IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No GYCV2018/001
GY Civil Appeal No 125/2017

BETWEEN

THE MEDICAL COUNCIL OF GUYANA **APPLICANT**

AND

JOSE OCAMPO TRUEBA **RESPONDENT**

Before The Honourables **Mr. Justice Adrian Saunders**
Mr. Justice Jacob Wit
Mr. Justice David Hayton
Mme. Justice Maureen Rajnauth-Lee
Mr. Justice Denys Barrow

Appearances:

Mr. Kamal Ramkarran for the Applicant.
Mr. Ian N. Chang S.C. with Mr. Sanjeev Datadin and Mr. Robin Hunte for the Respondent.

REASONS FOR DECISION
of
The Honourable Justices Saunders, Wit, Hayton, Rajnauth-Lee and Barrow

Delivered by
The Honourable Mr. Justice Barrow
on the 6th day of April, 2018

[1] At the end of the hearing of the application by the Medical Council of Guyana (the Council) for special leave to appeal which the Court had directed was to be treated as the substantive appeal if leave was granted, we allowed the appeal, thereby restoring the decision of the High Court (Acting Chief Justice George) to dismiss the claim for judicial review that had been brought by Dr Jose Ocampo Trueba (Dr Ocampo). Counsel urged that full reasons for our decision be given because they agreed that there was great need for this Court to resolve the deep uncertainty whether, and to what extent, the Civil Procedure Rules 2016 (the CPR) applied to judicial review claims, as it was standard in Guyana for the Crown Office Rules 1906 of England and its local accretions, to be applied to such claims. Thus, the application which was before the High Court, that resulted in the dismissal of the claim, was an application for orders nisi for certiorari and mandamus, which are orders unknown to the CPR.

The underlying proceedings

[2] On 14 September 2017, counsel for Dr Ocampo filed an urgent, without notice application in the High Court seeking interim orders or rules nisi of mandamus and certiorari and writs of certiorari and mandamus against the decision of the Council refusing him full registration as a medical practitioner, for which he had applied on 17 July 2017. In 2013 he had been granted institutional registration as a medical practitioner, which permitted him to practice medicine only at the institutions stated in the licence. Dr Ocampo deposed in his supporting affidavit that prior to the refusal of his application for full registration, the Council did not inform him, and he was unaware, of any relevant facts or circumstances that could have militated against the approval of the application and that he was not given an opportunity to be heard before the Council made its decision. He therefore contended the decision was made unlawfully, unreasonably, unfairly, in bad faith, without or in excess of jurisdiction, in breach of the rules of natural justice and was therefore null and void and of no legal effect. He asked for the orders nisi to be granted and that thereafter the Council should show cause why the orders should not be made absolute.

[3] On October 19, 2017, George CJ (ag) refused the without notice application. She said that -

Having reviewed the authorities, more particularly, those that are directly binding on the court – Medical Council of Guyana v Sooknanan (2014) 85 WIR 394 at p 397 a decision of the Caribbean Court of Justice, Medical Council of Guyana v Hafiz (2010) 77 WIR 277 at p. 286 Guyana Court of Appeal, as well as the Bahamian case of Shanmugavel v Bahamas Medical Council (2011) 80 WIR 11 in which the aggrieved medical practitioner appealed a decision not to register him as provided by the Medical Act Cap. 224 where no reasons were given by that territory's Medical Council, I have concluded that the prerogative writ procedure cannot be employed where the legislation-in this case s.19 of the Medical Practitioners Act, Chapter 32:02 has provided an alternative mechanism to challenge a decision of the Medical Council, to wit a statutory right of appeal. The applicant should have filed an appeal pursuant to section 19 of the said Act.

[4] Dr Ocampo appealed to the Court of Appeal which allowed his appeal and remitted the claim to the High Court for it to consider whether to exercise its discretion to grant judicial review. The court decided that the Chief Justice had proceeded on the premise that because there was available the statutory right of appeal this precluded the grant of judicial review but, the court held, it was not inevitable that a right of appeal barred an applicant from seeking judicial review; rather, a court should consider whether, in the particular circumstances of a given claim, judicial review was the appropriate recourse.

The intervention of the Council.

[5] The Council was ignorant of the proceedings in the High Court and only became aware that there had been proceedings when it received in the mail, on 29 November 2017, a copy of the Chief Justice's order. The Council was not served with the Notice of Appeal but counsel obtained a copy from the Registry. On 8 December 2017 it received notice of the hearing of the appeal on 21 December 2017, which counsel attended, and he was permitted to make submissions.

