[2022] JMCA Civ 26

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2021CV00020

BETWEEN	**KINGSLEY CHIN**	**APPELLANT**
AND	**ANDREWS MEMORIAL HOSPITAL LIMITED**	**RESPONDENT**

Written submissions filed by NEA|LEX for the appellant

Written submissions filed by Myers Fletcher and Gordon

21 March and 29 July 2022

(Considered on paper pursuant to rule 1.7(2)(i) of the Court of Appeal Rules)

MCDONALD-BISHOP JA

[1] I have read, in draft, the comprehensive judgment of my learned brother, Brown JA (Ag). I agree with his reasoning and conclusion and have nothing useful to add.

SIMMONS JA

[2] I have read the draft judgment of my brother Brown JA (Ag) and agree with his reasoning and conclusion. There is nothing that I wish to add.

BROWN JA (AG)

[3] This is an appeal against the order of Y Brown J ('the learned judge'), made on 29 October 2020, refusing the appellant's application for leave to apply for judicial review. At the time of making the order, the learned judge also refused the appellant leave to appeal and awarded costs to the respondent, Andrews Memorial Hospital Limited ('AMH'),

to be taxed if not agreed. Leave having been refused in the court below, as is provided for by the Court of Appeal Rules ('CAR'), the appellant made an application for and was granted, leave to appeal the learned judge's order by this court on 1 March 2021.

Background

[4] The background facts are taken from the affidavits filed by the parties in the court below. AMH is a company limited by guarantee without share capital. AMH carries on the business of a private hospital. According to its articles of incorporation, AMH's objectives include attending to the needs of humanity, alleviating human sickness and suffering and attending to the needs of the sick and suffering members of society. The media through which AMH seeks to realise its objectives are the provision of a hospital, hospice, medical and nursing services, various "ethical drugs", medical doctors, nurses, technicians and other medical personnel. In addition to its articles of incorporation, AMH is governed by its bylaws. Consequently, it is the appellant's belief that AMH is a "functionary public authority", the core business and activity of which are matters of public interest and concern.

[5] The appellant is an orthopaedic spine surgeon. He submitted his credentials to the board of AMH to be granted clinical privileges to admit and treat patients at its hospital. By letter dated 22 October 2015, under the hand of its President or Chief Executive Officer ('CEO'), the board of AMH advised the appellant that he had been granted admitting privileges from 23 October 2015. The maintenance of the admitting privileges was predicated on the annualized fulfilment of two conditions: submission of his (a) current medical registration certificate; and (b) malpractice/indemnity insurance certificate. That letter also made completing each patient's discharge summary, at the time of discharge, a part of maintaining admitting privileges at AMH. There is a gap between this letter and when the appellant said he submitted his credentials and complied with the conditions.

[6] According to the appellant, it was in or around April 2017, that he submitted his credentials to AMH for clinical privileges, which were granted conditionally. Having

complied with the conditions, his clinical privileges were renewed in January 2018, in accordance with AMH's bylaws. Under the arrangement between the appellant and AMH, patients admitted and treated by the appellant made payments directly to the appellant. AMH, in turn, billed the appellant for the corresponding use of its facility.

[7] From the appellant's viewpoint, the arrangement was without problems until November 2018. By letter dated 29 November 2018, AMH informed the appellant that he was being placed on 90 days' suspension, retrospectively, commencing on 18 November 2018, pending investigations of matters "deemed extremely serious". During the period of the suspension, all the appellant's practicing rights at AMH were revoked. He was also specifically debarred from admitting patients or scheduling surgical procedures of any description. The letter, exhibited to the appellant's affidavit, was under the hand of AMH's then President or CEO and set out the breaches discussed during a meeting of AMH's Medical Executive Committee ('the Medexcom'), which met on 31 October 2018.

[8] Two breaches were identified. Firstly, on 25 August 2018, the appellant videotaped a surgical procedure being performed by another doctor in the OR suite while the patient was on the operating table. This video, overlaid with rap music containing expletives, was allegedly later posted on the appellant's social media page. The letter alleged this to be a repeat infraction. Further, the letter recounted advice given to the appellant that any filming for educational purposes must be done with the written consent of the patient, obtained in advance of the surgery. It was also alleged that AMH was questioned by the Medical Council of Jamaica about the appellant's recording and posting of the later video. Secondly, the appellant was informed of his probable liability for allowing and/or causing physicians who had not been given practicing privileges at AMH to assist him in procedures.

[9] The appellant asserted that AMH's power to suspend is contained in article 4.6 of its bylaws, the "relevant" parts of which were reproduced in his affidavit. The appellant referred to article 1.32 of the bylaws, which, he contended, provides for video recording of surgical procedures with the written consent of the patient. He charged that he had

obtained the required written consent, which he exhibited in his affidavit. AMH's second allegation was met with a denial. The appellant countered that the reasons given by AMH for the suspension of his privileges are not matters which could result in imminent danger to the health or safety of any individual or the orderly operation of AMH.

[10] According to the appellant, article 4.2.14.14 of AMH's bylaws lays down the circumstances in which his privileges may be revoked. This article lists impairments by alcohol, drugs or illness, while managing patients at AMH, as grounds which may result in revocation of practicing privileges. However, no such impairment was ever alleged by AMH.

[11] The appellant charged that AMH suspended him without affording him a hearing or an opportunity to make representations on his own behalf, in breach of natural justice. Furthermore, although his period of suspension expired on 17 February 2020, AMH has failed to communicate the findings of the investigations to him and/or restore or reinstate his clinical privileges in breach of its own bylaws. The decision not to restore his clinical privileges was also "malicious, in bad faith and for an improper purpose".

[12] The appellant caused his attorneys-at-law to write to AMH (letter dated 18 May 2020) to assert the unlawfulness of his suspension and demand the reinstatement of his clinical privileges. The letter, exhibited in his affidavit, demanded immediate reinstatement and, in any event, within seven days, failing which, legal proceedings would be instituted. Through its attorneys-at-law (letter dated 29 June 2020), AMH expressed its unwillingness to restore the appellant's clinical privileges. Two bases were given for that decision. Firstly, the appellant was suspended under article 4.6, which gives the CEO the power or authority to suspend without a hearing. Secondly, the appellant was invited to a meeting with the CEO to discuss the suspension, but he failed to attend.

Application for judicial review

[13] The appellant filed a notice of application for court orders on 26 August 2020. The orders sought are listed below:

"1. Leave to apply for judicial review of the decision of the Respondent refusing to restore/reinstate the Applicant's clinical privileges to admit and treat patients at the Respondent's facility, by way of:

(i) A ***Declaration*** that the Respondent's initial suspension of, and subsequent refusal to restore/reinstate, the Applicant's clinical privileges to admit and treat patients at the Respondent's facility as contained in letter dated June 29, 2020 is wrongful and a breach of contract between the Applicant and the Respondent.

(ii) An order of ***Certiorari*** to remove to this Honourable Court and quash the decision of the Respondent refusing to restore/reinstate the Applicant's clinical privileges to admit and treat patients at the Respondent's facility.

(iii) An order of ***Mandamus*** directing the Respondent to restore/reinstate the Applicant's clinical privileges to admit and treat patients at the Respondent's facility.

(iv) Damages for loss of income/revenue.

(v) Costs to be costs in the claim." (Emphasis as in the original)

[14] Some 18 grounds were filed in support of the application. The grounds as filed are:

"1. Rule 56.3(1) of the Civil Procedure Rules, 2002 (as amended) provides that a person wishing to apply for judicial review must first obtain leave.

2.The Applicant is an Orthopaedic Spine Surgeon.

3. The Respondent is a company limited by guarantee without share capital which carries on the business of a private hospital. The objects of the Respondent, according to its Articles of Incorporation, are, among other things, attending to the medical needs of humanity, alleviating human sickness and suffering, attending to the needs of the sick and suffering members of society.

4. The Respondent furthers and carries out its objects by providing a hospital, hospice, medical and nursing services, all kinds of ethical drugs, medical doctors, nurses, technicians and other medical persons to attend to the needs of the sick.

5. The Respondent is therefore a functionary public authority whose core business and activities are matters of public interest and concern.

6. In or around April 2017, the Applicant submitted his credentials to the board of the Respondent and applied for and was granted clinical privileges to admit and treat patients at the Respondent's facility.

7. At the material time, the Respondent was the only health facility in Jamaica where the Applicant had clinical privileges.

8.The Applicant continued to enjoy the privileges until November 17, 2018.

9.By letter dated November 29, 2018 the Respondent notified the Applicant that he was being placed on suspension for 90 days pending the conclusion of investigations into matters which the Respondent deemed extremely serious. The suspension period commenced on November 17, 2018 and expired on February 17, 2019.

10. The suspension arose from allegations of breach of hospital policy by the Applicant. The allegations concern filming of surgical procedure which was done by the Applicant for educational purposes on or about August 25, 2018. The Respondent also alleged that the Applicant also allowed or caused physicians who do not have practising privileges at the Respondent to assist with surgical procedure.

11. Despite the fact that the suspension period has expired, the Respondent has not to date restored/reinstated the Applicant's clinical privileges.

12. By letter dated May 15 [sic], 2020, the Applicant wrote to the Respondent informing it that the suspension was wrongful, in that, it breached the principles of due process

> and natural justice, and demanded the reinstatement of the Applicant's clinical privileges.
>
> 13. By letter dated June 29, 2020 the Respondent informed the Applicant, through his Attorneys-at-Law, that it will not restore the Applicant's privileges.
>
> 14. The Applicant has sufficient interest in the matter as he is directly affected by the Respondent's decision about which this application is made.
>
> 15.The decision of the Respondent refusing to restore/reinstate the Applicant's clinical privileges was made without a hearing in breach of the principles of natural justice and procedural fairness. The decision was also made in breach of the Respondent's bylaws, maliciously, in bad faith and for an improper purpose. The decision is also unreasonable and irrational.
>
> 16. The time limit for making this application has not been exceeded. This application is made promptly.
>
> 17. There is no alternative form of redress available to the Applicant.
>
> 18. The Applicant has suffered and continues to suffer loss and damage, including a diminution of income and injury to professional reputation, and has incurred and continues to incur expenses."

