

SUPREME COURT OF QUEENSLAND

CITATION: *Coppens v Water Wise Design Pty Ltd* [2013] QCA 145

PARTIES: **JOSEPHINE ROSALIE COPPENS**
(applicant)
v
WATER WISE DESIGN PTY LTD
(respondent)

FILE NO/S: Appeal No 7002 of 2012
QCAT No 43 of 2012
QCAT No 375 of 2010

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Applications – Civil

ORIGINATING COURT: Queensland Civil and Administrative Tribunal at Brisbane

DELIVERED ON: 7 June 2013

DELIVERED AT: Brisbane

HEARING DATE: 21 February 2013

JUDGES: Fraser and Gotterson JJA and Martin 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 refused.**
2. Application to adduce further evidence refused.

CATCHWORDS: ENERGY AND RESOURCES – WATER – WATER
MANAGEMENT – SEWERAGE – QUEENSLAND – where
the applicant claimed that the sewerage facility installed on
her property was defective – where the applicant contended
that the respondent designed a sewerage facility which could
not be approved by the local authority without the prior
approval of the Chief Executive of the Department of Natural
Resources and Mines – where the applicant commenced
proceedings against the respondent and local authority –
where the proceedings against the local authority were struck
out for want of jurisdiction – where the Appeal Tribunal
affirmed the Adjudicator’s decision that prior chief executive
approval was not necessary – whether the Appeal Tribunal
erred in dismissing the applicant’s appeal

On-site Sewerage Code 2002 (Qld), cl 11.2
Plumbing and Drainage Act 2002 (Qld), s 92, s 93, s 94, s 96

COUNSEL: The applicant appeared on her own behalf
D E F Chesterman for the respondent

SOLICITORS: The applicant appeared on her own behalf
Thynne & Macartney for the respondent

- [1] **FRASER JA:** Ms Coppens has applied for leave to appeal against a decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal dismissing Ms Coppens' application for leave to appeal from a decision of the Queensland Civil and Administrative Tribunal constituted by an Adjudicator. Under s 150(3) of the *Queensland Civil and Administrative Tribunal Act 2009* such an appeal to the Court of Appeal may be made only on a question of law and only by leave.
- [2] The proposed appeal is out of time but Ms Coppens' explanation for her delay was satisfactory and the respondent did not submit that she should be refused the necessary extension of time otherwise than by reason of a suggested lack of merit in the proposed appeal.
- [3] The Adjudicator answered the following preliminary question in the affirmative:
 "Whether, under the Plumbing and Drainage Act 2002, the Standard Plumbing and Drainage Regulation 2003, the on-site Sewage Code 2002 and AS/NZ 1457 of 2000 as they existed at 2 June 2005, the on-site sewerage treatment system *as installed* at the Applicants premises at 3 Westringia Court, Craignish, could be lawfully approved by the Local Authority without the prior approval of the system by the Chief Executive of the Department of Natural Resources Mines."¹
- [4] The Appeal Tribunal dismissed Ms Coppens' appeal from the Adjudicator's answer.
- [5] In an earlier proceeding Ms Coppens had claimed that the sewerage facility installed on her land was defective, particularly because in times of rain treated effluent floated over the surface of the land. She brought proceedings against the plumber who had installed the facility. The Tribunal found in her favour in those proceedings and the plumber paid her some money pursuant to an order made by the Tribunal.
- [6] Ms Coppens apparently considered that her losses were not fully compensated by that payment. She brought an application for damages against the respondent and the Fraser Coast Regional Council. The claim against the local authority was struck out on the ground that there was no jurisdiction in the Tribunal to hear it. As to the respondent, Ms Coppens alleged that it designed an on-site sewerage facility which, as installed, could not lawfully be approved by the local authority and that the respondent was liable to her for damages on various bases. Her proposed appeal in this Court, however, is necessarily limited to the question whether the Appeal Tribunal erred in law in dismissing her appeal from the Adjudicator's affirmative answer to the preliminary question. This turns upon the application of provisions of the *Plumbing and Drainage Act 2002* and the *On-site Sewerage Code 2002*.
- [7] The *Plumbing and Drainage Act 2002* (Qld)² relevantly provided at the times material in this matter:

¹ The Appeal Tribunal noted that the Adjudicator's reasons omitted the words in italics.

