

SUPREME COURT OF QUEENSLAND

CITATION: *Kylie Louise Chivers v Gold Coast City Council* [2010] QSC 98

PARTIES: **KYLIE LOUISE CHIVERS**
(applicant)
v
GOLD COAST CITY COUNCIL
(respondent)

FILE NO/S: BS6396/07

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 6 April 2010

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 29 March 2010

JUDGE: Martin J

ORDER: **APPLICATION DISMISSED**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – APPLICATION FOR DECLARATION – where respondent decided that the applicant was keeping an American Pit Bull Terrier and therefore contravened the relevant local law – whether applicant was owner of the dog – whether applicant had standing to seek judicial review

ADMINISTRATIVE LAW – JUDICIAL REVIEW – APPLICATION FOR DECLARATION – where respondent decided that the applicant was keeping an American Pit Bull Terrier and therefore contravened the relevant local law – whether an American Pit Bull Terrier is the same breed as an American Staffordshire Terrier

Acts Interpretation Act 1954 (Qld)
Animal Management (Cats and Dogs) Act 2008 (Qld)
Customs Act 1901 (Cth)
Customs (Prohibited Imports) Regulations 1956 (Cth)
Judicial Review Act 1991 (Qld)
Local Government Act 1993 (Qld)
Local Law No. 12 (Keeping and Control of Animals) 1998 (Gold Coast City Council)
Statutory Instruments Act 1992 (Qld)
Subordinate Local Law No. 12 (Keeping and Control of

Animals) 2007 (Gold Coast City Council)

Parker v Annan [1993] SCCR 185

R v Knightsbridge Crown Court; ex p. Dunne [1994] 1 WLR 296

COUNSEL: S P Fynes-Clinton for the applicant
R J Bain QC and R Quirk for the respondent

SOLICITORS: Counsel directly briefed for the applicant
King and Co for the respondent

- [1] This application concerns the fate of a dog called “Tango”. In 2004 the Gold Coast City Council decided that Tango was an American Pit Bull Terrier and ordered that he be destroyed. The applicant appealed that order. She and the Council reached a compromise – he was not destroyed; but he had to leave the Gold Coast. The applicant says that she has satisfied a particular term of the compromise and that means that Tango should be able to come back to the Gold Coast. Whether he can is the matter for decision..

Application for review

- [2] The applicant brings her application under Pt 5 of the *Judicial Review Act* 1991. She seeks:-
- (a) a declaration that the keeping by the applicant of her dog “Tango” at her home ... , in the local government area of the City of Gold Coast, does not contravene s 10 of the respondent’s Local Law No. 12 (Keeping and Control of Animals); and
 - (b) an injunction restraining the respondent from seizing or otherwise interfering with the dog “Tango” for so long as it is otherwise kept in accordance with the respondent’s Local Law No. 12 (Keeping and Control of Animals).
- [3] The grounds upon which the application is brought include:-
- (a) that Tango is of the breed American Staffordshire Terrier (“AmStaff”).
 - (b) that the evidence upon which the respondent Council purported to rely in support of its assertion that Tango was an American Pit Bull Terrier (“APBT”) was of no value because the assessment process used by the respondent was incapable of identifying whether a dog was wholly or partly of the breed APBT.
- [4] The major issues are:
- (a) who is the current owner of Tango,
 - (b) whether Tango is an APBT, and
 - (c) whether the APBT is a breed apart from the AmStaff.

- [5] In April 2004 Tango was seized by the respondent Council and was made the subject of a destruction order. That action was taken on the basis that he was an APBT and, so, came within the provisions of the then relevant local law dealing with the keeping of a prohibited animal.
- [6] The applicant, who was then the owner of Tango, appealed against the destruction order. In August 2004 that appeal was settled and a consent order was made by the Magistrates Court in the following terms:-
- “1. The appeal be dismissed.
 2. Within 21 days the dog “Tango” be released by the respondent to the appellant at a location outside the GCCC jurisdictional area, the costs of transportation to be met by the appellant.
 3. The dog is never to be returned to the GCCC jurisdictional area unless the appellant is able to satisfy the respondent that the dog is a purebred American Staffordshire terrier.
 4. Prior to the dog’s release to the appellant, the dog is to be micro-chipped by the respondent at the appellant’s expense.
 5. There be no order as to costs.”