[15] Notice of the appellant's application, together with the appellant's affidavit, was served on the AMH. AMH responded by filing a notice of preliminary objection on 22 October 2020, supported by an affidavit. By that notice, AMH telegraphed its intention to raise a preliminary objection that its decision is not amenable to judicial review at the hearing of the substantive application. The essence of the supporting affidavit is that the decision to suspend and subsequently refuse to reinstate the appellant's privileges is a matter governed by private contract, making it devoid of any element of public law.

The decision in the court below

[16] The extracted formal order is set out in full below:

> "1. Application for leave to apply for Judicial Review is denied on the basis that Andrews Memorial Hospital Limited is a private entity lacking statutory authority and its grant to the Applicant to use its facilities for medical purposes does not fall within the purview of public law, but is instead a matter best suited for the sphere of private law. Furthermore, the Applicant's affidavit does not disclose whether the suspension of his use of the said hospital facility has affected his ability to carry out his duties to his patients which could be classified as an element of public concern. What the Applicant has presented ought to be dealt with under the rubric of the law of [c]ontract.
>
> 2. Application for leave to appeal is refused.
>
> 3. Costs to the Respondent to be agreed, or taxed.
>
> 4. …"

The appeal

[17] The appellant filed three grounds of appeal, challenging the exercise of the learned judge's discretion not to grant leave to apply for judicial review. The grounds are:

> "a. The learned judge erred as a matter of fact and/or law and/or wrongly exercised her discretion when she refused to grant the Applicant leave to apply for judicial review in circumstances where the Applicant has arguable grounds for judicial review with a realistic prospect of success.
>
> b. The learned judge misdirected herself on the law and erred in insufficiently regarding the totality of the Applicant's evidence, which caused her to derive an erroneous conclusion that the grant of the privileges to the Applicant does not fall within the purview of public [sic] but a matter best suited for the sphere of private law to be dealt with under the rubric of contract law.
>
> c. The learned judge erred in awarding costs against the Applicant without making a finding that the Applicant's conduct in making or pursuing the application was unreasonable."

[18] The appellant seeks the following orders from this court:

> "a. The appeal be allowed.

b. The orders made on October 29, 2020 by the Honourable Miss Justice Yvonne Brown be set aside.

c. The Appellant be granted leave to apply for judicial review of the decision of the Respondent refusing to restore/reinstate the Applicant's [sic] clinical privileges to admit and treat patients at the Respondent's facility.

d. The Appellant is to file a Fixed Date Claim Form and supporting affidavit at the registry of the Supreme Court within 14 days of the date of this order.

e. The costs of the appeal and in the court below be awarded to the Appellant to be taxed if not agreed."

The issues for determination

[19] The principal issues raised for resolution are, one, whether the learned judge correctly exercised her discretion by refusing the appellant leave to apply for judicial review (grounds (a) and (b)); and two, whether the learned judge was correct in ordering costs against the appellant (ground (c)).

Issue one: whether the learned judge correctly exercised her discretion by refusing the appellant leave to apply for judicial review.

[20] It was submitted on behalf of the appellant that AMH is a body that is subject to judicial review by virtue of: (a) the nature of its activities; (b) its registration under the Nursing Homes Registration Act ('NHRA'); and (c) its activities, which have resulted in it becoming enmeshed in those of public hospitals, which themselves would be subject to judicial review under the National Health Services Act ('the Act'). The appellant relied on the following cases for support: **Karen Thames v National Irrigation Commission Limited** [2015] JMCA Civ 43 ('**Thames v NICL**') and **R (on the application of A) v Partnership in Care Limited** [2002] EWHC 529 (Admin) ('**R v Partnerships in Care**').

[21] In the written submissions made on behalf of AMH, it was not contested that although it is a private company, it may be considered as exercising an element of public functions. In like fashion, AMH cited **Thames v NICL**. The point of divergence between AMH and the appellant is the reviewability of its decision in relation to the appellant.

[22] Learned counsel for the appellant submitted that AMH's decision suspending and subsequently revoking the appellant's clinical privileges is administrative and, therefore, subject to judicial review. Cases from Canada, as well as the United States of America ('USA'), and also the text, Law and Medicine in Canada, were cited in support. The following cases were cited: **Kenneth Shephard v The Colchester Regional Hospital Commission** (1994) CanLII 4355 (NS SC) ('**Shephard v CRH Comsn**'); **Sacred Heart Hospital and the Board of Directors v Aucoin** (1991) CanLII 2616 (NS CA) ('**Sacred Heart Hospital v Aucoin**'); **Mahmoodian v United Hospital Centre Inc** 404 S.E.2d 750 decided 25 April 1991 ('**Mahmoodian v UHC**'); **Balkissoon v Capital Hill Hospital** 558 A 2d 304 (DC 1989) decided 27 April 1989; and **Greisman v Newcomb Hospital** 40 NJ 389 (NJ 1963) decided on 1 July 1963. These authorities will be discussed below.

[23] Learned counsel for AMH argued that the decision to revoke the appellant's clinical privileges is one of a private contractual nature devoid of any public law element. It was submitted that **Thames v NICL** decided that dismissals in the context of relationships of pure master and servant or an office held at pleasure are not subject to judicial review. Susceptibility for review will only arise where the dismissed employee was a public servant and the power to dismiss arose either solely from statute or was statutorily fortified.

[24] It is AMH's position that the criteria for review in these relationships, as laid down in **Thames v NICL**, do not apply to this case. Its contention is that, the appellant is not a public servant and AMH's power to suspend or revoke his clinical privileges is neither derived from nor fortified by statute; instead, AMH's power to act as it did springs from its articles of incorporation, bylaws and the private contractual relationship with the appellant.

[25] Learned counsel for AMH next submitted that since the appellant's contract letter was "not regulated or established by statute", the relationship between them is that of pure master and servant, making public law remedies inapplicable. In the next breath, counsel for AMH submitted that although the appellant was not AMH's employee and this

case is not a dismissal in the technical sense, the reasoning in **Thames v NICL** is still applicable.

[26] Accordingly, learned counsel for AMH argued that the legislation and cases referred to by the appellant do not assist his case. The NHRA does not touch and concern decisions of private hospitals to grant or revoke clinical privileges of individual doctors, and so it is irrelevant. The court should, therefore, have regard to the guidance in **Thames v NICL** which treated in detail with the applicability of judicial review to decisions of private bodies such as AMH.

Discussion

Amenability of AMH as a body to judicial review

[27] Admittedly, AMH is not a "public health facility" nor does it provide "public health service" within the meaning of the Act. Section 2 of the Act limits the meaning of a "public facility" to those institutions appearing in a list under the First Schedule. Private hospitals do not appear on this list, in contradistinction to "public hospitals", which appear on the list. Likewise, section 2 provides a restrictive meaning of "public health service". The definition reads:

> "… 'public health service' means any service which is provided, whether directly or indirectly, by public health personnel in the fulfilment of their official duties, and includes services offered by public health facilities for research, monitoring, regulatory or promotional activities or for the reception or treatment of persons suffering from illness ..."

In essence, and for present purposes, public health service is service which is provided by public health personnel in the discharge of their official duties. The appellant does not seek to contend that AMH is a public health facility or provides public health service, characteristics which would arguably make it susceptible to the court's supervision. Instead, his position is that, although AMH provides private health service and, is a private corporation, it, nevertheless, should not escape the court's supervisory scrutiny.

[28] As was said above, counsel for AMH does not dispute that, as a body, AMH is amenable to judicial review. In **Thames v NICL**, this court accepted the lower court's finding that the National Irrigation Commission Limited, a private corporation with a public reach, was susceptible to judicial review. Noting that the issue was no longer in dispute on appeal, Phillips JA (at para [36]) affirmed the approach to be taken in seeking to determine whether the conduct of a body is reviewable. That is, this quest requires an examination of the source and nature of the power exercised, as well as the nature of its functions (see **Council of Civil Service Unions and Others v Minister for the Civil Service** [1984] 3 All ER 935, [1985] AC 374 ('**CCSU**'); **R v Panel on Take-overs and Mergers, ex parte Datafin plc** [1987] 1 All ER 564; and **R v Dr A Binger, NJ Vaughn, and Scientific Research Council, ex parte Chris Bobo Squire** (1984) 21 JLR 118). Phillips JA went on to say, at para [36], that:

> "… If the body is supported either directly or indirectly by a periphery of statutory powers and penalties or the nature of [the] functions it performs and generates public interest, it will be amenable to judicial review. By contrast, if the function it performs generates no public interest or if it is not regulated by statute it will not be subject to judicial review."

[29] In this case, AMH is a company limited by guarantee without a share capital. AMH is required to be registered under the NHRA, upon pain of a penalty before a Parish Court (see section 3(1) of the NHRA). The application for registration is made to the Chief Medical Officer ('CMO') of Jamaica, who issues a certificate of registration to the successful applicant, valid for two years, unless sooner cancelled (see sections 3(2), 3(3) and 3(6) of the NHRA). The fact of registration under the NHRA and the display of the certificate of registration in a conspicuous place in the home and publication on the approved list in the Gazette (see sections 3(4) and 3(5) of the NHRA) is notice to the world of the registration.

[30] The requirements of application for registration and biennial renewal of registration subject AMH to the maintenance of certain minimum statutory standards of accommodation and provision of medical, nursing and general staff (see the proviso to

section 3(3) of the NHRA). For example, the applicant for registration, or any person employed by him, must not be unfit by reason of age or otherwise to carry on or be employed in a nursing home of the description sought to be registered; or the home is not under the management of either a registered medical practitioner or registered nurse who is resident in the home. The CMO has the power to refuse an application for registration if he or she is not satisfied that these standards have been met. Not less than 30 days before the date of expiration of the certificate of registration, an application for renewal of registration must be made to the CMO. Upon the receipt of the application for renewal, the CMO must cause the nursing home to be inspected. The issuance of an inspection certificate is a prerequisite to the consideration of the application for renewal (see sections 3A(1) and 3A(2) of the NHRA). After issuing a certificate of registration, the CMO may, on any ground disentitling registration of a nursing home or conviction of an offence either under the NHRA or in relation to the home, cancel the registration of any person in respect of any nursing home.

