THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV2016/0820

BETWEEN:

DR. ABNER JAMES

Claimant

and

THE MEDICAL AND DENTAL COUNCIL

Defendant

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

Appearances:
Mr. Horace Fraser of Counsel for the Claimant
Mrs. Wauneen Louis-Harris for the Defendant
Claimant present
Dr. Sherry Ephraim Le-Compte and Ms. Shereen Chery, Chairperson and Executive Director respectively of the Defendant present

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2017: June 8;
2018: March 27.

JUDGMENT

[1] **CENAC-PHULGENCE J**: Dr. Abner James ("Dr. James") filed a fixed date claim form against the Medical and Dental Council ("the Council") 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.

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.
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.
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.
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.
6. A declaration that the Claimant is entitled to the right vested in medical practitioners pursuant to section 50 of the Health Practitioners Act.
7. Damages for loss of chance to earn an income.
8. Damages for distress and inconvenience.
9. Costs."

Background Facts

[2] Dr. Abner James ("Dr. 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 Council for a practising certificate, his having expired. It is noted that there is no indication in the claimant's pleadings as to when his practising certificate expired but in cross-examination Dr. James did admit that his practising certificate expired in either December 2012 or January 2013. Thus, his application for "renewal" of his practising certificate was made some eighteen months after it had expired.

[3] 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 claimed that by the said letter he was suspended from practising medicine.

[4] 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 Registered Mental 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.

[5] 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, and Dr. James did not attend the anger management programme as directed by the Council. No decision has been made by the Council in relation to Dr. James' application which is still technically pending before it.

The Legislative Framework

[6] The legislation which deals with the registration and regulation of health practitioners in Saint Lucia and for all other related matters is the **Health Practitioners Act**.[1] That Act is divided into various parts and divisions.

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

[7] Division 2 of Part 2 deals with the Medical and Dental Council. The Council is established by section 5 of the Act and some of the functions of the Council highlighted by section 8 are:

> (a) "To assess applications for the registration of medical practitioners and dental practitioners;
> (b) To register persons who satisfy the requirements for registration under the provisions of this Act as medical practitioners and dental practitioners;
> (c) To assess applications for practicing certificates for medical practitioners and dental practitioners;
> (d) To issue practicing certificates to persons who satisfy the requirements for practicing as a medical practitioner or dental practitioner under the provisions of this Act;
> (e) To monitor and assess whether a medical practitioner or dental practitioner complies with the provisions of this Act;
> (f) To promote high standards in the practice of medicine and dentistry;
> (g) To investigate complaints made against a medical practitioner or dental practitioner referred to it by the Commission or of its own motion;
> (h) To ensure compliance with this Act."

[8] The powers of the Council are provided for in section 9(1) and states that the Council shall have power to do all things necessary or convenient to be done in connection with the performance of its functions.

[9] Division 3 of Part 2 deals with Registration and Practising Certificate and Part V deals with professional conduct with Division 1 of that Part dealing with complaints. The relevant sections of the parts and divisions will be highlighted at the appropriate points as I address the various issues.

Whether the Council has powers of disciplinary control over health practitioners

[10] At the trial of this claim, counsel for the claimant Mr. Horace Fraser ("Mr. Fraser") withdrew the relief claimed at paragraph 2 of the amended claim which was a declaration that the defendant has not been conferred with powers of disciplinary control over Health Practitioners in Saint Lucia in accordance with the import and meaning of the Act. Part V of the Act does deal with professional conduct and

Division 1 deals with complaints and specifies the role of the Council on receiving complaints or where it initiates a complaint of its own motion. The Council is empowered to exercise disciplinary control over health practitioners under the provisions of the **Health Practitioners Act**.

Whether the Council suspended Dr. James from practising medicine

[11] At paragraphs 3 and 4 of the amended claim, declarations are sought that the defendant's decision to suspend the claimant from practising medicine is an act in the exercise of disciplinary control and is ultra vires the Act and is contrary to the rules of natural justice and fairness.

[12] Dr. Abner's claim that he was suspended by the Council from practising stems from the letter dated 15th August 2014. That letter stated as follows:

> "Dear Dr. James
>
> The Saint Lucia Medical and Dental Council (SLMDC) wishes to acknowledge receipt of your application package for the renewal of your practising certificate.
>
> Pursuant to Section 47 (4)(b) of the Health Practitioners Act No. 33 of 2006 (the Act), the SLMDC hereby requests a comprehensive report on the adverse event which resulted in your dismissal from the St. Jude's Hospital on March 25, 2014.
>
> The SLMDC further advises that pursuant to Section 36(2) of the Act, which reads:
>
> > "*A person shall not practice medicine or hold himself or herself out to be a medical practitioner or dental practitioner in Saint Lucia unless that person holds a valid practising certificate for that purpose issued pursuant to Section 47 and complies with this Act, the regulations and his or her practising Certificate."*
>
> You are not entitled to practice medicine at present, or until your practising certificate has been renewed.
>
> Please be guided that the report should reach the Saint Lucia Medical and Dental Council office no later than thirty (30) days of your acknowledgement of receipt of this letter.

Please be guided accordingly."

[13] Section 36(2) of the Act is in the terms as quoted in the letter of 15th August 2017. That section refers to a valid practising certificate issued pursuant to section 47. Section 36(3) provides that contravention of section 36(1) only - requirement to be registered as a medical practitioner or dental practitioner, or of section 36(1) and section 36(2) - requirement to have a valid practising certificate, is an offence and renders a person liable to a fine not exceeding to $100,000.00 or to imprisonment for a term not exceeding 3 years or to both.

[14] Section 47 of the Act deals with the issue of practising certificates. Subsection (1) makes provision for a medical practitioner or dental practitioner to apply for a practising certificate for the purpose of carrying on the practice of medicine or dentistry. Subsection (2) provides that the Council shall consider an application made under this section and may decide to issue or refuse to issue a practising certificate. Section 47 seems to relate to where a person does not have a practising certificate and is making application for one to be issued.

[15] The evidence in this case is that Dr. James' practising certificate was first issued for the period January 2011 - December 2012. It therefore expired on 31st December 2012 and Dr. James would have had to have made application to renew the practising certificate prior to its expiration. The evidence revealed that it was only some eighteen or so months later that he decided to apply for his practising certificate. By that time the certificate had expired and he no longer had a practising certificate. At the date when the Council wrote to Dr. James in the terms of the letter dated 15th August 2014, Dr. James was not the holder of a practising certificate or a valid practising certificate. Dr. James in cross-examination admitted that he did not apply to renew his certificate when it expired and he continued working at the St. Jude's Hospital.

