SUPREME COURT OF QUEENSLAND

CITATION:	*Steiner v Seri* [2012] QCA 226
PARTIES:	**STEINER, John Raymond** (applicant/appellant) **v** **SERI, Wayne Michael** (respondent)
FILE NO/S:	CA No 329 of 2011 DC No 164 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	24 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	28 May 2012
JUDGES:	Margaret McMurdo P and Muir JA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal granted but limited to two issues: first, whether s 24 *Criminal Code* 1899 (Qld) has application to s 235 *Building Act* 1975 (Qld), and, second, whether the magistrate erred in finding that the prosecution established beyond reasonable doubt that s 24 *Code* did not provide a defence to the charge under s 235 *Building Act*.** **2. Appeal dismissed.** **3. No order as to costs.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – OTHER MATTERS – where the appellant was the owner of property with a swimming pool – where the appellant was found to have failed to ensure the pool complied with fencing standards pursuant to s 235 *Building Act* 1975 (Qld) – where the appellant gave evidence that the property was tenanted, and by agreement, the tenants were responsible for pool maintenance – where the appellant had not inspected the pool for over two months – where the pool was old and the appellant had previously received an infringement notice – whether the defence of mistake of fact pursuant to s 24 *Criminal Code* 1899 (Qld) was applicable – whether the complainant proved beyond reasonable doubt that the

appellant did not have an honest and reasonable belief that the pool fence was compliant

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the appellant was ordered to pay the complainant's professional costs – where the prosecution was commenced by complaint and summons brought by an employee of the Townsville City Council in the employee's name – where the prosecution, in practical terms, was conducted by the Council – whether the magistrate erred in his costs order

Building Act 1975 (Qld), s 235 (repealed), s 256
Criminal Code 1899 (Qld), s 24
District Court of Queensland Act 1967 (Qld), s 118
Justices Act 1886 (Qld), s 4, s 42, s 142A, s 157, s 158A
Local Government Act 2009 (Qld), s 237, s 240
Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 195

Bailey v Doncon (2007) 178 A Crim R 358; [2007] WASC 252, cited
Ipswich City Council v Dixonbuild Pty Ltd [2012] QCA 98, cited
Latoudis v Casey (1990) 170 CLR 534; [1990] HCA 59, cited
Steiner v Seri [2011] QDC, Unreported, Durward SC, DCJ, No 164 of 2011, 31 October 2011, related
Walden v Hensler (1987) 163 CLR 561; [1987] HCA 54, considered
Warren v Coombes (1979) 142 CLR 531;[1979] HCA 9, cited

COUNSEL: D N Honchin for the applicant/appellant
R J Douglas SC for the respondent

SOLICITORS: Stevenson & McNamara Lawyers for the applicant/appellant
Townsville City Council for the respondent

[1] **MARGARET McMURDO P:** The appellant, John Steiner, was found guilty in the Townsville Magistrates Court on 27 January 2011 of failing to comply with s 235 *Building Act* 1975 (Qld)[1] in that, on 4 January 2010, he was the owner of an outdoor swimming pool in Hyde Park, Townsville, and failed to ensure the fencing around the pool complied with the appropriate fencing standards and was kept in good condition. He was fined $700 without conviction and ordered to pay $75.90 costs of court and the complainant's professional costs of $1,500.

[2] He appealed under s 222 *Justices Act* 1886 (Qld) to the District Court where his appeal was dismissed with costs. He now seeks leave to appeal to this Court under s 118(3) *District Court of Queensland Act* 1967 (Qld). With the agreement of the parties, this Court considered the merits of the grounds of the proposed appeal to this Court in determining whether leave should be granted, and, if so, on what terms.

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1 The relevant reprint is Reprint 6F effective 1 January 2010.

[3] There are eight proposed grounds of appeal but, as counsel for the respondent submitted, they raise three issues. The first is whether s 24 *Criminal Code* 1899 (Qld) applies to an offence against s 235 *Building Act*. The second is whether, if s 24 was capable of having application, the magistrate erred in finding that it did not excuse the appellant. The third is whether the magistrate erred in ordering the appellant to pay the Townsville City Council's costs.

[4] Before discussing these issues, I will refer to relevant aspects of the hearings in the Magistrates and District Courts.