[6] It was not until the Council applied to this Court for special leave to appeal, pursuant to section 8 of the Caribbean Court of Justice Act 2004, that the Council got the

opportunity to participate fully in the claim against it. It was submitted, however, on behalf of Dr Ocampo, that the Council should have awaited the hearing in the High Court of the remitted claim and it was only if the orders nisi had been granted and served on the Council that the Council should have been able to participate in the proceedings by showing cause against the orders being made absolute.

[7] The objection by counsel for Dr Ocampo to the grant of special leave was on the basis that the decision of the Court of Appeal was neither a final nor an interlocutory order but a provisional one and, relying on this Court's decision in *Robin Singh v AG of Guyana*,[1] no leave could be granted. It was difficult to follow this submission because that case was concerned with whether an appeal lay to the Court of Appeal under a provision of the Court of Appeal Act on which the appellant had mistakenly relied. In this claim, Dr Ocampo successfully appealed to the Court of Appeal and the issues which were considered in *Singh* simply did not arise in this application to this Court for special leave to appeal. As this Court most recently re-stated in *AG of Guyana v Dipcon Engineering Ltd*[2], it will grant special leave to appeal pursuant to section 8 of the Caribbean Court of Justice Act 2004, where it appears there is need to prevent a miscarriage of justice. As set out immediately below, the facts placed before this Court by the Council fully convinced the Court that it should grant special leave to appeal to prevent a serious miscarriage of justice.

[8] The Council's participation had a major impact, because of the facts stated in the affidavit of its secretary, Ms Juanita Johnson, sworn on 10 January 2018 in support of its application for special leave to appeal to the CCJ. The Secretary deposed that Dr Ocampo had been practising medicine in breach of the terms of his institutional registration, which permitted him to practise only at a single institution, because he had been practising also at a different facility. The Council had written to Dr Ocampo about this breach twice; on 19 June 2017 and 21 July 2017. He did not reply to these letters and continued to practise medicine in breach of his registration.

[9] Both letters were exhibited and they are in strong terms. The letter of June 19th warned Dr Ocampo that he should desist from practising at the different facility and

[1] [2012] CCJ 2 (AJ).
[2] [2017] CCJ 17 (AJ).

that if he failed to obey the directive his current licence would be withdrawn with immediate effect. The letter of July 21st was written four days after Dr Ocampo's application for full registration. It referred to the earlier letter and the fact that Dr Ocampo had continued to practise in breach of his licence. It identified the provision in the applicable legislation which empowered the Council, in the event of professional misconduct or malpractice, to take disciplinary measures including suspension or revocation of licence. The letter made clear the Council was considering the evidence and investigating whether he was guilty of professional misconduct or malpractice and required him to offer any comments he wished to make within 7 days. It warned that if he did not respond the Council would proceed to determine the issue and make findings adverse to his interest, without further input from him. Dr Ocampo did not respond.

[10] In addition, the Council published an advertisement daily, alternatively in two newspapers of wide circulation in Guyana, between November 23 and 27, 2017 notifying the public that Dr Ocampo was licensed to practice medicine only at a stated hospital.

[11] In her affidavit, the Secretary also detailed steps she had taken to personally confirm the facility where Dr Ocampo was unlawfully practising, the office hours when he worked there, which she was told, and what were his charges for sessions of dialysis. She stated she had visited the facility on 10 January 2018 and took 3 photographs of signs showing Dr Ocampo's name as offering medical services. She also made a purchase to show the date and time she visited. Copies of the photographs and receipt were attached to her affidavit in support of the application.

[12] Dr Ocampo filed an affidavit in opposition, on 25 January 2018, some 15 days after the Secretary's affidavit. He said not a word in response to challenge the matters set out in the letters of June 19th and July 21, 2017 and confirmed by the Secretary's affidavit. We, therefore, accept as entirely true the evidence given on behalf of the Council.

[13] Based on this evidence we conclude that it was highly improper that Dr Ocampo concealed those very material facts from the High Court, in making his without

notice application. It was outright dishonesty for him to have sworn, as he did, that he had "never been the subject of any disciplinary proceedings either in Guyana or Cuba or elsewhere"; that the Council before making its decision not to grant his application "never informed me of any relevant fact or circumstance which could have militated against the grant of its approval"; that the Council did not afford him any opportunity of being heard before it made its decision; and that he was "unaware of any relevant fact or circumstance which could have militated against the grant of its approval". We shall return to this egregious conduct.

