



Civil and Administrative Tribunal
New South Wales

Case Name: Kirk v Independent Liquor and Gaming Authority;
Ashton v Independent Liquor and Gaming Authority

Medium Neutral Citation: [2016] NSWCATAD 64

Hearing Date(s): 14 March 2016

Date of Orders: 8 April 2016

Decision Date: 8 April 2016

Jurisdiction: Administrative and Equal Opportunity Division

Before: Hennessy LCM, Deputy President

Decision: 1. The application made by Mr Kirk in proceedings 1510778 is dismissed.
2. The applications made by Mr Ashton, Mr Levy, Mr Teale, Mr Du Chesne, Mr Whitney, Mr McKew and Mr Ashton Snr in proceedings 1510779 are dismissed.

Catchwords: JURISDICTION . decision that ex-officer bearers of registered club not fit and proper persons to hold office . decision as to disciplinary action pending . whether applicants have standing to apply for administrative review of the decision as to fitness and propriety . whether Tribunal has jurisdiction to entertain the application

Legislation Cited: Administrative Decisions Review Act 1997 (NSW) s 9
Civil and Administrative Tribunal Act 2013 (NSW) s 30 and s 55(1)(b)
Interpretation Act 1987 (NSW), s 35
Liquor Act 2007 (NSW)
Registered Clubs Act 1976 (NSW), ss 57E, 57F, 57G, 57H, 57I, 57J, 57K and 57L

Cases Cited: Allan v Transurban Link Pty Ltd (2001) 208 CLR 167
Australian Education Union v Department of Education

and Children's Services [2012] HCA 3
CIC Insurance Ltd v Bankstown Football Club Ltd
(1997) 187 CLR 384
Khatri v Price [1999] FCR 1289
Project Blue Sky v Australian Broadcasting Authority
(1998) 194 CLR 355
Registrar of Titles (WA) v Franzon [1975] 132 CLR 611

Category: Principal judgment

Parties: File: 1510778
Anthony Kirk (Applicant)
Independent Liquor and Gaming Authority
(Respondent)

File 1510779
Robert Ashton Jnr (1st Applicant)
Marcus Levy (2nd Applicant)
Allan Teale (3rd Applicant)
Chris Du Chesne (4th Applicant)
Leonard Whitney (5th Applicant)
Luke McKew (6th Applicant)
Robert Ashton Snr (7th Applicant)
Independent Liquor and Gaming Authority
(Respondent)

Representation: Counsel:
M Robinson SC (Applicant in 1510779)
P Ginters (Respondent in 1510779 and 1510778)
Solicitors:
Mitchell Lawyers (Applicant in 1510778)
Gilchrist Connell (Applicants in 1510779)
Crown Solicitors Office (Respondent in 1510779 and
1510778)

File Number(s): 15107791510778

Publication Restriction: Nil

REASONS FOR DECISION

Overview

- 1 The Independent Liquor and Gaming Authority (the Authority) has found that eight former members of the governing body of the Paddington Bowling Club are not fit and proper persons to hold any position on the governing body of

any registered club: *Registered Clubs Act 1976* (NSW), s 57H. The Authority is yet to decide what action, if any, to take as a result those findings.

- 2 The Authority has applied to summarily dismiss the applications brought by all eight applicants in two separate proceedings on the basis that the proceedings are frivolous or vexatious or otherwise misconceived or lacking in substance: *Civil and Administrative Tribunal Act 2013* (NSW), s 55(1)(b). The Authority says the applicants lack standing to make the applications and the Tribunal does not have jurisdiction to review the decisions. The resolution of those issues depends on the meaning of s 57L of the *Registered Clubs Act 1976* (NSW) which is in Part 6A of that Act.
- 3 I have decided that the applications should be dismissed because s 57L of the *Registered Clubs Act* gives standing to a person against whom any disciplinary action is taken by the Authority in relation to a complaint. No disciplinary action has yet been taken. Similarly, the Tribunal does not have jurisdiction to entertain the applications because the reference to a decision by the Authority in relation to a complaint under this Part in s 57L is a reference to a decision to take or not to take action under s 57H(2). It does not include dealing with or determining a complaint under s 57H(1).

