



Civil and Administrative Tribunal

New South Wales

Case Name: Kilic v Independent Liquor and Gaming Authority

Medium Neutral Citation: [2016] NSWCATAD 290

Hearing Date(s): 6 December 2016

Date of Orders: 9 December 2016

Decision Date: 9 December 2016

Jurisdiction: Administrative and Equal Opportunity Division

Before: Hennessy LCM, Deputy President

Decision:

1. The Secretary, Department of Justice is joined as a respondent to the proceedings.
2. The following disciplinary action is stayed pending further order of the Tribunal:

Pursuant to s 141(2)(l)(i) of the Liquor Act 2007, Mr Kilic is ordered to pay, within 28 days, the sum of \$5,233.41 to the New South Wales Department of Justice, for the Secretary's costs on carrying out the relevant investigation or inquiry under s 138 of the Act.

3. The decision to disqualify Mr Kilic from being a close associate of a licensee in New South Wales is stayed pending further order of the Tribunal on the following conditions:

(a) Mr Kilic is not to hold or acquire any share in the capital of the business of an applicant or licensee under the Gaming and Liquor Administration Act 2007 or receive rent, profit or other income in connection with the use or occupation of premises on which the business is to be carried on;

(b) Mr Kilic is not to receive any income derived from the business of an applicant or licensee under the Gaming and Liquor Administration Act 2007 or to

receive any other financial benefit or financial advantage from the carrying on of such a business other than that relating to the organisation and conduct of musical events in licensed premises;

(c) Mr Kilic is not to hold the position of director, manager or secretary, or any other position, however designated that is an executive position, in any business of an applicant or licensee under the Gaming and Liquor Administration Act 2007;

(d) Mr Kilic is not to participate in any directorial, managerial or executive decision, in any business of an applicant or licensee under the Gaming and Liquor Administration Act 2007, unless that decision relates to organising and conducting musical events in licensed premises.

4. The application for a stay is otherwise dismissed.

5. The matter is listed for further directions on 20 December 2016 at 11.30 am.

Catchwords:

ADMINISTRATIVE LAW – power of NSW Civil and Administrative Tribunal under s 60 of the Administrative Decisions Review Act 1997 (NSW) to order a stay prohibiting or retracting publication of a notice of decision under s 36C of the Gaming and Liquor Administration Act 2007 (NSW) – utility of such an order after publication – where the decision is disciplinary action under the Liquor Act 2007 (NSW) – where the effect of the decision is to trigger statutory publication obligations

Legislation Cited:

Administrative Decisions Review Act 1997, s 60
Gaming and Liquor Administration Act 2007 (NSW), s 36C
Liquor Act 2007 (NSW), Part 9

Cases Cited:

Australian Securities and Investments Commission v Administrative Appeals Tribunal (2009) 181 FCR 130; [2009] FCAFC 185
Williamson v Director General, Department of Transport [2000] NSWADT 165

Category:

Procedural and other rulings

Parties: Murat Kilic (Applicant)
Independent Liquor and Gaming Authority (1st Respondent)
Secretary, Department of Justice (2nd Respondent)

Representation: Counsel:
J Emmett (Applicant)

Solicitors:
Levitt Robinson Solicitors (Applicant)
Crown Solicitors Office (1st and 2nd Respondents)

File Number(s): 1610774

Publication Restriction: Nil

REASONS FOR DECISION

Overview

- 1 Mr Kilic has applied for a stay of a decision by the Independent Liquor and Gaming Authority to disqualify him from holding a liquor licence or being the manager of licenced premises for three years. The decision also disqualifies him from being a “close associate” of a licensee for the same period. Mr Kilic does not wish to continue to hold a licence or be a manager before his application to the Tribunal is determined. But he does want to continue organising and conducting musical events on licenced premises. He is concerned that if he does so, he may be regarded as a ‘close associate’ of a licensee: *Gaming and Liquor Administration Act 2007* (NSW).
- 2 I am required to take into account Mr Kilic’s interests, the Authority’s submissions and the public interest: *Administrative Decisions Review Act 1997* (NSW), 60(3). I have granted a stay of the decision that Mr Kilic is disqualified from being a close associate of a licensee in New South on certain conditions. The conditions are designed to ensure that Mr Kilic is only remunerated and involved in management decisions to the extent necessary to organise and conduct musical events in licensed premises.
- 3 The Authority consents to a stay of its second decision that Mr Kilic pay \$5,233.41 to the Department of Justice being half the Secretary’s costs of carrying out the investigation.

