



New South Wales
Supreme Court

CITATION : **Bhatia v New South Wales Medical Board [2007] NSWSC 1316**

HEARING DATE(S) : 8 November 2007

JUDGMENT DATE : 9 November 2007

JUDGMENT OF : Harrison J

DECISION : Plaintiff's application dismissed with costs.

CATCHWORDS : ADMINISTRATIVE LAW – medical practitioner - inquiry by medical board – appointment by registrar pursuant to statutory delegation – delegation of discretionary power – substantive ultra vires – procedural ultra vires – error of law – exercise of power to appoint under s 66 Medical Practice Act 1992

LEGISLATION CITED : Interpretation Act 1987
Medical Practice Act 1992

CASES CITED : Ex parte Forster; Re University of Sydney [1963] SR (NSW) 723
Owendale Pty Ltd v Anthony and Anor (1966-1967) 117 CLR 539
Re Reference under Section 11 Ombudsman Act 1976 for an Advisory Opinion (1979) 2 ALD 86
Roehrich v New South Wales Medical Board [2004] NSWSC 1264
X v New South Wales Medical Board (1993) 32 ALD 330

PARTIES : Dr Satya Pal Bhatia (Plaintiff)
New South Wales Medical Board (First Defendant)
Andrew E Dix, Registrar, New South Wales Medical Board (Second Defendant)
Dr Donald Grimes and Dr Stuart Renwick (Third Defendants)

FILE NUMBER(S) : SC 30119 of 2007

COUNSEL : M Robinson (Plaintiff)
G Furness (Defendants)

SOLICITORS : TressCox Lawyers (Plaintiff)

In person (Second Defendant)

**IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION
ADMINISTRATIVE LAW LIST**

HARRISON J

8 November 2007

**30119 of 2007 SATYA PAL BHATIA V NEW SOUTH WALES MEDICAL
BOARD & ORS**

JUDGMENT - EX TEMPORE

1 This is an urgent application by the plaintiff for an interlocutory order restraining the defendants from conducting an inquiry pursuant to s 66 of the *Medical Practice Act 1992* ("the Act"). The plaintiff is a medical practitioner specialising in plastic and reconstructive surgery. The first defendant is the New South Wales Medical Board constituted by the Act. The second defendant is the registrar of the first defendant. The third defendants have been appointed by the second defendant to conduct the inquiry. Interlocutory relief is sought in aid of a claim for an order in the nature of certiorari quashing or setting aside the decision of the second defendant to appoint the third defendants to conduct the inquiry.

2 The plaintiff seeks relief alleging substantive ultra vires, procedural ultra vires or error of law. The plaintiff submits that the second defendant purported by Notice of Appointment to "appoint" the third defendants to conduct an inquiry in circumstances where the second defendant was only authorised by the first defendant to "approve" two persons to act. Furthermore, the second defendant purported by Notice of Appointment to appoint the third defendants to conduct an inquiry in circumstances where the second defendant was only authorised by the first defendant to approve two persons to act "in the event that exercise of power is required between meetings of the Conduct Committee" and that no such circumstance had been or could reasonably have been established. The plaintiff contended that the delegation decision was invalid.

Background

3 Section 66 of the Act is in the following terms:

"66 Suspension or conditions to protect the public

(1) The Board must, if at any time it is satisfied that such action is necessary for the purpose of protecting the life or physical or mental health of any person:

(a) by order suspend a registered medical practitioner from practising medicine for such period (not exceeding 8 weeks) as is specified in the order, or

(b) impose on a registered medical practitioner's registration such conditions, relating to the practitioner's practising medicine, as it considers appropriate.

(2) The Board may take such action:

(a) whether or not a complaint has been made or referred to the Board about the practitioner, and

(b) whether or not proceedings in respect of such a complaint are before the Tribunal or a Committee.

(3) The Board is to give written notice of any action taken under this section to the practitioner concerned."

4 In August 2003, in accordance with the powers conferred under s 136(1) of the Act, the first defendant had delegated the power to appoint persons such as the third defendants to the second defendant. The terms of that delegation are as follows:

"3.4 To the Conduct Committee or in the event that exercise of power is required between meetings of the Conduct Committee, two persons approved by the Registrar, its power to act under the Part 4, Division 5 of the Medical Practice Act."

5 By a Notice of Appointment dated 29 October 2007, the second defendant appointed the third defendants as delegates of the first defendant to conduct an inquiry. That notice was in the following terms:

"In accordance with the power delegated to me by the New South Wales Medical Board under section 136 of the Medical practice Act 1992 (the Act), I hereby appoint Dr Donald Grimes and Dr Stuart Renwick to conduct an Inquiry pursuant to section 66 of the Act for the purpose of determining whether any action should be taken, either suspending or placing conditions upon Dr Satya Bhatia's (MPO 011487, DOB 18 August 1932, Bachelor of Medicine Bachelor of Surgery Punjabi University India, 1955, Fellow of the Royal College of Surgeons England 1965) registration."

6 A copy of that Notice of Appointment was sent to the plaintiff's solicitor by the first defendant under cover of letter dated 2 November 2007. Part of that letter is in the following terms:

"I refer to the Board's letter dated 5 September 2007. On 23 October 2007 the Board's Performance Committee considered the complaints made by Mrs Jacquelyn Robinson and Ms Amani El-Kaddoumi arising from surgical procedures conducted by Dr Bhatia. The Committee expressed concern in relation to Dr Bhatia's removal and re-implantation of a breast implant, infection control standards, the treatment of the known infection and the adequacy of his response to

the Board.

