Supreme Court

New South Wales

Case Name:	Buckley v Independent Liquor & Gaming Authority
Medium Neutral Citation:	[2016] NSWSC 760
Hearing Date(s):	20 May 2016
Decision Date:	10 June 2016
Jurisdiction:	Common Law
Before:	Button J
Decision:	(1) The Secretary of the Department of Justice is joined to the proceedings as a defendant. (2) Until further order of a judge of this Court, there is to be no order whereby the plaintiff, Mr Buckley, must pay any legal costs of the Secretary of the Department of Justice. (3) The matter is listed for directions before the Common Law Registrar at 9 AM on 1 July 2016.
Catchwords:	PRACTICE AND PROCEDURE – application for joinder of a party – r 6.24(1) of the Uniform Civil Procedure Rules – appeal against decision of Independent Liquor and Gaming Authority – order for joinder made
Legislation Cited:	Gaming and Liquor Administration Act 2007 (NSW), s 37A Uniform Civil Procedure Rules 2005 (NSW), r 6.24(1)
Cases Cited:	Sharman Networks v Universal Music Australia (2006) 155 FCR 291
Category:	Procedural and other rulings
Parties:	Neville John Buckley (First Plaintiff/First Respondent) Station House Campsie Pty Limited (Second Plaintiff/Second Respondent) Independent Liquor & Gaming Authority (First

	Defendant) Secretary of the Department of Justice (Applicant)
Representation:	Counsel: A Hatzis (Plaintiffs/Respondents) J Emmett (Applicant) Solicitors: Hatzis Cusack Lawyers (Plaintiffs/Respondents) Crown Solicitor's Office (Applicant)
File Number(s):	2015/378537

JUDGMENT

Introduction

1 This application for joinder of a party or, in the alternative, that that party be granted leave to appear at a hearing as an *amicus curiae* (friend of the court), came before me in the Duty List on 20 May 2016. It was founded upon a notice of motion filed on 6 May 2016 by the Secretary of the Department of Justice (the Secretary).

2 The position of Mr Neville Buckley, the respondent to the motion and the plaintiff in the substantive proceedings, was that he consented to the alternative order and neither consented to, nor opposed, the primary order sought by the applicant.

Background

3 The background may be shortly stated.

4 On 17 December 2015, the Independent Liquor and Gaming Authority (the Authority) determined two applications of Mr Buckley. The first was to transfer a liquor licence from one premises to another. The second was to increase the gaming machine threshold at the latter premises from 0 to 27.

5 Prior to coming to that decision, the Authority invited submissions from interested parties. The applicant had a statutory right under s 37A of the *Gaming and Liquor Administration Act 2007* (NSW) to make submissions to the Authority in respect of any application made under the New South Wales gaming and liquor legislation, and it did so. In a nutshell, the Secretary neither

advanced nor opposed the application, and was content to abide the ruling of the Authority.

6 On 17 December 2015, the Authority refused both applications of Mr Buckley.

7 On 5 April 2016, Mr Buckley filed in this Court an amended summons joining the Authority as the sole defendant. In short, Mr Buckley submits that the Authority made a number of legal errors in coming to its decision. They include: misapplying or misapprehending the term "*immediate vicinity*" in relation to a school, with no or insufficient regard to relevant legal principles; misconceiving its jurisdiction, and failing to exercise its statutory remit, in relation to conclusions and assertions about the proximity of the new hotel to that school; failing to provide adequate reasons; taking into account irrelevant considerations; and making a decision afflicted by legal unreasonableness.

8 Subsequently, the Authority filed a submitting appearance. The result of that is that, in the substantive proceedings, unless some alternative procedure is adopted, there will be no contradictor whatsoever of the assertions of unlawfulness to be made by Mr Buckley about the decision of the Authority.

The hearing before me

9 It is in that context that the Secretary has applied, pursuant to r 6.24(1) of the Uniform Civil Procedure Rules 2005 (NSW), to be heard in the proceedings, as I have said, either as a full party or as a friend of the court.

10 Counsel for the Secretary, in learned written submissions, took me to the principles that apply to such an application. In short, they are that the court will always exercise caution in permitting non-parties to be joined to proceedings; that a court will consider whether the party seeking to be joined has a "*legal interest*"; whether it is "*necessary*" for the non-party to be joined for the court to be able to determine the issue before it; and whether the party "*ought to have been joined*".

11 A court is able to impose conditions or limitations on the joinder, and if it is not satisfied that the joinder is necessary, the court may permit the party to appear to make submissions in a way akin to being a friend of the court.

12 It is noteworthy that counsel also accepted that the decision of the Full Federal Court in *Sharman Networks v Universal Music Australia* (2006) 155 FCR 291 may be contrary to the application, at least to some degree, in that it refers to a "*large intermediate area*" between an intervener and a friend of the court, within which the Secretary may fall.

13 In short, the position of counsel was that, at the least, the consent order should be made that his client be permitted to play the role of friend of the court. But he submitted that that was not entirely satisfactory, in that, if restricted to that role, his client would neither be entitled to lead evidence at first instance, nor to pursue an appeal.

14 Finally, he accepted that joinder of his client as a party could have an adverse effect on the position of Mr Buckley with regard to costs, and was content for me to mould some appropriate order to deal with that question.

15 As I have said, the solicitor for Mr Buckley made it clear that there was no opposition to the alternative order; indeed, he did not actively oppose the primary order. I also understood him to accept the force of what had been said on behalf of the Secretary with regard to my ability to ameliorate the question of costs.

Determination

16 Turning to my determination, it is true that the Secretary did not play an active role opposing the two applications during the stage of submissions prior to the decision being made. That is significant, but not adversely determinative.

17 I am soundly persuaded that one or other of the orders sought should be made, so that there is an effective contradictor, not only to speak in support of the lawfulness of the conduct of the Authority, but also to assist this Court in arriving at the correct determination of the matter.

18 I also think there is force in the proposition of the Secretary that, although unlikely, it is possible that there will be a dispute as to precisely which evidence was before the Authority in the period leading up to the making of the decision. That argues in favour of the Secretary being joined as a party, and not simply

having the right to be heard. So does the desirability of there being a moving party on an appeal, if one is thought to be necessary.

19 As for the question of costs arising from the joinder of a new party, on the one hand I accept that, if I were to make the primary order, there should be some protection of the position of Mr Buckley. On the other hand, I do not think it my place to bind unduly the discretion with regard to costs that will be reposed in the judge that hears the matter substantively. In particular, any costs order may very much depend on the conduct of the parties leading up to, and at, any hearing, including, of course, that of Mr Buckley. In the circumstances, I think that I should make such an order, but that it should not be overly inflexible.

20 In short, I consider that the primary order sought by the Secretary should be made, but that Mr Buckley should be protected to some degree from paying the costs of the Secretary once it is joined as a party.

21 The costs of the hearing before me were not the subject of written or oral submissions by either party. In those circumstances, I infer that each party is content for me to make no order as to costs, with the result that each party will bear his or its own costs of the application.

22 Finally, I think that I should make an order bringing the matter back before the Common Law Registrar promptly so that it may proceed to hearing expeditiously.

Orders

23 I make the following orders:

(1) The Secretary of the Department of Justice is joined to the proceedings as a defendant.

(2) Until further order of a judge of this Court, there is to be no order whereby the plaintiff, Mr Buckley, must pay any legal costs of the Secretary of the Department of Justice.

(3) The matter is listed for directions before the Common Law Registrar at 9 AM on 1 July 2016.

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