[16] The ordinary meaning of the word 'suspend' is to cause something to stop temporarily or to remove someone temporarily from a job or position, usually as a punishment.[2] Counsel Mr. Fraser quite correctly conceded at the trial that the Council could not have suspended something which was no longer in existence. At the date when Dr. James applied to the Council, by his own actions of not applying to renew his practising certificate before it had expired, he had put himself in a position where he could not practice medicine. I find that the Council did not suspend Dr. James by its letter of 15th August 2014. It would be more appropriate to say that Dr. James suspended himself and not the Council. All the Council did in its August 2014 letter was simply to remind Dr. James of the statutory provisions and to draw to his attention the fact that he could not practice medicine until he had a practising certificate which was clearly within the scope and functions of the Council.

[17] I am therefore unable to grant the declarations that the Council's decision to suspend the Claimant from practising medicine is ultra vires the **Health Practitioners Act** or that that it was contrary to the rules of natural justice. The declarations at paragraph 3 and the relevant part of paragraph 4 which relates to suspension by the Council are denied.

A common law right to work?

[18] Dr. James sought 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. Mr. Fraser argued that a literal interpretation of section 49 places a penalty without due process on someone who does not apply within the time stipulated in that section. He argued further that an applicant could lose their ability to practice and such an interpretation defeats the legitimate expectation to a renewal in circumstances where he qualifies and to the common law right to work. His argument was that the section cannot be interpreted to take away rights.

[2] Collins Concise Dictionary and Thesaurus,(3rd edn. HarperCollins Publishers 2003).

[19] Mr. Fraser also sought to argue that a literal interpretation of sections 49 and 50 of the Act leads to an absurd result and that a refusal to renew a practising certificate of a medical practitioner who applies is a breach of his constitutional right to property guaranteed by section 6 of the **Constitution of Saint Lucia**. However, this is a matter introduced in written submissions and does not form part of the relief sought by Dr. James nor is there any pleading which touches this matter at all in the claim and affidavit in support. I therefore make no pronouncement on this matter. Matters must be properly pleaded so that the defendant knows the case that he has to answer. Several cases in this jurisdiction have made this abundantly clear. If the claimant wishes to challenge the constitutionality of a legislative provision he has to indicate in his pleadings the section of the constitution which he alleges is being contravened.

[20] Mr. Fraser relied on the case of **Nagle v Fielden**[3] to support his contention that there is a common law right to work. In that case, Mrs. Nagle brought an action against the stewards of the Jockey Club who had refused to issue her a licence as a trainer of racehorses on the basis that she was a woman. The master of the rolls, Lord Denning said:

> "The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The courts will not give effect to it….But if the rule is reasonable, the courts will not interfere…."[4]

[21] The court in **Nagle** went into to say that:

> "…a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as the courts will intervene to protect his rights of property, they will also intervene to protect his right to work."

[3] [1966] 2 WLR 1027.
[4] ibid at p. 1033.

[22] Mrs. Wauneen Louis-Harris, counsel for the defendant, submitted that there is no right to work under the provisions of the law in Saint Lucia whether by virtue of the common law or the Constitution. Counsel submitted that this right to work is a right enshrined in the **Universal Declaration of Human Rights** in Article 23(1) and although Saint Lucia is a member of the United Nations the right to work has not been incorporated into local law in Saint Lucia.

[23] There is no case in our jurisdiction which speaks to a common law right to work. What **Nagle** establishes is how the common law seeks to protect a man's right to work at his chosen profession. Mrs. Nagle's action succeeded because the Jockey Club was under a duty to all persons interested and concerned in racing to exercise its control lawfully and reasonably and not exercise capriciously any discretion vested in it under the rules. Great emphasis was placed on the fact that the Jockey Club had a complete monopoly over racing and could put a man effectively out of business. The Court in **Nagle** found that where those who have the control of a trade or profession make a rule which enables them to exclude a person from his work arbitrarily or capriciously, not reasonably, that rule is bad as against public policy. The locus standi of Mrs. Nagle was therefore derived from the infringement of public policy by a body which completely controlled a particular trade.

[24] What I understood Lord Denning to be saying in **Nagle** is that in the absence of any legislative provisions or even a contractual relationship, the common law would recognize a man's right to work; in other words, his right to be protected from losing his livelihood. Therefore, if there is a pre-requisite to work, e.g. obtaining a licence or a practising certificate in this case, a certification requirement, this should be treated seriously and cannot be denied or taken away arbitrarily or lightly without due process. This however does not in any way mean that the person is entitled as of right without more to the licence or certificate as the case may be nor does it create a right which is enforceable by way of a declaration. The Court in **Nagle** was very clear that what Mrs. Nagle was entitled

to was a declaration that her rejection and ouster was invalid and an injunction requiring the association to rectify their error. The Court went on to say that in such cases such an individual may not be entitled to damages unless he can show a contract or a tort. But he can get a declaration and injunction.[5]

[25] I find that there is no established common law right to work or to practice medicine and therefore the declaration sought at paragraph 1 of the claim is refused. What I am prepared to say is that the Act should not be interpreted or administered in a manner which deprives a person of the opportunity to properly earn a livelihood once all the necessary conditions have been met especially in circumstances where the body doing the administering is the only one charged with such responsibility and it is not open to an applicant to go elsewhere.

Whether Dr. James is entitled to be issued with a practising certificate to practice medicine on his application for such certificate

[26] Section 47 of the Act deals with applications for practising certificates where one does not have a practising certificate. Section 47 provides as follows:

> **"47. Practicing certificate**
> (1) Where a medical practitioner or dental practitioner holds a valid certificate of registration under this Act, the medical practitioner or dental practitioner may apply in the prescribed form for a practicing certificate for the purpose of carrying on the practice of medicine or dentistry in the category of registration for which the person is registered.
> (2) The Council shall consider an application made under this section and may, subject to the provisions of this section, decide to issue or refuse to issue a practicing certificate to the applicant.
> (3) In making its decision, the Council shall have regard to the extent, if any, to which the applicant has satisfied recency of practice requirements.
> (4) Before deciding on an application for issue of a practicing certificate, the Council —
> a. May investigate the applicant;
> b. May, by notice in writing given to the applicant, require the applicant to give the Council within a reasonable time of at

[5] *[1966] 2 WLR 1027 at 1034.*

least 30 days as stated in the notice, further information or a document which the Council may reasonably require to decide the application for renewal; and

c. May, if the Council is not satisfied that the applicant has satisfied any recency of practice requirements, by notice given to the applicant, require the applicant to undergo a written, practical or oral examination within a reasonable time of at least 30 days stated in the notice and at a reasonable place.

(5) The Council may require the information or document required under subsection (3) (b) to be verified by a statutory declaration.

(6) The purpose of an examination under subsection (3)(c) shall be to assess any effect the applicant's non-satisfaction of the recency of practice requirements has on the ability of the applicant to practice the profession competently and safely.

(7) If the Council is not satisfied that the applicant has satisfied recency of practice requirements, the Council may issue the practicing certificate of the applicant subject to such conditions the Council considers will sufficiently address the extent to which that applicant has not satisfied the requirements.

