THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV2016/0820

BETWEEN:

DR. ABNER JAMES

Claimant/Applicant

and

THE MEDICAL AND DENTAL COUNCIL

Defendant/Respondent

Before:
The Hon. Mde. Justice Kimberly Cenac-Phulgence
High Court Judge

Appearances:
Mr. Horace Fraser of Counsel for the Claimant
Mrs. Wauneen Louis-Harris of Counsel for the Defendant
Claimant present
Dr. Sherry Ephraim Le-Compte and Ms. Shereen Cherry, representatives of the Defendant present

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2017: February 28;
May 4.

JUDGMENT

[1] This decision concerns an application filed on 30th December 2016 for an order directing the Medical and Dental Council ("the Council") to forthwith issue the claimant, Dr. Abner James ("Dr. James") with a practising certificate to enable him to practice his profession as a medical doctor in the state of Saint Lucia until the hearing and determination of the matter. The grounds/reasons for the application are that Dr. James has not worked since August 2014 because the Council has unreasonably and unlawfully refused to issue him with a practising certificate and he is unable to earn an income and is suffering hardship; and that the applicant

has filed an appeal before the Health Practitioners Appeals Board ("the Appeals Board") but that body, though constituted, is yet to conduct any business and Dr. James remains without a remedy which is a denial of his constitutional right to due process. The applicant has given the usual undertaking as to damages.

[2] Dr. James also filed a fixed date claim form on 30th December 2016 which was amended with leave of the Court on 8th February 2017 claiming the following relief:

> "1. A declaration that the Claimant has a common law right to work and to practice medicine and accordingly the provisions of the Health Practitioners Act cannot be interpreted to curtail, impede or take away that right.
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> 2. A declaration that the Defendant has not been conferred with powers of disciplinary control over Health Practitioners in St. Lucia in accordance with the import and meaning of the Health Practitioners Act.
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> 3. A declaration that the Defendant's decision to suspend the Claimant from practising medicine is an act in the exercise of disciplinary control over the Claimant's right to practice his profession which is ultra vires the Health Practitioner's Act.
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> 4. A declaration that the Defendant's decisions of suspending the Claimant from practising medicine and ordering him to undergo an anger management programme were contrary to the rules of natural justice and fairness.
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> 5. A declaration that in accordance with provisions of [sic] the Health Practitioners Act the Claimant is entitled to be issued with a practising certificate to practice medicine on his application for such a certificate,
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> 6. A declaration that the Claimant is entitled to the right vested in medical practitioners pursuant to section 50 of the Health Practitioners Act.
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> 7. Damages for loss of chance to earn an income.
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> 8. Damages for distress and inconvenience.
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> 9. Costs.

Evidence in support of the Application

[3] Dr. Abner James was registered as a medical doctor in 2011 to practice medicine in Saint Lucia and was issued a practising certificate for two years. A medical practitioner must have a practising certificate in order to practise medicine in Saint Lucia. On 23rd March 2014, Dr. James had a confrontation with a patient and was subsequently dismissed from St. Jude's Hospital where he was employed as a Senior House Officer. In July 2014, Dr. James made an application to the Medical and Dental Council ("the Council") for a practising certificate, his having expired. It is noted that there is no indication in the claimant's pleading as to when his practising certificate expired but the Council in its response to the application which is the subject of this decision, averred that the practising certificate was granted until 31st December 2012. The Council is the body responsible for issuing practising certificates to persons who satisfy the requirements for practising as a medical practitioner or dental practitioner pursuant to the **Health Practitioners Act**[1].

[4] The Council by letter dated 15th August 2014, acknowledged receipt of Dr. James' application and requested that he provide a comprehensive report of the adverse event which resulted in his dismissal from the St. Jude's Hospital. The letter also stated that he was not entitled to practice medicine at present, or until his practising certificate had been renewed. Dr. James claims that by the said letter he was suspended from practising medicine.

[5] By letter dated 16th December 2014, the Council wrote to Dr. James requiring him to issue a written consent to St. Jude's Hospital to permit the disclosure of the record pertaining to the incident which led to his termination which he did. By that same letter, the Council indicated to Dr. James that upon him signing the consent and waiver, the Council would be amenable to the issue of the renewal of his "licence" upon certain specified conditions, one of which would be that he undergo an anger management programme for a period of three (3) months with a

[1] Cap. 11.06, Revised Laws of Saint Lucia, 2013.

Registered Health Practitioner. The Council indicated further that Dr. James' progress would be reviewed subsequent to the three month period in the process of considering his application for renewal of his practising certificate.

