SUPREME COURT OF QUEENSLAND

CITATION:	*Kazakova v Queensland Fire and Rescue Service* [2011] QCA 328
PARTIES:	**KAZAKOVA, Eva** (applicant) **v** **QUEENSLAND FIRE AND RESCUE SERVICE** (respondent)
FILE NO/S:	CA No 52 of 2011 DC No 2639 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	18 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2011
JUDGES:	Margaret McMurdo P, Muir and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS	**1. Application for adjournment is refused.** **2. Application for leave to appeal is refused with costs.**
CATCHWORDS:	APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where the applicant is the owner of a premises used as a boarding house – where the applicant's premises was inspected by the Queensland Fire and Rescue Service – where the applicant was given a requisition requiring fire safety deficiencies to be addressed – where the applicant failed to address the deficiencies and was charged with two offences under the *Fire and Rescue Service Act* – where the applicant was found guilty and was fined – where the applicant sought an adjournment of the appeal for medical reasons – where the applicant then went on to argue that the building was being used as a class 1A building and was therefore exempt from the obligations of a fire safety plan and the requisition – whether an adjournment should be granted – whether leave to appeal should be granted *Building Act* 1975 (Qld), s 216 *Fire and Rescue Service Act* 1990 (Qld), s 69, s 104FA, s 147

COUNSEL: The applicant appeared on her own behalf
D J Lang for the respondent

SOLICITORS: The applicant appeared on her own behalf
Crown Law for the respondent

[1] **MARGARET McMURDO P:** I agree with Chesterman JA's reasons for refusing the applicant an adjournment and for refusing her application for leave to appeal, subject only to the following observations.

[2] It is not an easy task to determine the meaning of the phrase "a single dwelling" for the purposes of the definition of "budget accommodation building" in the *Fire and Rescue Service Act* 1990 (Qld) and the *Building Act* 1975 (Qld). In some circumstances, it may be that the term "single dwelling" could include a boarding house of the kind conducted by the applicant. But it is abundantly clear from the terms of the definition of "budget accommodation building" and the related provisions set out in Chesterman JA's reasons at [13]-[16] that in this context a building used as a single dwelling being a detached house differs from the ordinary concept of boarding house, hostel or guesthouse. Here, "single dwelling" involves the use of a detached house as a more permanent and smaller domestic household than that conducted by the applicant. It would include a single, two person or family household, or a shared household with co-tenants, but it would not include a household from which a business was conducted taking in boarders, lodgers or paying guests.

[3] I agree with Chesterman JA that the application for an adjournment should be refused and the application for leave to appeal refused with costs.

[4] **MUIR JA:** I agree that the applications should be refused with costs for the reasons given by Chesterman JA.

[5] **CHESTERMAN JA:** The applicant is the owner of premises situated at 7 Bradman Street Caboolture which, it is common ground, was constructed prior to 1988 with extensions completed in April 1993. The buildings were used as a boarding house at the time relevant to the proceedings.

[6] Section 104FA of the *Fire and Rescue Service Act* 1990 (Qld) ("*FRS Act"*) commenced on 1 July 2002. It applies:

> "… to a budget accommodation building … if –
>
> (a) construction of the building started before the commencement of this section … ."

Section 104FA(2) provides:

> "The owner of the budget accommodation building must prepare a fire safety management plan for the building within 1 year after the commencement."

[7] Section 147 of the *FRS Act* provides that a person commits an offence if she:

> "(b) fails to comply with any requisition made or any notification or notice given pursuant to this Act".

[8] Section 69 of the *FRS Act* provides that the Commissioner may require any occupier of premises to take measures for the purpose of reducing the risk of a fire on the premises, or reducing potential danger to persons or property in the event of a fire. A requisition may be given personally to the occupier or by way of notification published in the Gazette.

[9] Inspections of the applicant's premises in October and November 2008, and May 2009 showed that the premises:

(i) had been equipped with some stand alone battery operated smoke alarms but no fire or smoke alarm system connected ("hard wired") to the main electricity supply;

(ii) had no emergency lighting;

(iii) had no evacuation plan or diagram on display for the benefit of residents; and

(iv) had no fire safety management plan.

The applicant was given a requisition requiring her to address fire safety deficiencies in the building. They had not been attended to by the time of the third inspection in May 2009.

[10] The applicant was charged with two offences under the *FRS Act*. They were:

(1) "On or about 9 October 2008 at Caboolture … **EVA KAZAKOVA** being the owner of a building … at 7 Bradman Street Caboolture … being a budget accommodation building did fail to prepare a Fire Safety Management Plan for the building within one year of the commencement of section 104FA … of the Act."

