Lim Mey Lee Susan *v* Singapore Medical Council
[2011] SGHC 132

Case Number : Originating Summons No 1252 of 2010 (Summons No 521 of 2011)

Decision Date : 26 May 2011

Tribunal/Court : High Court

Coram : Philip Pillai J

Counsel Name(s) : Lee Eng Beng SC, Tammy Low, Christine Huang and Elizabeth Wu (Rajah & Tann LLP) and Bernice Loo (Allen & Gledhill LLP) for the plaintiff; Alvin Yeo SC, Melanie Ho, Lim Wei Lee, Sugene Ang and Jolyn de Koza (Wong Partnership LLP) for the defendant; Chong Chin Chin and Sharon Lim for the Attorney General's Chambers.

Parties : Lim Mey Lee Susan — Singapore Medical Council

Civil Procedure

Administrative Law – Judicial Review – Discovery of documents

26 May 2011 Judgment reserved.

Philip Pillai J:

1 Summons No 521 of 2011 is an application in connection with the judicial review proceedings in Originating Summons No 1252 of 2010 ("OS 1252/2010"). It is a discovery application to require the Singapore Medical Council ("SMC") to produce the following categories of documents:

(a) In relation to the decision of the SMC to revoke the appointment of the Disciplinary Committee ("1st DC"), which heard a complaint against the Applicant, and the decision to appoint another Disciplinary Committee ("2nd DC") to hear the same complaint:

(i) all correspondence exchanged between the Secretariat of the SMC and any member(s) of the SMC, or between such members *inter se*, between 29 July 2010 and 16 September 2010;

(ii) all documents evidencing discussions between members of the SMC and/or members of the Secretariat of the SMC between 29 July 2010 and 16 September 2010; and

(iii) all minutes of meetings of the SMC held between 29 July 2010 and 16 September 2010.

(b) All correspondence, emails and minutes of meetings evidencing SMC's appointment of the 1st DC and the discussions relating to the 1st DC's appointment and the discussions of the Secretariat of the SMC and/or the SMC in relation to the appointment of the 1st DC.

(c) All minutes of meetings, internal papers, drafts and reports prepared by the SMC or working groups within the SMC relating to the amendment of reg 42 of the Medical Registration Regulations which came into effect pursuant to the Medical Registration (Amendment) Regulations 2010 (S 528/2010).

2 The Applicant had by a letter, dated 24 January 2011, invited the SMC to provide discovery of the above documents which the SMC by a letter, dated 31 January 2011, declined.

3 The application for discovery is pursuant to O 24 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC"). It should be noted, however, that the Applicant has sought both prerogative and non-prerogative relief in OS 1252/2010. I entertain some doubt as to whether the discovery process is applicable if an applicant for judicial review is seeking prerogative relief. Woo Bih Li J in *Yip Kok Seng v Traditional Chinese Medicine Practitioners Board* [2010] 4 SLR 990 made the following observation (at [17]):

> Our O 53 derives from the pre-1977 O 53 in the English equivalent ("English O 53") of the Rules of the Supreme Court 1965, with the distinction that it is (since 1994) begun by *ex parte* originating summons and not originating motion. The procedure is both uncertain and cumbersome. *It is not clear whether certain processes applicable to ordinary originating summons, such as discovery, are applicable in addition to those prescribed under O 53*. An applicant seeking both prerogative and ordinary remedies is obliged to proceed via two separate originating processes, and again it is not clear whether subsequent consolidation is possible. From the perspective of a public body, it enjoys the procedural protection in O 53, such as the requirement for leave and the limitation of time, in respect of actions for the prerogative remedies, but not in actions for other remedies. A detailed consideration of these procedural issues can be found in Lord Diplock's leading speech in *O'Reilly v Mackman* [1983] 2 AC 237 ("*O'Reilly*") at 280-282.
>
> [emphasis added]

There seems to have been some doubt in English law (prior to the 1977 amendments to O 53 of the Rules of the Supreme Court 1965 (SI 1965 No 1776) (UK) ("RSC")) as to whether discovery was permissible in judicial review proceedings in which prerogative remedies were sought (see Oliver Sanders, "Disclosure of Documents in Claims for Judicial Review" [2006] JR 194 at 195). Denning LJ in *Barnard v National Dock Labour Board* [1953] 2 QB 18 held (at 43) that there is "no discovery" in *certiorari* applications (also see *O'Reilly v Mackman* [1983] 2 AC 237 at 281 (*per* Lord Diplock)). However, the UK Law Commission's *Report on Remedies in Administrative Law* (Cmd 6407) in 1976 noted (at [15]) that the general power to order discovery under O 24 of the RSC was *prima facie* applicable to O 53 of the RSC:

