FEDERAL COURT OF AUSTRALIA

Sharman Networks Ltd and Others v Universal Music Australia Pty Ltd and Others

[2006] FCAFC 178

Branson, Lindgren and Finkelstein JJ

20-24 February, 7 December 2006

Practice and Procedure — Intervenors — Amici curiae — Distinction between — Whether non-lawyer parties may be amici curiae — Whether rules of court are designed to comprehensively deal with applications for intervention by non-lawyer parties — Federal Court Rules 1979 (Cth), O 6, r 17, O 52, r 14AA.

Pursuant to the *Federal Court Rules 1979* (Cth), the Court could grant leave to a person (the intervenor) to intervene in proceedings at first instance level (O 6, r 17) or on appeal (O 52, r 14AA), on terms and conditions determined by the Court.

In the instant appeal, the Australian Consumers' Association, Electronic Frontiers Australia Inc and the New South Wales Council for Civil Liberties (the parties) made a joint application to be heard, but as amici curiae rather than as intervenors pursuant to O 52, r 14AA.

Held: (1) The Court has an implied power to ensure that it is properly informed of matters which it ought to take into account in reaching its decision and, for this purpose, it may hear an amicus curiae or friend of the court. [5]

(2) Order 6, r 17 and O 52, r 14AA are intended to regulate comprehensively the practice of the Court with respect to the intervention of non-lawyer parties in proceedings, both original and appellate. [11]

(3) It is only the legal practitioner who is invited by the Court to assist who stands outside the rule regime and may appear as amicus curiae. [11]

(4) The parties could not appear as amici curiae but only as intervenors pursuant to the rules. [13]

Consideration of the distinction between intervenors and amici curiae. [6]-[11]

Cases Cited

United States Tobacco Co v Minister for Consumer Affairs (1988) 20 FCR 520.

Application to intervene

JM Ireland QC, *SCG Burley* and *NR Murrary*, for the appellants.

AJL Bannon SC, *R Cobden* SC, *JM Hennessy* and *C Dimitriadis*, for the respondents.

G McGowan SC and *L De Ferrari*, for the applicants for amicus curiae status.

Cur adv vult

7 December 2006

The Court

1 At the commencement of the hearing of this appeal, and three related appeals, the Australian Consumers' Association Pty Ltd, the Electronic Frontiers Australia Inc, and the New South Wales Council for Civil Liberties Inc made a joint application for leave "to be heard in the … appeals as amici curiae". It is convenient here to adopt the descriptor "Amici" for the applicants although, as appears below, we regard their application as an intervention application. After hearing from the Amici, and such of the parties as wished to be heard, the Court ordered on 20 February 2006 that the Amici be granted leave pursuant to O 52, r 14AA of the *Federal Court Rules 1979* (Cth) to intervene in the appeals on certain conditions and with certain rights and liabilities.

2 The Court indicated when making the intervention orders that its reasons for making the orders would be published together with the reasons for final judgment on the appeals. The appeals have now all been finalised by the making of consent orders, the last such order having been made on 15 November 2006. It is nonetheless appropriate for the Court's reasons for making the intervention orders to be published.

3 Order 52, r 14AA of the *Federal Court Rules* provides:

> (1) The Court may give leave to a person (the *intervener*) to intervene in the appeal, on the terms and conditions, and with the rights, privileges and liabilities (including liabilities for costs), determined by the Court.
>
> (2) In deciding whether to give leave, the Court must have regard to:
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> (a) whether the intervener's contribution will be useful and different from the contribution of the parties to the appeal; and
>
> (b) whether the intervention might unreasonably interfere with the ability of the parties to conduct the appeal as they wish; and
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> (c) any other matter that the Court considers relevant.
>
> (3) The role of the intervener is solely to assist the Court in its task of resolving the issues raised by the parties.
>
> (5) When giving leave, the Court must specify the form of assistance to be given by the intervener and the manner of participation of the intervener, and, in particular, must specify:
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> (a) the matters that the intervener may raise; and
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> (b) whether the intervener's submissions are to be oral, in writing, or both.

(Emphasis in original.)

4 The Amici did not challenge the validity of O 52, r 14AA. However, notwithstanding (indeed, perhaps because of) the wide terms of the rule, the Amici disowned any wish to be granted leave to intervene pursuant to it. They contended:

> The granting of standing to *amicus curiae* is entirely within the Court's discretion. This is to be distinguished from leave that may be granted to an intervenor, which is, in part, governed by Order 6 r 17 and Order 52 r 14AA of the *Federal Court Rules*.

(Footnote omitted.)

5 It is not especially helpful to analyse the authorities upon which the Amici relied in support of the above contention. It is clear that this Court has an

implied power to ensure that it is properly informed of matters which it ought to take into account in reaching its decision and that, for this purpose, it may hear an amicus curiae or friend of the court (*United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520 at 534).

6 It is also clear that before the *Federal Court Rules* were amended by the insertions of O 6, r 17 (for proceedings in the original jurisdiction) and O 52, r 14AA (for proceedings in the appellate jurisdiction) a distinction was maintained between the respective positions of an amicus curiae and an intervenor. Although no strict rules developed in respect of the role of an amicus curiae, the ordinary position was that an amicus curiae did not become a party to the proceeding and had no right of appeal from the judgment delivered (*United States Tobacco Co v Minister for Consumer Affairs* at 534-537). A costs order was not ordinarily made against an amicus. By contrast, a person accepted as an intervenor was ordinarily regarded as a party to the litigation with the privileges and obligations that this entailed (*United States Tobacco Co v Minister for Consumer Affairs* at 534-535).