(8) Before deciding to issue a practicing certificate on recency of practice conditions under subsection (3), the Council shall —

a. Give notice in writing to the applicant —

i. Of the details of the proposed conditions,

ii. Of the reason of the proposed imposition of the conditions,

iii. That the applicant may make a written submission to the Council with respect to the proposed conditions, within a reasonable time of at least 14 days stated in the notice, and

b. Have regard to any written submission made to the Council by the applicant.

(9) If the Council decides to issue the practicing certificate on recency of practice conditions, the Council shall, as soon as is practicable, decide the review period which shall apply to the conditions and give the applicant notice in writing of the period.

(10) The Rules made under section 55(d) shall provide for the procedure for review under subsection (9).

(11) The Council may refuse to issue a practicing certificate —

a. If the medical practitioner or dental practitioner fails to pay the prescribed practicing certificate fee;

b. If the medical practitioner or dental practitioner fails to provide any information required by the Council by a date specified by the Council;

c. If the medical practitioner or dental practitioner has not practiced for a period of time as specified by the Council

unless the Council is satisfied that he or she complies with the requirements of section 40; or

d. If the medical or dental practitioner fails to meet the recency of practice requirements.

(12) A practicing certificate shall not be issued unless the Council is satisfied that the medical practitioner or dental practitioner to whom the practicing certificate is to be issued —

a. Has adequate professional indemnity insurance in place; or

b. Is exempt from the requirement of professional indemnity insurance, in accordance with section 44.

(13) Where the Council decides to grant a practicing certificate under this section, the practicing certificate shall be issued on payment of the prescribed practicing certificate fee.

(14) A practicing certificate shall be —

a. In the prescribed form and shall specify the following information —

i. The name of the medical or dental practitioner,

ii. The category of registration,

iii. The nature and character of the medical practice or dental practice which may be performed and

iv. The conditions of registration and practice, and

b. Evidence that the person named in it is duly certified to practice medicine or dentistry in the category of registration specified in the practising certificate.

(15) A practicing certificate shall be valid for a period of —

a. Two years in the case of a General Practitioner or a Specialist Practitioner registered under this Part;

b. Six months in the case of a Temporary Practitioner registered under this Part; or

c. The duration of a state of emergency, in the case of a registration of a medical practitioner or dental practitioner registered under section 39, unless suspended or revoked under this Act and is renewable.

(16) The Council shall, as soon as is practicable after it makes a decision to refuse to issue a practicing certificate to an applicant, give notice in writing to the applicant of the refusal to issue the practicing certificate, the reasons for refusal and the applicant's right to appeal under this Act." (my emphasis)

[27] The provisions of section 47 illustrate very clearly that there is no right to the issuance of a practising certificate. The issuance of a practising certificate is subject to the medical practitioner satisfying specific conditions including (a) having adequate professional indemnity insurance or exemption from the

requirement to have professional indemnity insurance; (b) satisfying recency of practice requirements; (c) payment of the prescribed fee. Subsection (11) details the grounds upon which an application for a practising certificate can be refused.

[28] Sections 49 - 53 of the Act deals with renewal of a practising certificate and set out the procedure to be followed and the matters to which regard must be heard by the Council in considering an application for renewal. Counsel, Mr. Fraser submitted that Dr. James had a legitimate expectation in an automatic renewal of his practising certificate barring any adverse reason standing in the way of its grant. The grant or refusal of an application for renewal of a practising certificate is subject to the satisfying or not of the conditions specified in sections 49 - 53 of the Act. It cannot be said that there is an automatic right to renewal in circumstances where the Council has a discretion to grant or refuse the renewal of a practising certificate.

[29] Mr. Fraser referred to the case of **Robert Perekebena Naidike et al v The Attorney General of Trinidad and Tobago**,[6] a decision of the Privy Council in support of his submissions. In **Naidike**, the appellants challenged the decision of the Minister for National Security refusing to renew his work permit. The Board in Naidike quoted Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Service**[7] where he spoke of:

> "some benefit or advantage …[the appellant] had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment."

The Board concluded that Naidike had such a legitimate expectation, having previously been issued with successive work permits prior to the Minister refusing the renewal. The Board also said that Naidike had no substantive right to be granted a work permit, only the right to have his application fairly decided.

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[6] [2004] UKPC 49.
[7] [1983] UKHL 6.

[30] In this case, it cannot be said that Dr. James has a legitimate expectation to the renewal of his practising certificate in circumstances where he had never before applied for and obtained renewal of the licence to practice. I cannot find any force in the argument that Dr. James is entitled to renewal of his practising certificate and the declaration sought at paragraph 5 of the amended claim must therefore be denied.

Whether Dr. James is entitled to the right vested in medical practitioners pursuant to section 50 of the Act

[31] Section 49 of the Act deals with applications for renewal of practising certificates. Section 49 (1) provides as follows:

> "(1) Subject to subsections (2) and (3), a medical practitioner or dental practitioner **shall** apply to the Council for the renewal of his or her practicing certificate." (my emphasis)

Subsection (2) provides that 'an application under subsection (1) shall only be decided by the Council if it is received within the period starting 60 days before the expiry of the practising certificate and ending immediately before the expiry of the practising certificate.'

[32] Based on this section Dr. James should have made his application for renewal of his practising certificate by about the end of October 2012. He did not do so and instead made his application in July 2014. In Dr. James' affidavit in response filed on 23rd February 2017 in relation to the late application, he said at paragraph 3 that:

> "…due to the exigencies of work, I was required to work for over eight hours a day every day as a result time did not afford me the opportunity to apply for the renewal of my practising certificate in a timely manner. The delay in applying for the certificate was not a deliberate act on my part."

In paragraph 5 of the affidavit Dr. James said that he was not the only medical practitioner who had a problem of working long hours and not being able to make an application for the renewal of a practising certificate in a timely manner. He

continued that he was not aware of any situation where other medical practitioners in his situation had their late applications for renewal of their practising certificates refused on the ground that such applications were outside the time frame stipulated by the legislation.

[33] There is nothing before me to suggest that Dr. James' application for renewal was refused based on the fact that it was filed late. It must be remembered that the Council is yet to make a final determination on the application for renewal and from the evidence accepted Dr. James' application albeit filed outside the time frame stipulated in the Act and began its processing.

[34] Section 49(2) is clear as to timeframe within which an application for renewal must be made. The section does not however say what is to happen if the application is not filed within the stipulated period.

[35] Section 50 of the Act provides as follows:

> (1) "If an application for renewal is made under section 49, the applicant's practicing certificate is taken to continue in force from the day it would, apart from this section, have expired until —
>
> a. If the Council decides to renew the practicing certificate, the day the renewal is issued to the applicant under section 52;
> b. If the Council decides to refuse to renew the practising certificate, the day the notice of the decision to refuse the application for renewal is given to the applicant under section 52; or
> c. If the application is taken to have been withdrawn under section 51(3), the day it is taken to have been withdrawn.
>
> (2) Subsection (1) shall not apply if the practicing certificate has been suspended in accordance with the provisions of this Act.