Without notice and Order *nis*i

[14] The deception that Dr Ocampo perpetrated makes it even more necessary that this Court should examine the without-notice and order-nisi procedure that allowed him such scope. As to that procedure, the Council submitted that before the CPR were introduced in February 2017, there were no explicit Guyanese procedural provisions in the High Court rules regarding judicial review. In the absence of written rules, a practice developed whereby the courts would grant *ex parte* orders nisi against a respondent. The respondent thereafter had to show cause why the orders should not be made absolute.[3] The Council submitted that a completely new civil procedure system now exists and Part 56 of the CPR contains detailed provisions on obtaining administrative orders. There is also a Judicial Review Act Chapter 3:06 which was passed by the National Assembly, assented to by the President in 2010 and published in the revised volumes of the Laws of Guyana. However, this Act has not yet been brought into force.

[15] The Council submitted that Part 56 of the CPR must be used by litigants seeking judicial review and, therefore, every other form of practice formerly applicable, such as the practice of obtaining *ex parte* orders nisi with the need for the respondent to show cause against making the orders absolute, is by implication excluded. The CPR now requires that such cases be commenced by a Statement of Claim (except where Fixed Date Applications are permitted). Commencing the claim in this way means that the full spectrum of procedural tools such as discovery, case management

[3] A helpful discussion of the former practice was given by Bernard C (as she then was) in *AG v Jardim* (2003) 67 WIR 100 at 105.

conferences, pre-trial review and oral evidence at trial, are now available to the parties. We interject to note that there is no provision in the CPR, which exists in some jurisdictions, mandating that an applicant for judicial review must first obtain permission to apply for judicial review and the Act does not include such a requirement.

[16] The Council also submitted that the terms of the *ex parte* order nisi, sought by Dr Ocampo and which was traditionally granted by the courts under the pre-CPR practice, was inconsistent with CPR 17.01(4) which provides that an interim order expires within 14 days unless a further order is made. The obvious intention of the new rules is to severely limit orders made in the absence of representations from the opposing party. The prior regime, under the old prerogative writ system, where orders were granted without notice at the beginning of the proceedings and could only be displaced if the opposite party showed cause against it being made absolute, operated to shift the burden to the opposing party. The new rules abolished that position.

[17] Additionally, counsel for the Council submitted, even if it was possible for Dr Ocampo to commence the claim in the manner that he did, he did not satisfy the test for the granting of interim orders without notice, under the CPR. Rule 17.01(3) required that he should have satisfied the court that (a) there was good reason for not giving notice or (b) in the case of urgency, it was not reasonably possible to give notice or (c) giving notice would have defeated the purpose of the application. The Council submitted that Dr Ocampo had no good reason for not giving notice and if notice had been given, that would not have adversely affected his claim. Furthermore, the matter was not urgent as Dr Ocampo continued to be institutionally licensed to practice medicine for more than 5 months after the Council refused his application. His registration did not expire until January 26, 2018.

[18] In response to the Council's submission that judicial review proceedings fell within part 56 of the CPR, counsel for Dr Ocampo submitted that rule 56.01(a) provides that Part 56 applies to administrative orders where the relief sought is for judicial review under the Judicial Review Act. It was therefore submitted that since the Act was not in operation, Dr Ocampo could not have brought an application under Part

56. The common law position in relation to applications for judicial review still applied. Interestingly, counsel also submitted that even though Dr Ocampo could not have applied for relief under the Act, the court was nevertheless not free to act inconsistently with the Act, which in section 9 provided that the court should not refuse an application for judicial review because of an alternative remedy.

[19] In reply, the Council submitted that part 56 of the CPR applies to all administrative orders including constitutional relief, certiorari and mandamus. The Council submitted that although the same orders named in the Rules can be obtained in judicial review proceedings at common law, the Rules set out the procedure for obtaining those orders, and counsel for Dr Ocampo erred when he submitted that the old prerogative writ procedure still exists under the Rules.

