COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 104 of 2019

B E T W E E N

PHILIPPA FINLAYSON
TRACEY MAJOR-WHITE
GWENDOLYN MICKLEWHITE
BARBARA STURRUP
RAINYA SMITH-PINDER
PAULETTE HIGGS
EUCHARIA CAMPBELL
CATRINA SMITH
SHERRELLE MUSGROVE
MATHIAN PRATT
MELANIE OBREGON
LINDA THOMPSON
CHRISTINE SNISKY-NIXON

Applicants

AND

THE BAHAMAS PHARMACY COUNCIL

Respondent

BEFORE: **The Honourable Mr. Justice Jones, JA**

APPEARANCES: **Mr. Luther McDonald with Ms. Wynsome Carey, Counsel for the Joint Applicants**

Mr. Raynard Rigby with Mr. Christopher Francis, Counsel for the Respondent

DATES: **29 October 2019; 6 November 2019**

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Civil appeal – Application for a mandatory injunction – Mandatory injunction pending appeal – Prospects of success of appeal – Balance of convenience – Public interest - Pharmacy Act

The applicants all obtained their academic qualifications from the McHari Institute ("McHari") and were licensed by the respondent to practice as pharmacists. The respondent granted the joint applicants' licences from 2010 and subsequently renewed their licenses annually. In January 2017 the respondent passed a resolution refusing to issue further licenses to the applicants on the grounds

that it had acted improperly in previously issuing the licenses. This was due to the fact that McHari was not an accredited institution and therefore the applicants did not meet the requirements of the Pharmacy Act which requires an applicant for a license to hold a pharmacy degree from an accredited college or university. The applicant Finlayson brought judicial review proceedings in the court below against the respondent. The relief sought was refused and the applicant appealed to this Court. The other applicants were granted leave to be joined as appellants in the appeal filed by Finlayson. Pending the determination of the appeal the applicants sought a mandatory injunction requiring the renewal of their licences to practice as pharmacists in The Bahamas.

Held: application refused. Costs to the respondent to be agreed or taxed.

On an application for a mandatory injunction pending appeal the factors to be considered are: a) whether there is a real prospect of the appeal succeeding and b) where does the balance of convenience lie. The public interest is also a critical factor.

Even if it was accepted that the applicants have some prospect of succeeding on their appeal it could not be said that it was a strong case. The dominant factor in deciding whether to grant the mandatory interim injunction sought by the applicants was that the respondent's decision was made in the exercise of its statutory powers for the public good. The public interest and the balance of convenience would not be served by granting the injunction sought by the applicants.

Novartis AG v Hospira UK Ltd [2013] EWCA Civ 583 considered
R. v Westminster City Council Ex p. Augustin [1993] 1 W.L.R. 730 considered
Sierbein v Westminster City Council [1987] Lexis Citation 1367 applied
Smith v Inner London Education Authority [1978] 1 All ER 411 applied

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REASONS FOR DECISION

Delivered by the Honourable Mr. Justice Jones, JA:

1. In a short judgment on delivered on 29 October 2019, I granted leave for twelve McHari graduates to join the appeal of Phillipa Finlayson ("the applicant") against the judgment of Charles J, in the court below refusing to grant orders to compel The Bahamas Pharmacy Council ("the Council") to renew her pharmacist licence. I had before me, as a single judge, a Summons filed on 15 October 2019, seeking a mandatory injunction for the renewal of the applicant's licence pending the determination of her appeal. After my ruling both parties agreed to amend the Summons to include the applicant and the twelve McHari graduates ("the joint applicants") the subject of the ruling.

Background

2. The joint applicants are pharmacists licensed by the Council to practice at various times since 2010. The joint applicants' academic qualifications were obtained from the McHari Institute ("McHari"). The Council was established under section 3 of the Pharmacy Act ("the PA") which came into force in December 2009. The Council granted the joint applicants' licences from 2010 and subsequently renewed their licenses annually.

3. In January 2017 the Council passed a resolution refusing to issue further licences to the joint applicants on the grounds that it acted improperly in registering and issuing licences to the joint applicants previously. Under the PA, a condition of being registered as a pharmacist is that the applicant must hold a pharmacy degree "**from an accredited college or university"**. The Council determined that McHari is and was not an accredited college or university.

4. The applicant brought judicial review proceedings against the Council. She asked for an Order for Certiorari quashing the resolution; an Order for Mandamus directing the Council to renew the licences of the joint applicants and a Declaration that the Council acted unfairly, arbitrarily and capriciously towards the applicant. Charles J, refused the application. In the court below, the Council continued to issue provisional licences "until the matter had been finally heard and determined".

Issue

5. In this application the joint applicants sought a mandatory injunction requiring the renewal of their licence to practice as pharmacists in The Bahamas pending the determination of their appeal. The two issues normally raised on a mandatory injunction application pending appeal are:

a) Is there a real prospect of this appeal succeeding?

b) Where does the balance of convenience lie?

Analysis and Discussion

Was there a real prospect of the appeal succeeding?

