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

B E T W E E N

PHILIPPA FINLAYSON

Applicant

AND

THE BAHAMAS PHARMACY COUNCIL

Respondent

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

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

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

DATES: **21, 29 October 2019**

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Application for joinder – Joinder - Sufficient legal interest - Whether the parties proposed to be joined in the appeal have a legal interest which calls for their participation in the appeal – Rules of the Supreme Court Order 15 Rule 6

The applicant is a pharmacist having received her qualifications from the McHari Institute ("McHari"). She was licensed to practice in The Bahamas in 2010 by the respondent, who also licensed sixteen other pharmacists ("the McHari graduates") possessing similar qualifications. The applicant and the McHari graduates were licensed to practice each year from 2010 until January 2017 when the respondent determined by resolution that it had acted beyond its legal powers in registering and licensing the applicant and the other McHari graduates. The Pharmacy Act provides for the registration of a pharmacist who holds a degree "from an accredited college or university"; McHari is not an accredited college or university under the Act. As a consequence of the resolution, the applicant launched judicial review proceedings against the Council seeking the following relief: a) certiorari of the resolution, b) mandamus directing the Council to renew her license and of those of the other McHari graduates and c) a declaration that the Council acted unfairly, arbitrarily and capriciously. The relief sought was refused by the court below and the applicant appealed to this Court.

The application before the Court is for a joinder of twelve of the sixteen graduates affected by the Council's resolution to the applicant's appeal. The issue before the Court therefore was whether the McHari graduates have a legal interest which calls for their participation in the applicant's appeal.

Held: leave granted to join the twelve McHari graduates. Parties to be heard on the resulting orders and on the issue of costs.

As a general principle the court has, as per Order 15 Rule 6 of the Rules of the Supreme Court, a broad power to correct irregularities in joinder or misjoinder of parties.

In the present case the McHari graduates have a legal interest in the result of the proceedings for the following reasons: the challenged resolution arose from the same dispute; the judge, in dismissing the application for mandamus, refers to the applicant "and the other McHari graduates"; and as the facts apply equally to the applicant and the other McHari graduates the risk is minimized that there would be a need for fresh evidence and consequential delays.

The joinder is necessary to decide all issues related to the respondent's resolution which affects the applicant and the other McHari graduates and to prevent many satellite proceedings.

Elkind v. The Private Trust Corporation Limited [2013] 1 BHS J. No 199 mentioned
Long v Crossley (1879) 13 Ch D 388 considered
re I.G Farbenindustrie A.G Agreement [1944] Ch. 41 applied

JUDGMENT

Judgment delivered by the Honourable Mr. Justice Jones, JA:

1. Phillipa Finlayson ("the applicant") is a pharmacist licensed by the respondent ("the Council") to practice in The Bahamas from 2010. The applicant gained her pharmacist qualifications from the McHari Institute ("McHari"). The Council under the Pharmacy Act ("the PA") regulates licencing pharmacist in The Bahamas from December 2009. The Council granted the applicant a licence in 2010 and afterwards renewed her licence each year. During that period the Council also granted and renewed licences to sixteen other pharmacists ("the McHari graduates") who held similar qualifications from McHari.

2. In January 2017 the Council determined by resolution that it acted beyond its legal powers in registering and licencing the applicant and the sixteen McHari graduates. It decided to stop renewing the licences of the applicant and the McHari graduates until they took steps to secure qualifications acceptable to the Council. The PA requires that an applicant for

registration as a pharmacist must hold a pharmacy degree **"from an accredited college or university."** McHari is not an accredited college or university under the PA.

3. The applicant brought judicial review proceedings against the Council. During the proceedings in the court below, the sixteen McHari graduates applied for joinder but later withdrew the application after the Council signalled it would continue to issue provisional licences **"until the matter had been finally heard and determined."** The applicant sought the following relief:

> a) An Order for Certiorari quashing the Resolution;
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> b) An Order for Mandamus directing the Council to renew her license and those of the McHari Graduates; and
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> c) A Declaration that the Council acted unfairly, arbitrarily and capriciously towards her.

4. Charles, J. in the court below heard the application and refused the relief sought. On 27 June 2019, the applicant challenged the decision of Charles J, on an appeal to this court and sought an injunction before a single judge of this court requiring the Council to renew the licences of the applicant and the McHari graduates. The Council's principal objection to the injunction was on the basis the McHari graduates were not parties to the judicial review proceedings in the court below and could not now seek relief before the Court of Appeal. At the hearing, I agreed with the Council and dismissed the application for an injunction by the applicant and the McHari graduates. The applicant has now filed a Summons seeking an Order to join twelve of the sixteen pharmacists affected by the Councils' resolution. All twelve McHari graduates consented to join the applicant's appeal in an attachment to the applicant's affidavit of 29 July 2019.

Issue raised and Positions of the Parties

5. The issue raised is whether the McHari graduates have a legal interest which calls for their participation in the applicant's appeal? Raynard Rigby, ("counsel for the respondent") suggests the answer is no and that I should dismiss the application for joinder and order the applicant pay the respondent's costs in the application. On the other hand, Luther McDonald, ("counsel for the applicant") suggests that I should extend the time for the application for joinder of the McHari Graduates and they join in the applicant's appeal.