[36] Mrs. Harris, for the Council submitted that Dr. James failed to make his application for renewal in accordance with section 49 in that he did not make his application within 60 days prior to its expiration. Accordingly, section 50 does not avail Dr. James. Counsel made reference to an oral judgment of the Court in **The Medical and Dental Council v Dr. Shaelle Durrand** in support for this submission. The Court did not have the benefit of the text of that oral judgment.

[37] However, counsel for Dr. James, Mr. Fraser, submitted that the literal interpretation of section 49 of the Act is that Dr. James 'is not entitled to a renewal of his practising certificate and his career as a medical doctor in Saint Lucia is over for good because if he should practise he would be liable to criminal prosecution'. Mr. Fraser further argued that the literal construction of sections 49 and 50 of the Act leads to an absurd result in that a refusal to renew a practising certificate where the application is made out of time is a breach of the constitutional right to property under section 6 of the Constitution. He also argued that it takes away vested rights - the common law right to work. I have addressed both the constitutional breach submission and the common law right to work so I will not repeat that discussion.

[38] There is no evidence that the Council refused to deal with Dr. James application because it was not submitted in accordance with section 49. In interpreting legislative provisions, the court is required to interpret its meaning so that they can apply it to the facts of the case before it. In the words of Lord Diplock in **Duport Steels Ltd. v Sirs**[8]

> "When Parliament legislates … the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing the intention what that intention was, and giving effect to it. Where the meaning of statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be expedient, or even unjust or immoral."

The courts have over the years developed a range of rules of interpretation to assist them; (1) the literal rule - when the literal rule is applied, the words in the legislation are given their natural and ordinary meaning, in an effort to respect the will of Parliament; (2) the golden rule - under the golden rule for statutory interpretation, where the literal rule gives an absurd result, which Parliament could not have intended, the judge can substitute a reasonable meaning in the light of

[8] [1980] 1 All ER 529 at 547.

the statute as a whole; (3) the mischief rule - this rule was laid down in **Heydon's case** in the sixteenth century and requires judges to consider three factors: what the law was before the statute was passed; what problem (or mischief) the statute was trying to remedy and what remedy Parliament was trying to provide.

[39] Historically, the preferred approach to statutory interpretation was to look for a statutes' literal meaning. However, over the last three decades, the courts have accepted that the literal approach can be unsatisfactory. Instead, the judges have been increasingly influenced by the European approach to statutory interpretation which focuses on giving effect to the purpose of the legislation. Where having applied the literal meaning, the court is satisfied that it does not lead to an absurd result, it may however apply the purposive approach to decide whether a matter not seemingly covered by the legislation nonetheless falls within the definition provided under the legislation.

[40] In this case, applying the literal interpretation to section 49, it means that the Council cannot entertain an application for renewal of a practising certificate where that application is not made within the stipulated time period. Does this necessarily mean that such an applicant is shut out and cannot be considered for a practising certificate? I think not.

[41] If a medical practitioner does not apply for renewal of his practising certificate prior to its expiry but does so after the date of expiry then he/she technically no longer has a practising certificate and in that context there cannot be discussion about renewal of something which one does not have. When I assess the provisions of the **Health Practitioners Act** as a whole, I am not persuaded that a literal interpretation of section 49 leads to an absurd result.

[42] Section 47 of the Act as outlined above provides for the issue of a practising certificate and it seems only a logical conclusion that if you 'miss the boat' for renewal of your practising certificate then you must apply for one under section 47.

An applicant is not left without recourse. In fact, when one examines the provisions of sections 47 and 49 - 53 of the Act, except for the mention of renewal and the references to how that application is to be made, the other provisions as regards the powers of the Council in relation to the issue of practising certificates, the matters to be considered, the reasons for refusal of a practising certificate, among other things, the sections mirror each other in content. The only practical difference which could result on the issue of a practising certificate under section 47 and section 49 is that under the former, the date of issue would be from the date the Council makes a decision whilst under the latter, it will be issued from the date of the expiration of the last practising certificate.

[43] It is instructive to note that if one does not possess a valid practising certificate then one cannot practise medicine. The medical profession is an extremely important one and it is important that when they perform their functions, they are duly authorized and competent so to do. Section 50 of the Act which has been set out above makes provision so that where a medical practitioner applies for the renewal of his/her practising certificate within the stipulated time, the acts performed by the medical practitioner between the date of expiry of the certificate and the date of renewal or refusal to renew would not be illegal. If the application is considered prior to the expiration of the certificate, then there is no need for application of section 50. The section aims at protecting a medical practitioner who at the time of his application has a valid practising certificate but which expires in the period when the application for renewal is being considered. Section 50 does not apply where a practising certificate has been suspended pursuant to section 111.

[44] Section 50 is aimed at bridging the time gap between application for renewal, expiry and renewal or refusal to renew. This is necessary so that a medical practitioner is able to exercise his functions without fear of criminal sanction in circumstances where he has complied with section 49. Regulation of professions is important to promote public trust and confidence and also certainty. Mr. Fraser

argued that section 50 should apply to all medical practitioners whether they apply within the stipulated time or not. I must disagree as that certainly could not have been the intention of Parliament. Mr. Fraser's arguments that this interpretation puts a fetter on the Council's discretion to deal with Dr. James application also cannot be accepted in light of section 47 of the Act which provides an avenue for dealing with the application in such circumstances.

[45] In this case, Dr. James knew of the requirement but he said that he could not find the time because of his schedule to put in his application in time. That cannot be a good excuse. Dr. James continued to work even in the face of the clear provisions of the Act. A professional must adhere to the legislative provisions which govern his profession. He is not without recourse. His application has received the attention of the Council and if the Council decides to exercise its discretion and issue Dr. James with a practising certificate it would have to be issued from the date of their decision and not from the date of the expiration of Dr. James' last certificate.

[46] Dr. James having failed to make his application within the stipulated time period outlined in section 49 cannot avail himself of the provisions of section 50 of the Act. The declaration sought at paragraph 6 of the amended claim is also denied.

Whether the condition imposed by the Council requiring Dr. James to undergo an anger management programme is contrary to the rules of natural justice or was reasonable

[47] Dr. James complained that the Council did not have the power to direct him to undergo an anger management programme as part of the renewal application process. Mr. Fraser argued that no complaint was made to the Council regarding Dr. James and the procedure relating to complaints specified in the Act was not followed. He contended that in doing so the Council was in breach of section 10 of

the Act as it became a judge in its own cause. He relied on the dicta of Viscount Cave LC in **Frame UBC v Bath JJ**[9] where he said:

> "…I think it an ordinary rule that no one can be both party and judge in the same cause, holds good."