> Although there is no specific rule relating to discovery in Order 53 of the Rules of the Supreme Court *there is a general power under rule 3 of Order 24 to order discovery in any "cause or matter (whether begun by writ, originating summons or otherwise)"*. However, Denning LJ, in *Barnard v National Dock Labour Board*, said that there was no discovery in certiorari and certainly we know of no case where it has been ordered. Similarly there is a general power to order interrogatories under rule 1(1) of Order 26 in respect of 'any cause or matter', but here again we know of no prerogative order proceedings in which such an order has been made. …
>
> [emphasis added]

4 Neither party addressed me on whether discovery is in principle available in these judicial review

proceedings. In my view, however, whatever the historical position, discovery should, in principle, be available in all judicial review proceedings. As the English Law Commission has observed (see [4] above), O 24, r 1 of the ROC is unqualified in its application to "any party to a cause or matter":

> (1) Subject to this Rule and Rules 2 and 7, the Court may at any time order *any party to a cause or matter (whether begun by writ, originating summons or otherwise)* to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party. [emphasis added]

5 The first threshold cited by the Applicant is O 24 r 5 of the ROC under which she must show *prima facie* that: (a) the documents sought were or are in the other party's possession, custody or power; (b) the particular documents are relevant; and (c) discovery is necessary either for disposing fairly of the matter or for saving costs.

6 The core contemplation of O 24 of the ROC relates to civil litigation and it is common ground that this is not such a discovery application. It is a discovery application made in relation to a judicial review of the actions of the SMC pursuant to the Medical Registration Act (Cap 174, 2004 Rev Ed) ("MRA") . The adduction of fresh evidence in judicial review proceedings is necessarily limited because in such reviews the court does not make findings of fact based on evidence. The court's role in judicial review is limited to determining whether, based on the record, the action of the SMC under challenge, ought to be quashed or prohibited by reason of illegality, irrationality or procedural impropriety (to adopt the convenient categorisations enunciated by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410–411).

7 The underlying differences between discovery applications in civil actions and in judicial review is succinctly stated by Lord Bingham in *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650 ("*Tweed*") in the following terms at [2]:

> The disclosure of documents in civil litigation has been recognised throughout the common law world as a valuable means of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact. But the process of disclosure can be costly, time-consuming, oppressive and unnecessary, and neither in Northern Ireland nor in England and Wales have the general rules governing disclosure been applied to applications for judicial review. Such applications, characteristically, raise an issue of law, the facts being common ground or relevant only to show how the issue arises. So disclosure of documents has usually been regarded as unnecessary and that remains the position.

The relevant reasons for adopting this restrictive approach are also stated by Lord Carswell in *Tweed* at [31]:

> The reasons which have hitherto been regarded as providing grounds for maintaining these principles are (a) the obligation resting on a public authority to make candid disclosure to the court of its decision making process, laying before it the relevant facts and the reasoning behind the decision challenged ... [and] (b) the undesirability of allowing "fishing expeditions", where an applicant for judicial review may not have a positive case to make against an administrative decision and wishes to obtain disclosure of documents in the hope of turning up something out of which to fashion a possible challenge …

It should be noted that Lord Carswell was inclined to adopt a more flexible approach (at [32]):

… I do consider, however, that it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirement of the particular case, taking into account the facts and circumstances. …

Discovery of documents relating to SMC's revocation of the 1st DC and appointment of the 2nd DC

8 The judicial review record, which comprises the Applicant's statement in support, the Respondent's affidavit in reply and the Applicant's affidavits in response, together with all annexures, includes two material emails in which the members of the SMC first revoked the appointment of the 1st DC and subsequently appointed the 2nd DC. The Applicant's case on judicial review relating to bias or apprehension of bias is founded, *inter alia*, on the SMC Registrar and one witness and two 1st DC members being recipients of the two emails. The recipients of the two emails are all clearly identified and include the SMC Registrar and the 1st DC members and witness.

9 It is pertinent to note that the content of these emails to all SMC members which evince the SMC's decisions to first revoke the appointment of the 1st DC and subsequently to appoint the 2nd DC are self-explanatory. The email dated 3 September 2010 reads:

1. We refer to the inquiry against Dr Lim Mey Lee Susan.

2. At the hearing on 29 Jul 2010, the Defence Counsel made a procedural application for the Disciplinary Committee (DC) to recuse itself. Details of this case can be given only at the conclusion of the inquiry and until then, we seek your kind understanding and patience on this matter.

3. As the result of the DC having recused itself, it is now necessary for the Singapore Medical Council to revoke the appointment of the current DC hearing this inquiry and appoint a new DC pursuant to Section 42(5) of the Medical Registration Act, i.e.