Analysis and Discussion

6. At the start of the hearing counsel for the respondent, helpfully conceded that this Court has the authority to add a party to an appeal under Order 59 Rule 10/8 as quoted in The Supreme Court Practice 1999 (White Book):

> **"Adding parties**
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> **The Court of Appeal has power to add or give leave to add parties (e.g. The legal owner of a chose in action where the equitable assignee sues) (Performing Right Society v. London**

> **Theatre of Varieties [1922] 2 KB 433 at 450, CA; affirmed [1924] - 7 - A.C. 1) but would not (if it has the power) add a party to enable relief to be given against him which was not asked for at the trial (see Edison & Swan, etc., Light Co. v. Holland (1889) 11 Ch.D. 28 CA). A person who has only a commercial but no legal interest in the outcome of an appeal cannot be added as a party to the appeal (see para. 59/8/2, above."**

7. He argues, however, that the court would only add a party if it can be shown that they possess a sufficient "legal interest". He referred Order 59 Rule 8/2 which provides:

> **"... A person cannot be joined as a party to an appeal, either under 0.15, r.6 or 0.59, r.8, unless he has a "legal interest" in the proceedings (i.e. there exists some issue between that person and someone who is already a party to the proceedings in respect of which some remedy or relief in the proceedings could be claimed); someone who has no legal interest, but is merely a person who would be affected wither commercially or in some other respect by the outcome of the appeal cannot be joined as a party...".**

8. In **re I.G Farbenindustrie A.G Agreement** [1944] Ch. 41 at page 43 Lord Greene MR said:

> **"...The fact that a person has a merely commercial interest in litigation gives him no right to demand to be added as a party to proceedings by the result of which that commercial interest may be affected, and the court has no jurisdiction to add him any more than it has jurisdiction to add any man in the street..."**

9. On the facts of this case, counsel for the respondent makes four points. First, the McHari graduates do not have a legal interest to be joined as appellants as they are simply people affected commercially by the appeal. Second, even if they do have a legal interest, it is individual to each and may turn on special facts not considered in the court below and not arising before this court. This he argues creates a risk the McHari graduates in seeking to joinder in this appeal may have to adduce fresh evidence unnecessarily delaying the appeal. Third, he argues, adding the McHari graduates are unnecessary to the result of this appeal as there is no new evidence that would aid in deciding the current appeal. To support the last point, counsel for the respondent cites **Elkind v. The Private Trust Corporation Limited** [2013] 1 BHS J. No 199 where Evans, J. (as he then was) refused to join extra individuals as defendants because he could not see on the pleadings and on the evidence provided how the added parties would aid in settling the issues before the court. The final matter raised is increasing costs by adding the McHari graduates in this appeal.

10. As a general principle, this court has broad powers to correct irregularities in joinder or misjoinder of parties. Order 15 Rule 6(1) and (2) of the Rules of the Supreme Court (R.S.C.) provides that:

"(1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —

(a) order any person who has been improperly or unnecessarily made a party of who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) order any of the following persons to be added as a party, namely —

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter,

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised."

11. **Gurtner v Circuit and Another [1968] 2 QB 587** expanded the principle. The UK Court of Appeal held:

> **"(1) that, where the determination of an action between two parties would directly affect a third person's legal rights or his pecuniary interest, the courts had a discretion, under R.S.C. Ord. 15, r. 6 (2), to order the third person to be added as a party to the action on such terms as the court considered desirable so that all matters in dispute could be " effectually and completely determined and adjudicated upon".**

12. The Jamaican Court of Appeal in **National Commercial Bank Jamaica Limited v International Asset Services Limited [2015] JMCA Civ 7**, a procedural appeal, considered

cases involving a pre-CPR application for joinder under rules similar to R.S.C. Order 15 r. 6. Phillips J.A had this to say:

> **"[38] There are two cases decided in this court namely, Jamaica Citizens Bank Ltd v Dyoll Insurance Co Ltd and Mutual Security Merchant Bank and Trust Company Limited v Rita Marley and Others and Aston Barrett and Others (1991) 28 JLR 670 (the former already referred to and relied on by counsel for the appellant), which have addressed the issue of adding parties after the commencement of the claim....**
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> **[39] In Jamaica Citizens Bank Ltd v Dyoll Insurance Co Ltd the applicant the mortgagee of certain lands, made an application to the court to intervene in the suit in an effort to prevent the defendant from building an apartment complex on the property bound by a restrictive covenant for the construction of dwelling houses only. The judge at first instance refused the application. The applicant appealed. This court held that once a third party was going to be affected legally or financially, the court in its discretion should permit the party to be added. The court made the point that there was authority to say that there need be no cause of action between the intervener and one of the parties, and that a mere commercial interest was not enough for a party to be joined. However, in this particular case the mortgagee had a far more substantial interest in the outcome of the action, than a mere commercial interest, and the ruling of the judge was overturned. The conclusion one draws from the judgment is that the interpretation to be given to the rules relating to the addition of parties is not a narrow and literal one, but that the court must be careful to ensure that all parties concerned in the dispute before the court, are before the court, as that serves the ends of justice.**
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> **[40] Although the author Sime states that the only restriction against joinder appeared to be that a cause of action must exist against each of the parties to be joined, this court has said that there does not have to be a cause of action between the person to be added and one of the parties in the action. However, in my view, the intervener, should have some substantial interest in the outcome of the litigation.**
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> **[41] In Mutual Security Merchant Bank and Trust Company Limited v Marley the applicants were claiming an interest in the estate of Robert Nesta Marley and wished to intervene in the action where the plaintiffs sought directions as to the price and sale of assets including real estate and royalties and administration of the said estate. The trial judge found that the**