[6] Dr. James through his counsel wrote to the Council on 13th October 2015 seeking a hearing date before the Council to which letter the Council responded indicating that a hearing in the matter would be conditional on his indication of whether he was insisting on a hearing before undergoing anger management. There was no further communication between the Council and Dr. James.

[7] By way of background, it may be useful to point out that Dr. James had filed two other claims based on the facts as set out before: SLUHCV2016/0044 filed on 15th April 2016 in which he had sought an interim order directing that Dr. James be entitled to practice medicine until the matter of the application for renewal of his practising certificate can be resolved and also for an interim declaration that the claimant's practising certificate is in force pursuant to section 50 of the **Health Practitioners Act**[2]. That claim was struck out. On 15th April 2016, Dr. James filed a second claim, SLUHCV2016/0337 for damages and consequential loss for interference with common law right to work, breach of his statutory right, breach of statutory duty and acting in bad faith. That claim was withdrawn in the face of there being the instant claim which had been filed on 30th December 2016. I mention these simply to illustrate that there have been several claims filed by Dr. James claiming substantially the same relief in various forms.

Preliminary Issues

Whether leave is required to bring this Claim

[8] At the onset, I believe it is critical to lay to rest an issue which the Council raised at the hearing of this application and in its submissions. The Council in its submissions stated that no leave had been given by the Court for the filing of judicial review proceedings and that these proceedings are judicial review

[2] Cap. 11.06, Revised Laws of Saint Lucia, 2013.

proceedings since Dr. James is contending that the Council acted ultra vires the Act. Counsel, Mrs. Louis-Harris therefore submitted that there was no proper claim before the Court. I refer to the case of **The Attorney General et al v D. Gisele Isaacs**[3] where the Court held that:

> "An applicant who seeks judicial review can also seek declarations in such an application. However, there is nothing to prevent a [sic] claimant from simply filing an application for a declaration coupled with a claim for damages. Such an application would be consistent with a claim under CPR 2000 for an administrative order. If, however, an applicant files an application for judicial review seeking an administrative order for declarations and damages, a judge has power under CPR 2000 to treat the application for judicial review as an application which would be consistent with the declarations (administrative order) which is being sought. This was the state of affairs in this case, and as such these applications ought not to have been considered a nullity because of such an irregularity to the extent that the trial judge, at the first hearing, has the jurisdiction to treat a judicial review claim as an administrative claim. Accordingly, the learned trial judge was correct in refusing the application to strike out the fixed date claim which had been based on the fact that leave was not obtained."[4]

I therefore conclude that the claim filed by Dr. James as currently filed is properly filed as no leave is required to file same.

Whether the fact that there is a remedy provided in the Act precludes Dr. James from bringing this Claim

[9] The other issue raised by the Council in its response to the application which I think is critical to address at this point is the submission that the proper and appropriate remedy for the applicant to vindicate his right is the prerogative remedy of mandamus to compel the Appeals Board to hear and determine the Appeal which Dr. James has lodged with that body. However, in the instant case, Dr. James has submitted that he has appealed to the Appeals Board as provided for in the Act since April 2016 and to date despite numerous letters to the Permanent Secretary inquiring as to the status of the Board and assurances by the Permanent Secretary that a hearing would be convened shortly, there has

[3] ANUHCVAP2015/0014, unreported (delivered 11th March 2016).
[4] See per Blenman JA at paragraphs 68-72 for a full discussion on the subject.

been no hearing. Is a claimant to be deprived of his right to review a public body's decisions where through no fault of his, the administrative machinery grinds to a halt and he is given no explanation or indication as to when the wheels will start turning. I think not. In the interests of justice, it is only fair that the claimant be allowed to pursue his claim.

Dr. James' Submissions

[10] At the hearing of this application, counsel for Dr. James, Mr. Horace Fraser submitted that the grant of the mandatory injunction was justified in this case. Mr. Fraser argued that the Council does not have a discretion to refuse the issue of a practicing certificate on grounds other than that stated in the statute and that the Council made two decisions which touch on discipline. Firstly, the Council suspended Dr. James and secondly, they asked him to undergo a programme of anger management before they can grant him renewal of his practicing certificate. Mr. Fraser submitted that Dr. James had a legitimate expectation to the renewal of his practicing certificate and that he could only have been denied the renewal on proper grounds and in accordance with the rules of natural justice. Mr. Fraser argued further that no matter when an applicant applied for a practicing certificate, the statutory provisions of the Act cannot be used to derogate from his rights.