The Magistrates Court proceedings

[5] The prosecution was commenced by complaint and summons brought by "WAYNE MICHAEL Seri of Townsville in the State of Queensland, being a person duly authorised pursuant to the *Local Government Act* 1993 and being a 'public officer' as defined in the *Justices Act*." Mr Seri was an employee of the Townsville City Council. The bench complaint sheet, the only originating document in the material provided to this Court, however, does not refer to Mr Seri but instead records the "applicant/complainant" as Townsville City Council.

[6] The prosecution ultimately proceeded only in relation to an alleged offence committed on 4 January 2010. The prosecution case turned solely on the evidence of Mr Giannakis, a compliance officer with the Council. He presented video evidence taken on 4 and 22 January 2010 showing that the pool had the alleged defects. He did not contact Mr Steiner between the two inspections and nor was Mr Steiner present when these inspections took place.

[7] Mr Steiner gave and called evidence. He owned the Hyde Park property where the pool was located but rented it to a tenant in April 2009. Under the rental agreement the tenant was responsible for maintenance of the pool. Mr Steiner tendered a condition report[2] which set out the condition of the property on 15 October 2009. Like the lease, it contained a condition that the tenant was responsible for keeping the pool in safe condition and the pool gate locked. Mr Steiner emphasised that, whether verbal or written, he had an agreement with the tenant that the tenant was to maintain the pool. The tenant was obliged under their agreement to maintain the property and to report to him any damage or items in need of repair.

[8] He arranged to inspect the property every three months. Prior to 4 January 2010 he most recently inspected it in mid to late October 2009. This followed his receipt of a Townsville City Council infringement notice concerning the pool fence in early 2009, as a result of which he contacted the Council to ascertain what was required to bring the pool up to standard. He was told to refer the matter to a building inspector. He contacted a building inspector, Mr Scott Hughes, who inspected the pool and gave Mr Steiner a list of the work required. Mr Steiner had the work carried out and a compliance certificate was issued in March 2009.

[9] Had his tenant told him about a problem with the pool, he would immediately have inspected the property and either fixed the problem or arranged for a tradesman to fix it as soon as possible. The tenant did not tell him of any problems with the pool between when the compliance certificate was issued in March 2009 and the date of the alleged infringement, 4 January 2010. When he last inspected the pool in mid to

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[2] Ex 7. This has not been provided to the Court and is no longer on the Magistrates Court or District Court files.

late October 2009, the gate was closing properly and the trench around the pool fence (which ensured the fence was of sufficient height) was cleaned out. There was no damage to the pool and it was functioning properly. No construction work had been carried out to the pool between March 2009 and 4 January 2010. As far as he was aware, the pool was compliant on 4 January 2010.

[10] On 19 January 2010, he received a Council enforcement notice concerning the pool. He had no communication about the pool between 4 and 19 January from either the Council or his tenant. As soon as he received the notice he telephoned the tenant and arranged to inspect the premises the following day. He told the tenant not to use the pool and to ensure the pool gate was locked with a key at all times. He observed a broken hinge on the pool gate and that the gate was not closing. He discussed the Council notice and its list of defects with the tenant. They determined that, as there was a guard dog and there were no children on the premises, locking the gate with a key was a substantial step towards compliance. Also on 20 January he made about 20 phone calls in an attempt to find a tradesman to fix the listed defects. He finally arranged for a tradesman to meet him on site. He was unable to assist but referred Mr Steiner to another tradesman whom he met on site the following day. This tradesman remedied the defects in about a week. Mr Steiner then contacted building inspector, Mr Trevor Maltby, who better explained the Council requirements. Mr Steiner arranged for the additional recommended work to be done and Mr Maltby issued a compliance certificate for the pool on 10 February 2010.[3]

[11] In cross-examination, Mr Steiner accepted that as owner of the property it was his responsibility to ensure the pool was compliant, adding that he had always done everything that the Council asked of him. He accepted the pool was old and that one option suggested by Mr Maltby was to remove the pool altogether. Mr Steiner accepted the pool had the charged defects as at 4 January 2010 and that he subsequently engaged tradesmen to fix them. He added that the pool was now compliant. He again conceded the pool was old and that it was "getting time to think about removing it".