"*The Medical Council may at any time revoke the appointment of any Disciplinary Committee or may remove any member of a Disciplinary Committee or fill any vacancy in a Disciplinary Committee.*"

4. The new DC will be appointed in due course and a separate email will be sent to you shortly.

5. Council's approval is sought on this administrative matter to revoke the current DC to allow SMC to move forward on this matter.

6. We will take it that members have no objections if we do not hear from you by Tuesday, 7 September 2010.

…

[emphasis in original]

10 The second email dated 13 September 2010, sent by and to the same parties, reads:

1. I refer to my email below [3 September 2010] where a new Disciplinary Committee (DC) has to be appointed for the inquiry for Dr Lim Mey Lee Susan.

2. The DC proposed to hear the case [is] as follows:

Proposed Members for DC – Dr Lim Mey Lee Susan :-

Prof Tan Ser Kiat (Chairman)

Prof C Rajasoorya

Dr Abraham Kochitty

A/Prof Koh Ming Choo Pearlie (Layperson)

Mr Vinodh Coomaraswamy SC (Legal Assessor)

3. All proposed DC members have declared that they have no conflict of interests and are agreeable to the appointment. In the meantime, we would be grateful that members do not discuss or mention this case (despite of what has been reported in the papers) so that the DC inquiry is not compromised.

4. Members' approval is sought for the appointment of the above DC. We will assume that members have no objections if we do not hear from you by **5pm, Tuesday, 14 Sep 2010** .

…

[emphasis in original]

Both emails required no reply and the SMC confirmed that none was received by the due dates.

11 In short, the Applicant's complaint that the Registrar and the two members and a witness of the 1st DC had received the emails is palpably evident in the record. It is also palpably evident on record that no express agreement was sought by the emails nor were any received by the due response dates from any member of the SMC. In the light of the above, the discovery application for all documents relating to the SMC's action first in revoking the appointment of the 1st DC and second in appointing the 2nd DC is not necessary for disposing fairly of the Applicant's case for judicial review on the record.

Discovery of documents relating to SMC's appointment of the 1st DC

12 There is no correspondence, emails and minutes evidencing SMC's appointment of the 1st DC and the discussions relating to the 1st DC's appointment in the record. The Applicant concedes that there is no allegation of bias or apprehension of bias against the process by which the 1st DC was appointed. There is therefore, on the record, no question raised of any contemporaneous bias or apprehension of bias on the part of the SMC when it appointed the 1st DC.

13 It is only because of the Applicant's challenge of the SMC's appointment of the 2nd DC that the Applicant now seeks discovery of the documents relating to the appointment of the 1st DC. The discovery application for these documents relating to the appointment of the 1st DC is remote to her challenge of the appointment of the 2nd DC. The subject matter of OS 1252/2010 relates to the 2nd DC and all the core documents relating to the 2nd DC required for the Applicant to make her case are in the record. The heart of the 2nd DC appointment is in the record, these being the emails, reproduced above at [9] and [10], which are self-explanatory. The discovery application for these

documents relating to the appointment of the 1st DC is again not necessary for disposing fairly of the Applicant's case on the record.

Discovery of papers relating to reg 42

14 This discovery application seeks discovery of all minutes, papers and reports of the SMC in relation to the amendment of reg 42 and it being brought into effect on 20 September 2010. Under the MRA, regulations may be made by the SMC with the approval of the Minister for Health. The Applicant has applied for a declaration that reg 42 is void as it violates the rules of natural justice. It is also the Applicant's case that the amendment of reg 42 was targeted at her. In support of this submission, the Applicant points out that reg 42 was brought into effect by the SMC on 20 September 2010 about six days after the 2nd DC was constituted (14 September 2010) and about four days after she was notified that the SMC had appointed the 2nd DC (16 September 2010). It was further submitted that the amendments brought into force on 20 September 2010 related principally to the disciplinary process and the availability of the advice of legal assessors to the disciplinary committee. Further, the Applicant avers that the entire amendments brought into effect on 20 September 2010 were subsequently repealed and reintroduced as part of a more comprehensive set of regulations brought into effect in December 2010.

15 Insofar as the challenge to reg 42 is based on it being contrary to natural justice, this challenge may be determined *ex facie* on the content of the amended reg 42. Insofar as the Applicant's submission of bias or apprehension of bias on the part of the SMC is founded on its content and legislative chronology, this is public record. It is again not necessary for fairly disposing of the Applicant's case on the record.

Conclusion

16 For the reasons set out above, each of these applications for discovery is dismissed. The costs of these applications shall be costs in the cause.