[11] Counsel stated that the application is still pending before the Council and no decision has been made on Dr. James' application for renewal of his practicing certificate. Counsel submitted that unless directed by the Court, the Council will not act. Mr. Fraser submitted that the injustice to Dr. James far outweighs the injustice that the Council would ever suffer. Mr. Fraser argued that the Council would lose nothing if Dr. James is granted a practising certificate as he would have to apply de novo for a practicing certificate in any event if he is not successful at the trial. Mr. Fraser referred the Court to several authorities in support of his contention that the application should be granted.[5] However, having reviewed the

[5] Chief Immigration Officer of the British Virgin Islands v Burnett (1995) WIR 153; Regina v Kent Police Authority and others, Ex Parte Godden [1971] 2 QB 662; Duncan v Attorney General [1998] 3 LRC 414; Allen

cases, I find that they are not relevant to the consideration of the application for the order being sought. In all of the cases referred to, a decision had been taken which was the subject of the Court's review. There was no consideration of an interim order in these cases and some of the principles extracted by Mr. Fraser seem more applicable to the substantive issues to be considered at trial.

The Council's Submissions

[12] Counsel for the defendant, Mrs. Louis-Harris submitted that the main issue or consideration for the Court is the balance of convenience. She cited the dicta of Ramdhani J [Ag.] in the case of **Hon. Shawn K. Richards et al v The Constituency Boundaries Commission et al**[6] in support of this submission. Mrs. Louis-Harris submitted that Dr. James has requested that the Court direct the Council to forthwith issue a practicing certificate to him. The effect of the order which Dr. James seeks is to render the entire process useless by granting the substantive relief without a full investigation and determination of the substantive issues. Counsel submitted that it is not usual that an injunction will be granted in public law matters because the decisions of public bodies are to be respected until set aside.

[13] Mrs. Louis-Harris further submitted that the risk of injustice to the members of the public should the interim relief be granted far outweighs the risk of injustice to Dr. James. Counsel argued that the interest of the public must be a factor to be taken into consideration. She cited section 8 of the Act which outlines the functions of the Council, two of these being to monitor and assess whether a medical practitioner or dental practitioner complies with the provisions of the Act and to promote high standards in the practice of medicine and dentistry. Counsel also referred to section 10 of the Act which provides that in performing its functions and

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v Thorn Electrical Industries Ltd. Griffin v Metropolitan Police District Receiver; Robert Perekebena Naidike et al v The Attorney General of Trinidad and Tobago, Privy Council Appeal No. 10 of 2003; McInniss v Onslow Fane and another [1978] 3 All ER 211.

[6] SKBHCV2013/0241 (delivered 25th November 2013, unreported).

exercising its powers, the Council shall act independently, impartially and in the public interest.

[14] Mrs. Louis-Harris submitted that there are issues to be determined such as the applicant's contention that there is a common law right to work which claim counsel says is unjustified and devoid of any legal basis. Counsel also pointed out that the applicant has indicated that he was suspended by the Council which is denied by the Council and which is therefore a matter for determination by the Court. Counsel also raised the issue of whether section 50 of the Act can avail the applicant as being another issue which is yet to be determined. It is the Council's contention that section 50 cannot apply to the applicant. Mrs. Louis-Harris submitted that the best course was for the Court to order that an early trial date be given for this matter rather than grant the interim order or mandatory injunction sought by the applicant.

Analysis

Whether there are grounds for the grant of an Order directing the issue of a practising certificate to Dr. James

[15] The application before this Court is in the nature of an application for a mandatory injunction against the Council. The principles applicable to the grant of injunctions in public law matters were explored by Ellis J in **Cable & Wireless BVI Limited ("Lime BVI") v The Telecommunications Regulatory Commission ("TRC")**.[7] Ellis J stated:

> "[113] Case law generally reveals that there is a strong presumption against interim relief in public law matters because it is in the public interest that decisions of public bodies are respected unless, and until, they are set aside. In relation to whether there is a serious issue to be tried, while the grant of permission is pegged as a starting point it is by no means the case that interim relief will be appropriate merely because permission has been granted. The courts have demonstrated that the more appropriate approach is to take account of the strength of the applicant's case when weighing the balance of convenience.

[7] BVIHCV179/2012 (delivered 9th August 2013, unreported).

