SUPREME COURT OF QUEENSLAND

CITATION:	*Pearson v Thuringowa CC* [2005] QCA 310
PARTIES:	**ANGUS ALEXANDER PEARSON** (applicant/appellant) **v** **THURINGOWA CITY COUNCIL** (respondent/respondent)
FILE NO/S:	CA No 94 of 2005 DC No 208 of 2004 MC No 182464 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	26 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	15 August 2005
JUDGES:	McPherson and Keane JJA and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for extension of time granted** **2. Application for leave to appeal dismissed** **3. Applicant to pay the respondent's costs of each application to be assessed on the standard basis**
CATCHWORDS:	STATUTES - BY-LAWS AND REGULATIONS - CONSTRUCTION - PARTICULAR WORDS - where s 97(1) *Standard Building Regulation* 1993 (Qld) prohibits the use of certain types of buildings for "residential purposes" without the approval of the relevant local government - where applicant was convicted in the Magistrates Court of using a shed in contravention of this prohibition - where applicant's appeal against his conviction to the District Court was dismissed - where there was unchallenged evidence that the shed used by the applicant was a building of the type subject to the prohibition on use for "residential purposes" and that no approval had been sought from the relevant local government - where the applicant admitted to regularly using the shed for food preparation, washing and storage - where the applicant also admitted to receiving mail and telephone calls at the shed - where the applicant did not sleep in the shed but in a nearby camper van - whether the Magistrate at

first instance had been correct to find that the applicant had used the shed for "residential purposes"

A New Tax System (Goods and Services Tax) Act 1999 (Cth), s 195-1
District Court of Queensland Act 1967 (Qld), s 118(3)
Residential Tenancies Act 1994 (Qld)
Standard Building Regulation 1993 (Qld), s 97(1)

Marana Holdings Pty Ltd & Anor v Commissioner of Taxation [2004] FCAFC 307; (2004) 214 ALR 190, considered
Zinace P/L v Tomlin & Ors [2003] QCA 102; Appeal No 195 of 2003, 12 March 2003, cited

COUNSEL: The appellant appeared on his own behalf
G P Lynham for the respondent

SOLICITORS: The appellant appeared on his own behalf
MacDonnells for the respondent

[1] **McPHERSON JA:** I agree with the reasons of Keane JA for dismissing this application with costs. The question in dispute is primarily, if not exclusively, one of fact as to which there are already concurrent findings of the Magistrates Court, and, on appeal from it, the District Court. In making it a statutory requirement in s 118(3) of the *District Court of Queensland Act 1967* that a further and third appeal be permitted only with leave of this Court, Parliament plainly intended that the discretion conferred by that provision should be favourably exercised only where there was some substantial reason for admitting such an appeal. Here there is none.

[2] **KEANE JA:** The applicant seeks leave to appeal against the decision of the District Court delivered on 1 March 2005 whereby the applicant's appeal to that court from a decision of the Magistrates Court was dismissed and the applicant was ordered to pay the respondent's costs of that appeal. The applicant had been convicted in the Magistrates Court on 28 April 2004 in respect of an offence of occupying a building for residential purposes contrary to s 97(1) of the *Standard Building Regulation* 1993 (Qld). The applicant appealed to the District Court from this conviction pursuant to s 222 of the *Justices Act* 1886 (Qld).

[3] Leave to appeal is necessary by virtue of the provisions of s 118(3) of the *District Court of Queensland Act* 1967 (Qld). An extension of time is necessary to enable that application to be made because the judgment of the District Court was delivered on 1 March 2005 and the application for leave to appeal was not filed until 12 April 2005. The respondent does not oppose the grant of an extension of time to enable the application for leave to appeal to proceed.

Background

[4] The offence in respect of which the applicant was convicted involved the use between 21 May 2003 and 22 October 2003 of a shed located at Borton Street, Balgal Beach for residential purposes, that use not having been authorised or approved by the respondent. The applicant was fined $1,000 and ordered to pay the respondent's costs fixed at $300.

[5] Section 97(1) of the *Standard Building Regulation* 1993 (Qld) provides:

> "(1) A person must not use a building (other than a class 1, 2, 3 or 4 building) for residential purposes unless the use is approved by the local government.
>
> Maximum penalty - 165 penalty units."

[6] In the Magistrates Court, there was unchallenged evidence that the shed was not a class 1, 2, 3 or 4 building and was a building for which no approval had been given for residential use by the respondent. There was also evidence from witnesses called by the respondent that the shed was used for residential purposes. The applicant, who represented himself both in the Magistrates Court and on appeal in the District Court, gave evidence in the course of which he made admissions to the effect that he watched football on the television in the shed, used a stove in the shed for cooking, used a toaster and jug located in the shed, used the fridge in the shed to store his food, used the shower in the shed, used the washing machine in the shed, had a phone in the shed the number of which was listed in the relevant telephone directory, had a mail box at the shed where he received mail and that he met visitors at the shed. The applicant usually slept in a nearby camper van.