- [7] There was no jurisdiction to make orders 2, 3 and 4 but, for the purposes of this application that is of no moment. Those orders represent, at least, the agreement reached between the appellant and the respondent.
- [8] This application was filed in July 2007. Since then there have been substantial changes to the legislation relating to the issue of “restricted dogs”. As the applicant seeks declarations as to current entitlement it is necessary to examine the current legislation and other statutory regimes that apply.

Relevant legislation

- [9] The *Animal Management (Cats and Dogs) Act 2008* (“AMCDA”) commenced on 1 July 2009. One of the purposes of the AMCDA is “to provide for the effective management of regulated dogs”.¹
- [10] The AMCDA does not prevent a local law from imposing (further) requirements in relation to cats or dogs generally.² A local authority may make a local law prohibiting anyone in its local government area, other than an exempted person, from possessing a dog of a particular breed.³ “Breed” includes crossbreed of a breed, and “local law” includes a subordinate local law.⁴

¹ AMCDA, s. 3(b).

² AMCDA, s. 6(1).

³ AMCDA, s. 6(2).

⁴ AMCDA, s. 6(5).

- [11] To the extent that the *AMCDA* and a local law are inconsistent, the local law is invalid to the extent of any inconsistency.⁵ The *AMCDA* does not limit a civil right or remedy that exists apart from the Act, whether at common law or otherwise.⁶

AMCDA, Chapter 4, Regulated dogs

- [12] A regulated dog is a “restricted dog”.⁷ A restricted dog is, relevantly, “a dog of a breed prohibited from importation into Australia under the *Customs Act 1901* (Cwlth).”⁸
- [13] The *Customs (Prohibited Imports) Regulations 1956* (Cwlth), r. 3 provides:

“3 Goods the importation of which is prohibited absolutely

- (1) The importation of goods specified in Schedule 1 is prohibited absolutely.”

- [14] Schedule 1 to the *Customs (Prohibited Imports) Regulations 1956* relevantly provides:

“Schedule 1 Goods the importation of which is prohibited absolutely (regulation 3)

<u>Item</u>	<u>Description of goods</u>
2	Advertising matter relating to any goods covered by this Schedule
26	Dogs of the following breeds: <ol style="list-style-type: none"> (a) dogo Argentino; (b) fila Brasileiro; (c) Japanese tosa; (d) American pit bull terrier or pit bull terrier;”

- [15] The *AMCDA* provides:

“71 Permit required for restricted dog

A person must not, unless the person has a reasonable excuse, own, or be a responsible person for, a restricted dog unless the relevant local government has issued a restricted dog permit to someone to keep the dog.

Maximum penalty – 75 penalty units.”

- [16] Chapter 4, part 3 of the *AMCDA* deals with restricted dog permits.

Section 10 of Gold Coast City Council Local Law No. 12 (Keeping and Control of Animals)

⁵ *AMCDA*, s. 6(3).

⁶ *AMCDA*, s. 7(1).

⁷ *AMCDA*, s. 60(c).

⁸ *AMCDA*, s. 63(1).

- [17] Section 10 of Gold Coast City Council *Local Law No. 12 (Keeping and Control of Animals)* (“Local Law 12”) provides:

“10(1) A local law policy may prohibit absolutely:-

- (a) the keeping of an animal;
- (b) the keeping of particular species, breed, age or sex of an animal;
- (c) the keeping of an animal in an identified part of the Area; and
- (d) the keeping of more than a specified number of an animal.

- (2) A person must not keep an animal contrary to a prohibition mentioned in subsection (1).