[31] The CMO's powers of refusal and cancellation are procedurally laid out under the NHRA. Firstly, the exercise of both the power of refusal and cancellation must abide the giving of 14 days' notice to the affected person of the intention to refuse or cancel the registration. The notice must state the grounds upon which either the refusal or cancellation is proposed to be made. Furthermore, the notice must intimate that the CMO will give audience to either the person to be affected or his representative to show cause why the order should not be made. However, that indication to the CMO must be made within 14 days of the receipt of the CMO's notice (see section 5(1) of the NHRA).

[32] Not only is the refusal or cancellation procedure undergirded by the principles of natural justice, the refusal or cancellation order is subject to an appeal process. Above the CMO is a three-member Nursing Homes Appeals Tribunal, appointed by the Minister (see section 5(5) of the NHRA). The aggrieved person has 14 days from the date a copy of the relevant order was sent to him within which to appeal (see section 5(4) of the NHRA). The order refusing or cancelling registration does not come into effect until 14

days from the date on which it was made or (where a notice of appeal has been given) the appeal has either been decided or withdrawn (see subsection 5(3) of the NHRA).

[33] The general governmental oversight of entities registered under the NHRA, through the CMO, makes two things plain. First, a private hospital such as AMH, is regulated by statute insofar as its core business is concerned. Second, there is a public interest in the quality of health care that AMH provides to the public, despite its status as a private hospital. It seems fair to say, by virtue of the functions AMH performs, it generates public interest. On these premises, the conclusion that certain decisions of AMH are susceptible to judicial review is inevitable.

[34] The appellant also relied on **R v Partnerships in Care** to support the proposition that AMH is a body that is amenable to judicial review. This was an application for judicial review of the defendant's decision to change the focus of a ward at its private psychiatric hospital. The ward was previously dedicated solely to the treatment of female patients with personality disorders. The claimant had been detained in that ward from June 2001, pursuant to section 3(1) of the Mental Health Act 1983. The cost of her care was borne by her local health authority, which had a contractual arrangement with the defendant for the provision of mental health care, in the exercise of delegated authority from the Secretary of State. In August of that year, the defendant decided that the ward would serve female patients with a primary diagnosis of mental illness, while allowing the current patients an 18 months' period to complete their treatment.

[35] The approach of the court was to decide whether the defendant's decision to refocus the ward was (a) made in "in relation to the exercise of a public function" within the meaning of rule 54.1 of the CPR and, accordingly, susceptible to judicial review; and (b) whether the managers of the defendant were a public authority as contemplated by section 6 of the Human Rights Act 1998.

[36] However, the reasoning upon which the decision in **R v Partnerships in Care** was based gives some guidance, even if it is only persuasive. Keith J grounded his

decision on reviewability on what he described as the free-standing obligation of the defendant. That is, what they were required to do under statute. At para. 24, he said:

> "… But whether facilities can and should be provided, and adequate staff made available, to enable the treatment which the psychiatrists say should take place is another matter entirely. That is the subject of specific statutory underpinning directed at the hospital: the statutory duty imposed by regulation 12(1) of the 1984 Regulations on the hospital to provide adequate staff and adequate treatment facilities was cast directly upon the hospital as the registered person under the Mental Health Act 1984 ..."

[37] The circumstances of **R v Partnerships in Care** are markedly different from this case. In this case, the state was not fulfilling its duty to provide medical care through a contractual arrangement with a private entity, namely, AMH. In short, in this case, we do not have privatisation of public services offered in partnership with a private entity. The provision of medical care by AMH cannot, therefore, be appropriately described as being "enmeshed in the activities of a public body", as it could properly have been said of the defendants in **Poplar Housing and Regeneration Community Association Ltd v Donoghue** [2002] QB 48, from which the phrase was extracted. That phrase was apt in circumstances where there was an assimilation of the powers of the local authority by the private entity.

[38] To transpose the reasoning to this case, AMH's free-standing statutory obligations to provide accommodations of a certain standard and resident medical or nursing personnel require it to conform to certain public standards. That, together with the scrutiny provided by the CMO, is ample evidence of a private entity providing a public service, which, by that fact, is governed by a public standard. This reinforces my earlier finding that AMH, as a body, is amenable to judicial review.

Is the decision to revoke the appellant's privileges reviewable?

[39] I now turn to the principal area of dispute, whether the decision of AMH to suspend then revoke the clinical privileges of the appellant, is subject to judicial review. I will first

consider the position in the Canadian jurisdiction. An examination of the position in the USA will follow. From there, I will assess whether the learning from either or both jurisdictions may be applicable in this jurisdiction.

(a) The Canadian position

[40] In the extract from Gilbert Sharpe's The Law & Medicine in Canada, 2nd edition, at pages 256-257, the Canadian courts appear to have adopted a bifurcated approach to the question of reviewability of decisions relating to a doctor's clinical privileges. On the one hand, an initial decision, whether to grant or refuse an application for privileges, is treated as a purely administrative matter and, therefore, devoid of any public law element. On the other hand, once privileges have been granted, the suspension or revocation of those privileges must be procedurally consistent with the hospital's bylaws. Once the bylaws require a hearing, an 'administrative' decision is transformed into a 'judicial' one, with the concomitant duty of fairness, expressed in the adherence to rules of natural justice.

[41] The principles articulated in Law and Medicine in Canada formed the basis of the decision of the Supreme Court of Nova Scotia Appeal Division in **Sacred Heart Hospital v Aucoin**. Jones JA quoted the following passage, said to be taken from page 269 of the text:

> "Membership on a hospital medical staff is a privilege granted by the hospital. An initial application for privileges may be treated as an administrative decision by the hospital board in which no reasons need be given or an appeal allowed unless the legislation under which the hospital operates specifically stipulates that a hearing is required. Decisions of a hospital board relating to re-appointment, variation of privileges or termination of privileges or appointment are judicial or quasi-judicial ones requiring a hearing to ensure the principles of natural justice are not violated. The attitude of appeal boards and the courts appears to be that as long as a hospital follows the procedure established in the legislation under which it operates, it should be allowed to select the staff required to

> provide a program of care tailored to the needs of the community it serves."

It was the opinion of the court that Sacred Heart Hospital was a statutory body performing a public service. Accordingly, whether the board of Sacred Heart Hospital exceeded its jurisdiction in suspending the respondent's privileges was reviewable. The court went on to uphold the decision of the board as it acted within its powers under the bylaws and according to the principles of natural justice.

[42] The first instance decision in **Shephard v CRH Comsn** followed the law as declared in **Sacred Heart Hospital v Aucoin**. Scanlan J repeated a substantial portion of the passage quoted at para. [40] above and reiterated the Canadian courts' insistence that a suspension of privileges must find accord with the hospital's bylaws. Scanlan J quoted section 8 of the Colchester Regional Hospital Commission Act, which demonstrates the statutory underpinning of the relevant bylaws. The salient parts of section 8 are reproduced below:

> "The Commission shall have full power and control of the operation and management of the Hospital and … may make by-laws, rules and regulations deemed necessary for the control, operation and management of the Hospital and medical staff …"

The applicable bylaws in **Shephard v CRH Comsn** are, therefore, not merely a matter of contract between the doctor and the hospital, but a statutory instrument, having the force of law. A perusal of Scanlan J's judgment does not reveal that the issue joined was the competence of the court to review the hospital's decision to suspend Dr Shephard. The issue was the propriety of the suspensions and the award of damages. The reviewability of the decision, it appears, was never in issue. Scanlan J declared that the case concerned the review of the legal nature of hospital privileges which had to be conducted by reference to the hospital bylaws and administrative law.

(b) The position in the USA

[43] As in the Canadian cases referred to above, the bylaws of a hospital, and the application of those bylaws to a doctor, were at the heart of the issue on appeal in **Greisman v Newcomb Hospital**. Like this case, the Newcomb Hospital was a privately incorporated entity with purposes similar to the objects of AMH (care for the sick and injured persons residing in, and within the vicinity, of the city of Vineland, New Jersey and "other sick or injured persons as the facilities of the hospital will permit"). The hospital operated as a non-profit corporation (for which it received tax exemptions) but received some of its funding from two state entities and was eligible for some federal funds.

[44] The hospital refused to permit the plaintiff, the holder of a doctoral degree in osteopathy, to file an application for admission to its courtesy staff. Membership on the courtesy staff bears similarity to clinical privileges in allowing the medical practitioner both to admit in, and treat his patients at, the hospital facilities. The hospital's refusal to allow the filing of the application was grounded on a provision in its bylaws, which required an applicant for membership on its courtesy staff to be a graduate of a medical school approved by the American Medical Association ('AMA') and be a member of the County Medical Society ('CMS'). The plaintiff's school (Philadelphia College of Osteopathy) did not have the imprimatur of the AMA. Neither was he a member of the CMS. However, he had an unrestricted licence to practise medicine and surgery within the State of New Jersey, issued by the State Board of Medical Examiners.

[45] The plaintiff was successful before the lower court which concluded that the provision in the bylaws that barred his application was contrary to public policy. The lower court directed the hospital to consider the application for membership "in accordance with its remaining valid bylaws".

[46] On appeal, the hospital contended that being privately run, it was within its discretion to exclude physicians from its medical staff, and that no legal ground existed for judicial interference with its refusal to consider the plaintiff's application for membership. While the New Jersey appellate court acknowledged judicial expressions

declaring hospitals such as Newcomb to be private in nature and their staff admission policies to be entirely discretionary, the court rejected the implication that Newcomb was not subject to review. In doing so, the court adverted to Newcomb's "vital public use of serving the sick and suffering" and its source of partial public funding (see page 396 of the judgement). In the opinion of Jacobs J, at page 396:

> "… activities much less public than the hospital activities of Newcomb, have commonly been subjected to judicial … supervision and control to the extent necessary to satisfy the felt needs of the times …"

[47] Therefore, the only issue on appeal in **Greisman v Newcomb Hospital** was the validity of the impugned provision in its bylaws. The court, in upholding the decision of the lower court, at page 403, said this:

> "… In the light of [Falcone v Middlesex Co Medical Soc. 34 N.J. 582 (1961)] and its aftermath and the discrediting of the notion that doctors of osteopathy are merely cultists and may not safely be permitted to associate with doctors of medicine, it is clear to us that it had no such right. In this day there should be no hesitancy in rejecting as arbitrary, the stand that a doctor of osteopathy, though fully licensed by the State authority and reputably engaged in the general practice of medicine … is nonetheless automatically, and without individual evaluation, to be considered unfit for staff membership at the only available hospital in the rather populous metropolitan area where he resides and practices. The public interest and considerations of fairness and justness point unerringly away from the hospital's position and we fully agree with the Law Division's judgment rejecting it."