[20] We found convincing the submissions of Mr. Ramkarran for the Council. In addition, and in modification, we observe that the CPR provides in rule 2.02(1) that the CPR applies to all civil proceedings under the jurisdiction of the Court and, while not defined in the rules, the expression 'civil proceedings' is a most compendious one, which embraces virtually any civil claim in court (formerly an action or matter) and clearly includes a claim for judicial review. This point was fully discussed and settled by this Court in *Singh*.[4]

[21] Further, in rule 2.02(3) it is provided that *"Where these Rules are silent on a matter and no other enactment applies, the matter shall be determined by analogy to these Rules."* Since no other enactment applies to judicial review claims, the CPR applies by analogy. As was submitted, rule 56.01(a) provides for the CPR to apply to claims brought under the Judicial Review Act, whenever that Act comes into operation, so it is only consistent that the Rules should apply, by analogy, to claims for judicial review, brought before the Act commences. Still further, we observed that Dr Ocampo commenced his claim by Fixed Date Application, a creation of the CPR, thereby confirming the virtual impossibility of the CPR not applying to any claim in court.

[4] [2012] CCJ 2 (AJ) at [37].

[22] Our conclusion that the CPR applies generally to judicial review claims and that, by analogy, Part 56 should be applied specifically to such claims notwithstanding (and, perhaps, because) the Judicial Review Act does not apply meant the application of Dr Ocampo was properly refused by the High Court, even if that court arrived at refusal on a different basis. The implication of our decision is that pending (and especially unheard) applications, brought or proceeding otherwise than in accordance with the CPR will now need to be case managed, bearing in mind the stricture in rule 8.01(4) that a claim should not be defeated by reason of having been brought by the wrong form or procedure.

[23] While that was the reasoning for our decision, we take the opportunity to address two other matters, being the issue of alternative remedies and the issue of a court's jurisdiction to strike out proceedings for abuse of the court's process.

Appeal versus Judicial Review

[24] As indicated, the High Court dismissed Dr Ocampo's application because judicial review was not an appropriate remedy in this situation where a remedy of appeal was available to Dr Ocampo. The written judgment of the Court of Appeal clarified that the Chief Justice should have considered whether judicial review was the appropriate recourse where there existed a right of appeal and she should not have proceeded on the basis that the mere existence of that recourse meant the applicant should not have brought a claim for judicial review.

[25] To this Court, both sides presented very able and helpful arguments on the issue of appeal versus judicial review and how a court should approach the issue. Because of the commendable despatch with which this claim proceeded, the written submissions of the parties were prepared before the written judgment of the Court of Appeal became available. The pith of that judgment is that the mere existence of a right of appeal does not preclude judicial review and that an applicant may be permitted to proceed with judicial review if he shows there are exceptional circumstances which justify so proceeding rather than appealing. On examining the written and oral submissions of counsel on both sides it was clear this was the position of both sides

and the division was as to the application of this principle to the facts of the particular case.

[26] Our disposition to the question, in this case, of appeal or judicial review is that the fully reasoned and persuasive judgment of the Court of Appeal states the applicable legal principles and reasoning in an entirely satisfactory manner. The judgment says nothing, as regards applicable principles, contrary to what either side has submitted. The court did not purport to apply the principles it stated to the facts of this case but remitted the case to the High Court for that court to engage in that process. This was most fortunate because the information now before us was not even a glimmer before them. In the circumstances, it is entirely appropriate that we leave the decision of the Court of Appeal on this point as the last word.

[27] We should mention that we have considered the seeming contradiction between supporting the reasoning of the Court of Appeal and allowing the appeal against their decision to remit the claim to the High Court to consider whether the claim for judicial review should be allowed to proceed. It should be apparent that there is no contradiction as we have decided the case and arrived at a result on a basis that they did not address and was not presented to them, namely, the availability of *ex parte* orders and orders nisi in the new CPR landscape.

[28] Before leaving this issue, we would simply observe that in any future case where the court must consider whether to permit recourse to judicial review where a right of appeal is given, there will be much cogency to the factor, as existed in this case, that the appeal is to a High Court judge in chambers, as per section 19 of the Medical Practitioners Act Cap.32:02. That provision brings the matter into the jurisdiction of the High Court and makes it a civil proceeding in which the panoply of remedies within the armoury of the court are available regardless of whether the challenge is to the legality or the merits of the decision. As a rule of thumb, the safe route to a substantive resolution in a case like this would therefore appear to be to appeal the decision and not to request judicial review.