6. Counsel for the joint applicants referred to the case of **Novartis AG v Hospira UK Ltd** [2013] EWCA Civ 583 from the English Court of Appeal, where Floyd LJ in delivering the judgment of the court explained the test to be applied on the grant of an injunction pending appeal where the appellant has lost at first instance. He said at para 41:

> **"[41] I would summarise the principles which apply to the grant of an interim injunction pending appeal where the claimant has lost at first instance as follows:**
>
> > **(i) The court must be satisfied that the appeal has a real prospect of success.**

> **(ii) If the court is satisfied that there is a real prospect of success on appeal, it will not usually be useful to attempt to form a view as to how much stronger the prospects of appeal are, or to attempt to give weight to that view in assessing the balance of convenience.**
>
> **(iii) It does not follow automatically from the fact that an interim injunction has or would have been granted pre-trial that an injunction pending appeal should be granted. The court must assess all the relevant circumstances following judgment, including the period of time before any appeal is likely to be heard and the balance of hardship to each party if an injunction is refused or granted.**
>
> **(iv) The grant of an injunction is not limited to the case where its refusal would render an appeal nugatory. Such a case merely represents the extreme end of a spectrum of possible factual situations in which the injustice to one side is balanced against the injustice to the other…."**

7. Counsel for the joint applicants suggested that the **Novartis** principles relating to prospect of success apply equally to a mandatory injunction. The joint applicants contended that their prospects of success in this appeal was good for three reasons. First, the trial judge's interpretation of the word "accredited" in the PA is unreasonable. Second, the actions taken by the Council in dealing with the joint applicants created a legitimate expectation that they would be registered. Third, there was no evidence to support the conclusion of the trial judge that the applicants' legitimate expectation had been frustrated.

8. However, on an appeal for a mandatory injunction after refusal of a judicial review it requires a very strong case for the application to succeed. In **R. v Westminster City Council Ex p. Augustin** [1993] 1 W.L.R. 730 the applicant arrived in the UK from St. Lucia and, was placed in Council accommodation under a statutory provision pending inquiries as to their status. The Council was of the view that she was not eligible as she intentionally made herself homeless and sought to remove her from the premises. The Council allowed the applicant to remain at the premises until the conclusion of the judicial review hearing. The application was dismissed, and the applicant appealed.

9. Sir Stephen Brown in giving the courts judgment said at 734:

> **"In considering such an application as this at the appellate stage, in my judgment a very strong case would have to be made out for a successful appeal in order to justify a court making a mandatory injunction of this nature. The court is being asked, in effect, to extend what is initially a statutory right under section 63 at a second stage of proceedings. The judgment of Parker L.J. in the Hammell case [1989] Q.B. 518 suggests that**

> **consideration should be given to granting such an injunction at the initial judicial review stage when leave to move for judicial review had been granted, and where a strong case can be shown that there is a reasonable prima facie case. But this is a further stage removed. At this stage, in my judgment, it is not incumbent upon this court in the circumstances of this case to grant such an injunction and I would refuse this application."**

10. The respondent, on the other hand, argued that the prospects of the joint applicants' success on appeal was weak for three reasons. First, McHari was not at any time an "accredited" college or university and therefore the joint applicants were not entitled to registration. Second, the joint applicants did not have a legitimate expectation of being registered after the passing of the PA. Third, the Council acted rationally and with procedural fairness in passing the resolution.

11. If it was accepted that the joint applicants have some prospects of success on this appeal, which I did not, I was unable to say that it is a strong case. Even if I was wrong on this that was not the end of the matter as the balance of convenience and the public interest were critical factors to be accounted for.

The balance of convenience and the public interest

12. The joint applicants argued that they would suffer irremediable harm and hardships including, financial and reputational loss if a mandatory injunction was not granted to them. This they said should tip the balance of convenience in their favour.

13. However, in **Smith v Inner London Education Authority** [1978] 1 All ER 411 it was held that a statutory body should not be prevented by injunction from exercising its statutory powers unless there was a real prospect of success that the applicant could succeed at trial. Browne LJ said at 422:

> **"…I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed. I think this is an example of the 'special factors' affecting the balance of convenience which are referred to by Lord Diplock in American Cyanamid Co v Ethicon Ltd…"**

14. Second, in **Sierbein v Westminster City Council** [1987] Lexis Citation 1367 the applicants operated sex shops under a Local Government statute. A resolution was passed by the local authority that no person should operate a sex shop without a licence. On application, the local authority refused the licences and the applicants applied for judicial review to quash the decision. In addition, the applicants sought an interlocutory injunction to restrain the local authority pending the hearing of the application. In refusing the injunction, Dillon LJ said:

> **"…I myself feel that in a case where what is sought to be restrained is the act of a public authority in a matter of public law, the public interest is very important to be considered and the ordinary financial considerations in a Cyanamid case, though no doubt to some extent relevant, must be qualified by a recognition of the public interest. A fortiori is that so when the injunction is sought to permit the party concerned to do or continue something which will be in breach of the criminal law…."**

15. In the facts of the case which were before me, despite the financial loss and hardship to the joint applicants on the one hand, it was impossible to quantify the public interest in monetary terms on the other. The wide breadth of the public interest can be gleaned from the preliminaries to the Pharmacy Act Ch 227. The purpose of the Act is to:

> **"…provide for the regulation and control of the practice of pharmacy and for the registration and licensing of persons qualified to practise pharmacy and for the establishment of The Bahamas Pharmacy Council and for other matters connected therewith"**

Conclusion

16. In my judgment the Council's decision was in the exercise of statutory powers for the public good. This, in my view, was the dominant factor in deciding whether to grant the mandatory interim injunction sought by the joint applicants. I did not accept that the public interest and the balance of convenience would be served by granting the injunction sought by the joint applicants. For the above reasons, this application was refused. Costs to the respondent to be agreed or taxed.

The Honourable Mr. Justice Jones, JA