Maximum Penalty: 50 Penalty Units”

- [18] The Gold Coast City Council *Subordinate Local Law No. 12 (Keeping and Control of Animals)* 2007 (“Subordinate Local Law No. 12”) relevantly provides:

“24 Prohibition on keeping of restricted dogs – Local Law, s10(1)

- (1) A person must not keep a restricted dog in the local government area of the local government.”

- [19] There are a number of exceptions to the prohibition in s. 24(1) of Subordinate Local Law No. 12. None of those is asserted in the Application to be applicable.

- [20] Section 3 and Schedule 1 to Subordinate Local Law No. 12 provide for the definition of particular words used in Subordinate Local Law No. 12. Schedule 1 provides:

“**restricted dog** has the meaning given in section 1193E of the Act.

Section 1193E of the Act provides that a **restricted dog** is a dog –

- (a) of a breed as follows –
 - (i) dogo Argentino;
 - (ii) fila Brasileiro;
 - (iii) Japanese tosa; or
- (b) of the type commonly known as ‘American pit bull terrier’ or ‘pit bull terrier’; or ‘pit bull terrier’; or
- (c) of a breed or type prescribed under a regulation; or
- (d) that is a crossbreed, or the offspring of, a dog of a breed or type mentioned in paragraph (a), (b) or (c), whether or not the dog appears to be a dog of that type or breed.

Also, a dog is a **restricted dog** if it is the subject of a restricted dog declaration.”

- [21] That section was omitted from the *Local Government Act* 1993 on 1 July 2009, as was the whole of chapter 17A. From that time, the definition of “restricted dog” in the *AMCDA* has applied.⁹

⁹ *Acts Interpretation Act* 1954, s. 14H; *Statutory Instruments Act* 1992, ss. 7, 14, schedule 1.

- [22] It follows, then, that an American pit bull terrier, or a pit bull terrier or a cross-breed of one or other of them is a restricted dog the keeping of which is prohibited.

Ownership

- [23] The respondent raised the standing of the applicant to bring the application and argued that she was not, at the time of making the application, nor at the hearing, the owner of Tango and that, therefore, she had no relevant interest upon which to make her application.
- [24] This submission was based upon the evidence contained in a series of documents which made up Exhibit 8. The first was a facsimile transmitted by the applicant to an officer of the respondent on 10 September 2004 following the “consent order” referred to above. The body of the document reads:-

“To Geoff Irwin

Tango is now owned by Brian Jones. He has taken over the ownership of the microchip and registered Tango in NSW. He will be contacting you to arrange to collect Tango. I have attached copies of the registration and microchip change of ownership.

Kylie Chivers”

- [25] Attached to the facsimile was a document entitled “Declaration Change of Ownership”. It appears to be a document relating to a micro-chip registry conducted by a private concern. The document is signed in the appropriate places by both the applicant and Brian Jones, the applicant’s step-father. The document refers to the applicant as the previous owner and Mr Jones as the new owner. It is dated 9 September 2004.
- [26] The applicant was cross-examined and re-examined on this documentation. The gist of her evidence was that she regarded Tango as her dog or her family’s dog. There was no evidence that anything had changed since her statement to the Council made in the facsimile of 10 September 2004.
- [27] In re-examination the applicant was asked the following by Mr Fynes-Clinton:
- “Having regard to what you were asked and what you have seen about the involvement of Mr Jones, would you please explain to the court the nature of your current interest in the dog Tango as at today, 29 March 2004? --- He is my dog. That’s why I am here, so I can bring him home.”
- [28] Tango has been living in New South Wales since 21 September 2004 when he was collected by Mr Jones from Council officers. Ms Chivers gave evidence that she has, since that time, paid kennel fees of approximately \$17,000.00.
- [29] In the absence of any evidence to demonstrate there has been a change in the position since that notified by the applicant in September 2004, I find that the applicant was not, at the time of making the application nor at the time of its hearing, the owner of Tango.

