SUPREME COURT OF QUEENSLAND

CITATION:	*Owen v Menzies & Anor* [2011] QCA 241
PARTIES:	**RONALD OWEN** (applicant) **v** **RICHELLE MENZIES** (first respondent) **RHONDA BRUCE** (second respondent)
FILE NO/S:	Appeal No 7138 of 2011 SC No 7138 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application - Civil
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Orders delivered ex tempore on 6 September 2011 Reasons delivered on 16 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	6 September 2011
JUDGES:	Fraser and White JJA and Margaret Wilson AJA Judgment of the Court
ORDERS:	**Delivered ex tempore on 6 September 2011:** **1. Pursuant to s 68(5) of the *Supreme Court of Queensland Act* 1991 (Qld), proceedings numbered 7138 of 2011 be removed into the Court of Appeal.** **2. The costs of the application are reserved.**
CATCHWORDS:	PROCEDURE – COURTS AND JUDGES GENERALLY – COURTS – CONCURRENT JURISDICTION OF DIFFERENT COURTS – CASES OTHER THAN UNDER CROSS-VESTING LEGISLATION – where the Queensland Civil and Administrative Tribunal stated a case to the Supreme Court of Queensland – where findings were made in the Supreme Court on a previous appeal in the same matter which form part of the case stated - where the case stated involves important questions regarding the interpretation and constitutionality of the *Anti-Discrimination Act* 1991 (Qld) – where all the facts in the proceeding have been found – whether special circumstances exist that make it desirable for the proceedings to be removed to the Court of Appeal pursuant to s 68(5) of the *Supreme Court of Queensland Act* 1991 (Qld)

Anti-Discrimination Act 1991 (Qld), s 124A, s 134(1)(a), s 212, s 216
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 131, s 132, s 259, s 260
Supreme Court of Queensland Act 1991 (Qld), s 68(5)

R v Fukusato [2003] 1 Qd R 272; [2002] QCA 20, considered
Menzies & Ors v Owen [2008] QADT 20, cited
Owen v Menzies & Ors (2010) 243 FLR 347; [2010] QSC 387, considered

COUNSEL: R Haddrick for the applicant
S Robb for the respondent

SOLICITORS: S K Lawyers for the applicant
Caxton Legal Centre for the respondent

[1] **THE COURT:** The applicant applied under s 68(5) of the *Supreme Court of Queensland Act* 1991 (Qld) for an order that the proceeding which the applicant started in the Trial Division on a case stated by the Queensland Civil and Administrative Tribunal for the opinion of the Court be removed into the Court of Appeal.

[2] The Court has jurisdiction to hear and determine the case pursuant to s 216(1) of the *Anti-Discrimination Act* 1991 (Qld). Section 216 was repealed by s 1348 of the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act* 2009 (Qld) but s 259 and s 260 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) preserve the operation of s 216(1) with respect to these proceedings.

[3] Section 68 of the *Supreme Court of Queensland Act* 1991 (Qld) relevantly provides:

> "(5) If a proceeding (whether by way of appeal or otherwise), or a proceeding on a stated case (other than a case stated by another court), is started in the other court—
>
> (a) the Court of Appeal, if satisfied that special circumstances exist that make it desirable to do so, may, on application by a party or of its own motion, order that the proceeding be removed into the Court of Appeal; and
>
> (b) on an order being made under paragraph (a), the proceeding must be continued and disposed of in the Court of Appeal.
>
> …
>
> (7) In this section—
>
> ***another court*** means the Trial Division or a District Court."

[4] The applicant and the respondents submitted that special circumstances existed that made it desirable for the Court of Appeal to order the transfer of these proceedings from the Trial Division to the Court of Appeal.

[5] At the hearing of this application on 6 September 2011 the Court ordered that:

1. Pursuant to s 68(5) of the *Supreme Court of Queensland Act* 1991 (Qld), proceedings numbered 7138 of 2011 be removed into the Court of Appeal;
2. The costs of the application are reserved.

These are the Court's reasons for making those orders.

Background

[6] On 19 September 2008, the former Anti-Discrimination Tribunal found that the applicant had contravened s 124A of the *Anti-Discrimination Act* 1991 (Qld) ("the Act").[1]

[7] That former Tribunal was constituted by Member Daryl Rangiah who was appointed by Her Excellency the Governor, acting by and with the advice of the Executive Council and under the Act, as a part-time member of the former Tribunal.