[48] Mr. Fraser argued that the Council's decision to ask Dr. James to undergo the anger management programme was in breach of the rules of natural justice as Dr. James was not afforded a hearing on the issue before a decision was made. He also argued that it was ultra vires the Act as the procedure set out in sections 52(3) and (4) or sections 109(9) (d) were not observed. The procedure for the conduct of an investigation by the Council is expressly set out in sections 108 to 110 of the Act he submitted. Mr. Fraser also contended that no notice was given to Dr. James about the investigation, in particular the documents he authorized St. Jude's Hospital to disclose to the Council were never seen by him and he was given no hearing in relation to the matter and the decision remains pending. Counsel referred to the case of **Kanda v The Government of Malaya**[10] in support of his submission where Lord Denning said the following:

> "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence is given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them."

[49] Counsel for the Council Mrs. Harris contended that the condition imposed was necessary to ensure that the public interest was served. Mrs. Harris submitted that the imposition of the condition was in-keeping with the functions of the Council as set out in section 8(e) and (f) of the Act 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. In relation to Mr. Fraser's submission regarding the right to be heard, Mrs. Harris submitted that Dr. James made representations in the report which he submitted to the Council and that he did not respond to the letter which imposed the

[9] [1926] AC 586 at 593.
[10] [1962] AC 322.

condition of the anger management programme. Counsel's position was that a fair hearing does not have to follow any prescribed format.

[50] In its affidavit in answer filed on 16th February 2017, the Council averred that it requested information in the form of a report from Dr. James as part of the process of dealing with Dr. James' renewal application. The Council said that it acted within the powers conferred by the Act and in any event it gave Dr. James an opportunity to be heard via that report which he submitted to the Council.

Discussion

[51] In a letter dated 16th December 2014[11] the Council wrote to Dr. James in the following terms. I have reproduced the entire letter so that the context can be understood clearly:

> "Dear Dr. James
>
> I hereby acknowledge receipt of your Report dated the 18th day of August 2014 and the Medical Report appended thereto which sets out the circumstances within which your employment at the St. Jude's Hospital (hereinafter referred to as SJH) was terminated.
>
> Please note that the Medical and Dental Council of Saint Lucia (hereinafter referred to as MDC) has made a formal request of the SJH for an extensive report on the adverse event which culminated in your dismissal aforesaid, including witness statements.
>
> SJH has indicated that you are required to consent in writing to the disclosure of the information requested and to sign a waiver confirming that you will forego any court action against the SJH as per SJH requests in the circumstances.
>
> Accordingly, request is hereby made for your co-operation in releasing the information requested from the SJH in relation to your file in the manner specified herein.
>
> This will facilitate the investigation being conducted by the MDC in compliance with Section 51(1)(a) of the Health Practitioner's Act No. 33 of 2006 (hereinafter referred to as the Act).

[11] Page 6 of Trial Bundle 2.

Section 51(1)(a) of the Act enacts that:-

"Before determining an application for renewal, the Council –
(a) may investigate the applicant;"

Please note that upon your signing of the relevant documents particularized herein, that the MDC will be amenable to the issue of the renewal of your licence upon certain specified conditions to be communicated to you.

Further and in light of the content of your report aforesaid one such condition imposed by the MDC is that you undergo an anger management programme for a period of three (3) months with a registered Mental Health Practitioner.

The MDC will review your progress subsequent to the determination of the three month period in the process of considering your application for renewal of your licence.

Please be guided accordingly." (my emphasis)

[52] The report submitted to the Council by Dr. James dated 18th August 2014 was a two-page document outlining the event which had transpired on 23rd March 2014 and which had led to his dismissal from St. Jude's Hospital.[12] In the penultimate paragraph of that report, Dr. James stated that he had undergone approximately 2 months of counselling at the behest of a physician not associated with St. Jude. He went on to state that Sister Felicien, Medical Cousellor at Victoria Hospital had counselled him.

[53] Section 51(1) (similar to section 47(4)) of the Act provides as follows:

(1) Before determining an application for renewal, the Council —
   a. May investigate the applicant;
   b. May, by notice in writing given to the applicant, require the applicant to give the Council, within reasonable time of at least 30 days as stated in the notice, further information or a document which the Council **may reasonably require to determine the application for renewal**; and
   c. May, if the Council is not satisfied that the applicant has satisfied any recency of practice requirements, by notice

[12] Pages 33-34 of Trial Bundle 2.

given to the applicant, state conditions under which an application may be reconsidered." (my emphasis)

[54] Sections 51(1)(a) and 47(4)(a) state that in determining an application for the renewal or issue of a practising certificate respectively, the council may investigate an applicant. When one examines the provisions of the Act, the power to investigate is contained in many sections. For example, section 41 of the Act provides that in determining an application for registration of an individual as a medical or dental practitioner, the Council may investigate the applicant. Sections 51(1)(b) and 47(4)(b) give the Council the power to request further information or a document but restricts it to information or a document which is reasonably required to decide the application for renewal or issue of a practising certificate. I think that this clearly shows that the power to investigate does not relate to any and everything but is confined to matters which are relevant to assessing whether a medical practitioner is up to par in terms of his/her competence and not matters which have to do with attitude or behaviour. In my opinion, the Act does not give the Council a carte blanche power to investigate. Sections 51(1)(c) and 47(4)(c) of the Act make provision for the Council to require an applicant to undergo a written practical and oral exam in cases where it is not satisfied that an applicant has satisfied recency of practice requirements.

[55] Sections 52(1) and (2) and 47(2) and (3) of the Act provide that the Council shall consider an application for renewal/issue of a practising certificate and subject to the provisions of the respective provisions decide to renew/issue or refuse to renew/refuse a practising certificate. It also provides that in making its decision the Council shall have regard to the extent to which an applicant has satisfied recency of practice requirements. Sections 52(3) and 47(7) of the Act is the first mention of the imposition of conditions in relation to practising certificates. These sections provide that where the Council is not satisfied that an applicant has satisfied recency of practice requirements, the Council may renew the practising certificate subject to such conditions the Council considers will sufficiently address the extent to which the applicant has not satisfied the requirements.

[56] Sections 52(4) and 47(8) of the Act provide that before deciding to renew a practicing certificate on recency of practice conditions the Council must do certain things. The Council must notify the applicant in writing of the details of the proposed conditions, of the reason for the proposed imposition of the conditions and advise the applicant that he/she may make written submissions to the Council with respect to the proposed conditions within at least 14 days. The Council shall have regard to any written submissions made by an applicant. Recency of practice requirements is defined by section 4 of the Act as:

> "The requirements prescribed by Regulations, that if satisfied, demonstrate that an applicant for issue or renewal of a practising certificate has maintained an adequate connection with the practice of medicine or dentistry and may include the following:
>
> (a) The nature, extent and period of practice of medicine or dentistry by of the applicant;
> (b) The nature and extent of any continuing professional education undertaken by the applicant;
> (c) The nature and extent of any research, study or teaching, relating to the practice of medicine or dentistry, undertaken by the applicant;
> (d) The nature and extent of any administrative work relating to the practice of medicine or dentistry undertaken by the applicant; and
> (e) The nature and extent of absence from clinical practice if in excess of 6 months;"

[57] Sections 52(5) and 47(9) of the Act provide for the Council to decide the review period which shall apply to any conditions imposed where a practising certificate is renewed or issued on recency of practice requirements and inform the applicant by written notice of the period.