Background

- 4 On 3 December 2014 the Secretary of the Department of Trade and Investment, who was also the Executive Director of the Office of Liquor, Gaming and Racing, made a complaint to the Authority under Part 6A of the *Registered Clubs Act* concerning the Paddington Bowling Club. The Club held a licence under the *Liquor Act 2007*.
- 5 The complaint identified 33 grounds which the Secretary contended justified disciplinary action. Grounds 25, 26, 28, 30, 31, 32 and 33 constituted complaints against the applicants in *Ashton & Anors v Independent Liquor and Gaming Authority* (File 1510779) (the Ashton proceedings). Ground 29 constituted a complaint against Mr Brian Kirk, the applicant in *Kirk v Independent Liquor and Gaming Authority* (File 1510778) (the Kirk proceedings).

- 6 By letter dated 13 November 2015 the Chief Executive of the Authority wrote to the Independent Liquor and Gaming Authority and the applicants setting out the Authority's findings as to each of the grounds of complaint. The Authority found that each of the applicants in the Ashton proceedings and Mr Kirk were not fit and proper persons to be a member of the governing body of a registered club. The Authority invited the parties to make final submissions as to what if any disciplinary action should be taken pursuant to section 57H of the Act in the light of those findings.
- 7 On 11 December 2015, before a decision had been made as to whether any action should be taken, the applicants applied to the Tribunal for administrative review of the findings.
- 8 I have not differentiated between the submissions made by Mr Robinson SC on behalf of eight applicants and those made by Mr Mitchell on behalf of Mr Kirk. Rather, I have treated their submissions as submissions in both proceedings.

The issues

- 9 There are two issues:
- (1) do the applicants have standing to apply for administrative review of the Authority's findings; and
 - (2) does the Tribunal have jurisdiction to review the finding of the Authority that the applicants are not fit and proper persons to be a member of the governing body of a registered club.
- 10 I do not accept the applicants' submission that the Authority's application for dismissal is premature. The Authority has not yet decided whether to take any action under s 57H(2) but when it does, the applicants say that they are likely to apply for a separate review of that decision. Because there is no dispute that that decision is reviewable by the Tribunal, it is sensible, according to the applicants, for the current applications to remain on foot.
- 11 The issue of whether the Tribunal has jurisdiction cannot be made on the basis of what is regarded as sensible or practical. The Authority has applied for the proceedings to be summarily dismissed and the Tribunal must determine that issue according to law. If the Tribunal has no jurisdiction, in most circumstances it should not proceed to hear the case: *Khatiri v Price* [1999] FCR 1289 at [14]-[15].

Legislative scheme - Part 6A of the Registered Clubs Act

- 12 Part 6A of the *Registered Clubs Act* is headed ~~“Disciplinary Action”~~. It contains eight sections s 57E . s 57L.
- 13 The relevant provisions and their headings (which are not taken to be part of the Act) are s 57E (Interpretation), s 57F (Grounds for making complaint); s 57G (Procedure for taking disciplinary action); s 57H (Disciplinary powers of Authority); s 57I (Procedure for implementing disciplinary action); s 57J (Declarations concerning ineligibility of persons to be secretary or member of governing body) and 57L (Administrative review by NCAT of decisions by Authority under this Part).
- 14 Section 57E is headed ~~“Interpretation”~~ but contains no definition of any of the words or phrases in issue in these proceedings.
- 15 Section 57F(1) and (2) set out who may make a complaint and that the grounds must be specified in writing. Section 57F(3) lists the grounds on which ~~“disciplinary action”~~ may be taken by the Authority. In this case, the Authority found that the ground set out in s 57F(3)(g) (that the secretary of the club or any member of the governing body of the club is not a fit and proper person to act as such) applied to the applicants. As a consequence, disciplinary action could be taken on that ground: *Registered Clubs Act*, s 57F(3).
- 16 Section 57G relates to the procedure for taking disciplinary action. In particular, before taking ~~“disciplinary action”~~ the Authority must notify the Club and invite it to show cause as to why the Authority should not take disciplinary action against the Club. That was done in this case by letter dated 13 November 2015.
- 17 Section 57H(1) gives the Authority power to ~~“deal with and determine a complaint that is made to it under this Part”~~.
 - (1) The Authority may deal with and determine a complaint that is made to it under this Part.
 - (2) If the Authority is satisfied that any of the grounds on which the complaint was made apply in relation to the registered club or a person who is the secretary or member of the governing body of the club, the Authority may decide not to take any action or may decide to do any one or more of the following: ò