² Reprint No 1A, effective from 29 November 2004.

- “92(1) For the construction, installation and operation of on-site sewerage facilities that are not chemical, composting or incinerating toilets, the following apply—
- (a) the on-site sewerage code;
 - (b) to the extent the facility consists of a septic tank—
AS/NZS 1546.
- ...
- 93 Model approval for prefabricated items
- (1) A person may apply to the chief executive for an approval (a *model approval*) for a stated prefabricated item.
 - (2) The chief executive may give the model approval only if the chief executive is reasonably satisfied the item conforms with the on-site sewerage code.
- ...
- 94 Type specification approval for built items
- (1) A person may apply to the chief executive for an approval (a *type specification approval*) for a stated built item.
 - (2) The chief executive may give the type specification approval only if the chief executive is reasonably satisfied the item conforms with the on-site sewerage code.
- ...
- 96 Approval for on-site sewerage facilities
- (1) The owner of premises may apply to the local government for an approval to build, install or change an on-site sewerage facility on the premises.
 - (2) The local government may give the approval only if—
 - ...
 - (b) the facility is designed to comply with the codes, standards or design rules mentioned in section 92; and
 - ...
 - (e) if the facility includes an on-site sewage treatment plant (other than an on-site sewage treatment plant consisting only of a septic tank)—
 - (i) to the extent the plant consists of a prefabricated item—the plant conforms with a model approval; or
 - (ii) to the extent that the plant consists of a built item—the plant conforms with a type specification approval.
- ...”

[8] Terms used in those provisions were defined in the Schedule as follows:
“*built item* means—

- (a) an on-site sewage treatment plant that is wholly built on the premises where it is, or is to be, used; or
- (b) an element of an on-site sewage treatment plant, if the element is wholly built on the premises where the plant is, or is to be, used.

on-site sewage treatment plant is a sewage treatment plant installed or to be installed on premises as part of an on-site sewerage facility for the premises.

on-site sewerage facility means a facility installed on premises for—

- (a) treating, on the premises, sewage generated on the premises, and disposing of the resulting effluent—
 - (i) on the premises; or
 - (ii) off the premises by—
 - (A) common effluent drainage; or
 - (B) collection from a tank on the premises; or
- (b) storing on the premises sewage generated on the premises for its subsequent disposal off the premises by collection from the premises.

prefabricated item means—

- (a) a wholly prefabricated on-site sewage treatment plant; or
- (b) a prefabricated element of an on-site sewage treatment plant.”

[9] Clause 11 of the *On-site Sewerage Code* of July 2002 dealt with “type specification approval”. It set out the minimum requirements for “type specification approval of a particular built item” by the Department of Natural Resources & Mines and, in cl 11.2(c), provided that type specification approval was not applicable to a “built item ... that is specifically designed and constructed in-situ by the owner or occupier of the premises or a person other than the owner or occupier and effluent is discharged to a subsurface land application system, e.g. constructed surface or subsurface flow wetland and associated land application area.”³

[10] The Appeal Tribunal discussed the relevant legislation in the following passage of its reasons:

“The effect of that legislation is that on-site sewerage facilities can be approved by the Chief Executive (of the Department) if they are pre fabricated (s 93 of the *Plumbing and Drainage Act* 2002) or built items built on the premises (s 94). Schedule 3 of that Act [Reprint 1A, as in force on 29 November 2004] defined a “built item” to include an element of an on-site sewerage treatment plant, if the element was wholly built on the premises where the plant is or was to be used. Clause 11.2 of the *on-site Sewerage Code* 2002 provided that the requirement for “type specification” by the Department of Natural Resources and Mines did not apply to a built item that was specifically designed and constructed in-situ by the owner or occupier of the premises or a person other than the owner or occupier and effluent was discharged to a subsurface land application system

³ It may have been assumed in the Tribunal that any inconsistency between this provision and the *Plumbing and Drainage Act* 2002 should be resolved in favour of this provision. I will adopt the same assumption. I refrain from deciding that point, which was not argued.

e.g. constructed surface or subsurface wetland and associated land application area.