[58] The salient question at this juncture is whether when the Council sought to impose the condition that Dr. James undergo a programme of anger management for a period of three months it was doing so in accordance with either section 52 or 47 of the Act. The attaching of conditions under these two sections has to do with circumstances where an applicant does not satisfy recency of practice requirements. This clearly was not the case as there is no evidence from the Council to suggest that there was any issue as regards recency of practice

requirements. The sections also speak to the imposition of the conditions as part of the renewal or grant of a practising certificate. In Dr. James' case, the Council indicated that it was amenable to renewing his practising certificate subject to certain conditions one of which was the anger management programme. Then the Council went on to state that it would review Dr. James' progress subsequent to the determination of the three-month period in the process of considering his application for renewal. The Council clearly wanted Dr. James to undergo the anger management as a pre-condition to renewing his practising certificate. But could it properly do that?

[59] The sections dealing with renewal and issue of practising certificates make no provision for the imposition of such conditions as requiring an applicant to undergo anger management. An anger management programme has nothing to do with recency of practice requirements. In fact, neither does the request for a comprehensive report on the adverse events which led to Dr. James' dismissal from St. Jude's Hospital. In deciding the application for renewal or issue of a practising certificate, the Council must at all times act within the confines of the legislation. I therefore find that the condition of requiring Dr. James to undergo anger management was ultra vires the provisions of the Act.

[60] Mrs. Harris for the Council was adamant that Dr. James had been afforded an opportunity to make representations by way of the report. The sections dealing with the renewal or issue of a practising certificate do not speak to allowing an applicant the opportunity to make representations without more. The sections specifically refer to making submissions in relation to the proposed conditions for the issue or renewal of a practising certificate on recency of practice requirements.

[61] The Council made a determination that Dr. James required anger management as a consequence it would seem of his written report and also based on the letter received from St. Jude's Hospital dated 17th April 2014.[13] That letter had stated

[13] Page 37 of the Trial Bundle.

that Dr. James had been terminated due to acts of gross misconduct. It also indicated that a comprehensive review of the incident confirmed that he had assaulted a female patient in the Emergency Room and that his behaviour was deemed unprofessional and contrary to that expected of a physician.

[62] In a letter dated 9th November 2015,[14] the Council advised counsel for Dr. James that the recommendation/condition to require Dr. James to undergo anger management was issued in light of the report submitted and his admission that he had undergone counselling in the past. The letter went on to refer to two appraisals from Victoria Hospital which had come to its attention. These appraisals revealed that Dr. James required strengthening in the areas of inter personal relations in particular … when confronted with challenging personalities or situations which require a calm thoughtful approach for resolution and also recommended that Dr. James strive to show greater maturity in his approach to situations which challenge him and requires skills in conflict resolution.

[63] Dr. James was never heard in light of the information received from St. Jude's Hospital or the statement in his report that he has undergone counselling as a result of the incident. Neither would it appear was Dr. James given copies of these documents which the Council took into consideration in coming to its decision to impose such an anger management programme condition. That could not be in keeping with natural justice principles. I cannot accept Mrs. Harris' submission that Dr. James was afforded an opportunity to be heard by way of his written report.

[64] The Act makes provision for the making of complaints which is where the Council should have directed its energies if it thought that Dr. James' conduct as a medical practitioner merited some attention. Section 104 of the Act makes provision for the Commission or the relevant Council to lodge a complaint with respect to the conduct of a medical practitioner. Section 105 provides the specific matters in

[14] Page 42-44 of the Trial Bindle.

respect of which a complaint may be made and includes that a health practitioner commits an act of professional misconduct. The section defines what professional misconduct is by identifying specific acts but is not limited to only the acts listed.

[65] Section 106 deals with the complaints procedure and sets out how the complaint is made and the role of the Commission on receiving a complaint. The section also detailed the role of the Council on receiving a complaint or where it initiates a complaint of its own motion. Importantly, section 106(6) states that the rules of procedural fairness shall be observed in determining a complaint.

[66] Section 109 deals with the complaints procedure and provides for the notification of a complaint to the health practitioner. This section gives a very detailed procedure for the hearing of a complaint and importantly provides that the health practitioner is entitled to make submissions when appearing before the relevant Council and to be assisted by another person including an attorney-at-law for advisory purposes only. Only if the relevant Council after considering the investigation and considering the explanation and submissions of health practitioner thinks that he/she has a case to answer can it take further action. Subsection (9) details the actions which the Council may take and includes imposing on the health practitioner a condition subject to which he or she may continue to practice, caution or reprimand, suspension or revocation of a practising certificate in accordance with section 111 and 112 of the Act.

[67] In a letter dated 29th September 2014[15] written to the Council by St. Jude's Hospital, the Hospital gave some very fitting advice to the Council. They reminded the Council that it is for them after having had a written complaint or being aware of certain information with respect to the professional conduct on the part of its registered practitioners to commence inquiries on its own motion or where the Commission has asked it to do so. The letter went on to state that as it related to the request by the Council for witness statements or accounts by three staff

[15] Pages 39-41 of Trial Bundle 2.

members to be submitted to the Council, they strongly advised against it. They said the Council must summon the witnesses and seek statements from them in relation to the incident and the physician must be given a statement informing him that the specific witnesses would be summoned. The letter stated further that the **Health Services (Complaints and Conciliation) Act**[16] gives wide powers to the Commission established under that Act whereas the **Health Practitioners Act** did not give such wide powers to the Council and it was therefore their view that the Council should seek legal advice as to the manner in which such investigations should be conducted. That letter encapsulates the essence of this matter.

[68] The Council in its attempt to fulfil its functions and mandate of the Act has conflated its roles relating to the issue/renewal of practising certificates and that of complaints. It is clear that the conduct of a health practitioner is an important factor or component in relation to assessing the fitness of an individual to continue to practice as a health practitioner. However, the rules of natural justice and the provisions of the Act must always be adhered to. The Council on receipt of the information regarding Dr. James' dismissal from St. Jude's was entitled to carry out its investigation into the matter of his dismissal but it could not do things which the Act never gave authority to do and was confined to issues which touched and concerned the renewal of a practising certificate. The Act did not give the Council the authority to impose conditions such as anger management on an application for a practising certificate nor to make the submission of the report on dismissal from previous employment or the adherence to an anger management programme pre-requisites for the issue of a practising certificate. If the Council wished to address its concerns regarding Dr. James' alleged anger issue it had to follow the correct procedure, not deal with it in a renewal application where the legislation gave them no power so to do.