[7] In the light of this evidence, the learned Magistrate concluded that, during the relevant period, the applicant used the shed for residential purposes.

[8] On appeal to the District Court, the applicant contended that the conviction was "unsafe and unsatisfactory", by which it may be understood that the applicant asserted that the evidence was not sufficient to sustain the conviction. He also contended that the fine was excessive.

[9] The learned District Court judge who heard the applicant's appeal to that court rejected these contentions. In my view, there was no reason why the learned District Court judge should have regarded the evidence as being insufficient to sustain the conviction.

[10] The only real issue for discussion in this appeal is whether the learned Magistrate at first instance was correct to find that the applicant had used the shed for "residential purposes". If that finding was correct then, in light of the unchallenged evidence about the classification of the shed by the local government and the admissions made by the applicant about his usage of it there could be no basis for overturning the applicant's conviction. The applicant submits, in effect, that the evidence before the learned Magistrate was not sufficient to enable his Honour to find that the applicant had, in truth, made use of the shed for "residential purposes".

[11] The phrase "residential purposes" is not defined in the *Standard Building Regulation* 1993 (Qld) so it is necessary to arrive at an appropriate definition by recourse to authority and by reasoning from first principles. In terms of relevant authority, the Full Court of the Federal Court recently had the opportunity to consider the meaning of "residential premises" for the purposes of the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) ("the GST Act") in *Marana Holdings Pty Ltd & Anor v Commissioner of Taxation*.[1] The definition of that phrase provided by s 195-1 of the GST Act depended upon the meaning of the term "residence". After conducting an extensive review of the dictionary definitions of

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[1] [2004] FCAFC 307; (2004) 214 ALR 190.

words such as "residence", "reside" and "residential", as well as examining previous authority dealing with the meaning of phrases such as "residential accommodation", the Full Court concluded that such terms usually connote "a degree of permanent or long-term commitment to the occupation of the premises in question".[2] I would respectfully agree with that conclusion.

[12] The question in this case is whether the applicant used the shed for "residential purposes". In my opinion, bearing in mind what has recently been said by the Full Federal Court about the meaning of "residential", a building is being used for "residential purposes" when the primary use of the building is as a venue for a function or functions normally undertaken in a dwelling, such as food preparation and consumption, washing or sleeping, in a manner that is not merely temporary or sporadic but is consistent with an intention to use the building for such functions on a permanent or long-term basis. Whether or not the usage to which a building has been put meets this definition will be a question of fact in each case. In the present circumstances, in my view, the applicant's admissions about his persistent use of the shed in order to carry out functions consistent with the use of that building as a dwelling mean that it is not possible to conclude that the learned Magistrate, and the learned District Court judge on appeal, were in error when they found that the applicant had made use of the shed for "residential purposes".

[13] The applicant's other submissions to this Court are that the learned District Court judge erred by failing to consider whether the applicant was a tenant at the shed for the purposes of the *Residential Tenancies Act* 1994 (Qld) or, alternatively, that the applicant was a common law periodic tenant at the shed. It is unnecessary to consider the factual correctness of the assertions upon which these submissions are based beyond saying that, even if true, the position of the applicant as a tenant under statute or common law would not tend to establish that the applicant was not using the shed for "residential purposes". Indeed, it might be thought that the proposition that the applicant was a tenant of the premises would tend to suggest the opposite.

[14] It follows from what I have already said in these reasons that the applicant is unable to identify any arguable error on the part of the learned District Court judge that would justify this Court granting leave to appeal. The restriction imposed by s 118(3) of the *District Court of Queensland Act* 1967 (Qld) on appeals to this Court serves the purpose of ensuring that this Court's time is not taken up with appeals where no identifiable error or injustice can be articulated by those litigants whose arguments have already been fully considered at two judicial hearings.[3] As the applicant has failed to identify any arguable error the application for leave to appeal should be dismissed.

Conclusion and orders

[15] I would order that the application for an extension of time be granted and that the application for leave to appeal be dismissed. I would further order that the applicant pay the respondent's costs of each application to be assessed on the standard basis.

[16] **DUTNEY J:** I agree with the orders proposed by Keane JA and with his reasons for proposing those orders. I also agree with the further observations of McPherson JA.

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2 *Marana Holdings Pty Ltd & Anor v Commissioner of Taxation* [2004] FCAFC 307 at [60]; (2004) 214 ALR 190 at 203.

3 *Zinace P/L v Tomlin & Ors* [2003] QCA 102; Appeal No 195 of 2003, 12 March 2003 at [9] - [10].