Four principles may be distilled from **Greisman v Newcomb Hospital**. Firstly, an exclusionary hospital bylaw, which is repugnant to the public interest, fairness and justness, will be struck down. Secondly, hospital bylaws, which debar an applicant from consideration for staff privilege, without regard to his individual fitness, are arbitrary. Thirdly, the hospital as a monopoly provider of medical services in the geographical area is under a fiduciary duty not to exercise its employment power in an arbitrary manner. Fourthly, since a hospital, although a private organization, is an entity in which the public

is vitally concerned and which engages in activities affecting the health and welfare of the people, its admissions policy is not immune from judicial interference.

[48] Although the court in **Greisman v Newcomb Hospital** was concerned with the validity of the exclusionary provision in the hospital's bylaws, on its way to its decision on that point, Jacobs J made the following general observation, at page 402:

> "… while the managing officials may have discretionary powers in the selection of the medical staff, those powers are deeply embedded in public aspects, and are rightly reviewed, for policy reasons entirely comparable to those expressed in *Falcone,* as fiduciary powers to be exercised reasonably and for the public good." (Italics as in the original)

Implicit in those observations is the assertion that the exercise of the hospital's discretionary powers of engagement of medical staff is imbued with a public law element, making it reviewable. I shall, of necessity, return to this below.

[49] Leaving aside the validity of the bylaws in **Greisman v Newcomb Hospital**, for the moment, I turn my attention now to the decision in **Balkissoon v Capitol Hill Hospital** 558 A 2d 304 (DC 1989), which wrestled with the question of procedural propriety in the restriction of a doctor's staff privileges. It is instructive to reproduce the encapsulation of the hospital's bylaws, as set out in the judgment, at page 306:

> "… The procedures mandated by the bylaws are identical for revocation of privileges or a denial of an application for privileges. A standing committee of doctors, the Medical Executive Committee ['MEC'], makes an initial recommendation as to the action to be taken. If the action is adverse to the doctor's status at the hospital, the bylaws direct that, upon the practitioner's request, an ad hoc committee from the [MEC] be convened as a factfinding [sic] body before which the practitioner is entitled to present evidence. The bylaws direct that this ad hoc factfinding [sic] committee is to make a written report and recommendation to the [MEC] that it reject, deny, or affirm its initial recommendation. The [MEC] must consider the ad hoc committee's report before making a final recommendation to the Governing Body of the Hospital. If the [MEC] maintains its adverse recommendation, the practitioner

> has a right of appeal to the Governing Body. On appeal, the Governing Body is to review the record to ensure that the [MEC's] recommendation is justified and not arbitrary or capricious."

[50] The hospital, in 1980, placed restrictions on Dr Balkissoon's staff privileges while it initiated proceedings for complete revocation of those privileges. He was granted temporary privileges while the revocation procedure was in train. Before the completion of the revocation exercise, Dr Balkissoon's privileges came up for annual renewal. His application was considered by the Medical Staff Credentials Committee ('MSCC'), which recommended that his application be denied for failure to attain minimum standards. The MEC accepted the recommendation of the MSCC and advised Dr Balkissoon accordingly. The doctor's privileges were then apparently suspended.

[51] Dr Balkissoon requested a hearing by the ad hoc committee which, at the conclusion of a three-day hearing, recommended that his privileges be restricted. The advice of legal counsel was sought. That advice characterised the procedure adopted by the ad hoc committee as defective and in breach of the hospital's bylaws. Dr Balkissoon was so advised and, his consent requested for the ad hoc committee to be reconvened. Through his attorney-at-law, Dr Balkissoon responded, avoiding the request for his consent but demanding the immediate restoration of full medical privileges. The hospital treated the letter from Dr Balkissoon's counsel as a rejection of its proposal to reconvene the ad hoc committee, advising him accordingly, and of its decision to reconsider that committee's initial report.

[52] After failing, through court action, to prevent the hospital from proceeding as it advised it would, the MEC recommended that Dr Balkissoon's application for reappointment be denied. The matter proceeded through all the stages under the bylaws then re-entered the court at the instance of Dr Balkissoon. He sought an injunction and damages. The trial court granted the hospital's application for summary judgment; while the court accepted the procedural defect, it treated the doctor's refusal as having the effect of a waiver. The doctor appealed.

[53] On appeal, Gallagher J, at page 307, opined that the "… hospital must … afford [the] appellant at least all the process and protections encompassed in its bylaws". The appeal court, by a majority, rejected the hospital's argument that Dr Balkissoon had waived his right to object to the defective procedure. The court held that the hospital's obligation to adhere to its bylaws arose both from contract as well as the public interest in the operation of the hospital. At page 308, Gallagher J was of the opinion that:

> "Hospitals exist to provide health care to the public. In addition to serving the needs of their patients, hospitals also provide a place of employment for doctors and other professionals. The privilege to admit and treat patients at a hospital can be critical to a doctor's ability to practice his profession and to treat patients. Both doctors and their patients can suffer if otherwise qualified doctors are wrongly denied staff privileges.
>
> … Thus, while sharing the interest of hospitals that only qualified doctors be given staff privileges, the public also has an interest in assuring that staff decisions are not made arbitrarily. A hospital's failure to comply with material procedures delineated in its bylaws is inherently arbitrary … As with an administrative agency of the government, requiring a hospital to follow its bylaws reduces the risk of arbitrary decisions without unnecessary interference with those who have the duty and expertise to make the decisions. Thus, although the bylaws may create contractual rights, the Hospital's obligation to act in accordance with its bylaws is independent of any contractual right of [the] appellant."

[54] The decision of the Supreme Court of Appeals of West Virginia in **Mahmoodian v UHC** is also expressive of the courts' insistence, in that jurisdiction, on reviewability in cases involving a doctor's hospital privileges. The issue, in that case, was whether a decision of a private hospital adversely affecting a medical staff member's previously granted privileges at that hospital was subject to judicial review. The court gave an affirmative answer to the question. McHugh J, at page 64, said:

> "Utilizing breach of contract principles, most courts explicitly addressing the issue presented here have held, and we hereby hold, that the decision of a private hospital to revoke, suspend, restrict or refuse to renew the staff appointment or clinical

> privileges of a medical staff member is subject to limited judicial review to ensure that there was substantial compliance with the hospital's medical staff bylaws governing such a decision, as well as to ensure that the medical staff bylaws afford basic notice and fair hearing procedures, including an impartial tribunal …"

[55] In declaring that the private hospital's decision was subject to judicial review, the court rested its ruling on the common law. In doing so, the court rejected the argument of Dr Mahmoodian that the hospital was a state actor, and therefore required to adhere to state and federal due process requirements. At page 65, McHugh J opined:

> "… However, there are basic common-law procedural protections which must be accorded a medical staff member by a private hospital in a disciplinary proceeding which could seriously affect his or her ability to practice medicine. Such basic procedural protections include notice of the charges and a fair hearing before an impartial tribunal. If a private hospital's medical staff bylaws provide these basic procedural protections, and if the bylaws' procedures are followed substantially in the particular disciplinary proceeding, a court usually will not interfere with the medical peers' recommendation and the hospital's exercise of discretion on the merits."

In essence, the court is concerned with the procedural fairness of the disciplinary process, not its merits, as guaranteed by its bylaws.

[56] In arriving at his decision on reviewability, McHugh J referred to several decisions, including **Gianetti v Norwalk Hospital** 211 Conn. 51 (Conn. 1989) decided on 25 April 1989, a decision of the Connecticut Supreme Court. In that case, Charles D. Gianetti, a physician, brought an action which alleged, among other things, breach of contract. The action arose out of Norwalk Hospital's refusal to reappoint him to its medical staff. The hospital was a member of the Joint Commission on Accreditation of Hospitals. This body required its members to adopt medical staff bylaws that included provisions for "due process fair hearings prior to termination of a doctor's privileges" (see page 53 of the judgment). Under the bylaws, written acceptance of membership on the medical staff was a declaration to abide by the bylaws.

[57] The case was then reviewed by someone described as "an attorney state trial referee", who found that the hospital's bylaws constituted a contract between the parties, and held that the procedure by which Dr Gianetti was denied reappointment was a breach of the contract. Following the hospital's objection, two questions of law were reserved for the supreme court. As rephrased by the Supreme Court, the questions were:

> 1) Do the bylaws of the Norwalk Hospital constitute an enforceable contract between that hospital and Dr Gianetti as a member of its medical staff?
>
> 2) Are administrative decisions by the Norwalk Hospital, as to the rights of Dr Gianetti as a medical staff member under its bylaws, subject to judicial review?

[58] The court answered the first question in the negative and the second question in the affirmative. The court based its answer to the first question on the fact that, the publication of bylaws by the hospital's board was a result of a legal duty imposed by the Connecticut state department of health regulations to adopt medical staff bylaws (see page 59 of the judgment). The corollary of this, the court found, at page 60, was the hospital's duty to obey the medical staff bylaws. Since both the enacting and the obedience of the bylaws were state-imposed, the hospital's agreement in that respect could not be regarded as valid consideration to support an enforceable contract. In answering yes to the second question, the court found the bylaws to constitute an enforceable part of the contract (page 63). Consequently, at page 64, it opined:

> "… Because issues of contractual rights and duties are subject to judicial review, it follows that because the Norwalk Hospital medical staff bylaws are an integral part of the contractual relationship between the plaintiff and this hospital, actions under these bylaws are subject to judicial review."

The public-private dichotomy in the USA

[59] In arriving at its decision, the court in **Gianetti v Norwalk Hospital** noted that resolution of the question of judicial reviewability in some jurisdictions depended on whether the hospital was public or private, and referenced a 1966 article published in the Washington University Law Review (1966 Wash ULQ 485). In that article, the writers made it clear that private hospitals were not previously subject to judicial review. At page 485, they wrote:

> "The rule is well established that a private hospital has a right to exclude any physician from practicing therein. The action of hospital authorities in refusing to appoint a physician or surgeon to its medical staff, or declining to renew an appointment that has expired, or excluding any physician or surgeon from practicing in the hospital, is not subject to judicial review. The decision of the hospital authorities in such matters is final".