(2) "On or about 20 November 2008 … **EVA KAZAKOVA** … failed to comply with (the) Requisition by Commissioner … given pursuant to section 69 of the … *Act* contrary to section 147 1 (b) …

PARTICULARS

Eva Kazakova provided accommodation for more than six persons contrary to the requirement of (the) Requisition … namely ***"Do not offer or provide budget accommodation at the premises until or unless the premises comply with the Fire Safety Standard as defined"*** … ."

[11] The charges were heard in the Caboolture Magistrates Court over three days in June and July 2009. On 20 August 2009 the Magistrate found the applicant guilty on both charges, fined her $5,000.00 and ordered her to pay $5,869.30 professional costs. She was allowed 12 months to pay in default of imprisonment for 200 days.

[12] The applicant appealed to the District Court a judge of which on 28 February 2011, dismissed the appeal. The applicant now seeks leave to appeal from that dismissal. When the applicant was called on Ms Kazakova, who appeared for herself sought an adjournment. The court heard argument from both parties on the question of the adjournment and whether there ought to be a grant of leave. The reason for so

proceeding was that if the application for leave had no arguable basis, no purpose would be served by adjourning it. If, however, there seemed some arguable ground that the judgment of the District Court was wrong, so that leave to appeal should be granted, that order could be made and the hearing of the appeal put off to a later date when the applicant was prepared to present her case.

[13] The term "budget accommodation building" when used in the *FRS Act* has the same meaning as that given to it in the *Building Act* 1975 (Qld) ("*Building Act*"). That Act, by s 216, defines such a building to be one:

> "(a) whose occupants have shared access to a bathroom or sanitary facilities, other than a laundry; and
>
> (b) that provides accommodation of a following type for 6 or more persons –
>
> (i) boarding house, backpacker or other hostel guesthouse … or similar type accommodation;
>
> … ."

[14] By subsection 3:

> "(a) a building used as a class 1a building or class 2 building"

is not a "budget accommodation building". A "class 1a building" is in turn defined to mean a building which under the 2004 edition of the *Building Code of Australia* ("*Code"*) is classified as a class 1a building. Such a building is:

> "a single dwelling being:
> (i) a detached house; or
> (ii) … ."

[15] A class 1b building is a boarding house, guest house, hostel or the like in which not more than 12 persons would ordinarily be resident. A class 3 building is a residential building, other than a building of class 1 or 2, which is a common place of long term or transient living for a number of unrelated persons including, *inter alia*, a boarding house, guest house, hostel, lodging house or backpackers accommodation.

[16] The general provisions of the Code explain that the intent of classifications is to:

> "categorise buildings of similar risk levels based on use, hazard and occupancy"

and that

> "Classification is a process for understanding risks in a building … according to its use. It must be correctly undertaken to achieve (Code) aims as appropriate to each building in each circumstance.
>
> It is possible for a single building to have parts with different classifications. … Where there is any conflict between what requirements the part should comply with, the more stringent requirement applies."

[17] The applicant appeared for herself before the Magistrate but retained counsel for the appeal to the District Court. The notice of appeal set out 25 grounds, mostly

challenges to findings of fact and conclusions of mixed fact and law. The applicant's counsel abandoned all those grounds, and argued instead two new grounds. They were that the Magistrate erred in not finding that the applicant's building was being used as a class 1a building and that the sentence imposed was manifestly excessive.

[18] The learned judge recorded some facts which had been found by the Magistrate and not challenged. They were:

> "… there were two buildings; there was one bathroom and one toilet in each building; there were at least 12 beds and probably more because three rooms were locked at the time of inspection; there were at least six occupants at the relevant time in October 2008; … the tenants were not genuine employees and the right to tenancy hinged on the residential tenancy agreement."

[19] The reference to "genuine employees" was a reference to an argument run by the applicant before the Magistrate that the tenants in her boarding house were employees, thereby seeking to take her premises within the exception found in s 216(3)(d) of the *Building Act*, that a building is not a budget accommodation building if it is a building "in which an employer provides … as an incident of, an employer-employee relationship, accommodation to persons other than backpackers or fruit pickers". The Magistrate found against the applicant on that ground and the point was not contested in the District Court.

[20] The Magistrate accepted evidence that the applicant let her premises to single men on a "share room" basis at a rent per person of $99 per week. Each tenant had entered into a written tenancy agreement with the applicant in a form prepared by her solicitor.