The learned Adjudicator found that it was not disputed by the parties that the facility as installed was a built item which therefore attracted the operation of s 94, subject to the operation of the provisions of clause 11.2. Ms Coppens argues that the Adjudicator was in error in that finding (that it was not disputed), because Ms Coppens' written submission, supplied on 1 November 2011 to this Tribunal, had contended that the septic tank was prefabricated; and that she had applied to the Council for a garden irrigation system, a "built item". Her application for leave to appeal from the Adjudicator's determination contends that section 94 of the Act did not apply, as the system installed had prefabricated items.

The problem that Ms Coppens faces on this appeal or application for leave to appeal, is that while the septic tank was undoubtedly prefabricated, the definition of a "built" item includes elements of an on-site sewerage treatment plant wholly built on the premises, and it was open to the Adjudicator to find that the sewerage treatment system as installed on the premises, was consistent with the type of system described in clause 11.2 of the *on-site Sewerage Code 2002*. The sand filter portion of it was a built item, and specifically designed for construction in situ, by a person other than the occupier, and effluent was installed to a subsurface land application system. It was not an irrigation facility. Accordingly, the appeal and the application for leave to appeal must be dismissed."

- [11] Ms Coppens challenged that analysis. The essence of her argument was that, because the plant as installed at her premises included prefabricated items and was not specifically designed for those premises, the local authority could not approve its installation in the absence of approval of the Chief Executive of the prefabricated items.
- [12] As to the question whether the sewage treatment plant was "specifically designed and constructed in situ" within the meaning of cl 11.2(c) of the *On-site Sewerage Code 2002*, the Appeal Tribunal found that: "[i]n or about May 2005, Ms Coppens had engaged Water [Wise] Design Pty Ltd to design an on-site sewerage system..."; "[i]t is common ground that Waterwise Design Pty Ltd did design an on-site sewerage system for Ms Coppens, to be installed in the premises..." and "Ms Coppens submitted that design to the Council for approval"; "clause 11.2 of the *on-site Sewerage Code 2002*...did not apply to a built item that was specifically designed and constructed in-situ by...a person other than the owner or occupier and effluent was discharged to a subsurface land application system e.g. constructed surface or subsurface wetland and associated land application area"; "it was open to the Adjudicator to find that the sewerage treatment system as installed on the premises, was consistent with the type of system described in clause 11.2 of the *on-site Sewerage Code 2002*"; and "[t]he sand filter portion of it was a built item and specifically designed for construction in situ, by a person other than the occupier, and effluent was installed to a subsurface land application system..."⁴

⁴ [2012] QCATA 129 at [4], [5], [13], [15].

