total enclosed area of the Western Terrace pursuant to cl 6(4)(a). The reasons upon which that conclusion should be upheld, though not articulated by the primary judge, are set out above.

58 Because the prosecutor could therefore not rely upon cl 6(4)(a), the prosecution could only succeed if the mesh screens constituted "walls" for the purposes of cl 6(2). In applying the definition of "walls" in cl 6(7), which was the approach adopted by both parties in the Local Court, the magistrate did not err in law. The contrary conclusion reached by the primary judge was erroneous.

59 It follows that, as the prosecution was run in the Local Court, there was no error of law on the part of the magistrate requiring that his dismissal of the charge be set aside. The judgment and orders of the primary judge should, however, be set aside.

60 Although the matter was described by the parties as a "test case", there was no suggestion that costs should not follow the event, as occurred in the Court below.

61 The Court should make the following orders:

(1) Grant leave to Blacktown Workers' Club Ltd to appeal from the judgment and orders given in the Common Law Division on 14 October 2010.

(2) Direct that the appellant file within 7 days a notice of appeal in accordance with the draft notice contained in the white folder.

(3) Allow the appeal and set aside the orders made in the Common Law Division on 14 October 2010 and, in lieu thereof:

(a) dismiss the prosecutor's appeal from the judgment and orders made in Blacktown Local Court on 7 December 2009, and
(b) order the prosecutor to pay the costs of Blacktown Workers' Club Ltd of that appeal.

(4) Order that the respondent pay the appellant's costs in this Court.

62 **HANDLEY AJA** : In this summons for leave to appeal heard on a final basis I have had the considerable benefit of reading the reasons for judgment of Basten JA in draft. I agree with his Honour's reasons and the orders he proposes but will add some supplementary thoughts without or intending to express even a tentative view about their validity.

63 As his Honour said [12], the argument and the decisions below did not explore the relationship between the definition of enclosed in s 4 of the Act and cl 6 of the Regulation.

64 Section 23(2) confers power to make regulations with respect to guidelines "in relation to determining what is an enclosed public place". It was common ground [12] that the Guidelines in cl 6 of the Regulation were prescriptive, exhaustive and valid.

65 It is not clear to me that this is correct. Section 23 does not authorise regulations which are inconsistent with the Act. It may therefore be arguable that cl 6 supplements the definition of enclosed in s 4 without restricting it. This would permit a finding that a public place was substantially enclosed within the s 4 definition although it was not for the purposes of cl 6.

66 A construction which would permit such a result might be thought to constitute a trap for an occupier who set out to comply with cl 6 and succeeded. However the regulation making power in s 23(2) does not in terms authorise regulations for determining what is not "an enclosed public space". In particular it may not authorise regulations which confer exemptions from the definition of enclosed in s 4.

67 On this view a public place would be enclosed if it was substantially enclosed within s 4 or within cl 6.

68 Another possibility, not explored in argument or in the judgments below, is that there may be more than one way of defining the relevant public place. The prosecution treated this as the Western Terrace of the club. It may have been open to it to treat the relevant public place as the Western Terrace combined with the walkway and loading dock areas accessible through the door in the solid wall at the north eastern end of the Terrace.

69 The entrance to the loading dock facing Flushcombe Road may then have qualified as a gap in the exterior wall which opened directly to the outside within cl 6(5) and there may have been other such gaps in the walls or ceiling at the rear of the building. The larger area may or may not have been substantially enclosed for the purposes of s 4 or cl 6.

70 The mesh in the security screens shown in the exhibit was of considerable thickness as it had to be if it was to provide security. A finding that it did not appreciably impede lateral airflow is counterintuitive, particularly since the solid component of the screens was between 50% and 41% depending on the cut (black 49). The question of course is one of fact. The Western Terrace is presumably air-conditioned and the screens may not appreciably impede any forced draft. This was not addressed in the evidence, and it may or may not be relevant in the construction and application of cl 6.

71 The orders proposed by Basten JA should be made.

72 **SACKVILLE AJA** : I agree with the orders proposed by Basten JA and, subject to one qualification, with his Honour's reasons.

73 The qualification is that I prefer not to express a view as to whether it was open to the magistrate to conclude that the mesh fence " *open[ed] directly to the outside* " within the meaning of cl 6(4)(a) of the Smoke-Free Environment Regulation 2007 (" *2007 Regulation* "). As Basten JA has pointed out, that issue arises only if the areas occupied by the mesh screen can be described as " *gap[s] in a wall* " for the purposes of cl 6(4)(a). For the reasons given by Basten JA, Harrison AsJ was correct to conclude that the areas occupied by the mesh screen cannot be so described.

74 I wish to add one further point. As Basten JA has explained, this case was conducted in the Local Court and the District Court on the basis that the " *guidelines* " in cl 6 of the 2007 Regulation are prescriptive, exhaustive and valid. Having regard to the common position taken by the parties, it is not necessary to decide whether the assumption on which they proceeded is correct. However, if it is not, a prosecutor may be able to establish that an area is an " *enclosed public place* " for the purposes of s 6 of the *Smoke Free Environment Act* 2000 (" *the Act* "), even though he or she is unable to prove that the relevant area does not exceed the threshold of 75 per cent specified in cl 6(2) of the 2007 Regulation.

75 Notwithstanding that the parties have characterised this as a " *test case* ", they have assumed rather than debated the answer to a potentially important question of construction of the Act and the 2007 Regulation. The resolution of that question will have to await another day.

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