[21] The only question before the District Court, apart from the challenge to penalty, was whether the applicant's boarding house, for such it was found to be by reference to evidence not challenged in the District Court, was being used as a class 1a building. The building was classified by the relevant local authority as a class 1a building. The judge rightly pointed out that before the exception found in s 216(3)(d) of the *Building Act* applied, the applicant's buildings had to be *used* as a "single dwelling – detached house".

[22] The learned judge gave as her reasons for dismissing the appeal:

> "… the premises … would not be a budget accommodation building if, at the relevant time, it was being used as a single dwelling.
>
> The (applicant's counsel) … argued … that a detached house was a class 1A building and exempt from the obligations of a fire safety plan and the requisition.
>
> … to escape the obligation upon a budget accommodation building under the (*FRS Act*) the building must be used as a class 1A building. That is, it must be used as a single dwelling, being a detached house … .
>
> Ms Kazakova's building was registered … as a class 1A building. Registration however was not enough as the building must actually

> be *used* as a class 1A building. … Ms (K)azakova argued before the Magistrate that her business had provided the accommodation as part of an employment contract. … The argument about the employment relationship was not pursued on appeal. … The irresistible conclusion is that the primary relationship, if not the only relationship, between Ms Kazakova and the residents … was that of landlord and tenants."

[23] Her Honour found that for a building to be *used* as a class 1a building it had to be occupied by one household. Her Honour equated "single dwelling" with "a single occupancy … in the context of one household." Her Honour contrasted that term, single dwelling, with the descriptions of class 1b, 2 and 3 buildings.

[24] The definition in the *Code* of a class 1a building is not without difficulty. What is a "single" dwelling? The choice of adjective is meant, presumably, to differentiate such a dwelling from a multiple dwelling. The point of distinction thus appears to be between a detached house used as a habitation for one person, or one group of persons, which may be regarded as an aggregated unit of persons, and a habitation of unconnected persons, or multiple households. Thus understood it accords with the primary judge's understanding that a single dwelling is the habitation of one discrete household the members of which are permanent residents. A single dwelling is therefore likely to be occupied by a relatively small group of people the members of which will remain stable over a sustained period of time. Its members will be bound by ties of affection and kinship.

[25] The *Code* makes it clear that a class 1a building, and its use as such, is different to a boarding house, guesthouse, hostel, lodging house or backpackers accommodation. These uses fall within class 1b or 3. What they have in common, is that the number of residents is likely to exceed that found in a conventional family household, and the composition of the group of residents will tend to change frequently. Residency is likely to be transient and residents will have only their address in common.

[26] When one has regard to the *Code's* purposes of classification of buildings, one can see the importance of these concepts. A building used for a large number of residents who are strangers to each other, and who might occupy a building for brief periods and therefore not become familiar with its floor plan and means of egress, will have a greater need for a fire safety management plan than those who live in their own home and are familiar with it, and between whom ties of affection are likely to lead to a greater degree of assistance in the event of a fire than would be the case with a transient population of a boarding house.

[27] The evidence left no doubt that the applicant's premises were being used as a boarding house. On the evidence it would appear they were being used as a class 1b or perhaps a class 3 building. Such a use precludes the use of the premises as a class 1a building. Whatever the exact parameters of that use might be the *Code* makes it clear that a boarding house is not such a use.

[28] The applicant did not appear to contest this conclusion. Rather she was concerned to re-agitate some of the grounds of appeal which her counsel had abandoned. That course is not open to her. She is bound by the manner in which her counsel conducted the appeal. Putting that to one side, it is not usually a basis for a grant of leave to appeal that there were points she could have raised in the District Court but did not do so.

[29] The applicant said nothing in this Court on the question of penalty. What was said on that topic by the primary judge was, with respect, clearly right. Her Honour said:

> "… the duty of the Court was to impose a fair and proper sentence. The total sentence … had to be proportionate to the total level of offending. Ms Kazakova failed to provide a fire safety plan and failed to comply with the requisition. Those breaches put the safety of Ms Kazakova's tenants at risk. It was not a case of mistake. … it was a calculated gamble taken by a landlord operating premises for profit. Ms Kazakova made no attempt to comply with the relevant safety standard. Instead she actively sought to avoid it. …
>
> It was a course of conduct that went on for at least seven months. Both personal and general deterrence are important. The offending appeared to be a commercial decision. … Accordingly, a substantial financial penalty was needed as a deterrent."

[30] There is no reason to doubt the judgment of the District Court. An adjournment of the application for leave to appeal would serve no purpose. The application for leave to appeal should be refused, with costs.