- 4 Finally, Mr Kilic sought an order that the Authority be prohibited from carrying out its statutory obligation to publish the decision or material relating to the decision, on its website, or elsewhere, pending resolution of this case. That order would have to be re-cast because the decision has already been published. The most authoritative case on this issue is the decision of the Full Court of the Federal Court in *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2009) 181 FCR 130; [2009] FCAFC 185. The factual and legal issues are analogous to those in the present case. I agree with the reasoning and conclusion in that case and have applied them to this case.
- 5 If the Tribunal stays the decision under review, it also has power to make an order staying or otherwise affecting the Authority's publishing obligations. But in this case, there are three reasons for deciding not to make an order affecting the Authority's publishing obligations. The first is that I have not stayed the entire disciplinary decision. Mr Kilic is still disqualified from holding a licence or from being the approved manager of licensed premises. The second is that even if I had stayed the entire decision, there is little utility in making an order that the Authority remove the publication from its website when Mr Kilic's reputation has already been damaged. The third is that there are public interest considerations in favour of publication. I will elaborate on these reasons below.
- 6 The Secretary, Department of Justice is joined as a respondent. The first respondent, the Independent Liquor and Gaming Authority, intends to file a submitting appearance.

Stay of decision to disqualify Mr Kilic from being a 'close associate'

The reasons for the decision

- 7 Mr Kilic was the licensee of The Imperial Hotel from 26 April 2015 to 9 July 2015. The Authority decided that he was not a fit and proper person to hold a licence on the basis of 95 reports sourced from the NSW Police Computerised Operational Policing System (COPS Reports), 7 witness statements from local residents about noise and 2 police statements in relation to an incident where Mr Kilic was allegedly intoxicated while on duty.

- 8 In summary, the Authority found that the way Mr Kilic had conducted his business had a substantial adverse impact on the local amenity and adversely affected the quiet and good order of the neighbourhood. The Authority found that on 12 occasions police detected intoxicated patrons at or leaving the premises; on 22 occasions police detected prohibited drugs and/or drug paraphernalia inside or immediately outside the premises, on 12 occasions police issued move on directions or fail to quit infringements to patrons on or near the premises; and on 6 occasions police recorded adverse impacts on local amenity linked to the operation of the business. The Authority also found that Mr Kilic failed to exercise adequate control over the premises and that a short-term closure order was issued in response to concerns regarding the possession, use and supply of prohibited drugs.
- 9 Overall, the Authority concluded that Mr Kilic did not pay sufficient regard to the regulatory side of running a large scale, very late trading business with gaming machines and a focus on live entertainment. The adverse findings essentially arose from him prioritising the commercial and entertainment aspects of the hotel at the expense of his regulatory obligations.

Power to stay a decision

- 10 The Tribunal has power under s 60 of the *Administrative Decisions Review Act* to stay the operation or implementation of a decision pending determination by the Tribunal.

60 Operation and implementation of decisions pending applications for administrative review

(1) Subject to this section, an application to the Tribunal for an administrative review under this Act of an administratively reviewable decision does not affect the operation of the decision under review or prevent the taking of action to implement that decision.

(2) On the application of any party to proceedings for an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal may make such orders staying or otherwise affecting the operation of the decision under review as it considers appropriate to secure the effectiveness of the determination of the application.

(3) The Tribunal may make an order under this section only if it considers that it is desirable to do so after taking into account:

(a) the interests of any persons who may be affected by the determination of the application, and

(b) any submission made by or on behalf of the administrator who made the decision to which the application relates, and

(c) the public interest.

(4) While an order is in force under this section (including an order that has previously been varied on one or more occasions under this subsection), the Tribunal may, on application by a party to the proceedings, vary or revoke the order by another order.