- [13] Those conclusions effectively affirmed the Adjudicator’s findings of fact that the sewage treatment system was “specifically designed and constructed in situ by ... a person other than the owner or occupier and effluent is discharged to a subsurface land application system.”⁵ If there were no evidence to support those findings they would be open to challenge on the ground of error of law, but there was supporting evidence. A design of the on-site sewage treatment plant bearing the respondent’s name and logo was in evidence.⁶ The design showed the effluent being discharged to the subsurface of garden beds “to be constructed on a site to satisfaction of water wise design...” and it included a note that the effluent was to be dispersed below the surface of the topsoil unless the effluent was disinfected in accordance with the requirements of the *On-site Sewerage Code 2002*. Furthermore, Ms Coppens’ application in the Tribunal included the following note in a “Waste Water Disposal Soil and Site Evaluation Form” signed by the respondent’s representative: “construct subsurface irrigation under garden area...”.⁷ The Appeal Tribunal did not err in law in affirming the Adjudicator’s findings of fact.
- [14] The next question agitated by Ms Coppens concerns the significance of the use of prefabricated items in the construction of the on-site sewage treatment plant. As to the septic tank, it was not found as a fact that it was part of the sewerage treatment plant as opposed to being designed for use merely for storage before sewage treatment. It appears from the plans that the sewage treatment plant was to be constructed wholly on-site by the digging of trenches, laying of sand, and installation of the pipes. There was also no finding that the septic tank as designed and installed did not comply with the standard specified in s 92(1)(b). The septic tank may be put to one side for present purposes.
- [15] As the Appeal Tribunal pointed out, the definition of “built item” includes “an element of an on-site sewage treatment plant” so that, at least to that extent, cl 11.2(c) dispensed with the need for type specification approval under s 94 as a condition of local government approval of the facility under s 96(2)(e)(ii). The aerobic sand filter is certainly an element of the sewage treatment plant, if it is not the entire sewage treatment plant. Ms Coppens argued that components of the sand filter were prefabricated, particularly the “100 mm slotted pvc pipe” and the “pump well 300 mm pvc pipe” in the respondent’s design.⁸ That appears to be so, but it is not at all clear that the definition of “built item” was necessarily inapplicable to the constructed sand filter and every element of it merely because some components of the filter were prefabricated. Questions of degree and character must be involved in deciding whether the use of a particular prefabricated item precludes a conclusion that the plant must be regarded as being “wholly built on the premises” for the purposes of the definition of “built item”. It is not appropriate to grant leave to appeal for the purpose of a reconsideration of those factual questions.
- [16] It is inappropriate for another reason to grant leave to appeal to consider whether Chief Executive approval was required under s 93 for any particular prefabricated item before the local authority could approve the facility under s 96(2)(e)(i); that was not the question answered by the Adjudicator. The question asked only whether lawful approval could be given by the local authority without the Chief

⁵ *Coppens v Water Wise Design Pty Ltd* [2012] QCAT 9 at [9].

⁶ Appeal Record Book, p 48.

⁷ Ms Coppens had no objection to the Court receiving that document, which did not make its way into the Appeal Record Book.

⁸ Appeal Record Book, p 47 an enlarged copy of which was supplied to the Court without objection.

Executive's prior approval "of the system". The Adjudicator's answer, the Appeal Tribunal's affirmation of which is the subject matter of the proposed appeal, did not decide whether local authority approval could be given in the absence of Chief Executive approval "for a stated prefabricated item" under s 93(1). (I note also that the question inappropriately referred to local authority approval of the "on-site sewerage treatment system", whereas s 96 refers to approval by a local authority of the building etc of an "on-site sewerage facility".)

- [17] The question apparently lacked utility for another reason. In argument at the hearing of the application, both Ms Coppens and the respondent endorsed the remarks by the Adjudicator that "any decision as to the lawfulness or otherwise of the local authority's approval of the system is not necessarily determinative of the wide ranging allegations made against the respondent, which relate to its role in designing the system, including, inter alia, advice as to the appropriateness of the system for the relevant purpose."⁹ I emphasise that the Court has not had the benefit of a transcript of the hearing when the question was set down for hearing in the Tribunal, but it appears from the parties' submissions that the question was set down at the instance of the Tribunal rather than upon application by either party. Perhaps the question had its genesis at a time when the Council remained a party to the proceedings, in which case there might perhaps have been some point in asking the question. Once the Council was removed as a party there was no significant point in having the question answered.
- [18] The inappropriate form of the question and its apparent irrelevance to the real substance of Ms Coppens' claims combine to suggest that any error of law in the Tribunal's answer to the question will not produce real injustice to Ms Coppens. This is not an appropriate case in which to grant leave to appeal.

Proposed orders

- [19] The application for leave to appeal should be refused. I would also refuse Ms Coppens' application to adduce further evidence. Having regard to the significance for my conclusion of the inutility of the question framed by the Tribunal, a matter for which neither party appears to have been responsible, I would make no order as to the cost of the application.
- [20] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.
- [21] **MARTIN J:** I agree with Fraser JA.

⁹ [2012] QCAT 9 at [3].