[8] The complainants were the first and second respondents, Ms Coutts, and Ms Turner. Ms Coutts and Ms Turner subsequently withdrew their complaints. The complainants alleged that the applicant engaged in the following acts in contravention of s 124A(1) of the Act:

(a) On at least 23 August 2005 the applicant drove a motor vehicle on public roads displaying a sticker that read:

> "GAY RIGHTS? UNDER GOD'S LAW THE ONLY RIGHTS GAYS HAVE IS THE RIGHT TO DIE
>
> LEV.20:13".

(b) On 23 August 2005 the applicant made the following comment during a meeting of the Cooloola Shire Council:

> "That's because I probably don't class the gays as being human".

(c) On 30 August 2005 the applicant provided a report to the Cooloola Shire Council tabled on 6 September 2005 which contained a number of statements regarding homosexuals, including:

> "Sodomite's (sic) cannot reproduce, their only means of recruitment to their way of life is by preying on the children of normal human beings ...".

(d) On 7 September 2005 the applicant participated in a television interview broadcast on Channel 7 in which he stated:

> "I think it is a very perverse lifestyle. ... Can our health services cope with the sodomite's epidemic? ... As you have prisoners who break the law lose certain rights and I do believe homosexuals lose rights. ... I think that they know they are going to die shortly I mean AIDS is pretty prevalent."

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1 See *Menzies & Ors v Owen* [2008] QADT 20.

(e) In about September 2005 the applicant published a document entitled "What's Going On In Council?" which contained a number of statements similar to those made by him on 23 August 2005 during the Council meeting.

(f) In mid to late 2005 the applicant caused a letter written by him to be published on the website lockstockandbarrel.org entitled "No Human Rights For Non-Humans" which included a number of statements regarding homosexuals, including:

> "Any person who commits acts that no ignorant animal would commit declares war on his community, and therefore may be destroyed by any or all of that community…".

[9] Member Rangiah found that the applicant had contravened s 124A(1) in respect of the complaints in paragraphs (a), (c), (d) and (f), and that the applicant had not contravened s 124A(1) in respect of the complaints in paragraphs (b) and (e).

[10] In relation to the complaints by the respondents, Member Rangiah ordered that the applicant pay $5,000 to the first respondent and that the second respondent's complaint be dismissed on the ground that the second respondent did not have standing as a person of bi-sexual orientation to bring her complaint. After receiving written submissions about costs, Member Rangiah ordered the applicant to pay half of the costs and outlays incurred by the first respondent, Ms Coutts and Ms Turner, such costs and outlays to be assessed on the standard basis on the scale of costs for the District Court.[2]

[11] In the course of the hearing of the complaints, the applicant submitted to the former Tribunal that there were four reasons why the Act, or parts of the Act, or the hearing of the complaints against him, was constitutionally invalid or prohibited. The applicant submitted:

(a) That the former Tribunal was exercising judicial power and as a court, it failed to meet the requirement of 'independence and impartiality' and the provisions establishing it were contrary to ch III of the *Commonwealth Constitution* and were therefore invalid.

(b) That s 124A of the Act is inconsistent with the implied protection of freedom of communication provided by the *Commonwealth Constitution* and is invalid.

(c) That s 124A is inconsistent with s 116 of the *Commonwealth Constitution*, which protects freedom of religion, and is invalid.

(d) That the *Anti-Discrimination Amendment Act* 2001 (Qld), which amended s 124A(1) to apply to vilification on the ground of sexuality, is invalid because certain changes to the office of the Governor had previously been made without a referendum having been conducted as required by s 53 of the *Constitution Act* 1867 (Qld).

[12] Member Rangiah decided that he was "not permitted to decide" the submissions in paragraphs (a), (b) and (c) and he did not rule upon the merits of those submissions. Member Rangiah rejected the applicant's submission in paragraph (d).

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2 *Menzies & Ors v Owen (No 2)* [2008] QADT 30.