- 18 Various possible actions are listed at s 57H(2)(a) to (i) including the payment of a monetary penalty and removing the secretary of the club or a member of the governing body of the club from office.
- 19 If the Authority decides to take disciplinary action under s 57H(2), s 57I sets out the procedure for implementing that disciplinary action including serving a notice on the club or the person concerned informing them of the Authority's decision.
- 20 Section 57L lists the people who may apply to the Tribunal for the review of a decision and identifies a reviewable decision as being a decision by the Authority in relation to a complaint under this Part. This provision is the main focus of dispute in these proceedings:

(1) Each of the following persons may apply to the Civil and Administrative Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of a decision by the Authority in relation to a complaint under this Part:

(a) the registered club or person against whom any disciplinary action is taken by the Authority in relation to the complaint,

(b) the complainant.

(2) Part 2 of Chapter 3 of the Administrative Decisions Review Act 1997 does not apply to an application to the Civil and Administrative Tribunal for an administrative review of a decision by the Authority under this Part.

Standing: meaning of the phrase “a person against whom any disciplinary action is taken by the Authority in relation to the complaint” in s 57L(1)

- 21 When construing legislative provisions, the test to be applied is what Parliament should be taken to have intended the expression “disciplinary action” to mean: *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ). As the plurality observed in *Project Blue Sky v Australian Broadcasting Authority*, at 381 [69], the primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. Accordingly, the modern approach to statutory construction requires that that enquiry begin with the context in which the expression is found: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

- 22 A person has standing to apply to the Tribunal for administrative review of a decision if that person is ~~%~~ a person against whom any disciplinary action is taken by the Authority in relation to the complaint: s 57L(1)(a).
- 23 The applicants submitted that ~~%disciplinary action+~~ includes a decision under s 57H(1) to ~~%deal with and determine a complaint+~~. According to the applicants, the findings that they are not fit and proper persons to be a member of the governing body of a registered club, and the publication of those findings on the internet, amounts to disciplinary action in itself. Because there is no reference to s 57H(2) in s 57L(1), parliament cannot have intended that a ~~%decision+~~ would be confined to a decision made under that provision.
- 24 I do not agree with that construction of s 57H(1) for the following reasons.
- 25 Although the term ~~%disciplinary action+~~ is not defined, its meaning is apparent from a reading of Part 6A as a whole. The phrase ~~%~~ a person against whom any disciplinary action is taken by the Authority in relation to the complaint+ refers to disciplinary action under s 57H(2). There is no provision for any other kind of ~~%action+~~ in Part 6A. Publication of a finding on the internet is not referred to in Part 6A and is not the kind of ~~%disciplinary action+~~ contemplated by s 57L.
- 26 The Authority has a general power to ~~%deal with and determine a complaint+~~, but the process of doing so is separated into two parts. Section 57H makes it clear that the first issue for the Authority is to determine whether it is satisfied that any of the grounds of the complaint apply. If it is so satisfied, the Authority may decide not to take any action or it may decide to do any one or more of the things listed in s 57H(2). The ~~%action+~~ in s 57H(2) is not the action of making the finding or publishing those findings on the internet. The action is any disciplinary action taken under s 57H(2).
- 27 This interpretation is supported by the fact that s 57F and 57G include the term ~~%disciplinary action+~~. That term suggests that the action is deleterious to the interests of the person against whom the action is taken. Section 57H(2) sets out certain kinds of ~~%action+~~. Section 57I(1) refers expressly to ~~%disciplinary action under s 57H+~~. It requires the service of a notice informing the relevant person of the Authority's decision. Subsection (3) of s 57I provides that

%disciplinary action+only %takes effect+on the date the notice is given or from a later specified date.