"[114] **It is also clear that the balance of convenience in public law cases cannot be measured simply in terms of the financial consequences to the parties. An applicant will normally have to demonstrate actual misfeasance before damages would be awarded against a public body. It follows therefore that the adequacy of damages is [sic] unlikely to be a key issue in public law cases because breach of public law does not of itself give rise to a claim in damages.**

"[115] Given these factors, the balance of convenience is likely to be the key factor for the court when deciding whether or not to grant interim injunctive relief. The case law demonstrates that there is an incontrovertible nexus between the balance of convenience and the public interest because a public body will have taken its decision in the exercise of powers intended for the public good. This was described by Lord Goff at 673A-674D of Ex parte Factortame.

> "Turning to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that "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 incline to the opinion that this can 32 be treated as one of the special factors referred to by Lord Diplock in the passage from this speech which I have quoted. In this context, particular stress should be placed upon the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put in to the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so to justify the refusal of an interim injunction in favour of the authority, or to render it just or convenient to restrain the authority for the time being from enforcing the law. […]" (My emphasis)

[16] It is accepted that the well-known principles in **American Cyanamid Co. v Ethicon Ltd**.[8] are applicable to the grant of mandatory injunctions but as Ellis J has stated, the balance of convenience is the key factor to be considered. In the case of **Shawn Richards**, Ramdhani J [Ag.] stated that in applications for interim

[8] [1975] AC396.

relief the Court is guided by the private law principles as espoused in **American Cyanamid** applied with appropriate flexibility. Ramdhani J [Ag.] also held that the Court must assess whether the balance of convenience or justice favours the grant of the interim order and choose the course which in all the circumstances appears to offer the best prospect that an eventual injustice can be avoided or minimized. As part of the process, the Court will also consider the public interest. In considering the balance of justice in this case, one way to approach the matter is to ask whether the refusal to grant the order might have the effect of rendering the entire process pointless.

[17] In the case of **Zockoll Group Ltd. v Mercury Communications Limited**,[9] the court had to consider whether it should grant a mandatory injunction ordering Mercury to withdraw a telephone number from a third party and restoring it to Zockoll. In that case the court looked at the approach to an application for a mandatory injunction and referred to the case of **Shepherd Homes Ltd. v Sandham**[10] where Megarry J said:

> "…on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

Lord Justice Phillips in Zockoll did remark that **Shepherd** pre-dated **American Cyanamid** but thought nevertheless that the principles espoused in **Shepherd** provided useful guidance.

[18] In **Zockoll**, Lord Justice Phillips continued:

> "In Shepherd Homes Ltd. **v.** Sandham , Megarry J. spelled out some of the reasons why mandatory injunctions generally carry a higher risk of injustice if granted at the interlocutory stage: they usually go further than the preservation of the status quo by requiring a party to take some new positive step or undo what he has done in the past; an order requiring a

[9] [1997] EWCA Civ 2317.
[10] [1971] 1 Ch 340 at 351.

party to take positive steps usually causes more waste of time and money if it turns out to have been wrongly granted than an order which merely causes delay by restraining him from doing something which it appears at the trial he was entitled to do; a mandatory order usually gives a party the whole of the relief which he claims in the writ and make it unlikely that there will be a trial. One could add other reasons, such as that mandatory injunctions (whether interlocutory or final) are often difficult to formulate with sufficient precision to be enforceable. In addition to all these practical considerations, there is also what might be loosely called a ´due process' question. An order requiring someone to do something is usually perceived as a more intrusive exercise of the coercive power of the state than an order requiring him temporarily to refrain from action. The court is therefore more reluctant to make such an order against a party who has not had the protection of a full hearing at trial."

[19] Lord Justice Phillips in **Zockoll** commended the judgment of Chadwick J. in **Nottingham Building Society v Eurodynamics Systems**[11] as being a more concise summary of the approach to be adopted in considering whether to grant a mandatory injunction. He said:

> "In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be ´wrong' in the sense described by Hoffmann J.
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> Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo.
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> Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish this right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.
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> But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted."

[11] [1993] FSR 468 at p. 474.

[20] Before continuing, I pause to note that Dr. James' application is not for an order compelling the Council to act on the application for renewal which is still pending before them but rather for them to issue a practicing certificate to Dr. James until determination of the proceedings. Counsel for Dr. James in his submissions did acknowledge that the application for renewal of Dr. James' practising certificate was still pending.