- [30] Should I be wrong in that conclusion I will consider the other matters raised in the application.

What breed is Tango?

- [31] It is reasonable to infer from the agreement which underlay the “consent order” that, at that time, both the applicant and the respondent were of the view that an American Pit Bull Terrier was not the same breed as an American Staffordshire Terrier.
- [32] That view appears to have been maintained by the Council (at least to the knowledge of the applicant) until the hearing of this application when, in reliance upon the expert evidence called by the applicant, it submitted that an ABPT is the same breed as an AmStaff.
- [33] The history of the dog is, in brief, that the applicant purchased Tango from her brother. The applicant says that Tango’s sire (“Zeus”) and dam (“Jessie”) were AmStaffs. Tango has never been registered but a full sister from her litter – “Miss Maudi” – is registered as an AmStaff.
- [34] A senior scientist at Genetic Technologies Corporation Pty Ltd undertook genetic parentage testing of samples taken from Tango, Zeus and Jessie and formed the view that Jessie and Zeus “qualify” with a reasonable level of scientific certainty as the parents of Tango.
- [35] I am satisfied that Tango is the son of Jessie and Zeus, that each of those dogs was an AmStaff and that, in the ordinary course of events, Tango would be regarded as an AmStaff. That, though, is not the end of the matter.
- [36] Other expert evidence was called by the applicant from a Mrs Brashears and a Miss Harvey. This was evidence which, as it turned out, was relied upon more by the Council than the applicant.
- [37] Mrs Brashears’s evidence (which consisted of an affidavit and a transcript of evidence given by her in another case) was admitted pursuant to s 92 of the *Evidence Act 1977*. Since making the affidavit and giving that evidence, Mrs Brashears has passed away. There was no objection to the receipt of her evidence. She was an experienced owner and breeder of AmStaffs and APBTs in the United States of America. She was registered as a breeder with both the American Kennel Club (“AKC”) and the United Kennel Club (“UKC”). Her evidence was that a dog which is a purebred APBT is exactly the same dog in terms of genetic history and make up as a dog which is a purebred AmStaff. She explained the reasons for the difference in names in the following way:

- “4. Based on information which can be obtained from the AKC and UKC web sites, all of which is consistent with general industry knowledge and understanding among Amstaff breeders, and certainly with my own knowledge and understanding:-
- (a) the common origin of the two breeds arose out of crossbreeding between the English Bulldog and one

- or more breeds of English Terrier, in England, in the early to mid-19th-century;
- (b) these dogs began to make their way to the United States in the later part of the 19th-century, in which country they become known as Pit Dog, Pit Bull Terrier and, later, American Bull Terrier;
 - (c) the United Kennel Club in the United States first recognised and registered the breed under the name American Pit Bull Terrier in 1898;
 - (d) in 1936, the same dogs began to be accepted for registration by the American Kennel Club under the name Staffordshire Terrier;
 - (e) my understanding of the reason for this name change is that:-
 - (i) while most of the ABPTs were used as farm dogs, or fighting dogs, there was a group that wanted to show their dogs in conformation, which UKC did not offer – there was no UKC breed standard at the time;
 - (ii) these persons tried to get AKC to accept them for registration so they could show, and they wrote the original APBT/Amstaff breed standard for show purposes and proved pure breeding, but AKC would not allow the name due to the association with pit fighting;
 - (iii) for similar reasons, the AKC would not let these persons use the name American Bull Terrier either (one of the considerations) as the white (Hinks) Bull terrier breeders did not want them confused with their breed;
 - (iv) finally, the AKC agreed to accept the breed for registration and showing under the name Staffordshire Terrier, which the original Amstaff owners accepted.
 - (f) in 1972, the AKC changed the name to American Staffordshire Terrier, to avoid confusion with the then newly accepted breed of Staffordshire Bull Terrier.”