applicant had an interest in the outcome of what could be determined in that action and ordered that they be joined. The plaintiffs appealed on the grounds that what they were seeking in the court was approval of the sale of certain assets and the intervention of the applicants to protect their limited interest would not put an end to their claim, could be futile, would cause delay, would engender expense to the estate, and would guarantee adversarial proceedings.

[42] In allowing the appeal, the Court of Appeal held that the trial judge had exercised his discretion on the wrong principles, in that:

> **"[He had] failed to appreciate the nature of the proceedings in which joinder was sought and focused entirely on the applicants' alleged interest i.e. the best price, which could not settle the very important question of their entitlement to the assets, the best price for which, was the sole question before the court. With respect to that question, the learned judge did not bear in mind that the joinder must enable the court effectually and completely to adjudicate and settle all questions in the originating summons for directions by the appellants."**

The real question therefore was whether the applicants' presence was necessary so as to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause..."

13. The McHari graduates have a legal interest in the result of these proceedings for four reasons. First, the challenged resolution adopted by the Council arose from the same dispute. The challenged resolution speaks to the **"applicant and sixteen other McHari graduates"** and fixes their status and qualifications as pharmacist. Second, the respondent filed affidavits from Vanria Rolle and Danielle McKenzie which all discuss what can only be the McHari graduates legal interest in the result of the proceedings. In the affidavit of Danielle McKenzie, she says at para 5:

> **"5. Since the date of the Resolution, the Council provided provisional registration to the 16 graduates with the exception of the Applicant. <u>The Council intends to continue to allow for provisional licencing until the matter is finally heard and determined...</u>" [Emphasis added]**

14. In the affidavit of Vanria Rolle filed on 11 June 2019 she says at para 11:

> **"11. The Council's position has consistently been that the 15 McHari graduates are not parties to the matter but that <u>the Ruling may impact their licensure due to the fact that they</u>**

were the subject of the Council's Resolution which lead (sic) to the commencement of the judicial review proceedings." [Emphasis added]

15. Third, the judge in the court below made many references to the McHari graduates. The judge considered the effect her orders had on the applicant and the McHari graduates. This is plain from the following extract of the judge's written ruling. At paras 204 and 205 of the judgment she said:

> **"[204] The Council acted fairly and in accordance with the norms of natural justice when passing the resolution which is the subject matter of this action. All that the Council is requesting the applicant and the other 16 McHari graduates to do is to sit an exam. These examinations will be administered biannually in May and October allowing the graduates three (3) attempts during the two-year period. There ought to be no demur with this.**
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> **[205] In the premises, I will make the following orders:**
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> **a) The application for an Order for Certiorari quashing the resolution adopted by the Council in January 2017 be dismissed;**
>
> **b) The application for an Order for Mandamus directing the Council to renew the licenses of the applicant and other McHari graduates be dismissed; and**
>
> **c) The application fora Declaration that the Council acted unfairly, arbitrarily and capriciously towards the applicant be dismissed." [Emphasis added]**

16. Fourth, as the facts apply equally to the applicant and the twelve McHari graduates this minimizes the risk the joinder would call for fresh evidence and any consequential delays. In my judgment, the joinder to the appeal is necessary to decide all the issues related to the Council's resolution affecting the applicant and the McHari graduates. Fifth, where the joinder is necessary the Council can be protected by costs orders.

17. Finally, it is not necessary to consider prospects of success of the appeal on a joinder application. As Fry J said long ago in **Long v Crossley** (1879) 13 Ch D 388 at 391:

> **"...The object of the provisions of the rules was, not that a party's case should be so framed as to succeed, but that it should be so framed that it can be adjudicated upon by the Court, whether in his favour or against him..."**

Conclusion

18. In summary I agree the joinder of the McHari graduates to the judicial review proceedings is essential to settle all the matters in dispute between applicant, the McHari graduates and the Council and to prevent many satellite proceedings. I also accept the McHari graduates share

a legal interest in the result of the proceedings. These conclusions in my view are adequate to allow leave to add the twelve McHari graduates as parties to this appeal. To conclude, leave granted to join the twelve McHari graduates consenting to join the applicant's appeal. I will hear the parties of any resulting orders and on the issue of costs.

The Honourable Mr. Justice Jones, JA