[29] We would also observe that it may be possible, in a scenario similar to the current one, for the court to direct that a claim brought for judicial review should proceed as an appeal under a specific statutory procedure or otherwise as appropriate. By raising

this possibility, we do not intend to encourage the bringing of ill-advised judicial review claims in the belief that if an unworthy attempt is scotched the applicant loses nothing since the court will not dismiss it but route it properly. Adventurers should be aware that there may be a costs consequence. Rather, the thinking is that a genuinely brought claim for judicial review, if not appropriate, should not result in the loss of all recourse by an applicant on a purely procedural basis. In this regard we note the un-commenced Judicial Review Act provides in section 11 for a court to direct that a claim for judicial review that is not amenable to that remedy should continue as an ordinary private law action and give such directions as may be necessary. It may be that the court's case management powers and the overriding objective of the CPR to deal justly with cases may enable the court to exercise a power similar to that provided in the section.

Strike out jurisdiction

[30] The Court was greatly disturbed by the deception perpetrated by Dr Ocampo in failing to disclose the very material facts that the Council had investigated him for practising in breach of his licence, that it had presented this breach to him as professional misconduct and liable to result in disciplinary action that he had been given an opportunity to defend, and that he knew the Council had a perfectly good reason for refusing his application. We were relieved to be told by senior counsel, upon inquiring of him, that he did not know of the correspondence to Dr Ocampo from the Council and that he was surprised to learn of it on reading the secretary's affidavit.

[31] Dr Ocampo's conduct, upon being exposed even at this late stage, would have justified and indeed demanded that his claim be struck out as an abuse of the court's process. The position was clearly expressed by the English Court of Appeal in *Masood v Zahoor (Practice Note),*[5] which held that 'where a claimant [was] guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute the claim, then the claim may be struck out for that reason'. In Guyana, rule 14.01(1)(a)(ii) gives the High Court the

[5] [2009] EWCA Civ 650.

case management power to strike out a statement of case if it appears the case is an abuse of the court's process. Section 11(6) of the Caribbean Court of Justice Act 2004 empowers this Court to exercise all the powers that the Court of Appeal could have exercised and section 6 of the Court of Appeal Act Cap.3:01 gives that court power to exercise the powers that the High Court could have exercised.

[32] We note that in *Summers v Fairclough Homes*[6] the Supreme Court of England, approving *Masood*, refused to strike out, after a trial on quantum, a massively overstated personal injury claim, when the defendant discovered that the claimant had been playing football, working and leading a normal life, despite claiming to be grossly disabled, on crutches and unable to work. Their Lordships concluded that as a matter of principle, cases should only be struck out on these grounds, after a trial, in very exceptional circumstances. While a strike out before trial could produce a significant saving of a number of resources, if the case had proceeded to trial and a dismissal of the claim on its merits would produce the same result, it could be helpful to the litigants and, in this case, to the public interest for the court to give a decision on the merits and withhold the strike out power.

[33] It is for this reason we chose to decide this appeal on the merits rather than exercise the strike out power. But it is also in the public interest that we make these further observations about the conduct of the claim in the High Court.

[34] It is basic law that an applicant has a duty fully and frankly to disclose all material facts to the court. That duty must be most scrupulously performed when an applicant makes his application without notice to the party who will be the object or target of the order sought in which case there is no possibility for any inaccurate or deficient information the applicant has presented to the court to be supplemented or corrected.

[35] If the duty of full disclosure is basic, the duty to be truthful is transcendent. The affidavit that Dr Ocampo swore was a statement on oath and, even if as a matter of shortcut, he did not actually swear on the Bible (or any other Holy Book), he presented that document as his oath and asked the court to act on it as such. It is a criminal offence knowingly to give false evidence on oath. We would be failing in

[6] [2012] 1 WLR 2004.

our duty as guardians of the administration of justice if we allowed Dr Ocampo's conduct to go unremarked.

A happy note

[36] Our concluding observations end these reasons for decision on a happy note. As mentioned, this case proceeded with admirable despatch and expedition. The claim was filed on 14 September 2017, decided by the Chief Justice on 19 October 2017, and heard by the Court of Appeal on 21 December 2017, when it gave an oral judgment.[7] The application for special leave to appeal was filed on 10 January 2018 and affidavits and written submissions were completed in time for the hearing before the CCJ on 16 March 2018.

[37] It is a deep pleasure to pay tribute to the judiciary, the court administration and counsel for this remarkable achievement. This case took 6 months from start to finish.

/s/ A. Saunders

The Hon Mr Justice A Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ M. Rajnauth-Lee

The Mme Justice M Rajnauth-Lee

/s/ D. Barrow

The Hon Mr Justice D Barrow

[7] This was followed by a written judgment filed in the CCJ on 15th March 2018.