[21] I note that the applicant did not address the principles applicable to the grant of an interim mandatory injunction in his submissions. At the hearing he simply told the Court that the injustice to his client far outweighed that to the Council. The applicant had to show the Court how the balance of convenience lay more in his favour. It was clear from Counsel's arguments that they addressed the substantive issues which the Court ultimately has to decide. This in my mind clearly pointed to the fact that perhaps the order applied for was not appropriate at this stage.

Where does the balance of convenience lie?

[22] In assessing the balance of convenience, the Court must consider whether the refusal to grant the order sought might have the effect of rendering the entire process pointless. The Court must also consider whether the grant of the order sought will have the effect of rendering the entire claim useless as the applicant would have substantially obtained the relief which he has claimed. It is to be remembered that part of Dr. James' claim is for a declaration that he is entitled to a be issued with a practicing certificate on his application for same and a declaration that he is entitled to the right vested in medical practitioners pursuant to section 50 of the Act among others.

[23] The Court is being asked to order that the Council issue a practicing certificate to Dr. James forthwith until the hearing and determination of these proceedings. The Council is empowered by section 8(c) of the Act to "assess applications for practicing certificates for medical practitioners…" Section 49 of the Act outlines the

procedure which is to be followed on an application for renewal of a practicing certificate. Section 52 of the Act details what the Council should do before determining an application for renewal and section 52 states that the Council shall consider the application and decide to renew or refuse to renew the applicant's practicing certificate and provides the procedure to be adopted in that event. Section 53 of the Act deals with the discretion of the Council to refuse to renew a practicing certificate, the reasons for refusal and the procedure to be adopted where there is a refusal to renew. It is also to be noted that a practicing certificate is valid for a period of two (2) years in the case of a general practitioner or a specialist practitioner.

[24] It is clear from the above sections that the function of issuing practicing certificates and the exercise of the discretion to grant or refuse renewal of a practicing certificate lie in the purview of the Council. The Court cannot exercise a discretion in place of the Council on an application such as this where all the relevant information to be considered in the assessment of an application for renewal is not before this Court. By making an order directing the Council to issue a practicing certificate until the hearing and determination of the proceedings, the Court would effectively be exercising the Council's discretion for a period longer than the Act prescribes. It is also the case that the Court would be ordering the exercise of a discretion in circumstances where the Council has not made a decision on the application as yet. In fact the evidence before the Court is that Dr. James' practicing certificate had already expired for some eighteen months when he made his application for renewal before the Council.

[25] The issues for determination by the Court on the substantive claim are whether the Council suspended Dr. James, whether he had a right to renewal of his practicing certificate on application, whether section 50 avails the applicant, whether in exercise of its discretion and as part of its investigative powers the Council was right to have requested information on the applicant's former employment at St. Jude's Hospital and whether the Council as part of the exercise of its discretion

could have asked the applicant to undergo an anger management programme. If the Court grants the order directing the Council to issue a practicing certificate to Dr. James then it renders its deliberation on some of the issues to be decided otiose. If in fact on the substantive hearing, the Court were to find that the Council was right to have requested the information on Dr. James' former employment or that it had the right to ask Dr. James to undergo an anger management programme, the issuance of an order directing the Council to issue a practicing certificate at this stage would undermine the Council's decision making powers as prescribed by the Act.

[26] A Court must always be careful not to substitute its exercise of discretion for that of the public body unless and until the decision made has been set aside. The balance of convenience to my mind favours that the status quo remain and that the trial in this matter be expedited so that the substantive issues can be addressed by the Court and a final decision made in the matter. The applicant, Dr. James has not shown the Court that he has good grounds for the grant of this application and I cannot say that I feel a high degree of assurance that Dr. James will be able to establish his right at a trial. I do not see that the risk of injustice if this injunction is refused sufficiently outweighs the risk of injustice if it is granted. Even if the issues to be decided were to be decided in Dr. James' favour, the Council would now have to consider the application pending before it. Dr. James would not have an automatic right to the issue of a practicing certificate as that is not part of the relief which he has claimed.

[27] In all the circumstances of this case and for the reasons above, I make the following orders:

(1) The application for an order directing the Council to forthwith issue Dr. James' with a practicing certificate to enable him to practice his profession of medicine in the State of Saint Lucia until the hearing and determination of the matter is refused.

(2) Costs to the Council in the sum of $1000.00 to be paid within 21 days of the date of this Order.

(3) The claim is to proceed to be case managed on a date to be fixed by the Court Office.

(4) Given the nature of the matter, the Court Office is directed to attempt to find an early date for the trial of the substantive claim once the matter has been case managed.

Kimberly Cenac-Phulgence
High Court Judge

By The Court

Registrar