[69] In light of the above, the Court declares that the imposition of the requirement that Dr. James undergo an anger management programme for a period of three (3)

[16] Cap 11.19, Revised Laws of Saint Lucia 2008.

months by a Mental Health Practitioner is contrary to the rules of natural justice and fairness. It is also ultra vires the sections 47 and 52 of the Act.

[70] The application of Dr. James remains pending before the Council and should be dealt with urgently and a decision rendered in keeping with the provisions of the Act. The delay in dealing with the application cannot be countenanced. This is a professional whose ability to practice his chosen profession has been curtailed because the Council has imposed a requirement that it did not have the power to impose. This certainly cannot be right. The question which must naturally follow is whether Dr. James is entitled to damages.

Is Dr. James entitled to any damages?

[71] In an article titled, **Financial Remedies Against the State for Breaches of Public Law**,[17] Gerard Clarke expressed the opinion that the law on financial remedies against the State for public law wrongs is conservative, restrictive and arguably lacks coherence and principle. He concluded that many cases involving claims for financial remedies have negative results for claimants and I agree. However, whatever one's opinion the Court is left to apply the law as it now stands.

[72] In this case, Dr. James claimed damages for loss of chance to earn an income and for distress and inconvenience. In his affidavit in support of the claim, Dr. James averred that the actions and decisions of the Council 'have caused him financial hardship and mental anguish which continue unabated'.

[73] Dr. James' evidence in support of his claim for damages is that prior to March 2014 he was employed at St. Jude's Hospital as a Senior House Officer and earned a net salary of $6,893.83 per month and a contract gratuity of $14,883.27.

[17] Gerard Clarke, 'Financial Remedies Against the State for Breaches of Public Law' <www.publiclawproject.org.uk/data/resources/154/FINANCIAL-REMEDIES-AGAINST-THE-STATE.pdf> accessed 18th January 2018.

He produced a salary slip from September 2013 in support his claim. The salary slip reveals that the basic salary was $5,159.53.

[74] Dr. James' claim for damages is based entirely on the fact that the Council suspended him and by virtue of this he was unable to take up offers of employment with M Care, a private medical clinic where he said he would have earned $500.00 per day for six days a week. There is no evidence to support this. Dr. James also stated in his affidavit that between December 2015 and February 2016 he applied for and was offered a job as a doctor with Norwegian Cruise Lines and he lost that offer because he did not have a valid practising certificate. He said he expected to earn approximately US$7,000.00 per month. The email correspondence provided in support of this does not indicate that any offer was made to Dr. James. It simply stated that they could not consider making an offer until he had his updated medical licence.

[75] Apart from the statement that the actions of the Council have caused him mental anguish, there is no evidence to support this in Dr. James' affidavit in support of his claim. Mr. Fraser made reference to public humiliation suffered by Dr. James being less than that suffered by the claimants in **Fraser v Judicial and Legal Service Commission et al**[18] **and Angela Innis v the Attorney General**.[19] However, there is no evidence that Dr. James suffered or is suffering any public humiliation.

[76] Mr. Fraser submitted that rule 56.8(1) and (2) of the **Civil Procedure Rules 2000** ('CPR') allows the Court to award damages on a claim for judicial review.

[77] Rule 56.8(1) and (2) of the CPR are in the following terms:

> "Joinder of claims for other relief
> 56.8

[18] [2008] UKPC 25.
[19] [2008] UKPC 42.

(1) The general rule is that, where permitted by the substantive law, an applicant may include in an application for an administrative order a claim for any other relief or remedy that –
    (a) Arises out of; or
    (b) Is related or connected to; the subject matter of an application for an administrative order.
(2) In particular the court may, on a claim for judicial review or for relief under the Constitution award –
    (a) damages;
    (b) restitution; or
    (c) an order for return of property to the claimant;

    If the –
    i. Claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or
    ii. Facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief; and
    iii. Court is satisfied that, at the time when the application was made the claimant could have issued a claim for such remedy."

This rule is a statement of the existing common law principles regarding the award of damages in public law matters.

[78] Mrs. Harris for the Council contended that Dr. James failed to make a claim for any damages in the affidavit in support of the claim. Accordingly, the evidence before the Court does not support a claim or request for damages. The amended claim contains a claim for damages. Although the prayer in the affidavit in support does not reference a claim for damages, the affidavit does provide evidence from Dr. James in support of a claim for damages.

[79] An individual may seek compensation against public bodies for harm caused by the wrongful acts of such public bodies. Such claims may arise out of the exercise of statutory or other public powers by public bodies. Decisions or measures which are ultra vires their powers may be set aside by means of judicial review. The fact that an administrative act is ultra vires and so unlawful does not itself entitle the individual to damages for any loss suffered. An individual must establish that the

unlawful action also constitutes a recognized tort or involves a breach of contract.[20]

[80] Counsel, Mrs. Harris further submitted that Dr. James has failed to establish a recognized cause of action. She cited the case of **Hyman Joseph v St. Lucia Air and Seaports Authority**[21] in support of her submission. In **Hyman Joseph**, Edwards J said that in order for Mr. Joseph to be awarded damages for loss of earnings, he had to show that damage under a head recognized by the law has been suffered by him as a result of the Authority's breach of the law or interference with a right of his also recognized by law.[22]

[81] At paragraph 120 of **Hyman Joseph**, Edwards J quoting **Clerk & Lindsell on Torts** said that a claimant cannot bring a civil action where there is a breach of statutory obligation, unless, in respect of the breach of statute committed or threatened, he can point out a "private right", arising from the true construction of the statute which is often called a statutory tort. The learned judge continued and pointed out that counsel had not identified the cause of action that would accrue to Mr. Joseph for which she would have been able to issue a claim independent of the judicial view proceedings. Though Mr. Joseph had suffered an economic loss Edwards J pointed out that it is not every economic loss that gives rise to a recognized cause of action.

[82] At paragraph 121, Edwards J pointed out that it is not sufficient for a claimant in an administrative claim to simply claim damages. He must satisfy the Court on the pleadings that at the time when the administrative claim was filed, the claimant could have issued a claim for damages against the defendant for a recognized cause of action.

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[20] See X v Bedfordshire CC [1995] 2 AC 633 at 730G; Financial Services Authority v Sinaloa Gold Plc [2013] AC 28 at [31]. See also: Lewis, C., Judicial Remedies in Public Law, Chapter 15, (5th edn., Sweet and Maxwell, [2015]).

[21] SLUHCV2006/0110, delivered 9th May 2007, unreported.

[22] Hyman Joseph at para [118].