Consideration of stay application

- 11 A threshold issue is whether a stay is necessary “to secure the effectiveness of the determination”: *Williamson v Director General, Department of Transport* [2000] NSWADT 165 at [12] – [19]. Mr Kilic wishes to continue to earn an income as a promoter of musical events. If he is prevented from doing so, and the decision under review is ultimately set aside, he will not receive any compensation. In that sense, the stay is necessary to secure the effectiveness of the hearing.
- 12 Mr Kilic has an interest in continuing to earn an income as a promoter of music events. His solicitor set out details of his career as a music producer and promoter of musical events. Contrary to the Authority’s submission, I have not given less weight to that evidence because it was given by Mr Kilic’s solicitor rather than by Mr Kilic himself. This matter was listed for hearing 12 days after the application was lodged. Where the matter is listed urgently, Mr Kilic should not be disadvantaged because his lawyers chose to provide evidence from a solicitor rather than Mr Kilic himself.
- 13 The Authority opposed the granting of a stay even if it was subject to conditions. According to the Authority, a close associate may have the same degree of influence or control as a licensee or manager. A ‘close associate’ is defined in s 5 of the *Gaming and Liquor Administration Act*.

Meaning of “close associate”

(1) For the purposes of the gaming and liquor legislation, a person is a “close associate” of an applicant for, or the holder of, a gaming or liquor licence if the person:

(a) holds or will hold any relevant financial interest, or is or will be entitled to exercise any relevant power (whether in his or her own right or on behalf of any other person), in the business of the applicant or licensee that is or will be carried on under the authority of the licence, and by virtue of that interest or power is or will be able (in the opinion of the Authority) to exercise a significant

influence over or with respect to the management or operation of that business, or

(b) holds or will hold any relevant position, whether in his or her own right or on behalf of any other person, in the business of the applicant or licensee that is or will be carried on under the authority of the licence.

(2) In this section:

"relevant financial interest" , in relation to a business, means:

(a) any share in the capital of the business, or

(b) any entitlement to receive any income derived from the business, or to receive any other financial benefit or financial advantage from the carrying on of the business, whether the entitlement arises at law or in equity or otherwise, or

(c) any entitlement to receive any rent, profit or other income in connection with the use or occupation of premises on which the business of the club is or is to be carried on (such as, for example, an entitlement of the owner of the premises of a registered club to receive rent as lessor of the premises).

"relevant position" means:

(a) the position of director, manager or secretary, or

(b) any other position, however designated, if it is an executive position.

"relevant power" means any power, whether exercisable by voting or otherwise and whether exercisable alone or in association with others:

(a) to participate in any directorial, managerial or executive decision, or

(b) to elect or appoint any person to any relevant position.

14 My understanding is that Mr Kilic did not wish to hold any share in the capital of a business or receive rent, profit or other income in connection with the use or occupation of premises on which the business is to be carried on. But he may wish to receive income derived from the business or some other financial benefit or financial advantage from the carrying on of the business. That income or financial benefit or advantage would relate to the organisation and conduct of musical events in licensed premises.

15 I also understand that Mr Kilic did not wish to hold the position of director, manager or secretary, or any other executive position. He may, however, wish to participate in directorial, managerial or executive decisions if those decisions relate to organising and conducting musical events in licensed premises.

16 Contrary to their oral submission, the Authority acknowledged in the decision under review at [164] that "a close associate occupies a less direct position of regulatory responsibility in a licensed business". The capacity to exercise

significant influence over the management and operation of the business is ameliorated by the imposition of the conditions set out above.

- 17 The regulatory breaches found by the Authority were numerous especially considering that Mr Kilic held the licence for less than 3 months. The Authority found that they had a significant adverse effect on the local community. It would not be in the public interest to allow Mr Kilic to continue to operate as a licensee or manager. But if his activities, decision making and remuneration are confined to organising and conducting musical events in licensed premises, I am satisfied that a conditional stay should be granted.

Removal of notice of decision from Department's website

- 18 Mr Kilic sought an order that the Authority be prohibited from publishing the decision or material relating to the decision, on its website or elsewhere, pending determination of the application. As the decision had already been published in accordance with s 36C of the *Gaming and Liquor Administration Act*, I understand the application to be that the notice be removed and the Authority be prohibited from re-publishing the decision or material relating to the decision.
- 19 The Authority is required to publish a notice of the decision on the Departmental website as soon as practicable after the decision is made: *Gaming and Liquor Administration Act 2007*, s 36C. That notice is to include “a statement of the reasons for the decision and details of any penalty or sanction imposed, or any remedial action taken, in relation to the decision”: s 36(C)(3). There was no evidence as to the date on which the decision was published but Mr Kilic's solicitor's evidence was that Mr Kilic's business interests had been negatively impacted by the Authority's orders and their publication in the media. Collaborators have been reluctant to work with Mr Kilic or to invest in his creative projects. The evidence was that this had come about because of the media publicity based on the notice on the Department's website. I accept that evidence which was uncontradicted.
- 20 The most recent and authoritative decision on this issue is the decision of the Full Court of the Federal Court in *Australian Securities and Investments Commission v Administrative Appeals Tribunal* (2009) 181 FCR 130; [2009]