[13] The applicant appealed against that decision and that appeal was heard on 16 September 2010. Douglas J found for the applicant, set aside the orders of the former Tribunal, and ordered that the matter be remitted to the Queensland Civil and Administrative Tribunal (which had by then replaced the former Tribunal) to be dealt with according to law.[3]

[14] The second respondent had also appealed, on the ground that the former Tribunal erred in law in finding that a bisexual person did not have standing under s 134(1)(a) of the *Anti-Discrimination Act* 1991 (Qld) to complain about vilification on the ground of homosexuality. That issue was not determined because of the decision on the constitutional issue.

[15] The matter was listed for a directions hearing in the Queensland Civil and Administrative Tribunal before Senior Member Clare Endicott on 4 March 2011. The applicant and the respondents jointly submitted that five questions of law should be stated for the opinion of the Supreme Court. Senior Member Endicott stated a case under s 216(1) of the Act for the opinion of the Court on those questions as follows:

> "1. Were the proceedings in the Anti-Discrimination Tribunal an impermissible exercise by the tribunal of the judicial power of the Commonwealth under Chapter III of the *Commonwealth Constitution*?
>
> 2. Is section 212 of the *Anti-Discrimination Act 1991*, providing for the registration and enforcement of orders of the Anti-Discrimination Tribunal, inconsistent with Chapter III of the *Commonwealth Constitution*, and therefore invalid, so far as it purports to apply in these proceedings?
>
> 3. Is section 124A of the *Anti-Discrimination Act 1991* inconsistent with the implied protection of freedom of political communication provided by the *Commonwealth Constitution* and therefore invalid?
>
> 4. Alternatively, to what extent is section 124A of the *Anti-Discrimination Act 1991* to be read down in order to comply with the implied protection of freedom of political communication provided by the *Commonwealth Constitution*?
>
> 5. Does a bisexual person have standing under section 134(1)(a) of the *Anti-Discrimination Act 1991* to complain about vilification on the ground of homosexuality?"

(The applicant abandoned his previous contentions that s 124A of the Act was inconsistent with s 116 of the *Commonwealth Constitution* and that the *Anti-Discrimination Amendment Act* 2001 (Qld), which amended s 124A(1) to apply to vilification on the ground of sexuality, was invalid because certain changes to the office of the Governor had previously been made without a referendum having been conducted as required by s 53 of the *Constitution Act* 1867 (Qld).)

Consideration

[16] In *R v Fukusato*,[4] Thomas JA referred to the nature and importance of the constitutional issues in that case as the primary justification for removal of the

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[3] *Owen v Menzies & Ors* [2010] QSC 387.

[4] [2003] 1 Qd R 272 at [123] 311.

proceedings to the Court of Appeal. The importance of the constitutional issues raised in the present case was one of the reasons why the Court concluded that an order for removal was appropriate.

[17] It was also significant that one of those issues had already been considered in the Trial Division. Douglas J found in *Owen v Menzies & Ors* that:[5]

> "Once the permissible discussion of the effect of a matter arising under the *Constitution* or involving its interpretation on a case before a State tribunal achieves the form of a purportedly enforceable order, by the expedient simply of filing it in the registry of a court of competent jurisdiction, it seems to me that there has been an exercise of the judicial power of the Commonwealth by a body, here the Tribunal, on which that power has not been conferred."

[18] Questions 1 and 2 of the case stated require consideration of the correctness or otherwise of that finding. It was not in the interests of justice that the same point be considered again by a single judge. (The question whether that finding might create an estoppel was mentioned during the hearing of the application but no such contention was foreshadowed.)

[19] The Anti-Discrimination Tribunal has been abolished, but the constitutional questions retain significance. Section 124A of the Act remains in force and under the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) a decision of the Queensland Civil and Administrative Tribunal can also be enforced, in the case of monetary decisions, by filing the decision in "a court of competent jurisdiction" under s 131 and, in the case of non-monetary decisions, by filing the decision in a "relevant court" under s 132.

[20] Particularly because the parties agreed that the facts had been fully found, it was expedient for all of the questions in the case stated to be determined at the same time.

[21] Taking all of those circumstances into account, the Court concluded that there were special circumstances which made it desirable to remove the whole proceeding on the case stated to the Court of Appeal.

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5 [2010] QSC 387 at [29].