In support of this statement of principle, the authors cited **Shulman v Washington Hosp. Center** 222 F Supp 59, 63 (DDC 1963) (**'Shulman v WHC'**). Brian Lester, in his article Physician Privileges: Judicial treatment of the Discharged Physician published in the Notre Dame Law Review volume 76 1491, at page 1498-1499 (cited by the respondent), cites **Shulman v WHC** and reiterates the non-reviewability of private hospitals but makes the point that this former position has been eroded in many jurisdictions. At page 1500, the point is made that the courts introduced limited judicial review of private hospitals. This, they said, reflects the courts' acknowledgement of the pivotal role hospitals play in affecting the physician's employment prospects. This statement echoes the position of the court in **Greisman v Newcomb Hospital** (see paras. [43] - [48] above), where the court regarded the hospital's discretionary powers to deny hospital privileges as fiduciary powers to be exercised for the public good.

[60] On the other side of the divide, the physician was said to be seized of a right to avail himself of the facilities in a public hospital for the healing of his patients, making the decision to terminate his privileges reviewable. That right, the writers say, was

recognized despite the courts' refusal to (a) hold that a state was obliged to maintain a hospital for private medical practise, and (b) extend constitutional protection to that right. Accordingly, the right to practise assumed the character of a species of property. Being so categorised, the right cannot be taken away without due process (see page 487). At page 487-488, the writers said:

> "… Out of these two lines of cases has grown the idea that a licensed physician or surgeon has the right to use the facilities of a public hospital for the treatment of his patients so long as he abides by its rules and regulations."

The courts required the rules to be reasonable.

[61] Over time, the courts moved away from this public-private dichotomy, and some states resorted to the law of contract to resolve issues relating to the grant or refusal of medical staff privileges. According to the Wash ULQ article, at page 494, relying on **Berberian v Lancaster Osteopathic Hosp. Ass'n** 395 Pa 257, 149 A2d 456 (1959), the bylaws became the terms of the contract in the absence of, or in addition to, express contractual provisions. Quite often, according to the writers, the bylaws required notice of the charges, a hearing, together with the physician's right to defend himself before termination. If those provisions existed, the courts would insist on adherence. However, absent similar provisions, the courts adopted a policy of non-interference. At page 494, the writers opined:

> "… If such a by-law exists, the courts usually enforce it, preventing the removal of a physician without a hearing. In these cases, the courts still adhere to the general rule that they cannot interfere with the internal workings of a private corporation. However, relief is given on the theory that the hospital has breached the terms of a contract."

As we have already seen, in **Gianetti v Norwalk Hospital** (see paras. [53] – [55] above), the court applied these contract principles.

[62] The resort to contract law came to be overtaken by state intervention. State legislatures, partly as a response to an increase in medical malpractice claims, required

private hospitals to introduce medical staff bylaws. These bylaws came to be judicially recognized as enforceable promises, particularly in relation to termination. According to Brian Lester (see para. [58] above), in his article at page 1492:

> "… state legislatures enacted legislation requiring hospitals to enact medical staff bylaws to govern the hospitals' relationships with all practicing physicians, partly in response to the malpractice 'crisis'. Eventually most courts recognized bylaws as a set of enforceable promises, establishing procedural protections for physicians who were not re-appointed or were discharged, even to those physicians who enjoyed medical staff privileges as members of an open medical staff because they do not have an independent employment contract."

The Thames v NICL standard of reviewability of employment decisions

[63] The starting point to assess whether the cases relied on by the appellant are of assistance is first to recall what this court declared in **Thames v NICL**, on the question of reviewability of the decision in employment-type situations. The predicate proposition extracted is this: a decision of an entity that is subject to review is itself reviewable if there is a public element to the decision. The public element to the decision is discoverable by examining the nature of the decision or ascertaining whether it was the result of the exercise of a statutory power. In **Thames v NICL**, at para. [39], Phillips JA said:

> "… In determining whether a decision is amenable to judicial review, it has been held that one must examine whether there is a public law element to the particular decision, by looking at the nature of the decision and whether the decision was made under a statutory power ..."

Phillips JA attributed this test to Lord Diplock in the **CCSU** case.

[64] In the **CCSU** case, at page 949 (a passage quoted by Phillips JA at para. [39]), Lord Diplock declared the law as follows:

> "To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of

> persons) other than the decision maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn ...
>
> For a decision to be susceptible to judicial review the decision maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers …"

[65] In seeking to answer what was described as the "crucial question" raised in **Thames v NICL**, namely, whether judicial review is applicable to all decisions involving dismissal from employment, Phillips JA discussed Lord Reid's three categories of dismissal cases in **Ridge v Baldwin and Others** [1963] 2 All ER 66 ('**Ridge v Baldwin'**), together with some cases that applied the categories. At para. [40], the categories were identified as (i) dismissal of a servant by the master; (ii) dismissal from office held during pleasure; and (iii) dismissal from an office where there must be something against the officeholder to warrant his dismissal. In the first and second categories, there is neither a right of audience before dismissal nor a requirement to give reasons. These two categories are to be contrasted with the third, where both reasons and a hearing are prerequisites to a lawful dismissal.

[66] At para. [42] of the judgment, Phillips JA cited Lord Wilberforce's explanation for not extending the court's supervisory jurisdiction to categories one and two in **Malloch v Aberdeen Corporation** [1971] 2 All ER 1278, at 1294. Two reasons were advanced, both grounded in the relationship of master and servant. Firstly, since that relationship

arises from the common law sphere of contract law between parties, principles of administrative law, including those of natural justice, have no relevance. Secondly, since wrongful dismissal attracts only the remedy of damages and not reinstatement, that operates as a bar to the grant of administrative remedies, such as declaring the decision void.

[67] It is sufficient to note that Lord Reid's third category concerns the dismissal of a public servant or the power to dismiss when it arises from statute. In **Thames v NICL,** at para. [43], Phillips JA opined:

> "Lord Reid's third category of dismissal contemplates a situation where the person being dismissed is a public servant or the power to dismiss the person is derived solely from statute ..."

[68] In addition to the preceding three categories, Phillips JA, at para. [44], referred to a fourth category of dismissal, that is, where the common law master and servant relationship has been overlaid by statutory provisions giving administrative law protection. This category was recognized in **Malloch v Aberdeen Corporation**. Phillips JA cited **R v East Berkshire Health Authority, ex parte Walsh** [1984] 3 All ER 425, ('**ex parte Walsh**') as an authority in which this fourth category was cited with approval. This decision will receive a fulsome treatment below.

[69] After her review and discussion of the cases, Phillips JA, at para. [49], concluded that it was accepted in all the cases that:

> "… once the contract or terms of employment is not regulated or established by statute, the relationship between the parties is that of pure master and servant and public law remedies would not apply …"

[70] With that said, I return to **ex parte Walsh**. Mr Walsh was employed by the East Berkshire Area Health Authority ('the Authority') under a contract of employment as a senior nursing officer at the Wexham Park Hospital. His contract incorporated terms and conditions that were approved by the Secretary of State for Social Services, pursuant to subsidiary legislation. Following an incident at the Wexham Park Hospital, Mr Walsh was

suspended by the district nursing officer ('DNO'). The DNO later terminated his employment with the Authority following a disciplinary hearing. His appeal to the internal appeal committee was dismissed. The regional health authority refused to entertain a further appeal from Mr Walsh. During the course of these appeals, Mr Walsh did two things: (a) applied to an industrial tribunal alleging that his dismissal was unfair and sought compensation; and (b) made an application for permission to seek judicial review, claiming quashing and prohibition orders.

[71] The Authority raised a preliminary point regarding the appropriateness of judicial review proceedings to challenge his dismissal. The judge at first instance ruled against the Authority, holding that Mr Walsh's rights were of a sufficiently public nature to entitle him to certiorari (the quashing order). The prohibition order was not pursued. The Authority appealed. Therefore, the main contention on appeal was whether Mr Walsh's complaints gave rise to any right to judicial review.

[72] Sir John Donaldson MR reviewed **Ridge v Baldwin**, **Malloch v Aberdeen Corporation**, as well as **Vine v National Dock Labour Board** [1956] 3 All ER 939; [1957] AC 488 (a case challenging the decision to dismiss as ultra vires) and noted that in all three there was a special statutory provision bearing directly on the right of a public authority to dismiss the claimant. The Master of the Rolls, at page 430, then said:

> "As Lord Wilberforce said, it is the existence of these statutory provisions which injects the element of public law necessary in this context to attract the remedies of administrative law. Employment by a public authority does not per se inject any element of public law …"

As Sir Donaldson went on to elaborate, the fact that the employee is in a 'higher grade' or an 'officer' only increases the probability that there would be special statutory restrictions on his dismissal or other like substratum. It is this statutory substructure which injects the requisite public law element.

[73] If, instead of restraining a public authority in the manner it dismisses an employee, the legislature requires the public authority to contract with the employee on specified

terms, to give to the employee private law rights, and the authority so contracts, a breach of those terms does not result in public law remedies. The breach would be entirely contractual. The only public law concerns would be the authority's failure or refusal to include the stipulated terms in the worker's contract (see **ex Parte Walsh** at page 431).

[74] In Mr Walsh's case, the particular terms had been incorporated into his contract. His case was that the authority had breached the terms in delegating the power of dismissal and denying natural justice. Although the provisions were incorporated into his contract by statute and subsidiary legislation, his claim fell to be determined in private law. At page 442, Purchas LJ said this:

> "However, in my judgment the relationship between Mr Walsh and the health authority was one which fell within the category of 'pure master and servant' and although the power of the authority to negotiate terms with its employees were limited indirectly by statute and subordinate legislation. Any breach of those terms of which Mr Walsh complains related solely to the private contractual relationship between the health authority and him and did not involve any wrongful discharge by the health authority of the rights or duties imposed on it qua health authority. The rules of natural justice may well be imported into a private contractual relationship … but in such circumstances they would go solely to the question of rights and duties involved in the performance of the contract of employment itself. The manner in which the authority terminated, or purported to terminate, Mr Walsh's contract of employment related to its conduct as employer in a pure master and servant context and not to the performance of its duties, or the exercise of its powers as an authority providing a health service for the public at large. The importation of the rules of natural justice by direct reference or by implication into a contract of employment does not of itself import the necessary element of public interest which would convert the case from the first category envisaged by Lord Reid into one in which there was an element of public interest created as a result of status of the individual or the protection or support of his position as a public officer ..."

[75] In short, unless the claim of the physician arose from a breach of a public duty placed on the authority, which related to its statutory power to engage and dismiss him in the course of providing a national service to the public, the claim does not fall to be considered under public law. Nor would public law remedies, such as certiorari, be available. The House of Lords dismissed the petition by Mr Walsh for leave to appeal.

The bases for enforcing the private hospital bylaws in Canada and the USA

[76] From an examination of the cases from the Canadian jurisdiction, the appellant's submission that the courts in Canada insist on adherence to the hospital bylaws when suspending, or refusing to renew, clinical privileges, cannot be faulted. However, to resort to an idiomatic expression, the devil is in the details. That is to say, adherence to the bylaws is not insisted upon simply because they bear that epithet, without regard to their substance. The bylaws must either be quasi-judicial (requiring a hearing and appeal, etcetera), if made part of the contract between the parties or be underpinned by legislation, in the sense that the very promulgation of the bylaws was dictated by statute: **Shepard v CRH Comsn**. Alternatively, the decision of the hospital, based on the bylaws, is reviewable if it is a statutory body: **Sacred Heart Hospital v Aucoin**.

[77] Similarly, a consideration of the cases and materials from the jurisdiction of the USA reveals more than what is apparent on the surface. The following principles may be distilled from the cases and materials reviewed:

1) A private hospital must consider a physician's application for staff privileges in accordance with its bylaws: **Greisman v Newcomb Hospital**.

2) A private hospital's bylaws must not be contrary to public policy: **Greisman v Newcomb Hospital**.

3) A private hospital's bylaws must contain common law procedural protections such as notice of the charges and a fair hearing before an impartial tribunal: **Mahmoodian v UHC**.

4) A private hospital's bylaws are an enforceable part of the contract between the hospital and the physician to whom it extends visiting or clinical privileges: **Gianetti v Norwalk Hospital**.

5) A private hospital must adhere to its bylaws, arising from both contract and the public interest, in refusing to reappoint a physician to staff privileges: **Blakissoon v Capitol Hill Hospital**; **Mahmoodian v UHC**.

6) Limited judicial review of a private hospital's decision to revoke, suspend, restrict or refuse to renew staff appointments or clinical privileges is available, using breach of contract principles: **Mahmoodian v UHC**; **Gianetti v Norwalk Hospital**.

7) Notwithstanding the availability of limited judicial review, if a private hospital substantially follows its bylaws in disciplinary proceedings, the courts will not interfere with the exercise of its discretion in those proceedings: **Mahmoodian v UHC**.

A golden thread running through the principles adumbrated above is that private hospitals must act in conformity with their bylaws. However, the basic proposition upon which the courts in the USA have held these bylaws to be justiciable and, accordingly, to come under the courts' supervisory jurisdiction is that contractual obligations are subject to judicial review. In addition, some cases, for example, **Gianetti v Norwalk Hospital**,

and the journal articles referred to above, make it clear that the hospital bylaws were the product of state legislation.

[78] It is, therefore, clear that the source and status of the private hospital's bylaws, in one way or another, played a pivotal role in the decisions referred to from both Canada and the USA. I will therefore consider the bylaws of AMH against that background, with the objective of determining whether those cases offer any guidance in the manner the appellant contends. However, before doing so it will be useful to set out AMH's bylaws.

AMH's bylaws

[79] There are two overarching purposes of the AMH's bylaws. The first is to achieve excellence in the delivery of patient care and the second is governance of the activities of doctors with practicing privileges, and collaterally, provide structure to their practise at AMH (article 1.1). In particular, AMH wishes to ensure:

> i. "Physicians clinical activities strive for high professional standards, are efficient, effective and ethical
>
> ii. Practitioners have and maintain competencies for their clinical activities
>
> iii. Opportunities for providing care are fair and accessible to all qualified doctors
>
> iv. Clinical quality improvement is promoted through communication between doctors and other members of the health team as well as administration."

[80] Article 1.5 speaks to non-discrimination. The article provides that no aspect of a doctor's privileges is to be denied on any basis unrelated to the: (a) delivery of quality patient care in the hospital setting, (b) doctor's professional qualifications, (c) hospital's purposes, needs and capabilities or (d) needs of the community. There is an explicit prohibition on the denial of any aspect of privileges on the basis of sex, race, age, creed, colour or national origin, or whether the doctor is the holder of an MBBS or MD degree.

[81] Article 1.6 sets out the ethical behavioural expectations of AMH's doctors. Professionalism, ethics and integrity are expected of a doctor with practicing privileges, which he is expected to maintain. The doctor also has professional responsibility for the welfare, well-being and betterment of his patient. Among the guidelines for the doctor's relationship with AMH is the requirement to "[a]bide by all rules, regulations, policies, and by-laws of the AMH".

[82] In so far as decisions on clinical privileges are concerned, the introduction to the bylaws makes this the subject of delegation from the Board of Directors to the medical staff. The relevant paragraph reads, in part:

> "The Andrews Memorial Hospital Board of Directors, in accordance with legal and accreditation requirements, has delegated to the Medical Staff, through its Chair Departments, and committees, the duties and responsibilities set forth in these Bylaws … for implementing, supervising, and monitoring the quality of care provided by Physicians … and for making recommendations concerning applications for appointment, reappointment, Clinical privileges, and scope of practice."

The Medical Staff, in turn, delegates its responsibility for the oversight and participation in AMH's "integrated PSES" to its committees (see article 3.1). The chairpersons of these committees are appointed by the Board, on the recommendation of the President, unless the bylaws provide otherwise. Each member of the committee is appointed annually by the President, and is eligible for reappointment. The President and CEO, or their designees, are ex officio, non-voting members of the Medical Staff committees (see article 3.1.1).

[83] The Medexcom is the primary governance committee for the hospital medical staff. The membership of the Medexcom includes the clinical department chairpersons, CEO or his designee, (AMH's) Chief Medical Officer, and Chief of Staff. The Medexcom is chaired by the President. Members of the Board may attend meetings and participate in discussions but cannot cast a vote. Non-members, such as administrators and legal

counsel, may be permitted by the President to attend the Medexcom's meetings, but they have no voting rights (see article 3, generally).

[84] To the Medexcom is "delegated the primary authority over activities related to the functions of the Medical Staff and for Performance Improvement of the professional services provided by individuals with clinical privileges" (see article 3.2.3.1). Among the duties of the Medexcom is to make recommendations to the Board on, among other things, the mechanisms used to review credentials and delineate individual clinical privileges; applicants and members seeking medical staff appointment and reappointment; and delineation of clinical privileges for each eligible applicant and member (see articles 3.2.3.6, 3.2.3.7, 3.2.3.8).

[85] Article 4 of AMH's bylaws describes some of the processes for appointment, and/or the granting of clinical privileges for physicians, among other health professionals. The bylaws refer to detailed processes, contained in a separate document (Credentialing Policy) which was not made a part of the record of appeal.

Article 4.2.2 sets out the criteria for practicing privileges:

> "Practicing privileges shall be extended only to professionally competent practitioners who continuously meet the qualifications, standards and requirements set forth in these policies. Only the clinical privileges and prerogatives granted by the Board of AMH in accordance with these policies are conferred on doctors so chosen. No practitioner shall admit or provide services to patients in the hospital unless he/she has received practicing privileges or been granted temporary privileges in accordance with the procedures set forth in these policies."

This article proclaims that "[t]he granting of practicing privileges is solely at the discretion of the Board of AMH, and is renewable annually". Article 4.4.1, "recredentialing", reiterates the requirement for annual renewal of practicing privileges then makes the renewal automatic upon submission of certain documentation. The required documents

are "a copy of the new Medical Registration certificate and updated professional liability insurance coverage".

[86] Practicing privileges may be revoked if a doctor is presumed to be impaired by reason of substance, drugs or illness, while managing a patient at the hospital. Article 4.2.14.14 provides:

> "Practicing privileges may be revoked if a doctor is deemed to be impaired by alcohol, drugs or illness while managing patients at AMH. It is the duty of all doctors to inform the administration of AMH of any illness or infectious diseases that they themselves have that may lead to impairment."

This article does not go on to set out any procedural steps to be taken to effect revocation of practicing privileges.

[87] The concept of automatic relinquishment of appointment and or privileges is the subject of article 4.4.3. Under this article, clinical privileges and medical staff appointment, if applicable, are automatically relinquished if any of a number of events occurs. These events include making a material misstatement, misrepresentation or omission on an application form (under article 4.11, 111B. the applicant acknowledges and agrees that there shall be no entitlement to any hearing or appeal); failure to complete medical records (article 1.27 (Q) requires three or more patients over a three-month period; (R) says reinstatement will occur once the breach is repaired); failure to remain compliant with items with an expiry date, for example, a valid licence to practise in Jamaica. Automatic relinquishment continues until either the matter is resolved, or a request for reappointment or reinstatement of appointment and/or clinical privileges has been acted upon by the relevant body.

[88] Aside from relinquishment and revocation, the bylaws also make provision for what is described as, "[p]recautionary [s]uspension", or restriction, of all or any portion of an individual's clinical privileges. The sole ground of the suspension is the imminence of danger to the health and/or safety of any individual or the orderly operation of the

hospital, requiring action to be taken. Any one of seven persons can effect the suspension or restriction. Those so empowered are:

i. President

ii. Chief Medical Officer (physician hospital executive appointed by the Board to interface with the medical staff)

iii. Clinical Department chairperson

iv. Campus Chief of Staff

v. Credentials Committee chairperson

vi. CEO (President or President's designee)

vii. Chairperson of the Board

The aims of the suspension are two-fold. One is to facilitate the review of the matter. The other is to limit or modify the ability of the individual to supervise AHPs (allied health professionals) (see article 4.6.1).

[89] In so far as procedure is concerned, the precautionary suspension takes effect immediately and is of indefinite duration, unless it is modified by the President (article 4.6.2). A brief description of the reasons for the precautionary suspension is given to the individual (article 4.6.3). Following that, the Medexcom will review the reasons for the precautionary suspension at its next meeting ("'The [Medexcom]' usually meets quarterly or more often if necessary to fulfil its responsibilities", see article 3.2.4.1).

[90] This examination of AMH's bylaws reveals no reference to a legislative source of their enactment. Similarly, while the NHRA requires registration of privately run hospitals, this legislation does not make the adoption of bylaws a condition precedent or otherwise of registration. In short, the NHRA is silent on the question of the adoption and promulgation of bylaws for institutions coming within its ambit.

[91] The adoption of the bylaws by AMH was a purely internal matter, reflecting an autonomous act by its Board. Article 8.1, subtitled "Medical Staff Bylaws, Policies, and Rules and Regulations", reads:

> "The Medical Staff Bylaws, other Medical Staff policies, and Rules and Regulations are adopted and made effective upon approval of the Board, superseding and replacing any and all previous versions. These documents are intended to be compatible with each other, and will be compliant with all applicable state and federal laws".

The statement of legislative compatibility with state and federal law, is revelatory of two noteworthy points. The first point is the absence of any reference to Jamaican law. The second point is, that the document is an adoption from a country with a republican form of government, in which some states may require promulgation of hospital bylaws. Therefore, it is clear that the roots of AMH's bylaws are discoverable in the minutes of its Board meeting and not in Hansard.

[92] Without this legislative underpinning, AMH's bylaws cannot, therefore, be treated in the same manner as the bylaws in either **Sacred Heart Hospital v Aucoin** or **Shephard v CRH Comsn**. This court cannot, based on these authorities, adopt the position of the Canadian courts and insist that AMH abides by its bylaws, as a requirement of public law. In the same vein, the cases and materials referred to from the various jurisdictions in the USA, where they speak to the source of the bylaws, attribute the promulgation of the private hospitals' bylaws to either legal state requirement, membership of an organization or through regulations, requiring the adoption and implementation of bylaws. Since AMH's bylaws do not have a similar origin, this court cannot, by these premises, assume a posture similar to that taken by the courts in the USA. I would therefore distinguish **Greisman v Newcomb Hospital**, **Balkissoon v Capitol Hill Hospital**, **Mahmoodian v UHC** and **Gianetti v Norwalk Hospital**, for want of legislative grounding of AMH's bylaws.

[93] I come now to the breach of contract basis upon which some jurisdictions in the USA granted limited judicial review. This raises the question of the employment status between the appellant and AMH. Was he engaged by a contract of service or a contract for services? In respect of the former, the learned authors of Commonwealth Caribbean Employment and Labour Law, make reference to the legal definition of 'worker' in the Labour Relations and Industrial Disputes Act. At page 89, they say:

> "The definition now states that 'worker' means 'an individual who has entered into or works or normally works (or where the employment has ceased, worked) under a contract, however described, in circumstances where the individual works under the direction, supervision and control of the employer regarding hours of work, nature of work, management of discipline and such other conditions as are similar to those which apply to an employee."

[94] In seeking to determine whether a contract of service exists between parties, the courts will have regard to the terms of the contract, expressed and implied. The learned authors of Commonwealth Caribbean Employment and Labour Law assert that several Commonwealth Caribbean jurisdictions have enacted legislative guidelines to determine whether a contract of service exists. At page 94, they write:

> "… This is achieved by outlining the key components of the employment contract which include the names of the parties entering the contract; the date on which the employment began, is to begin or has expired; the rate of remuneration and when it is to be paid; the terms and conditions relating to hours of work, holidays, payment during illness and pensions; and the terms and conditions relating to notice in order to terminate the contract …"

None of these terms are mentioned in AMH's letter of 22 October 2015 to the appellant. Neither does any of the bylaws, upon which reliance is being placed as well. It appears fair to say that the employment relation between the appellant and AMH is devoid of any of the usual terms and conditions characteristic of an employer/employee or master and servant relationship.

[95] Is the relationship between the appellant and AMH to be categorized as that of an independent contractor? If the control test is used, a physician in the position of the appellant, may be considered to be an independent contractor. According to Brian Lester, writing in the Notre Dame Law Review, at page 1498:

> "In most cases, a physician is an independent contractor because the hospital lacks direct control over the physician's practice and the physician is paid directly by the patient or insurer."

The academic writers in Commonwealth Caribbean Employment and Labour Law, posit that the word 'independent' suggests a lack of reliance on the employer for the execution of the individual's functions and the word, 'contract' is indicative of the limited duration of the job, rather than of indefinite duration (see page 95).

[96] The appellant would seem to fit the concept of an independent contractor, offered by Commonwealth Caribbean Employment and Labour Law. The available evidence suggests the appellant's privileges ran for a year at any given time, and was extended for a succeeding year upon production of a current medical registration and malpractice or indemnity insurance. Under the terms of engagement, the appellant received no remuneration from AMH. Rather, it was AMH who billed the appellant for the use of its facility, leaving the cost of care for the appellant to resolve with his patients. This would point to an independent contractor status.

[97] However, the courts quite often resort to several tests to determine whether a worker is engaged as a servant or an independent contractor. Under Lord Denning's integration test, a contract of service exists where the employed is a part of the business and is an integral part of it. He's an independent contractor if, although his work is done for the business, it is a mere accessory to it (see **Stevenson Jordan Harrison Limited v McDonald and Evans** [1952] 1 TLR 101, at page 111). Hopefully, I am not oversimplifying the issue by saying that the appellant's work was being done for AMH; that is, as an accessory to the business. By this, I mean without the appellant's services AMH would continue to function as a private hospital.

[98] In my opinion, the mixed or multiple test, put forward by McKenna J in **Ready Mix Concrete v Minister of Pensions** [1968] 2 QB 497, does not advance the discussion of the appellant's status with AMH. I say so because the sole feature resembling a master and servant relationship here is the disciplinary control exercised by AMH over the applicant, under its bylaws. Likewise, for limiting evidentiary reasons, the court cannot apply the economic reality test. This test would require the court not only to interpret "the written contract between the parties, but [conduct] an investigation and evaluation of the circumstances in which the work was performed" (see Commonwealth Caribbean Employment and Labour Law, at page 100). Neither a written contract nor material to facilitate such an investigation forms part of the record of appeal.

[99] It appears, therefore, using the control test, that the appellant stands in the position of an independent contractor in his exercise of clinical privileges, in relation to AMH. If that characterization is correct, AMH's decision to suspend and its subsequent refusal to reinstate the appellant's clinical privileges (constructively dismiss), would fall outside the bounds of Lord Reid's classification of dismissal cases in **Ridge v Baldwin**. The appellant falls outside the first class of dismissal as he was not AMH's servant in the classic sense of master and servant employment. Similarly, since the appellant was not the holder of an office during pleasure, vis-à-vis AMH, the second category is inapplicable. Equally, the third category does not apply as the applicant is not a public servant, and neither is the power to dismiss him derived from statute (the bylaws have no statutory foundation, paras. [78] – [91] above). By parity of reasoning, the fourth category of dismissal, referred to by Phillips JA in **Thames v NICL**, as identified in **Malloch v Aberdeen Corporation**, would also not apply; the appellant did not have a master and servant relationship with AMH, in which AMH's power of dismissal is overlaid by statutory provisions.

[100] Although the appellant does not fall within a pure master and servant relationship, his engagement by AMH remains contractual; even if contractual without legislative underpinning. The appellant, in asserting that AMH should act in accordance with its bylaws, is implicitly resting that assertion on the premise that the bylaws form part of the

terms of their contractual arrangement. This assumption, in turn, is one of the appellant's bases for relying on the cases decided in the various jurisdictions of the USA, where the bylaws were treated as enforceable terms of the contract (see, for example, **Mahmoodian v UHC**).

[101] However, in this jurisdiction, a breach of contract by itself does not give rise to remedies in public law. For the breach of contract to endow the injured party with public law rights, the contract or terms of employment must be regulated or be established by statute, to adopt Phillips JA's opinion in **Thames v NICL**, quoted at para. [63] above. Or, as Albert Fiadjoe in Commonwealth Caribbean Public Law 3rd edition, at page 86, expressed it:

> "The crucial element is whether the dispute has a sufficient public law element. If it has, public law would prevail even if there was a contract of employment".

The appellant's contract with AMH was neither regulated nor established by statute. Consequently, there is no public law element in his dispute with AMH. The appellant is merely seeking to enforce a private right, arising from a contract which is entirely governed by common law principles. So premised, the appellant would not be entitled to the grant of a quashing order.

[102] An appeal to the rules of natural justice does not improve the appellant's position. The inclusion of grievance procedures such as the right to be given notice of the charges, a hearing before an impartial tribunal, to be represented and an appeal facility, into an employment contract, does not imbue that contract with public law rights. Relief would still be claimable on the basis of a breach of contract. As Purchas LJ opined in **ex parte Walsh**, the importation of natural justice rules into a private contract sounds in the vein of the parties' rights and duties in the performance of the contract, not the conferment of public law rights (see para. [74] above). Therefore, the appellant's complaint that AMH failed to discharge its duty to act fairly, cannot matriculate his private law claim into an entitlement to public law remedies.

[103] To adapt Purchas LJ's observation, in **ex parte Walsh** at page 441, in order for the dispute between the appellant and AMH to be reviewable, the refusal to reinstate the appellant's clinical privileges would have to touch and concern AMH's statutory responsibilities under the NHRA. For example, and only for the sake of argument, if AMH were to dismiss either the registered medical practitioner or registered nurse, resident in the home, leaving the home without the management of either personnel, then that dismissal, in so far as it would affect AMH's statutory obligations, would perhaps warrant the court's intervention (see section 3(3) of the NHRA).

[104] So then, the appellant's reliance on the cases from Canada is unsustainable as the bylaws in those cases were underpinned by legislation. Equally, the bylaws in some jurisdictions in the USA were the result of legal state requirements and, where they were not, were decided either on breach of contract principles, public interest or fiduciary powers grounds. In short, those cases did not offer the guidance the appellant submitted they could. The upshot is, the appellant was engaged in a contractual relationship with AMH, which included bylaws that were as privately adopted as the contract entered into. The learned judge was, therefore, correct in holding that the appellant's remedies lay in the realm of private, not public law.

Issue two: whether the learned judge was correct in ordering costs against the appellant.

[105] And so, I come to the second issue, was the learned judge correct in ordering costs against the appellant? While the appellant accepted that the learned judge had a discretion under Parts 56 and 64 of the CPR, he contended that the exercise of that discretion should have been predicated upon a finding that the appellant acted unreasonably. Counsel argued that the appellant acted reasonably in all the circumstances: (a) AMH's bylaws do not countenance any appeal; (b) there is a dearth of guidance in this jurisdiction on the nature of the peculiar relationship between a private hospital and a physician to which the former has been granted clinical privileges; and (c) the application was decided on the preliminary point raised by AMH.

[106] Counsel for AMH submitted that the learned judge was not confined to the criterion of unreasonableness stipulated in rule 56.15(5) of the CPR, since the application before the learned judge was not one for an administrative order, under rule 56.9. Rather, the application before the learned judge was one for leave to apply for judicial review, under rule 56.3. Therefore, counsel argued, in an application for leave to apply for judicial review, the learned judge was not constrained in the manner articulated by the appellant. Consequently, it was a correct exercise of the learned judge's discretion to award costs under Part 64 of the CPR, counsel concluded.

Discussion

[107] Part 56 of the CPR is headed 'Administrative Law'. Rule 56.1 bears the subheading, 'Scope of this Part'. Rule 56.1(1) reads:

> "This Part deals with applications –
>
> a) for judicial review;
>
> b) by way of originating motion or otherwise for relief under the Constitution;
>
> c) for a declaration or an interim declaration in which a party is the State, a court, a tribunal or any other public body; and
>
> d) where the court has power by virtue of any enactment to quash any order, scheme, certificate or plan, any amendment or approval of any plan, any decision of a minister or government department or any action on the part of a minister or government department."

Rule 56.1(2) says, "[i]n this part such applications are referred to generally as '**applications for an administrative order**'" (bold as in the original).

[108] It is clear from rule 56.1(2) that, for the purposes of Part 56, an application for judicial review is as well an application for an administrative order. Indeed, my perusal of **Paymaster Jamaica Limited v The Postal Corporation of Jamaica** [2018] JMCA Civ 6 and **Danville Walker v The Contractor General** [2013] JMFC Full 1(A), cited by

counsel for AMH, discloses a similar understanding of the rule by this court and the Full Court. However, counsel for AMH draws a distinction between an application for permission to apply for leave to apply for judicial review and the application for an administrative order, leave having been granted. I agree with this distinction for the reasons which follow.

[109] In **The Ministry of Finance and Planning & Public Service and Others v Viralee Bailey-Latibeaudiere** [2014] JMCA Civ 22 ('**Bailey-Latibeaudiere**'), the question was whether the judge at first instance was correct in treating the 14-day requirement within which to file a fixed date claim form, after having obtained permission to apply for judicial review under rule 56.12 of the CPR, as subject to the suspension of time running during the long vacation (rule 3.5 as then framed, now amended). The court returned a negative answer to the question. After a review of previous decisions, this court concluded that judicial review is treated as a special specie of litigation under the rules, with the consequence that Part 56 is a self-contained code within the general rules, save where other rules are specifically imported therein. At para. [109], Morrison JA (as he then was), said:

> "It seems to me, with respect, that by importing these general provisions of the CPR into Part 56, the learned judge failed to have sufficient regard to the special nature of judicial review proceedings and the fact that Part 56, as consistently interpreted by the courts, was plainly intended by the framers of the rules to be, save where otherwise indicated, a self contained [sic] code for the conduct of such proceedings."

[110] The proposition that Part 56 is a self-contained code for the conduct of proceedings such as judicial review, puts in sharp relief, the distinction between an application for leave to apply for judicial review and an application for an administration order. In order to apply for judicial review, that is, make a claim for judicial review, the applicant must first obtain leave (permission) from the court to do so (see rule 56.3(1)). The application for leave is to be considered forthwith by a judge who may grant leave without a hearing (see rule 56.4(1) and (2)). For present purposes, it is only necessary to address the

consequence of leave being granted. Rule 56.4(12) makes the grant of leave conditional on the applicant "making a claim for judicial review within 14 days of the receipt of the order granting leave". It is, therefore, only after the applicant for leave to apply for judicial review has been granted leave, that he can take the next step of applying for judicial review.

[111] How does the successful applicant for leave to apply for judicial review apply for judicial review or, in the language of rule 56.4(1), make a claim for judicial review? The claim for judicial review is made by making an application for an administration order, through the originating document of a fixed date claim form. Rule 56.9(1), so far as is relevant, reads:

> "An application for an administration order must be made by a fixed date claim form in form 2 identifying whether the application is for –
>
> a) judicial review;
>
> …
>
> … ;
>
> and must identify the nature of the relief sought."

So then, it is only after proceeding to this stage and complying with rule 56.9 of the CPR that the application for permission to apply for judicial review has transitioned into an application for an administrative order. It is that transition which triggers the provisions contained in rule 56.15.

[112] Rule 56.15 bears the subheading 'Hearing of application for administrative order'. The rule is set out in full below:

> "56.15 (1) At the hearing of the application the court may allow any person who or body which appears to have a sufficient interest in the subject matter of

> the claim to make submissions whether or not served with the claim form.
>
> (2) Such a person or body must make submissions by way of a written brief unless the court orders otherwise.
>
> (3) The court may grant any relief that appears to be justified by the facts proved before the court whether or not such relief should have been sought by an application for an administrative order.
>
> (4) The court may, however, make such orders as to costs as appear to the court to be just including a wasted costs order.
>
> (5) **The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application**." (Emphasis applied)

[113] Rule 56.15(4) endows the court with a discretion to make orders for costs at the hearing of an application for an administrative order. However, rule 56.15(5) enjoins the court not to make an order for costs, as a general rule. So, the default position is, no order for costs. If, however, the court considers that it is just to make a costs order against the applicant, rule 56.15(5) circumscribes the discretion given under 15.15(4) by requiring a consideration of whether the applicant acted unreasonably either in making, or the conduct of the application.

[114] This is the position the appellant submits the learned judge should have applied and contends, in failing to do so, she was in error. This submission is untenable. The appellant's application for leave to apply for judicial review, having been refused, never transitioned into an application for an administrative order. As I endeavoured to show, it is only that transition that would warrant resort to rule 56.15 of the CPR. To put the matter another way, the appellant tried to place himself in a position to make an

application for an administrative order, in which event he would have fallen within the ambit of the self-contained provisions of Part 56, requiring the consideration of costs under rule 56.15, but failed. Consequently, the appellant was not entitled to have the matter of costs considered under the strictures of rule 56.15.

[115] The position in the United Kingdom is that the defendant is entitled to his costs where permission is refused. The learned authors of Judicial Review Principles and Procedure state, at para. 28.07 that:

> "Where permission to apply for judicial review is refused, whether on paper or at a permission hearing, the defendant will usually be entitled to an order that the claimant pays its reasonable costs of preparing its acknowledgment of service and summary grounds."

In this case, the application for permission was *inter partes*, the notice of application for court orders having been served on AMH. A similar position obtains under the CPR.

[116] Rule 64.6 is subtitled, 'successful party generally entitled to costs'. Rule 64.6(1) says:

> "If the court decides to make an order about costs of any proceedings, the general rule is it must order the unsuccessful party to pay the costs of the successful party."

By virtue of rule 64.6(1), in an ordinary claim, as Stuart Sime in A Practical Approach to Civil Procedure 11th edition, at para. 43.02, says, "it is usual for the successful party in a claim to be awarded an order for costs against the unsuccessful party". In contradistinction, to what obtains under rule 56.15, the victor is entitled to all his costs unless the circumstances warrant otherwise. The unsuccessful party on an application for leave to apply for judicial review, stands in the shoes of the ordinary unsuccessful litigant, to whom rule 64.6 would apply.

[117] This application for permission was decided on a preliminary point. Success on the preliminary point might very well be indicative of the hopelessness of the application, an

indicium of the factors identified in **R (Mount Cook Land Ltd) v Westminster City Council** [2003] EWCA Civ 1346, in which a costs order should be made. While I have some sympathy for the appellant's position that the application is novel, the novelty lies only in the category of the parties involved and the circumstances in which the dispute arose, not in the applicable principles.

[118] Sympathy for the appellant's position is not, however, a sufficient basis upon which to say the learned judge was plainly wrong: **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042; **Attorney General v John McKay** [2012] JMCA App 1. Costs, generally, lies within the sole discretion of the judge. Since the learned judge did not provide any reasons for her decision, it is impossible for this court to discern what, if any factors entered her consideration in arriving at her decision. However, upon my independent analysis of the case, it cannot be said that her decision was wrong in law or on the facts, as her decision seems to have been based on an application of the general rule that costs follow the event. Neither can it be said that her decision is so aberrant that no judge mindful of her duty to act judicially would have made it. Consequently, there is no basis upon which this court would be entitled to interfere with the exercise of the learned judge's discretion in awarding costs to AMH.

Conclusion

[119] Although AMH is a private hospital, in consequence of the requirement for registration under the NHRA, together with the concomitant obligations imposed by legislation, and its public reach, it is a body that is subject to judicial review. That notwithstanding, its decision, refusing to reinstate the appellant's clinical privileges was a matter of private contract between them, without any legislative underpinning. In view of that, the decision not to reinstate the appellant's clinical privileges is devoid of any public law element and, therefore, not susceptible to judicial review. The learned judge was, therefore, correct in holding that the application did not fall within the purview of public law, and the appellant ought, instead, to seek his remedy in private law, namely, the law of contract.

[120] Furthermore, since the appellant, at the end of the permission hearing, was properly to be treated as a regular unsuccessful litigant, the learned judge properly exercised her discretion in making an award of costs in favour of AMH.

[121] I would, therefore, dismiss the appeal and award costs to AMH to be agreed or taxed.

MCDONALD-BISHOP JA

ORDER

1. The appeal is dismissed.

2. The order of Y Brown J made on 29 October 2020 in the Supreme Court is affirmed.

3. Costs of the appeal to the respondent, the Andrews Memorial Hospital, to be agreed or taxed.