FCAFC 185. ASIC had made a banning order prohibiting a person from providing financial services: *Corporations Act*, s 920A(1). Before ASIC had published the notice of the banning order in the Gazette, as required by s 920E(2) of the *Corporations Act 2001* (Cth), the person concerned sought a stay of the decision and of the publication of the decision.

21 Four relevant propositions which can be derived from the joint judgment, of Downes and Jagot JJ are that:

- (1) if the respondent has not published the notice when the applicant applies for a stay, the applicant may apply, as part of the stay application, not only apply for a stay of the order itself, but also of the publication of the notice; [62]
- (2) the respondent is bound by the legislation to publish the decision “as soon as practicable” after the decision is made: (*Gaming and Liquor Administration Act*, s 36C(2) and [64]);
- (3) if the decision has been published by the time the stay application is made, the Tribunal still has power to prohibit publication but the utility of an order is a relevant consideration; [64]
- (4) a fundamental element to be taken into account is the legislative scheme and, in particular, the public interest considerations embodied in the legislation under which the reviewable decision was made; [52].

22 It follows from the Federal Court’s reasoning and decision that if the relevant tribunal grants a stay of a decision and that decision has not yet been published, the stay may include a decision to prohibit the publication of the decision. Where only one part of the decision is stayed on conditions, the case for preventing the publication of the entire decision is not as strong.

23 Even if I had stayed the entire decision, there is little utility in making an order that the Authority remove the publication from its website when Mr Kilic’s reputation and ability to earn an income has already been damaged. That damage is detailed in the solicitor’s affidavit and I accept that evidence. The adverse media publicity and its effect on Mr Kilic cannot be undone. I also note that Mr Kilic has not applied for a non-publication order in respect of these proceedings.

24 Neither party made submissions as to the legislative scheme or the public interest considerations embodied in the legislation under which the reviewable decision was made. Even in the absence of any such submissions, it is clear

that there are public interest considerations in favour of publication of a notice of the decision. I have also taken those interests into account in refusing this part of the application.

Orders

1. The Secretary, Department of Justice is joined as a respondent to the proceedings.

2. The following disciplinary action is stayed pending further order of the Tribunal:

Pursuant to s 141(2)(l)(i) of the Liquor Act 2007, Mr Kilic is ordered to pay, within 28 days, the sum of \$5,233.41 to the New South Wales Department of Justice, for the Secretary's costs on carrying out the relevant investigation or inquiry under s 138 of the Act.

3. The decision to disqualify Mr Kilic from being a close associate of a licensee in New South Wales is stayed pending further order of the Tribunal on the following conditions:

(a) Mr Kilic is not to hold or acquire any share in the capital of the business of an applicant or licensee under the *Gaming and Liquor Administration Act 2007* or receive rent, profit or other income in connection with the use or occupation of premises on which the business is to be carried on;

(b) Mr Kilic is not to receive any income derived from the business of an applicant or licensee under the *Gaming and Liquor Administration Act 2007* or to receive any other financial benefit or financial advantage from the carrying on of such a business other than that relating to the organisation and conduct of musical events in licensed premises;

(c) Mr Kilic is not to hold the position of director, manager or secretary, or any other position, however designated that is an executive position, in any business of an applicant or licensee under the *Gaming and Liquor Administration Act 2007*;

(d) Mr Kilic is not to participate in any directorial, managerial or executive decision, in any business of an applicant or licensee under the *Gaming and*

Liquor Administration Act 2007, unless that decision relates to organising and conducting musical events in licensed premises.

4. The application for a stay is otherwise dismissed.

5. The matter is listed for further directions on 20 December 2016 at 11.30 am.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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