[38] Mrs Brashears then went on in her statement to give examples from her own experience of a dog which she owned – “Presley” – which, in the AKC, won prizes as an AmStaff and, in the UKC, won prizes as an APBT. Her evidence concluded with the opinion that:

“Although different breeders of the respective breeds may select different features for attempted emphasis for show judging purposes through selective breeding, the two breeds are in all material respects genetically and physically identical.”

[39] Evidence was also adduced by way of affidavit from Jane Harvey who has been involved in dog exhibiting and breeding in Australia for over 58 years. She also referred to the names used by the AKC and other kennel clubs and said:

“I am aware that, for some periods, the AKC has permitted dogs which are registered with the UKC as American Pit Bull Terriers to also be registered with the AKC as pedigreed AmStaffs. The two ‘breeds’ come from a common original breeding line, and are in that sense the same dog.”

- [40] None of the relevant laws or instruments, or the Commonwealth or State interpretation Acts, provide a meaning for the term “breed”.¹⁰ The *Macquarie Concise Dictionary* defines “breed” relevantly as:¹¹

“Breed

6. *Genetics* a relatively homogeneous group of animals within a species, developed and maintained by human intervention.

7. Lineage; strain.”

- [41] The *Oxford English Dictionary* provides the following as a relevant definition of “breed”:

“Race, lineage, stock, family; strain; a line of descendants from a particular parentage, and distinguished by particular hereditary qualities.”

- [42] The determination of whether a dog is of a particular breed can be quite difficult. There is, on the evidence before me, no satisfactory scientific method such as DNA analysis which provides a reliable answer. The word “breed” itself has to be applied carefully. To determine whether a dog is of a particular breed is, of course, a question of fact.

- [43] A breed of dog is not the same as a type of dog. In other jurisdictions the difficulty of identification has been acknowledged. In *Parker v Annan*¹² Lord Hope LJG said:

“There is an absence of any precise criteria by which a pit bull terrier may be identified positively as a breed and by this means distinguished from all other dogs. One must of course be careful not to extend the application of the section to dogs other than those which are described in it. A dog must be of the type known as the pit bull terrier if the section is to apply to it. But the phrase used by the statute enables a broad and practical approach to be taken, in a field in which it has been recognised that the pit bull terrier cannot, in this country at least, be precisely defined by breed or pedigree.”

- [44] That passage was adopted by Glidewell LJ in *R v Knightsbridge Crown Court; ex p. Dunne*¹³ who said:

¹⁰ cf. *AMCDA*, s. 6(5): “breed” includes a crossbreed of a breed.

¹¹ *Macquarie Concise Dictionary*, Fifth Ed., 2009.

¹² [1993] SCCR 185 at 190-191.

¹³ [1994] 1 WLR 296.

“...the word ‘type’ is not synonymous with the word ‘breed’. The definition of a breed is normally that of some recognised body such as the Kennel Club in the United Kingdom.”¹⁴

- [45] In this case there is unchallenged evidence as to the identity of the APBT and the AmStaff. The conclusion that I draw from that evidence is that the name “American Staffordshire Terrier” is a name which was adopted in the United States of America for purposes of promotion or other similar reasons and that that name was applied to American Pit Bull Terriers. All the evidence points to the same dog being given different names, that is, American Pit Bull Terrier or American Staffordshire Terrier, so that a dog recognised as being of one of those “breeds” is the same as a dog identified as being of the other “breed”. That practice appears to have been adopted in Australia. It follows then that the views held by the Council when it entered into the “consent order” were unfounded and that there is no difference between an APBT and AmStaff. Therefore, as I am satisfied that the applicant has demonstrated that Tango is an AmStaff it follows that Tango is also an ABPT and is thus subject to the restrictions under the local laws referred above.

Conclusion

- [46] The applicant is not the owner of the dog the subject of this application. The dog “Tango” is an American Pit Bull Terrier and is, thus, subject to the Council’s *Subordinate Local Law No. 12 (Keeping and Control of Animals) 2007*.
- [47] The application is dismissed. I will hear the parties as to costs.

¹⁴ At 303.