28 Read in that context, and having regard to the principle that Parliament is presumed to have intended that the same expressions have the same meaning throughout a statute, the most harmonious construction of the *Registered Clubs Act* is to read ~~disciplinary action+~~in s 57L(1) as %disciplinary action taken under s 57H(2)+; *Registrar of Titles (WA) v Franzon* [1975] 132 CLR 611, 618 (Mason J.)

29 Broader tests for determining whether a person has standing, such as a person "who is affected by a reviewable decision" have been said by the High Court to be %ambulatory+. In other words, whether or not a person is affected by a reviewable decision will vary depending on the nature of the reviewable decision: *Allan v Transurban Link Pty Ltd* (2001) 208 CLR 167 at [17]. The expression %a person against whom any disciplinary action is taken by the Authority+in s 57L is not ambulatory. It is specific. Only persons against whom disciplinary action is taken are entitled to seek review.

30 While the heading to Part 6A, %Disciplinary Action+is taken to be part of the Act, (*Interpretation Act 1987*, s 35) it does not follow, as the applicants submit, that there is a presumption that everything in Part 6A is or relates to disciplinary action. Part 6A also contains a pre-requisite to the taking of disciplinary action. That pre-requisite is a finding that the grounds on which the complaint was made %apply in relation to the person+; *Registered Clubs Act*, s 57H(2).

31 I do not accept the applicants'submission that the Authority has already made a disciplinary decision. The Authority has dealt with and determined a complaint referred to it under Part 6A but that decision does not amount to %disciplinary action+. The applicants lack standing and their applications should be dismissed on that basis.

Jurisdiction: meaning of phrase "a decision by the Authority in relation to a complaint under this Part"

32 The Tribunal has administrative review jurisdiction over a decision, or class of decisions, if %enabling legislation+so provides: *Civil and Administrative Tribunal*

Act 2013 (NSW), s 30; Administrative Decisions Review Act 1997 (NSW) s 9.
The *Registered Clubs Act* is an enabling Act. The Tribunal has administrative review jurisdiction over a decision by the Authority in relation to a complaint under this Part: *Registered Clubs Act, s 57L(1)*.

- 33 The applicants submit that the words a decision by the Authority in relation to a complaint under this Part in s 57L include a decision to deal with and determine a complaint that is made to the Authority under that Part: s 57H(1). By dealing with and determining the complaint as provided for in s 57H(1), the Authority has made a decision in relation to a complaint. I acknowledge that, when read in isolation, that is one possible interpretation of those words, but I must construe s 57L so that it is consistent with the language and purpose of all the provisions of the statute as a whole.
- 34 As I have said, Part 6A envisages a two stage process in relation to complaints. First, the Authority may deal with and determine a complaint: s 57H(1). Section 57H(2) provides that if the Authority is satisfied that any of the grounds on which the complaint was made apply in relation to the registered club or a person the Authority may decide not to take any action or may decide to do any one or more of the things listed in s 57H(2)(a) to (i). One option is to declare that a person is ineligible to hold office in the position of secretary or member of the governing body of a registered club. The applicants submitted that the Authority had almost made this decision by finding that the applicants are not fit and proper persons to act as the secretary or a member of the governing body of a registered club.
- 35 I accept that the Authority has made a finding which is consistent with the view that the applicants should be declared as ineligible to hold office in the position of secretary or member of the governing body of a registered club. But the applicants' submissions conflate the grounds of the complaint that have been found to apply to them with the power in s 57H(2)(g) to take a certain kind of disciplinary action. These are separate and distinct steps in the process.
- 36 The consequences of a finding that the Tribunal lacks jurisdiction is that the applicants will have no avenue for challenging the Authority's findings on the

merits. According to the applicants this would be blatantly unfair and could not have been Parliament's intention.

- 37 It is not for the Tribunal to ~~to~~ construct its own idea of a desirable policy+in circumstances where ~~the~~ statutory text+and the ~~the~~ statutory purpose+are relatively clear: *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3 at [28] per French CJ, Hayne, Heydon, Kiefel and Bell JJ).

Orders

1. The application made by Mr Kirk in proceedings 1510778 is dismissed.
2. The applications made by Mr Ashton, Mr Levy, Mr Teale, Mr Du Chesne, Mr Whitney, Mr McKew and Mr Ashton Snr in proceedings 1510779 are dismissed.

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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