Yip Kok Seng *v* Traditional Chinese Medicine Practitioners Board
[2010] SGHC 226

Case Number : Originating Summons No 113 of 2010

Decision Date : 06 August 2010

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : P Padman (K S Chia Gurdeep & Param) for the plaintiff; Rebecca Chew and Mark Cheng (Rajah & Tann LLP) for the defendant.

Parties : Yip Kok Seng — Traditional Chinese Medicine Practitioners Board

Administrative Law

Civil Procedure

6 August 2010

Woo Bih Li J:

Introduction

1 The plaintiff, Yip Kok Seng ("Mr Yip") said that he is a registered acupuncturist with the defendant, The Traditional Chinese Medicine Practitioners Board ("the Board") and not a full Traditional Chinese Medicine ("TCM") physician. He runs a wellness centre at Block 463 #02-21 Crawford Lane known as the National and Electro Wellness Centre ("the Centre").

2 He had two primary complaints. The first was that the Board had acted *ultra vires* its powers when it acted on a complaint made by [B] on 2 May 2008 which was not supported by a statutory declaration as required by Reg 3(2) of the Traditional Chinese Medicine Practitioners (Investigation of Complaints) Regulations (Cap 333A, Rg 4, 2002 Rev Ed).

3 The second was that the Board lacked jurisdiction to investigate a second complaint dated 2 June 2008 by [B] because the conduct complained of was not performed in the course of a healing session under TCM methods.

4 In his action, Mr Yip sought the following reliefs:

> 1. There be a declaration that the [Board] lacks the jurisdiction to investigate [Mr Yip's] conduct in respect of a complaint made against him by [B] on 2 June 2008 because:
>
> a. The conduct complained of was not performed in the course of a healing session under [TCM]; and
>
> b. The [Board] has no powers to look into matters outside the practice of [TCM].
>
> 2. There be a declaration that the [Board] had acted *ultra vires* its powers when it acted on a complaint made by [B] on 2 May 2008 which was not supported by a mandatory Statutory Declaration of [B].

3. The [Board] be restrained from convening hearings of the Investigation Committee under [S 28 of the Traditional Chinese Medicine Practitioners Act (Cap 333A, 2001 Rev Ed)] pending the hearing of this application.

4. The [Board] be directed to refer the complaint of [B] to the police for a formal investigation into the allegation of molest.

5. The costs of this application may be provided for in [Mr Yip's] favour.

5 At the hearing before me, Mr P Padman("Mr Padman"), who was Mr Yip's counsel, said he would withdraw prayer 4. Prayer 3 would also be withdrawn since I would be hearing the application before the Investigation Committee ("IC") convened its hearing.

6 Eventually, Mr Yip was not successful on the remaining prayers, *ie*, prayers 1 and 2. However, in the course of arguments, a preliminary point was raised which is of general importance.

General facts

7 I will state some background facts briefly before I elaborate on the preliminary point.

8 On 2 May 2008, [B] complained to the Board that Mr Yip had checked her private parts during her second appointment with him, without the presence of a female nurse, and that he had molested her.

9 An Inspection Officer of the Board, Toh Keng Wang ("Mr Toh") was then sent to the Centre on 6 May 2008 to look into the matter. Mr Toh said that the purpose of his visit was to inspect the Centre and the medical records maintained by Mr Yip to confirm whether [B] did attend at the Centre on the dates she mentioned and the type of treatment administered by Mr Yip. Mr Toh said that he informed Mr Yip that the Board had received a written complaint and he briefly described the nature of the complaint to him. Mr Toh requested to inspect [B]'s medical records which Mr Yip acceded to. Copies were made for Mr Toh. Mr Yip then denied molesting [B] on the day of her second appointment.

10 On 8 May 2008, the Board replied to [B] to inform her that a complaint would have to be supported by a statutory declaration and enclosed a form of the statutory declaration for her use.

11 On 2 June 2008, [B] lodged her complaint with the required statutory declaration.

12 The Board was satisfied that the 2 June 2008 complaint disclosed a *prima facie* case for inquiry. Accordingly, on 17 June 2008, Mr Yip was notified of the 2 June 2008 complaint with a copy of that complaint and [B]'s statutory declaration. He was also invited to submit his written explanation to the Board.

13 Thereafter, between 3 July to 20 August 2008, there ensued a series of correspondence between Mr Yip and the Board or the Board's solicitors in which Mr Yip stated, *inter alia*, his explanation.

14 On 30 December 2008, Mr Yip wrote to the Board to inquire about the status of the complaint. On 2 January 2009, the Executive Secretary of the Board replied that the Board had directed that the matter be referred to an IC. As mentioned above, the crux of Mr Yip's complaint about this direction was that he was not performing a healing session using TCM methods.

The preliminary point

15 Ms Chew, counsel for the Board, raised the preliminary point that as regards prayer 1, the proper remedy was not a declaration but *certiorari* and therefore Mr Yip should have proceeded by way of O 53 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("O 53"). O 53 requires leave to be first granted. On the other hand, Mr Padman argued that Mr Yip was not seeking a quashing order so he was not obliged to apply for leave to make his application under prayer 1. This preliminary point is of general importance and took up a considerable part of the hearing.

The bifurcated procedural regime

16 The preliminary point is founded on the bifurcated regime for obtaining remedies in an administrative law action. The prerogative remedies of mandamus, prohibition and *certiorari* are to be obtained via the procedure prescribed in O 53, which, as mentioned above, requires *inter alia* leave to be granted. Other remedies, including a declaration, are to be obtained via the normal originating processes. The two processes are exclusive – declaratory relief is not available under O 53: see the High Court decision in *Re Application by Dow Jones (Asia) Inc* [1987] SLR(R) 627 and the Court of Appeal decision in *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [5] and [6].

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.

18 In England, the position was changed in 1977 upon the recommendation of the Law Commission: see *Report on Remedies in Administrative Law* (Law Com No 73), 1976 Cmnd 6407; S.I. 1977 No. 1955. The English O 53 was deleted and replaced with a procedure known as "the application for judicial review", under which the court can award declaratory and injunctive relief and damages as an alternative or in addition to the prerogative remedies. Reforms have also been made by other jurisdictions: see the Ontario Judicial Review Procedure Act (RSO 1990, c J1), s 2; the New Zealand Judicature Amendment Act 1972 (Act 130 of 1972), s 4; and the Malaysian Rules of the High Court 1980, O 53.

19 It may be that reform is also needed in Singapore, but that is something for the Rules Committee to decide. For present purposes the bifurcated regime meant that I had to decide whether declaration was an appropriate relief for Mr Yip's prayer 1, and similarly whether Mr Yip should have proceeded by way of *certiorari* and sought leave first.

20 I should also observe that, because of our bifurcated regime, the *ratio* of *O'Reilly*, cited by Ms Chew, is inapplicable to Singapore. In that case, the House of Lords held that it would generally be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action. However, the basis of *O'Reilly* is the presence of a unified procedure by which all the remedies for the

infringement of public law rights could be obtained. In Singapore, we do not have such a unified procedure. Even in Malaysia, where there is a unified procedure, it has been held by the Federal Court that an application for a declaration can sometimes be made by ordinary action: see *YAB Dato' Dr Zambry bin Abd Kadir & ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, Intervener)* [2009] 4 MLJ 24.

21 I should also refer to *Chan Hiang Leng Colin v PP* [1994] 3 SLR(R) 209, which was again cited by Ms Chew. The relevant issue in that case was whether the Minister's decision to prohibit certain publications could be challenged in a Magistrate's Appeal from a conviction by the district court for possessing those publications. The High Court appeared to take the view that *O'Reilly* was *prima facie* applicable, but in the end decided that there was an exception because the parties were *ad idem* as to the court's competence to decide all the issues raised. The correctness of this approach was not fully argued before me. For present purposes, I am content to reiterate that the basis of the *O'Reilly* principle is the existence of a unified procedure for judicial review. As mentioned, the procedure in Singapore is bifurcated, and hence the only preliminary question here is whether Mr Yip should have applied for *certiorari* under O 53.

Certiorari or declaration

22 In the following passage in HWR Wade, *Administrative Law*, 5th Ed (Oxford: Clarendon Press, 1982), written five years after the 1977 reforms, the learned author looks back and observes (at p 570) that:

> One result of the procedural handicaps and incompatibilities mentioned above [in relation to the old English O 53] was that a kind of rivalry developed between *certiorari* (and prohibition) on the one hand and the declaratory judgment on the other. This is worth brief notice because it formed the background to the subsequent reforms.
>
> The story goes back about thirty years, to a time when it seemed that *certiorari* and prohibition might almost be put out of business by the rapidly developing remedy of declaration, aided where necessary by injunction. In legal history a shift of this kind from inferior to superior remedies is a familiar method of progress. In the United States declarations and injunctions have taken the place of certiorari to quash in federal administrative law for over sixty years ... There have been signs that a similar change might take place in England, where likewise the evolution of remedies is governed by the survival of the fittest.
>
> The advantages of the declaration were brought into prominence in 1953 in *Barnard v National Dock Labour Board* [1953] 2 QB 18. Dock workers in London had been dismissed for refusing to operate a new system for the unloading of raw sugar. After there had been a prolonged dock strike the men began actions for declarations that their dismissal was illegal. When they obtained discovery of documents from the Dock Labour Board they found that the vital order had been made not by the local board but by the port manager, who had no power to make it. Thus they won their case. But had they applied for *certiorari* they would probably have been unable to discover the irregularity and they would have been out of time, more than six months having expired. The Court of Appeal observed that *certiorari* was 'hedged around by limitations' and that it was right to grant declarations and injunctions to prevent statutory tribunals from disregarding the law.
>
> This policy of encouraging litigants to circumvent the limitations of *certiorari* was twice adopted by the House of Lords in later cases.

23 The two cases referred to were *Vine v National Dock Labour Board* [1957] AC 488 and *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260 ("*Pyx Granite*"). In the first case, a dismissed labourer sought a declaration that his dismissal was illegal, *ultra vires* and void. In the second case, a company sought declarations that a proposed development was in accordance with statute law, and that ministerial decisions refusing them permission in respect of part of their proposed development and granting permission subject to certain conditions in relation to other parts of their operations were of no effect. In both cases the declaratory relief sought was granted. Lord Goddard's speech in the second case (which Lord Oaksey agreed with) included the following passage:

> It was also argued that if there was a remedy obtainable in the High Court it must be by way of *certiorari*. I know of no authority for saying that if an order or decision can be attacked by *certiorari* the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive, though no doubt there are some orders, notably convictions before justices, where the only appropriate remedy is *certiorari*.

In *O'Reilly*, ([17] *supra*) at 246, Lord Diplock also observed in his leading speech that:

> Prior to the institution of the application for judicial review there was a long line of authority to the effect that a plaintiff could choose whether to apply for a prerogative writ or to sue for a declaration.

In support of this proposition, Lord Diplock referred to Lord Goddard's speech in *Pyx Granite*, and *Anisminic Ltd v Foreign Compensation* [1969] 2 AC 147.

24 There is also the Malaysian case of *Teh Guan Teik v Inspector General of Police & anor* [1998] 3 MLJ 137 ("*Teh Guan Teik*") which Mr Padman referred me to. There, Peh Swee Chin FCJ, after reviewing the authorities and referring to O 15 r 16 of the Malaysian Rules of the High Court, concluded at p 148 that:

> The entrenched principle that declaration and *certiorari* are not mutually exclusive and are concurrent remedies was asserted several times in the United Kingdom and followed by our courts.

The learned judge also said at p 150:

> I would like to make a general observation before I end this judgment of mine, *ie* that a claim for a declaration is a very efficient remedy for an aggrieved citizen against ultra vires actions of all public authorities or governmental bodies. It has no coercive force by itself, inter alia, so that no such governmental body need feel the threat of such force. Thus, if a person's rights are affected by an order from such a public authority, he can sue for a declaration of the impropriety of the said order and if he succeeds, he can ignore the said order with impunity; see *Dyson v Attorney General* [1911] 1 KB 410; or if a government servant categorized under art 132 of the Federal Constitution is dismissed from his post, he can claim a declaration that he still holds it. See *Surinder Singh Kanda v Government of Federation of Malaya* [1962] MLJ 169.

25 I make no comment on the English judicial policy, described by Professor Wade, of encouraging litigants to circumvent the limitations of *certiorari*. But it appears to me that the expansive approach taken towards declaratory relief is justified by the wording of O 15 r 16 of our Rules of Court, which is similar to O 25 r 5 of the English Rules of the Supreme Court 1883 and O 15 r 16 of the Malaysian Rules of the High Court in *Teh Guan Teik*. Our O 15 r 16 reads as follows:

Declaratory judgment (O. 15, r. 16)

> 16. No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right *whether or not any consequential relief is or could be claimed*. [emphasis added]

Therefore, on a plain reading of O 15 r 16, the fact that *certiorari* is or could be claimed is not a ground for refusing declaratory relief. The wide powers of the court to give declaratory relief also mean that there is likely to be a large degree of overlap between declaration and *certiorari*. The following exposition in HWR Wade & C F Forsyth, *Administrative Law*, 10th Ed (Oxford, 2009) at pp 480–481 on the utility of the declaration and the history of the remedy is also helpful:

> Declaratory judgments play a large part in private law and are a particularly valuable remedy for settling disputes before they reach the point where a right is infringed. The essence of a declaratory judgment is that is states the rights or legal positon of the parties as they stand, without changing them in any way; though it may be supplemented by other remedies in suitable cases ... In administrative law there are additional advantages, as in cases where it is difficult to choose the right remedy or where the ordinary remedy is for some reason unsatisfactory.
>
> The common law, with its insistence on compulsory remedies and its horror of maintenance and procedural abuse, long refused to countenance judgments that were merely declaratory; and so did the Court of Chancery. But they were needed inevitably in proceedings against the Crown, since in that case there was no means of enforcement, so that they were in regular use in connection with petitions of right and on the equity side of the Exchequer. Scots law had the action of declarator, which Lord Brougham attempted to import into England with only small success at first. Acts of 1850 and 1852 empowered the Court of Chancery to make declarations of right, but they were construed as narrowly as possible by a still mistrustful judiciary. Even the Judicature Acts 1873–75 did not implant any such power generally in the remodelled judicial system. It arrived finally only with the rules of court of 1883. It must therefore be considered a statutory rather than an equitable remedy. The surprising thing is that this form of relief, indispensable in any modern system of law, should be so recent an invention.
>
> ...
>
> [O 25 r 5 of the 1883 rules] is still the rule today, and the courts have grown accustomed to using it very freely. A declaratory judgment by itself merely states some existing legal situation. It requires no one to do anything and to disregard it will not be contempt of court. By enabling a party to discover what his legal position is, it opens the way to the use of other remedies for giving effect to it, if that should be necessary ... The declaration is a discretionary remedy. This important characteristic probably derives not from the fact that the power to grant it was first conferred on the Court of Chancery, but from the discretionary power conferred by the rule of court. There is thus ample jurisdiction to prevent its abuse...

26 Ms Chew cited *Punton and another v Ministry of Pensions and National Insurance (No 2)* [1964] 1 All ER 448 ("*Punton*"). In that case, the plaintiffs' claims for unemployment benefit were dismissed by the National Insurance Commissioner. They then sought a court declaration that each of them was entitled to unemployment benefit. Apparently, the plaintiffs could have challenged the decision of the Commissioner by *certiorari* proceedings but they had to do so within six months of his decision. Having failed to do so, they sought the declaration.

27 In the High Court, Philimore J decided he had jurisdiction to grant the declaration sought but he

declined to do so. The plaintiffs appealed against his decision and the Ministry of Pensions and National Insurance cross-appealed against his decision that there was jurisdiction to grant the declaration.

28 The Court of Appeal decided that there was no jurisdiction to grant the declaration. Sellers LJ said at pp 454-455:

> It is true that the Court of Queen's Bench has an inherent jurisdiction to control inferior tribunals in a supervisory capacity and to do so by *certiorari* (which would be the relevant procedure in this case) which enables the court to quash the decision if the inferior court can be shown to have exceeded its jurisdiction or to have erred in law. Neither *certiorari* nor mandamus usurp the function of a tribunal but require it, having quashed its decision, to hear the case and determine it correctly. There may be many cases where a summons for a declaration is at least an adequate substitute for *certiorari* proceedings and where it may have advantages over it with no defects. That would be so where an authoritative statement of the law by the High Court will serve to undermine a decision or order so that it need not be complied with and could not in the light of the pronouncement of the law be successfully enforced. This may arise, for instance, under the Town and Country Planning legislation or the Dock Workers (Regulation of Employment) Order, 1947, but in the present case the plaintiffs claim benefit under the Act in question and the position can be contrasted with that which arose in [*Pyx Granite*] where Lord Jenkins said ... at p 303:
>
> > "the company here cannot be said to occupy the position of the undertakers in *Barraclough v. Brown*. They are not seeking to enforce statutory rights by methods other than those prescribed by the Act creating them. They are merely seeking to ascertain the extent of their statutory liabilities."
>
> Without employing the methods set out in the National Insurance Act, 1946, that is without obtaining an award, the plaintiffs cannot enforce the statutory right to unemployment benefit they claim and the decision in *Barraclough v Brown* is more closely applicable than the many other authorities cited to us.
>
> Apart from *certiorari* there is no machinery for getting rid of the decision of the National Insurance Commissioner and, what is more important, no way of substituting an effective award on which the claims could be paid. It would be out of harmony with all authority to have two contrary decisions between the same parties on the same issues obtained by different procedures, as it were on parallel courses which never met or could meet, and where the effective decision would remain with the inferior tribunal and not that of the High Court. I conceive that to be the case here, and it seems to me to lead to a conclusion against the jurisdiction of the High Court in this particular matter. …

29 Ms Chew also cited *Eshah Binte Sa'at v Meriam Binte Sa'at & ors* [1975] 2 MLJ 97. In that case, the Collector of Land Revenue had, in a distribution suit in respect of an estate, ordered that the defendant be registered as the proprietor of certain lots of land. The plaintiff commenced an action in court to have the Register of Titles rectified and her name be registered as the owner of those lots. The plaintiff then sought to amend her writ by seeking a declaration that she was entitled to the lots although the precise terms of her amendment was not made clear to the court. Abdul Razak J said at p 97:

> There are a number of factors which in practice the court normally takes into consideration in exercising its discretion. It is usual not to grant a declaration where there are alternative

> remedies available and adequate and had not been exhausted unless difficult and doubtful questions of law are involved. It is the practice for the court not to interfere where the statute has prescribed a mode of procedure for the parties to seek redress. The court would not make a futile declaration. A declaration would have no effect on the Collector's award because it does not quash. Only *certiorari* quashes. A declaration can go no further than to state that the impugned order is invalid. Until it is so quashed the order or the award remains binding.

He then referred to the judgment of Sellers LJ in *Punton* and said at p 98:

> Thus said it leaves me only to stress that a declaration is only as good a substitute for *certiorari* where it seeks in the words of Lord Justice Sellers just mentioned "to undermine a decision or order so that it need not be complied with and could not in the light of the pronouncement of the law be successfully enforced". Clearly, those conditions would not work to dislodge and quash the Collector's order by a declaration because the order has already been made and complied with; namely, the land has already been registered in the name of the defendant. And it follows that in so far as enforcing the order is concerned the question hardly arises.

30 For the purposes of reaching a decision, it was sufficient for me to note that Mr Yip's complaint was that the Board acted *ultra vires* in investigating a complaint of molest in the course of a healing session which did not fall within the ambit of traditional Chinese medicine. If Mr Yip succeeded on this point, a declaration would suffice – an *ultra vires* decision is a nullity and after it is declared to be so there is nothing left to be quashed by *certiorari*. Also, since Ms Chew had informed me that the Board had, very properly, suspended further steps pending my decision and would abide by it, there was no need for *certiorari*.

31 I should mention that Ms Chew did not argue that the Board was in any way vexed or otherwise prejudiced because Mr Yip did not proceed by way of O 53. She did make a policy argument that allowing Mr Yip to proceed by way of an ordinary originating summons would encourage future litigants to circumvent O 53. Such an argument was also raised in *Drilex Systems Pte Ltd v Registrar of Companies & anor* [1989] 2 SLR(R) 511 but the court there did not make a ruling on the argument. I was not persuaded by such an argument. The court is well equipped to handle such abuses of process as and when they arise.

32 Moreover, in respect of prayer 2, the complaint was against Mr Toh's investigation on 6 May 2008. That act had been completed and had no continuing legal effect which could be quashed. In the circumstances, I was of the view that a declaration would be the only possible remedy for that investigation, should I find that it was illegal.

33 If I were to compel Mr Yip to proceed under O 53 for prayer 1, it would mean that he would have to proceed by way of two applications, instead of one, for prayers 1 and 2 respectively. I did not think it was right to order him to do so in the circumstances.

34 Accordingly, I decided that declaratory relief was appropriate for the complaints made by Mr Yip in his prayers 1 and 2 and that he was not required to proceed by way of O 53 to obtain *certiorari*.

The substantive merits

35 As regards the substantive merits of prayer 1, I accepted the general principle stated in *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR(R) 934 that it should be for the IC to decide in the first instance whether it has the jurisdiction to adjudicate on the matter brought before it.

36 As regards prayer 2, the Board accepted that it could not act on a complaint without a statutory declaration. Although the Board purported to act on the 2 May 2008 complaint when Mr Toh was sent to the Premises to investigate, the Board took the position that under s 30(1) of the Traditional Chinese Medicine Practitioners Act (Cap 333A, 2001 Rev Ed) ("the Act"), its authorized officer could conduct investigations without a complaint. Section 30(1) states:

> **30**. —(1) The Board may in writing authorise any officer —
>
> (a) to enter and inspect any premises which are used or proposed to be used, or in respect of which there is reasonable cause to believe that they are being used, for the carrying out of any prescribed practice of [TCM];
>
> (b) to inquire into and to report to the Board the conditions under which any prescribed practice of [TCM] is being or is proposed to be carried out by any person;
>
> (c) to observe the conduct by any person of any course in any prescribed practice of [TCM]; and
>
> (d) to enter and inspect any premises where any such course is or is proposed to be conducted.

37 I agreed that s 30(1) of the Act was not premised on a complaint being made. For that reason, I declined to make a declaration in terms of prayer 2.

38 However, I was of the view that the scope of the power of the Board's officer to investigate under s 30(1) of the Act is circumscribed by that provision and it did not empower Mr Toh to inspect medical records. I made this observation at the hearing and I also take this opportunity to remind the governing bodies of regulatory, professional and other organisations that they should ensure that they act in accordance with their power and duties under law. If they fail to do so, they should be prepared to acknowledge the fact.

39 Although Mr Yip was not successful on his substantive application, he had succeeded on the preliminary point which took some time. In the circumstances, I decided that each party was to bear his/its own costs of the application.