7 There can be a degree of confusion in the use of the terms "amicus curiae" and "intervener". At the extremes, the distinction is clear enough. Where a court invites a legal practitioner to assist it by ensuring that its attention is drawn to all relevant law and arguments, the legal practitioner is an amicus curiae, not an intervener. On the other hand, where a person's interests may be affected by the outcome, the person, if permitted by the court, becomes an "intervener", not an amicus curiae.

8 There is, however, a large intermediate area. A non-lawyer entity may seek to become involved in litigation. It may be an official body, such as the Australian Competition and Consumer Commission or the Australian Securities and Investments Commission (we leave to one side any special statutory power to intervene or to apply for leave to intervene). It may be an organisation that puts itself forward as acting in the public interest. The Amici so characterised themselves. Yet a further class of case is illustrated by an industry, trade or professional association, whose members' interests may be affected, directly or indirectly, by the outcome of the litigation.

9 While it is easy to see the first of these three intermediate categories as comprising entities acting in the public interest, entities in the second and third classes may be acting, to various degrees, both in the public interest and in private interests.

10 The Australian Law Reform Commission (the ALRC) in *Beyond the Door-keeper: Standing to Sue for Public Remedies*, Report No 78 recommended in 1996 that the distinction between intervenor and friend of the court be abandoned. Report No 78 stated (at [6.30]-[6.32]):

> The need for a new approach
>
> 6.30 The Commission *confirms* its conclusion in ALRC 27 that, in general terms, participation in public law proceedings by persons other than the original parties is to be encouraged. [ALRC 27 par 297] However, it considers that having separate categories of intervenors and friends of court is not the most effective way to promote participation by private persons. This approach limits a court's ability to accommodate the range of levels of participation that is possible. It can also raise difficult

> questions as to the nature of a person's interest and whether the interest is such that he or she should participate as an intervenor with all the rights and obligations of a party rather than as a friend of the court.
>
> A single statutory framework
>
> 6.31 The Commission considers that the two categories should be replaced by a statutory framework giving the courts a general power to allow intervention on terms and conditions. The framework will guide courts, parties and potential intervenors as to when an intervenor may participate in proceedings and the role he or she should play. It will allow the court to tailor the intervention in a way that is both appropriate to the proceedings and fair to the existing parties.
>
> 6.32 The framework will complement the existing statutory provisions allowing intervention by government bodies and private persons in particular circumstances.

(Emphasis in original.)

11 Rule 17 was introduced into O 6 and r 14AA was introduced into O 52 by the *Federal Court Amendment Rules 2002 (No 2)* (Cth) (SR 222 of 2002), in both cases commencing on 12 September 2002. We do not think it can be said that O 6, r 17 and O 52, r 14AA were intended to implement the ALRC recommendations referred to earlier: there was a six year gap between ALRC No 78 and the introduction of those rules; the rules do not refer to amicus curiae; and the Explanatory Statement that accompanied SR 222 of 2002 did not refer to the concept or to ALRC No 78. Nonetheless, we think that the new rules are intended to regulate comprehensively the practice of the Court with respect to the intervention of non-lawyer parties in proceedings, both original and appellate. We think it is only the legal practitioner who is invited by the Court to assist it, who stands outside the rule régime. Even in that case, of course, the terms on which a legal practitioner is invited to participate as amicus curiae should be defined by the Court in an exercise of its implied power.

12 Order 6, r 17 and O 52, r 14AA are drawn in sufficiently wide terms to enable the Court to craft an intervention order appropriate to the circumstances of the particular case. Importantly, the rules have been drawn in terms that require the Court, should it decide to give leave to intervene to a non-lawyer entity, to determine the terms and conditions of that leave and the rights, privileges and liabilities (including liabilities for costs) to be associated with the intervention. It would be inconsistent with the obvious intention of the rules for a non-lawyer entity to be free to seek leave to be heard as amicus curiae outside the comprehensive framework now provided by O 6, r 17 and O 52, r 14AA.

13 The present application does not fall within the true amicus curiae exception. The Amici retained counsel to seek leave, and if leave were obtained, to present submissions to the Court in accord with their instructions concerning the appropriate disposition of the appeals. For this reason, their application was appropriately determined by reference to O 52, r 14AA.

14 In determining the appropriate orders to be made on the application of the Amici, the Court took into account the following matters. It seemed to us that the Amici were in a position to advance useful submissions in the public interest on the proper construction of certain provisions of the *Copyright Act 1968* (Cth) which were amended by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) and on the application of those provisions in the context provided by software technology which allows peer to peer exchange of files. We considered that such submissions could be adequately advanced in writing. We were not

persuaded that the Amici would make contributions that were useful and different from the contributions of the many parties to the appeals if they were allowed the liberty of moving from being friends of the court to being friends of particular parties to the appeals. We took the view that fairness to the parties to the appeals required that the question of whether the Amici should assume any liability for any costs that their intervention might occasion a party should await their actual intervention. The orders made were in the form attached to these reasons for judgment.

15 In the event, the New South Wales Council for Civil Liberties Inc did not seek to exercise the leave granted to the Amici jointly. The other two Amici filed helpful written submissions for which the Court was grateful. With the agreement of all parties, the Court considered it appropriate to regard the leave granted as authorising the receipt of a joint written submission of two of the Amici. No party sought an order that the Amici, or any of them, be liable for any part of that party's costs.

Orders accordingly

Solicitors for the appellants: *Clayton Utz*.

Solicitors for the respondents: *Gilbert & Tobin*.

Solicitor for the applicants for amicus curiae status: Communications Law Centre.

VICTOR KLINE