[83] Mr. Fraser submitted that Dr. James has made out a case of loss of chance in respect of the income which he could have earned but for the statutory breaches the Council committed in relation to him.

[84] I have determined and so found that the Council did not suspend Dr. James. At the time of his application for renewal of his practising certificate he was no longer employed. That was not as a result of any actions of the Council. By his own admission in cross-examination, after he was terminated from St. Jude's Hospital, he decided to take a break before he applied for his practising certificate.

[85] There is no automatic right to a renewal of a practising certificate and the Council must satisfy itself of the things provided for in the Act. The Council has not yet made a final decision so it would be presumptuous to assume that had the Council not imposed the anger management condition, it would have issued the practising certificate or even that Dr. James would have obtained employment for that matter. In the case of **The Hon. Attorney General et al v D. Gisele Isaac**,[23] at the time the claimant was suspended she was properly employed and she would have had a cause of action in contract. Also, it was easy to ascertain what her loss would have been.

[86] Mrs. Harris on behalf of the Council argued that the fact that the Act gives a statutory right of appeal where the Council refuses a practising certificate means that the claimant is precluded from invoking the original jurisdiction of the High Court in a private civil law claim as in the instant case. The instant case is not a private civil law claim but a claim for administrative orders which falls within the definition of judicial review proceedings in rule 56 of the CPR. The fact that there is a right of appeal does not necessarily preclude a claim for judicial review especially in circumstances as in this case where the appeal mechanism provided by the Act has grinded to a screeching halt with no indication as to when its wheels will turn once more.

[23] ANUHCVAP2015/0014, delivered 11th March 2016, unreported.

[87] I do not think there is any need to explore whether the Council is a public body as this is very clear given the nature of the functions and powers of Council. The case of **X v Bedfordshire**[24] illustrates that damages for breach of statutory duty would only be allowed where: (1) the duty was imposed for the protection of a limited class of the public and (2) Parliament intended to confer a private right of action for breach of that duty.

[88] Dr. James has not identified what statutory duty owed to him has been breached. The functions and powers of the Council are not owed to individual health practitioners but to the public at large. There is nothing in the Act which seeks to protect individual health practitioners against economic loss and therefore there can be no right to maintain a private civil law claim on this basis. Mrs. Harris referred to **Clerk and Lindsell on Torts** at paragraph 14 - 01 where it states:

> "It is to be noted that in general the Courts have been ready to infer a right of action for breach of statutory duties designed to ensure personal safety, particularly of employees. They have been cautious in inferring the existence of such an action where the harm suffered in consequence of the breach of duty is economic loss and where the defendant is a public health authority."

[89] Dr. James has not shown that the Council was in breach of statutory duty. I agree with Mrs. Harris that the fact that the Council acted outside of the powers under the Act or failed to have regard to principles of natural justice does not amount to breaches of statutory duty.

[90] Mrs. Harris argued that Dr. James ought not to be claiming damages for loss of any category while his application for renewal was being considered. This she submitted is because Dr. James applied for the renewal of his practising certificate some eighteen months subsequent to its expiration and therefore deprived himself of the benefit and privilege accorded by section 50 of the Act. The Council contended that section 50 being only applicable where the renewal application is

[24] [1995] 2 AC 633.

made during the currency of an existing practising certificate, it would be unjust to reward Dr. James with damages where he could have earned an income if he had complied with section 49 of the Act.

[91] I have considered whether there is any cause of action which could have arisen in a case such as Dr. James' and have not been able to find any. There existed no contractual relationship between the Council and Dr. James. Having reviewed the **Health Practitioners Act**, I cannot see that it intended to create any private right of action for breaches by the Council of any of the statutory duties contained therein. It would certainly have been different if Dr. James were in employment and had been prevented from continuing to work because of the unlawful actions of the Council. In such a case, one might consider tortious interference as a cause of action.

[92] I also have explored whether there exists a duty of care owed to Dr. James by the Council which could form the basis for a cause of action in negligence. In the case of **Stovin v Wise**,[25] the Court held that the policy of the statute is a crucial factor in deciding whether it was intended to confer a right to compensation for a breach of a duty imposed by the statute, and a fortiori, for the imperfect exercise of a power conferred by the statute. The Court said that if the policy of the Act is not to create a statutory liability to pay compensation, the same policy should normally exclude the existence of a common-law duty of care. I cannot see how Dr. James could sustain a claim in negligence against the Council.

[93] I conclude on the matter of damages that Dr. James is not entitled to any award of damages either for loss of chance or for distress and inconvenience. Dr. James has failed to establish that the Council violated any private rights which would justify an award of damages under any head. There has been nothing to support Dr. James' contention that the Council breached its statutory duty and in any

[25] [1996] AC 923 at 952E-953D.

event, has failed to identify what statutory duty was breached. I therefore make no award of damages.

Conclusion

[94] Based on the discussion above, the final order is as follows:

(a) The declarations sought at paragraphs 1, 3, 5, and 6 of the amended claim filed on 8th February 2017 are denied.

(b) The declaration sought at paragraph 4 of the amended claim as relates to the Council's decisions of suspending Dr. James from practising medicine being contrary to the rules of natural justice is denied.

(c) The declaration sought at paragraph 2 of the amended claim having been withdrawn by the claimant is dismissed.

(d) The Court declares that the imposition of the requirement that Dr. James undergo an anger management programme for a period of three (3) months by a Mental Health Practitioner is contrary to the rules of natural justice and fairness and is ultra vires sections 47 and 52 of the Act.

(e) No award is made in respect of damages for distress and inconvenience.

(f) No award is made in respect of damages for loss of chance to earn an income.

[95] As relates to costs, Dr. James has only succeeded on one of the six declarations he sought. Having regard to the matters in rule 64.6 of CPR, I have considered the manner in which the claimant has generally conducted its case. In considering the issue of costs, I think it useful to point out that Dr. James had filed two other claims based on the same facts as set in the instant case prior to this one: 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 Act. 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. In all, the claimant has filed 3 claims in relation to this matter as well as an application for a mandatory injunction which was denied. I mention these simply to illustrate that there have been several claims filed by Dr. James claiming substantially the same relief in various forms which the Council has had to defend. This must factor into any assessment of costs which may be awarded.

[96] In light of the above and the limited success of Dr. James on this claim, I make no order as to costs.

[97] I thank Counsel for their very comprehensive submissions and apologize for the delay in the delivery of this judgment.

[98] It is my hope that as a result of this decision the Council would consider its powers under the various provisions of the Act and ensure that its actions fall within the scope and ambit of the provisions at all times. If it is that the Council is of the view that the practising certificate application/renewal process requires some enhancing, then that is a matter for legislative amendment to the Act. The Council cannot seek to do acts which do not fall within the specific provisions and seek to justify it by saying that one of its functions is to promote high standards in the practice of medicine and dentistry.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar