

COURT OF APPEAL

RECORD SHEET

NATURE OF JURISDICTION: Motion for stay of orders of the Medical Tribunal

FILE NO: CA 40354/95

DELIVERED: 13 June 1995

HEARING DATE: 13 June 1995

PARTIES: LEICESTER v WALTON

JUDGMENT OF: Kirby P

COUNSEL:
Appellant: M A Robinson
Respondent: H G Murrell

SOLICITORS:
Appellant: Edson Pike
Respondent: David Swain (Health Care Complaints)

CATCHWORDS: MEDICINE· medical discipline - order of Tribunal suspending practitioner for 6 months for over-prescription of prescription drugs of addiction and other orders designed to protect public from risks of repetition - appeal against orders· stay sought - held: Stay granted to defend utility of appeal - conditions imposed excepting suspension and requirement to work in group practice.
APPEAL - medical discipline - stay - protection of public· held: Court should defend utility of appeal but also defend public interest.

EX TEMPORE / RESERVED: Ex tempore

ALLOWED / DISMISSED: Orders made

NO OF PAGES: 3

CA 40354/95

THE SUPREME COURT OF
NEW SOUTH WALES
COURT OF APPEAL

KIRBY P

TUESDAY 13 JUNE 1995

LEICESTER v WALTON

MEDICINE - professional misconduct • professional discipline - order by Medical Tribunal that practitioner be suspended for excessive prescription of benzodiazepines • appeal to Court of Appeal - application for stay of Tribunal's orders - held: (1) In providing a stay, the Court was obliged to treat as paramount the protection of the public; (2) The Court is also obliged to protect the utility of the appeal which has been provided by Parliament; (3) Stay granted upon conditions imposed by the Tribunal but omitting (a) suspension; and (b) confirming practice to that of employee which would require sale of present practice in advance of the appeal; (4) Hearing expedited.

ORDERS

- 1) Stay the operation of the order of the Medical Tribunal herein, dated 17 May 1995, until the hearing of the appeal or until any further or other order of the Court or of a Judge of Appeal;
- 2) Order expedition of the hearing of the appeal (Category C) to the intent that the appeal will be heard within a period of four months;

- 3) Dispense with the Rules of Court relating to appeal books to the intent that the appellant will prepare a compilation of papers, with index, in lieu of appeal books;
- 4) Order written submissions;
- 5) Order that the stay provided in order 1) be upon the following conditions:
 - a) As 2) in the orders of the Tribunal;
 - b) As 4) in the orders;
 - c) As 5) in the orders
 - d) As 6) in the orders; and
 - e) As 7) in the orders.
- 6) Order that the costs of the proceedings before the Court today be costs in the appeal.

THE SUPREME COURT OF
NEW SOUTH WALES
COURT OF APPEAL

KIRBY P

TUESDAY 13 JUNE 1995

LEICESTER v WALTON

JUDGMENT

KIRBY P: Before the Court is an application for a stay of the operation of orders of the Medical Tribunal (the Tribunal) in respect of Dr Robert Duncan Barnaby Leicester (the medical practitioner). The Tribunal, on 17 May 1995, made orders, in effect, suspending the medical practitioner from practising for a period of six months, imposing upon him certain conditions designed to regulate his practice in respect of the prescription of certain drugs of addiction and ordering him to pay costs.

The medical practitioner appeals to this Court, as he is entitled to do. The appeal is not against the determination in its substance. It is against the orders which the Tribunal made. Those orders, as is frequently said, are not for the punishment of the medical practitioner, but for the protection of the public. I keep that purpose in mind as the paramount consideration in approaching this application for a stay.

The appeal has not yet been listed for hearing. Obviously, in the interests of the medical practitioner and of the public, the hearing should be

expedited. In due course I will propose a degree of expedition. The question arises as to what should happen in the interim?

The opponent, who was the complainant in the Tribunal, opposes the provision of a stay. She says that, for the protection of the public, the orders made by the Tribunal should take effect immediately. However, Parliament has provided the medical practitioner with a right to appeal to this Court. It is important that that right should not be lost simply because of the heavy burden of the Court's list. The right was conferred by Parliament to be a reality. It is the duty of the Court to protect its utility. The appropriate balance between doing so and protecting the public is, in my opinion, to provide the stay but upon conditions similar to those imposed by the Tribunal. There should be deleted, at this stage, the order of suspension, which is, as I have been informed, the substantive matter in the appeal. I would also not require the medical practitioner, at this stage, pending the outcome of the appeal, to relinquish his private practice.

The Court has been told that his mode of practice is substantially as a locum. However, he has a surgery in the Gosford area which he has maintained for a number of months. It would be inconvenient to require him now to dispose of that practice pending the outcome of the appeal when this Court will have the opportunity to consider whether some other or different order should be made.

One of the bases for opposing the grant of the stay was the information conveyed to the Court (although not strictly proved) that since the proceedings, the subject of the appeal, a further complaint has been made of the kind which was dealt with by the Tribunal in the instant proceedings.

I am disinclined to attach much weight to that intimation: It has not been the subject of a charge. Still less of a hearing before the Tribunal. It is fundamental that a person should not be dealt with, in such serious matters, without a full opportunity to know what is charged and to test and meet it.

The jurisdiction of the Tribunal and the Court being for the protection of the public, it is important to make it plain to the medical practitioner that any further professional misconduct, particularly during the period that the matter awaits a determination by this Court, will be taken most seriously by the Tribunal and the Court. It could result in further orders of the Tribunal which demonstrate the resolution of the Tribunal to protect the public from the unnecessary or excessive prescription of benzodiazepines and other like addictive drugs.

For these reasons, which I have expressed shortly, the orders which I make are:

- 1) Stay the operation of the order of the Medical Tribunal herein, dated 17 May 1995, until the hearing of the appeal or until any further or other order of the Court or of a Judge of Appeal;
- 2) Order expedition of the hearing of the appeal (Category C) to the intent that the appeal will be heard within a period of four months;
- 3) Dispense with the Rules of Court relating to appeal books to the intent that the appellant will prepare a compilation of papers, with index, in lieu of appeal books;
- 4) Order written submissions;
- 5) Order that the stay provided in order 1) be upon the following conditions:
 - a) As 2) in the orders of the Tribunal;
 - b) As 4) in the orders;
 - c) As 5) in the orders;
 - d) As 6) in the orders; and
 - e) As 7) in the orders.
- 6) Order that the costs of the proceedings before the Court today be costs in the appeal.

COURT OF APPEAL

RECORD SHEET

NATURE OF JURISDICTION: Medical Tribunal Appeal

FILENO: CA 40354/95

DELIVERED: 22 November 1995

HEARING DATE: 7 November 1995

PARTIES: LEICESTER v WALTON

JUDGMENT OF: PRIESTLEY, SHELLER, COLE JJA

COUNSEL:
Appellant: G F Grinter (Amicus curia.e)
Respondent: LA Levy

SOLICITORS:
Appellant:
Respondent: Health Care Complaints Commission

CATCHWORDS: APPEAL against severity of orders of Medical Tribunal- Notice of motion for adjournment - solicitor ceasing to act Pt 66 r 7 *Supreme Court Rules* - notice of motion to adduce fresh evidence - costs

EX TEMPORE/RESERVED: Reasons reserved

ALLOWED/DISMISSED: Adjournment - allowed
Adduce fresh evidence - dismissed

NO OF PAGES: 18

It would be grossly unfair for Dr Leicester personally to be required to pay those costs or for the respondent to pay its own costs. Although a fair solution would be for the Medical Defence Union to pay the costs, it is not a party to the proceedings and is therefore not amenable to such an order; Part 52A r4 of the *Supreme Court Rules*.

To determine whether the Court has jurisdiction to order Mr Pike to pay the costs, one must look to the statute, the rules of the Court and any other Act; *Knight v FP Special Assets Limited* (1992) 174 CLR 178. Although Mr Pike failed to comply with the rules, his conduct did not amount to "serious neglect, serious incompetence or serious misconduct"; s76C *Supreme Court Act 1970*. Further, his inaction did not lead to the incurring of costs which would not have otherwise been incurred; Rule 52A r43. Even if Mr Pike had complied with the Rules, it is difficult to see how an adjournment could have been avoided. There should be no order as to the costs of the application for an adjournment or as to the costs wasted by the adjournment.

(2) On 23 October 1995 Priestley JA stood over the respondent's application to adduce fresh evidence to the hearing of the appeal. This application should be refused. Section 90 (1) of the *Medical Practice Act 1992* enables a person to appeal to the Supreme Court against a decision of the Medical Tribunal. There is no reason why the Tribunal should not hear the complaint in the ordinary way. The hearing of this appeal should not be delayed to enable the hearing of the further complaint by the Tribunal.

ORDERS

1. Respondent's notice of motion of 16 October 1995 dismissed with costs;
2. Hearing of the appeal adjourned;

THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 40354/95

PRIESTLEY JA
SHELLER JA
COLE J A

Wednesday, 22 November 1995

LEICESTER v WALTON

JUDGMENT

THE COURT: This appeal by Dr Robert Barnaby Duncan Leicester against the severity of orders made by the Medical Tribunal on 17 May 1995 was listed and came on for hearing on 7 November 1995 when Dr Leicester through counsel, Mr G F Grinter, who appeared amicus curiae, applied by notice of motion for an adjournment. Dr Leicester's need for an adjournment was brought about by the late withdrawal of the services of his solicitor, Mr Edson Pike, and counsel, Mr Bozic, and his inability in the time available before the hearing to retain other representation.

The notice of motion, which was filed on 3 November 1995, originally came before Sheller JA on 6 November 1995 when it was stood over for hearing by the Full Court on 7 November. Sheller JA reserved the costs of the application before him for consideration by the Full Court.

On 13 June 1995 an application by Dr Leicester for a stay of the operation of the orders of the Medical Tribunal came before Kirby P, who made the following orders:

- "1. Stay the operation of the order of the Medical Tribunal herein, dated 17 May 1995, until the hearing of the appeal or until any further or other order of the Court or of a Judge of Appeal;
2. Order expedition of the hearing of the appeal (Category C) to the intent that the appeal will be heard within a period of four months;
3. Dispense with the Rules of Court relating to appeal books to the intent that the appellant will prepare a compilation of papers, with index, in lieu of appeal books;
4. Order written submissions;
5. Order that the stay provided in order 1. be upon the following conditions:
 - (a) As 2. in the orders of the Tribunal;
 - (b) As 4. in the orders; .
 - (c) As 5. in the orders;
 - (d) As 6. in the orders; and
 - (e) As 7. in the orders.
6. Order that the costs of the proceedings before the Court today be costs in the appeal."

Mr Pike acted for Dr Leicester on the application for a stay heard by the President. In his reasons for judgment the President emphasised Dr Leicester's entitlement to appeal and the interests of both the medical practitioner and of the public to have the hearing expedited. The President in effect stayed the order of suspension and did not require Dr Leicester, pending the outcome of the appeal, to relinquish his private practice. Kirby P referred to one of the bases for opposing the grant of the stay, that is to say information conveyed to the Court (although not strictly proved) that since the proceedings, the subject

Appeal he would have to get separate legal representation. On 1 November Dr Leicester, having spoken again to Mr Pike, sent a letter by facsimile to United Medical Defence indicating he did not wish to withdraw his appeal and expressing his disappointment at the decision to withdraw legal representation. He wrote:

"You have advised me today that 'depositions' regarding the appeal must be lodged today. As I am not a legal person I do not understand what is meant or required by this 'deposition deadline' and will obviously need time to seek legal advice.

Is it possible to have the appeal date deferred so that I might be able to obtain legal assistance?

Could you please advise me regarding this distressing situation as soon as possible, as I really do not know where to turn to for help at this point and may have to present myself unrepresented.

I appreciate that, on Monday, you advised my wife and myself that 'the other side are "very" vindictive, but surely in law, some sense of business and justice should prevail."

No doubt the reference to "depositions" was a reference to the President's order that written submissions be filed. Dr Leicester was active in his attempts to obtain legal representation. On 2 November he telephoned the Law Society and spoke to its Community Services Branch. The officer from that branch said she was unable to help. He attempted to speak to the President of United Medical Defence. He spoke to a Committee Member. He spoke to Mr Bozic of counsel who told him that he could not appear on his behalf as he was engaged in another case at Westmead Hospital. At about 4 pm on 2 November 1995 he spoke to Mr Grinter who appeared as amicus curiae before Sheller JA and on this application to the Full Court. On 3 November 1995 he received a facsimile transmission from United Medical Defence signed on behalf of Mr Pike advising that he was now unable to act for him in the proceedings and that

years, I am well aware of the options available and Dr Leicester is now fully informed of these.

During the course of the year I was impressed that Dr Leicester had been studying the subject of drug abuse and addiction and has now attained a more than adequate knowledge of all aspects of the subject."

Dr Leicester says that he has not possessed, supplied or prescribed schedule 8 drugs and has complied with orders 4, 5, 6 and 7 of the Medical Tribunal made on 17 May 1995.

On 6 November 1995 Sheller JA, when standing the application over for hearing before the Court, ordered Mr Pike to file an affidavit explaining the circumstances under which he had purported to have ceased to act for Dr Leicester and the basis upon which he claimed to have complied with the Rules in that regard. In accordance with that order Mr Pike made and filed an affidavit on 7 November 1995. In that affidavit he deposes to the term of his employment by United Medical Defence that he may only provide legal services to members of the organisation if he has been instructed to do so by his employer. On 26 October 1995 he received advice from Mr Bozic in relation to the appeal which he conveyed to the President of United Medical Defence. He was then instructed that he was no longer authorised to continue to act for the appellant. He attempted to communicate by telephone with Dr Leicester and says that he finally spoke to him on 30 October 1995 and informed him of his instructions. He says that the meeting took place on 30 October 1995 when Mr Bozic's advice was discussed and he asked Dr Leicester to take steps to make immediate arrangements for a new solicitor to act for him. He received no further communication from Dr Leicester and on 1 November telephoned him asking him what he intended to do. He says he strongly recommended that Dr Leicester get a new solicitor as a matter of urgency. Mr Pike said to Dr Leicester: "There is obviously preparation to do for the appeal if you do intend

ensure that the Appellant obtained the services of another solicitor if he was to pursue the Appeal."

Part 66 r7 of the *Supreme Court Rules* provides:

- "(1) Where a solicitor acts for a party to any proceedings and afterwards ceases to act, the solicitor may, subject to subrule (2), file notice of the change and serve the notice on the parties.
- (2) A solicitor shall not file or serve notice of a change under subrule (1) without leave of the Court unless the solicitor has, not less than seven days before doing so, served on the former client notice of intention to file and serve the notice of change.
- (3) A solicitor filing a notice of change under subrule (1) shall, except where the notice is filed with the leave of the Court, file and serve with the notice an affidavit showing service in compliance with subrule (2).
- (4) A solicitor may serve a notice under this rule on the former client by posting it to the former client at the residential or business address of the former client last known to the solicitor."

One purpose of this rule is to prevent solicitors, without the leave of the Court, ceasing to act for a client within less than seven days of notice in writing to the client. Thus situations such as that arising in the present case can be avoided or the consequences ameliorated. Furthermore the rule prevents the "employer" of a solicitor, such as United Medical Defence, requiring its employee to cease to act for a litigant without giving the appropriate notice or obtaining the Court's leave. Mr Pike, as a solicitor, should have been aware of this and advised both United Medical Defence and Dr Leicester accordingly. Having not applied for and obtained the leave of the Court, to cease to act, he should, while he remained on the record, have taken steps to ensure that Dr Leicester complied with the Court's orders. While Mr Pike was still his solicitor, Dr Leicester failed to comply with the Court's order to file submissions.

respondent and the Court as a matter of urgency and without authorising its employed solicitor to assist in applying for an adjournment, if alternative representation could not be obtained., on its face appears reprehensible and poor service to a member, whose interests it was there, presumably, to protect.

The question remains what is to be done to overcome the problem the United Medical Defence created, without doing injustice to the parties. The predicament in which Dr Leicester finds himself was not of his doing but of the organisation of which he was a member. Not unnaturally the respondent opposed any adjournment. However counsel for the respondent fairly acknowledged that in the circumstances and on the basis of a continuance of the orders made by the President an adjournment of the appeal was appropriate if not inevitable. The Court made such an order on 7 November 1995. The respondent asked for its costs both of the application for adjournment before Sheller JA and of the day wasted as a result of the adjournment. In the circumstances it would appear to be grossly unfair if Dr Leicester personally was required to pay those costs. On the material before us he has done everything possible to obtain representation at the hearing of the appeal and to comply with the Court's orders. Subject to one matter to which I will return, it would be unfair for the respondent to have to pay its own costs. A fair solution would be that United Medical Defence pay these costs. However it is not a party to the proceedings and., as will appear, not amenable to such an order. The question is whether Mr Pike, as Dr Leicester's solicitor, should be ordered to pay them.

Section 76 (1) of the *Supreme Court Act 1970* provides:

"Subject to this Act and the rules and subject to any other Act -

- (a) costs shall be in the discretion of the Court;

- (b) direct the solicitor to repay to his or her client the whole or any part of the costs which the client has been ordered to pay to any other party;
 - (c) direct the solicitor to indemnify any party other than his or her client against the whole or any part of the costs payable by the party indemnified.
- (2) The Court may refer the matter to a costs assessor under the Legal Profession Act 1987 for inquiry and report before making such an order.
 - (3) The Court may order that notice of such an order against a solicitor is to be given to the solicitor's client in a specified manner.
 - (4) A solicitor is not entitled to demand, recover or accept from his or her client any part of the amount for which the solicitor is directed by the Court to indemnify a party pursuant to such an order.
 - (5) Nothing in this section limits the generality of s76 or any other provisions of this Act."

We do not regard Mr Pike's conduct as amounting to "serious neglect, serious incompetence or serious misconduct."

Part 52A r4 of the *Supreme Court Rules* provides, so far as presently material, as follows:

- "(1) The powers and discretions of the Court under s76 of the Act (which relates to costs generally) shall be exercised subject to and in accordance with this Part.
- (2) Subject to subrule (5), the Court shall not, in the exercise of its powers and discretions under s76 of the Act, make any order for costs against a person who is not a party.
- (3) Subject to subrule (4), a person shall not be made a party for the purpose of making an application for costs against the person.
- (4) Subrule (3) shall not apply-

- (2) Without limiting the generality of subrule (1), a solicitor is responsible for default for the purposes of that subrule where any proceedings cannot conveniently proceed, or fail or are adjourned without useful progress being made, because of the failure of the solicitor -
 - (a) to attend in person or by a proper representative;
 - (b) to file any document which ought to have been filed;
 - (c) to deliver any document which ought to have been delivered for the use of the Court;
 - (d) to be prepared with any proper evidence or account; or
 - (e) otherwise to proceed.
- (3) The Court may, before making an order under subrule (1), refer the matter to a registrar for enquiry and report.
- (4) The Court may order that notice of any proceedings or order against a solicitor under this rule shall be given to the solicitor's client in such manner as may be specified in the order under this subrule.
- (5) This rule is in addition to an is intended to operate independently of the provisions of s76C of the Act and does not apply in circumstances where s76C of the Act applies."

The Court should not make an order for costs against Mr Pike for the purpose of punishing him or to demonstrate its disfavour of the way he or his employer has acted in this matter. The grounds for making an order against him must be that his action or inaction led to the incurring of costs which would not otherwise have been incurred or the wasting of costs which would not otherwise have been wasted. Mr Pike, so far as appears, was entitled to advise his client that he would no longer act for him. Had Mr Pike complied with Pt 66 r7 and, after due notice, filed a notice of ceasing to act, it is difficult to see how an adjournment of the appeal could have been avoided. It is unlikely that in the few extra days Dr Leicester would have been able to obtain other representation. He would have been compelled to make the application for adjournment that he did and the application would have been successful with