[12] Trevor Maltby, a senior building certifier with the Burdekin Shire Council, was also a private certifier endorsed to certify specified categories of work anywhere in Queensland. He gave evidence that he first inspected Mr Steiner's pool at his request on 1 February 2010 in response to a notice from the Townsville City Council. He inspected it again on 10 February 2010 after work had been carried out on it. He issued a "form 17" which indicated that the pool fence complied with the requirements of the *Building Act*. In cross-examination, he agreed the pool was not compliant on 1 February 2010.

[13] Scott Hughes was also a building inspector with the Burdekin Shire Council and a private certifier authorised to carry out pool compliance checks and to issue compliance certificates. He worked with Mr Maltby in assessing, rectifying and issuing compliance certificates on Mr Steiner's pool. On 9 March 2009, he issued a certificate to the effect that the pool fence was compliant with legislative requirements.

[14] In reaching his decision, the magistrate reasoned as follows. Mr Steiner's pool was suffering from the bulk of the defects particularised in the charge. He was the pool

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[3] Ex 9.

owner under s 234 *Building Act*. The absolute terms of s 235 *Building Act* make no allowance for the pool owner to have acted reasonably or for unexpected events. Section 257 *Building Act* did not require a contrary conclusion: if the *Building Act* was intended to accommodate a landlord in the same way as a member of the governing body of a body corporate it would have clearly stated this. Section 24 *Code* did not apply and was excluded by the wording of s 235 *Building Act*.

[15] If s 24 did have application, his Honour was not satisfied that Mr Steiner's actions could be regarded as the basis for a reasonable belief that the pool fence was compliant. The magistrate noted that Mr Steiner inspected the property on 15 October 2009 and did not inspect it again until 4 January 2010. It was not reasonable for him to rely on a three monthly inspection of a pool fence to satisfy himself as to compliance: "a more robust regime of inspection must be undertaken if one were to be able to rely on the exculpatory provisions of section 24". His Honour added that support for this conclusion came from the fact that in the present case the gate to the pool which had been compliant became grossly uncompliant within less than three months. His Honour was not satisfied that the belief held by Mr Steiner was reasonable in the circumstances. Each of the elements of the offence was proved beyond reasonable doubt. If s 24 applied, the prosecution had negatived the defence beyond reasonable doubt. Accordingly, his Honour found Mr Steiner guilty.

[16] The prosecutor submitted that a modest fine should be imposed and asked for costs. Mr Steiner's counsel emphasised Mr Steiner's genuine efforts to remedy the defects as soon as he became aware of them and submitted that the fine should be no more than that for a ticketed infringement notice ($700). He referred to s 157 and s 158 *Justices Act* and cited *Latoudis v Casey*[4] as authority for the proposition that costs under s 158 are by way of indemnity for costs that have actually been incurred. There was no evidence that the complainant, Mr Seri, had incurred any costs in this matter. The Townsville City Council chose not to put its name on the complaint and summons; Mr Seri was the complainant. He argued that it followed that there could be no order for costs against Mr Steiner.

[17] The magistrate concluded that "the costs are recoverable by the complainant through the Townsville City Council". Accordingly, he fined Mr Steiner $700 and ordered him to pay the complainant's costs. The bench complaint sheet is relevantly endorsed:

> "Professional costs $1500 – for payment to Townsville City Council."

The appeal to the District Court

[18] In determining Mr Steiner's appeal, the District Court judge found the magistrate's construction of s 235 *Building Act* was correct; it was an offence of absolute liability.[5] His Honour did not determine whether s 24 *Code* could have application to s 235 *Building Act* but stated that it was:

> "irrelevant in the context of the evidence of the appellant who gave no evidence of any mistake of fact, no evidence in support of the state of knowledge attributed to him in submissions and positively

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4 (1990) 170 CLR 534.

5 *Steiner v Seri* [2011] QDC, Unreported, Durward SC, DCJ, No 164 of 2011, 31 October 2011, [36]–[58].

> accepted that he had the responsibility to comply with the requirements of the Act".[6]

[19] The clear inference from these observations is that his Honour considered that, even if s 24 *Code* had application to a charge under s 235 *Building Act*, it did not provide Mr Steiner with any defence.

[20] His Honour noted that whilst Mr Seri was the complainant in the complaint and summons, the balance of the proceedings referred to the complainant as the Townsville City Council.[7] Counsel appearing in the Magistrates Court prosecution appeared "instructed by the Townsville City Council".[8] The transcript of the Magistrates Court proceedings was headed "Townsville City Council and John Raymond Steiner".[9] Mr Seri was a "public officer" under the *Justices Act*. Under s 240 *Local Government Act* 2009 (Qld), an employee authorised in writing by a local government may act as the authorised agent for the local government which must pay the costs incurred by the employee in any proceedings.[10] His Honour found that Mr Seri was acting for and on behalf of the Townsville City Council in issuing the complaint and summons in his name. His Honour rejected Mr Steiner's appeal as to costs, stating:

> "Whilst I think the Magistrate may have intended to say that the costs were incurred by the Townsville City Council through the named complainant Mr Seri, it is not a material matter. He clearly intended to indemnify the successful party – the Council – by the award of costs."[11]

[21] Accordingly his Honour dismissed the appeal with costs.

Can s 24 *Code* have application to offences against s 235 *Building Act*?

[22] The first issue is whether s 24 *Code* can have application to offences against s 235 *Building Act*. Section 24, mistake of fact, is contained in Ch V *Code* which deals with Criminal Responsibility. It provides:

> "**24 Mistake of fact**
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> (1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
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> (2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

[23] Section 36(1) *Code* which is also contained in Ch V states:

> "The provisions of this chapter apply to all persons charged with any criminal offence against the statute law of Queensland.
> …"

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6 Above, [61].
7 Above, [67].
8 Above, [69].
9 Above, [70].
10 Above, [75].
11 Above, [77].

[24] Section 235 *Building Act*[12] provides:

> "**235 Outdoor swimming pool must be fenced**
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> (1) The pool owner of an outdoor swimming pool on residential land must ensure –
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> (a) the pool has, around the pool, fencing complying with the fencing standards for the pool; and
>
> (b) the fencing is kept in good condition.
>
> Maximum penalty – 165 penalty units.
>
> …"

[25] There is nothing in the *Building Act* generally or in s 235 itself to expressly exclude the operation of s 24. Brennan J (as his Honour then was) in *Walden v Hensler*,[13] discussed the circumstances in which provisions in Ch V of the Code can be excluded by a special statutory provision:

> "… in the absence of express words, the provisions of another statute will not readily be construed as implying the exclusion of Ch. V or any of its provisions. Chapter V contains the provisions which substantially correspond with and supplant, in relation to statutory offences under the law of Queensland, the common law requirements of mens rea. In common law States and Territories, the presumption that mens rea is an element of a statutory offence may be displaced not only by the express words of a statute but also – albeit not easily – by considerations relating to the subject-matter or purpose of the statute creating the offence: *Lim Chin Aik v. The Queen* [[1963] A.C. 160, at pp. 173–174]; *Gammon Ltd. v. Attorney-General (Hong Kong)* [[1985] A.C. 1, at p 14]; *He Kaw Teh v. The Queen* [(1985) 157 C.L.R. 523]. In Queensland, to exclude the application of Ch. V or one of its provisions to a statutory offence, s. 36 must be repealed pro tanto. The test for determining whether Ch. V is excluded has been said to be more rigorous than the test for determining whether the common law presumption relating to mens rea has been displaced: *Brimblecombe v. Duncan; Ex parte Duncan* [[1958] Qd R. 8, at pp 12, 18–19]; *Hunt v. Maloney; Ex parte Hunt* [[1959] Qd R. 164, at pp 172, 183] and cf. *Geraldton Fishermen's Co-operative Ltd. v. Munro* [[1963] W.A.R. 129, at p 133]. … Whether or not there is a difference between the common law criterion for excluding mens rea from application to a statutory offence and the Code criterion for excluding Ch. V or one of its provisions, the latter criterion is not satisfied unless the statute creating the offence effects the exclusion expressly or by necessary intendment. Chapter V is not excluded merely on the ground that its application would make the object of the statute creating the offence more difficult of attainment."[14]

[26] Courts must construe statutes by reference to their text, context and purpose.[15] The question then is whether the text, context and purpose of the Act demonstrates the

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12 Reprint 6F.

13 (1987) 163 CLR 561.

14 Above, 567–568.

15 *Australian Education Union v General Manager of Fair Work Australia* (2012) 86 ALJR 595, 605 [27] (French CJ, Crennan and Kiefel JJ).

clear necessary intention of the legislature to exclude the operation of s 24 *Code* to offences against s 235 *Building Act*.

[27] Contrary to the competing contentions of both counsel, I was not assisted in answering that question by the terms of s 257 *Building Act*. That provision deemed each member of the governing body of a body corporate which commits an offence to have committed the offence and to be liable for punishment, unless the member proves either an absence of knowledge of the offence or that the member could not have prevented its commission by reasonable diligence. Section 257 was contained in Ch 10 of the *Building Act* (General Provisions) whereas s 235 was contained in Ch 8 (Swimming pool fencing). Section 235 created a discrete offence whereas s 257 potentially concerned all offences alleged against members of a body corporate. This case does not concern a body corporate. Section 257 is of no assistance in determining whether s 235 excludes the operation of s 24 *Code*.

[28] Counsel for the respondent emphasised the strong terms in the text of s 235 *Building Act*, especially the words "must ensure" and the purpose of Ch 8 of the *Building Act*.

[29] The word "ensure" relevantly means "to make sure or certain to come, occur, etc: *measures to ensure the success of an undertaking*".[16] It is therefore true that the terms of s 235 *Building Act* are expressed robustly. But in my opinion the expression "the owner must ensure" does not in itself specifically or by necessary implication exclude the important right created by s 24 *Code*.

[30] Although not stated in terms, it may also be accepted that the principal purpose of Ch 8 *Building Act* which contains s 235 is to introduce comprehensive obligations on pool owners to ensure pools are properly fenced and secured so as to minimise accidental injury and death to the vulnerable, particularly children. But as Brennan J explained in *Walden v Hensler*, s 24 *Code* is not impliedly excluded merely because the purpose of the statute and the terms of the relevant provision will be more difficult to achieve if it is not excluded. This commendable legislative purpose of Ch 8, the strongly worded terms of s 235, and s 235's interaction with other provisions in the *Building Act*, neither alone or in combination, are sufficient to infer a clear legislative intention to exclude the important rights ordinarily conferred under s 24 and the other provisions of Ch V *Code* by s 36(1) *Code* on all those charged with criminal offences in Queensland.

[31] If the respondent's construction were to be accepted, the most conscientious of pool owners would be liable under s 235 in the likely time lag between when a pool fence became unexpectedly non-compliant and when the pool owner became aware of the non-compliance. There is nothing in s 235 itself or elsewhere in the *Building Act* to suggest that the legislature had such an intention. Nor is there anything in the relevant second reading speech or explanatory notes to support such a legislative intention.[17]

[32] For these reasons, I consider that s 235 *Building Act* does not exclude s 24 *Code* and two provisions can operate harmoniously. It follows that the magistrate and the District Court judge both erred in finding that s 24 *Code* can have no application to an offence against s 235 *Building Act*.

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16 Macquarie Dictionary, Federation edition.

17 Queensland, Parliamentary Debates, House of Representatives, 11 September 2003, 3532–3533 (H Hobbs); Explanatory Notes, Building Amendment Bill 2003 (Qld).

Did the prosecution exclude the operation of s 24 *Code* on the evidence?

[33] The next issue is whether the prosecution proved beyond reasonable doubt that Mr Steiner was not acting under an honest and reasonable but mistaken belief as to the condition of the pool fence on 4 January 2010 so as to exclude him from criminal responsibility under s 235 *Building Act*.

[34] Although the magistrate wrongly held that s 24 *Code* could have no application to s 235 *Building Act*, his Honour prudently considered whether, if s 24 was applicable, it was excluded on the evidence. His Honour accepted that Mr Steiner honestly and reasonably believed the pool fence was in a compliant condition in mid October 2009. But a three monthly inspection regime of this pool fence was insufficient to found a reasonable belief that it was still compliant on 4 January 2010.

[35] The District Court judge found that, if s 24 *Code* was applicable to offences against s 235 *Building Act*, Mr Steiner gave no evidence of acting under any mistake of fact so that, even if s 24 *Code* had application to s 235 *Building Act*, it was not raised.

[36] I consider the District Court judge erred in finding there was no evidence raising s 24 *Code*. It was raised by evidence in Mr Steiner's case. He made efforts early in 2009 to ensure the pool fence was compliant, and it was certified as compliant in March 2009. He inspected it in mid-October 2009 less than three months before the alleged offence and it was then in a compliant condition. He intended to inspect the premises, including the condition of the pool fence, at three monthly intervals as provided by s 195(3) *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld). His contractual arrangements with his tenant were that the tenant was responsible for maintaining the pool and the pool fence; for reporting any repairs required and for keeping the gate locked at all times. The tenant did not report any problems between October and the date of the alleged offence, 4 January 2010. It was open to the magistrate to infer from this evidence that on 4 January 2010 Mr Steiner honestly, reasonably but mistakenly believed the pool fence was in the same compliant condition as it was in October 2009. Had that mistaken belief been the real state of things on 4 January 2010, he would not have been liable under s 235 *Building Act*.

[37] In the District Court appeal, the judge should have considered whether the magistrate erred in determining that the prosecutor had proved beyond reasonable doubt that Mr Steiner's honest but mistaken belief, that the pool fence was in a compliant condition on 4 January 2010, was not reasonable. In determining that question, consistent with the approach in *Warren v Coombes*,[18] the District Court judge was in as good a position as the magistrate to draw inferences from the undisputed evidence or the magistrate's findings. In drawing those inferences, the District Court judge was required to give respect and weight to the conclusion of the magistrate but to reach his own conclusion.

[38] I will now undertake that exercise. To establish Mr Steiner's liability under s 235 *Building Act*, the prosecutor had to establish beyond reasonable doubt that Mr Steiner did not honestly and reasonably believe the pool fence was in the same physical condition on 4 January 2010 as it was when he last checked it in October 2009, that is, compliant with the relevant fencing standards. There was no reason to

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[18] (1979) 142 CLR 531, 551.

conclude that this was not Mr Steiner's honest belief. The issue was whether that belief was reasonable in the circumstances. In determining this question, it is relevant that s 235 *Building Act* places a duty on a pool owner to ensure compliance. The concept of reasonableness under s 24 *Code* must be understood in that context.

[39] Mr Steiner's counsel emphasises the uncontested evidence that in mid to late October 2009, less than three months before the alleged offence, Mr Steiner knew the pool fence was in a compliant condition. As far as he was aware, neither he nor the tenant had done any subsequent work to the pool. Under the tenancy agreement, the tenant was responsible for maintaining the pool and fence in a safe condition and the pool gate was to be locked. Under the *Residential Tenancies and Rooming Accommodation Act* a lessor may enter the tenanted premises only at three monthly periods.[19] Mr Steiner was not due to undertake a further inspection until 4 January 2010.

[40] As a counterweight to the evidence emphasised in this application by Mr Steiner's counsel, the following evidence was also relevant. The pool was old and building inspector Maltby advised him that one option was to dismantle and remove it. I would infer that Mr Steiner's old pool fence may require more vigilant monitoring to ensure it remained in a compliant condition than a newly constructed pool fence.

[41] It seems to me that, with such an old pool fence, a reasonable pool owner would have done more than Mr Steiner to ensure it remained compliant. For example, there was no evidence that Mr Steiner had emphatically told the tenant to closely monitor the condition of the pool fence and gate and to immediately notify him of any defect which he was not able to instantly repair himself. And nor was there evidence to the effect that the tenant was especially reliable in monitoring, reporting or immediately fixing defects in the pool fence or that Mr Steiner believed the tenant was extremely reliable and his reasons for this belief.[20]

[42] Whilst s 195(3) *Residential Tenancies and Rooming Accommodation Act* does provide for a lessor to enter tenanted premises no more frequently than three months, the introductory words of that sub-section are "[u]nless the tenant otherwise agrees". As the magistrate appreciated, Mr Steiner could have agreed with the tenant to allow him to enter the premises for the limited purpose of inspecting the pool and pool fence more frequently than the statutorily permitted three month period.

[43] In the context of s 253 *Building Act* where Mr Steiner was required to ensure compliance, like the magistrate I am satisfied after reviewing all the evidence, that the prosecutor established beyond reasonable doubt that Mr Steiner's honest but mistaken belief, that the pool fence was in a compliant condition on 4 January 2010, was not reasonable.

[44] It follows that the District Court judge was right to dismiss the appeal against Mr Steiner's finding of guilt under s 253 *Building Act*.

Did the magistrate err in his award of costs?

[45] The final issue is whether the magistrate erred in his award of costs. The magistrate's power to award costs is governed by the *Justices Act* 1886 (Qld) the relevant provisions of which are as follows:

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19 *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld), ss 192(1), 195(3), 196; *Bailey v Doncon* (2007) 178 A Crim R 358, 367.

20 See, for example, *Bailey v Doncon* (2007) 178 A Crim R 358, 368–370 [61]–[80].

> "**42 Commencement of proceedings**
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> (1) Except where otherwise expressly provided … all proceedings under this Act shall be commenced by a complaint in writing, which may be made by the complainant in person … or other person authorised in that behalf.
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> …"

[46] Part 6 of the *Justices Act* is headed "Proceedings in case of simple offences and breaches of duty". Its div 8 deals with costs and relevantly includes:

> "**157 Costs on conviction or order**
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> In all cases of summary convictions and orders … the justices making the same may, in their discretion, order by the conviction or order that the defendant shall pay to the complainant such costs as to them seem just and reasonable."

[47] It is not suggested that the amount of costs ordered ($1,500) was anything other than just and reasonable and in compliance with s 158B *Justices Act* which requires justices to ordinarily award costs in accordance with the appropriate scale. The appellant's contention is simply that the complainant was Mr Seri not the Council. Under s 157 *Justices Act* the magistrate had a discretion to order Mr Steiner to pay the complainant's just and reasonable costs, that is, Mr Seri's costs. Mr Seri did not incur any costs; all legal costs were incurred by the Council; as a result Mr Steiner is not liable to pay the costs.

[48] The answer to this contention is not straight forward. Under s 256(2) *Building Act* a complaint under s 235 could be brought by either a local government like the Council or a person authorised by it. Mr Seri commenced the complaint in which he described himself as "a person duly authorised pursuant to the *Local Government Act* 1993, and being a 'Public Officer' as defined in the *Justices Act*".[21] The term "public officer" is defined in the *Justices Act* as including "an officer or employee of a local government; who is acting in an official capacity."[22]

[49] For relevant purposes, the *Local Government Act* 2009 (Qld), not the *Local Government Act* 1993 (Qld), was in force when the complaint was brought. Under s 237(1) of the 2009 Act, any proceedings by a local government must be started in the name of the local government. It is true that the chief executive officer or another employee authorised in writing by the local government may give instructions and act as the authorised agent for the local government and may sign all documents for the local government.[23] It is also true that a local government must pay the costs incurred by the employee in any proceedings.[24] It is strongly arguable, therefore, that the complaint should have been brought in the name of the Council, not in Mr Seri's name, although it is also arguable that Mr Seri could have brought the complaint as agent for the Council.

[50] If the legislature intended that all prosecutions of this kind by local governments must be in the name of the local government, there may be incongruous consequences. A decision by a local government to prosecute an offence like the

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21 *Steiner v Seri* [2011] QDC, Unreported, Durward SC, DCJ, No 164 of 2011, 31 October 2011, [73].

22 *Justices Act* 1886 (Qld), s 4 *public officer* (c).

23 *Local Government Act* 2009 (Qld), s 240(1).

24 Above, s 240(2).

present through an employee who is a "public officer" within the meaning of that term in the *Justices Act*[25] has the result that s 142A *Justices Act* (Permissible procedure in absence of defendant in certain cases) has application by way of s 142A(1) and s 142A(4)(a). But that provision does not apply if the prosecution is brought in the name of the local government. Further, s 158A *Justices Act* (Exercise of discretion in relation to an award of costs) only allows a Magistrates Court to award costs in favour of a successful defendant against a complainant who is a public officer, not a complainant which is a local authority: see *Ipswich City Council v Dixonbuild Pty Ltd*[26] and *Bowman v Brown*.[27] It is clearly desirable that the legislature clarifies this confusing and unsatisfactory situation as to the prosecution of offences by local governments in the Magistrates Court. But neither s 142A or s 158A are apposite here.

[51] What is clear is that in this case the complaint was brought by Mr Seri with the authority of the Townsville City Council. It may be that s 237(1) *Local Government Act* 2009 required that the complaint be brought in the name of the Council. This formal defect could easily have been remedied by amendment under s 48 *Justices Act*. The record does not show and it is not submitted that this was done. The bench complaint sheet, however, refers to the complainant as the Townsville City Council. Similarly, the transcript of the hearing in the Magistrates Court is headed "Townsville City Council (complainant)". The magistrate at the hearing introduced the matter as "… the matter of Townsville City Council as complainant." Mr R W Collins of counsel announced his appearance for the complainant stating that he was instructed by the Townsville City Council. This all suggests the trial was conducted on the basis that the complainant was the Townsville City Council.

[52] There is, however, further confusion as to the costs order. The wording of the costs order pronounced by the magistrate at the hearing suggests that it was made simply in favour of "the complainant through the Townsville City Council" which implies the complainant was Mr Seri, not the Council. But the endorsement on the bench charge sheet states that the costs are payable to Townsville City Council.

[53] The transcript states that Mr R W Collins of counsel was instructed by the Council to prosecute the complaint, apparently brought by Mr Seri on the Council's behalf. It may be accepted that costs were incurred in briefing Mr Collins. The Council was obliged under the *Local Government Act* 2009[28] to pay any costs incurred by Mr Seri in prosecuting the matter. Whether the complaint should have been brought by the Council or Mr Seri was not an issue at the hearing. Had it been, this formal defect could and would have been remedied by amendment under s 48 *Justices Act*. The trial was conducted on the basis the complainant was the Townsville City Council. Counsel for the prosecution established Mr Steiner's guilt of the offence beyond reasonable doubt. Costs orders are intended to be compensatory in the sense that they are to indemnify a successful complainant for the costs for which the complainant is liable.[29] On the way this trial was conducted, the complainant was the Council. If the complainant was in truth Mr Seri, he brought the complaint with the authority of the Council, so that the Council was liable to pay any costs he incurred as complainant. I remain unpersuaded that Mr Steiner has suffered any

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25 *Justices Act*, s 4, see [48] of these reasons.
26 [2012] QCA 98, [26]–[27].
27 [2004] QDC 6, [34]; [2004] QPELR 416, [34].
28 Section 240(2).
29 *Latoudis v Casey* (1990) 170 CLR 534, 543 (Mason CJ).

prejudice resulting from the costs order, or that it was made in error, or that it has caused any injustice.

The application for leave to appeal

[54] Applications for leave to appeal under s 118(3) *District Court of Queensland Act*, where the applicant already has had the benefit of a hearing in the Magistrates Court and an appeal to the District Court, are not granted lightly. Ordinarily, leave to appeal in such cases is limited to those raising an important question of law or matter of considerable public interest; or those resulting in a substantial injustice to the applicant, coupled with a reasonable argument that there has been an error which needs to be corrected.[30] Section 118(6) *District Court of Queensland Act* 1967 (Qld) allows this Court to grant leave on the conditions it considers appropriate.

[55] This application raises an important question of law which is also of considerable public interest, namely, whether s 24 *Code* can have application to a charge brought under s 235 *Building Act*. The magistrate and the District Court judge erred in ruling that it could not. Leave to appeal should be granted so that this error can be corrected. The magistrate was, however, correct in finding that the prosecution disproved the application of s 24 *Code* beyond reasonable doubt. The District Court judge was therefore right in refusing Mr Steiner's appeal against the finding of guilt.

[56] The proposed appeal against the costs order does not involve any substantial injustice to Mr Steiner who unsuccessfully defended the prosecution in which the Council, the complainant (at least in practical terms) incurred legal costs. Leave to appeal against the costs order should be refused.

[57] Leave to appeal under s 118(3) should be granted but limited in accordance with s 118(6) to two issues: first, whether s 24 *Code* can have application to s 235 *Building Act* and, second, whether the magistrate erred in finding the prosecution established beyond reasonable doubt on the evidence that s 24 *Code* did not provide a defence. Mr Steiner was successful on the first issue but as he was unsuccessful on the second, the appeal must be dismissed.

[58] As both parties had some success, I would make no order as to the costs of the application and the appeal.

ORDERS:

1. Application for leave to appeal granted but limited to two issues: first, whether s 24 *Criminal Code* 1899 (Qld) has application to s 235 *Building Act* 1975 (Qld), and, second, whether the magistrate erred in finding that the prosecution established beyond reasonable doubt that s 24 *Code* did not provide a defence to the charge under s 235 *Building Act*.
2. Appeal dismissed.
3. No order as to costs.

[59] **MUIR JA**: I agree with the reasons of McMurdo P and with the orders she proposes.

[60] **HENRY J:** I agree with the reasons of the President and the orders proposed by her Honour.

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[30] See, for example, *Smith v Ash* [2011] 2 Qd R 175, 188–189 [50].