The Board's Performance Committee resolved to refer Dr Bhatia to a Section 66 Inquiry pursuant to section 66 of the *Medical Practice Act, 1992* (the Act) to determine whether any action should be taken, either suspending or placing conditions upon Dr Bhatia's practice. It does this in the context of its jurisdiction to protect the public.

Dr Bhatia has been advised that the Inquiry will take place on **Monday 12 November 2007 at 10.00 a.m.** The Inquiry will be conducted in the Bernie Amos Hearing Room in the Old Medical Board building at the former Gladesville Hospital by Dr Donald Grimes and Dr Stuart Renwick, as the delegates of the Board appointed to conduct the Inquiry. A copy of the Notice of Appointment dated 29 October 2007 is enclosed for your information.

Please find enclosed a folder of documents numbered 1 to 15 prepared by the Board. Dr Bhatia has been advised that the documents were forwarded to you on his behalf. Also enclosed is a copy of the Board's letter to Dr Bhatia dated 2 November 2007."

7 Dr Bhatia was first registered to practice in New South Wales in 1976. He has been the subject of previous complaints in 1996, 1998, 1999 and 2005. In 2003 Dr Bhatia was reprimanded and conditions were placed on his registration. Two of those conditions were as follows:

"2. A person or persons appointed by the NSW Medical Board is/are to conduct an audit of Dr Bhatia's surgical practice, including but not limited to his history taking, physical examination, investigations, diagnostic process and decision making, and to report to the Board as soon as practicable. The auditor(s) are to report to the Board as soon as practicable following the audit. The auditor(s) may attend patient consultations and have access to patient records.

6. Dr Bhatia is to undertake and complete the Intensive Communication Skills Program conducted by the Cognitive Institute a course on communication approved by the NSW Medical Board."

8 Annexed to an affidavit sworn by the plaintiff's solicitor are minutes of the meeting of the Performance Committee of the first defendant held on Tuesday 28 February 2006. Part of what the minutes record is as follows:

"At its meeting on 19 April 2005, the Conduct Committee considered the audit report conducted on 20 October 2004 by Dr Meares and Dr King. The Committee noted that if no further improvements occur in future audit reports that Dr Bhatia be referred to the Performance Committee.

On 24 January 2006 the Conduct Committee considered the latest report of the audit conducted on 16 November 2005 by Dr Meares and Dr King. The Conduct Committee resolved that the results of Dr Bhatia's audits indicate that his performance is below the acceptable standard and that the matter be referred to the Performance Committee for consideration.

Resolution;

A Performance Assessment is undertaken as the documents considered by the Committee indicates [sic] that Dr Bhatia's professional performance is unsatisfactory in the areas of basic clinical skills, clinical judgment and medical records."

9 Also annexed to the affidavit are minutes for the meeting of the Performance Committee of the first defendant held on Tuesday 23 October 2007. Part of what those minutes record includes the following:

"On 28 February 2006 the Performance Committee resolved that a Performance Assessment be conducted. This was scheduled for 10 September 2007 but was cancelled by the Board due to concerns in relation to [the plaintiff's lawyers'] threat of legal action against the Assessors (trespass). This stems from their belief that the Performance Committee did not have delegated authority to make the decision referred to above. The Performance Assessment is now on hold until the delegation issue is resolved by legislative amendment. It is expected that this will occur before the end of the year, and that it will be retrospective.

In the meantime, two further complaints have been received. A s 66 inquiry has been considered in relation to these complaints but the delegates did not consider that a s66 inquiry was indicated.

The Committee needs to decide upon a course of action in relation to the 2 new complaints.

The Committee expressed concern in relation to the surgical procedure conducted by Dr Bhatia in relation to the removal and reimplantation of the breast implant; infection control standards; the treatment of the known infection and the adequacy of Dr Bhatia's response to the Board. In these circumstances the Committee considered that there were issues that require the Board to take action to protect the health and safety of the public and as such a s66 inquiry should be convened to deal with the issues raised in the complaints.

A Section 66 inquiry is convened and is to include both the Robinson and El Kaddoumi complaints. "

Discussion

10 The plaintiff relies upon three principal arguments. First, the plaintiff contends that the Notice of Appointment is invalid and ineffective to the extent that it purports to have been made pursuant to a delegation from the first defendant to the second defendant but which was limited to the extent that the second defendant was only thereby authorised to "approve" the third defendants. Accordingly, the Notice of Appointment dated 29 October 2007 by which the second defendant purported to appoint the third defendants to conduct the subject inquiry was, according to this argument, beyond power.

11 There is little doubt that the terms of the delegation characterised it as a delegation to "approve". The first defendant argued, however, that the delegation of a function to approve

carried with it the power to appoint. This was for at least two reasons. First, the delegation of a function necessarily carries with it at least an implied power to carry it out. In the context of the subject delegation, power to "approve" would be meaningless if it did not include at least an implied power to appoint.

12 Moreover, s 49(4) of the *Interpretation Act 1987* provides:

"A delegate may, in the exercise of a delegated function, exercise any other function that is incidental to the delegated function."

The first defendant contends that in the circumstances of the present case a power to appoint is incidental to the grant of a power to approve.

13 In my opinion the plaintiff's argument is without merit. Even without the assistance of s 49 (4), the plain and ordinary understanding of the words used carry the meaning suggested by the first defendant.

14 Secondly, the plaintiff argued that, in the absence of an express power to do so, a decision maker has no power to delegate a discretionary power to another person or body: *delegatus non potest delegare*. The delegation by the first defendant to the second defendant was therefore, according to this argument, also void and ineffective as being beyond power.

15 The plaintiff referred to *Ex parte Forster; Re University of Sydney* [1963] SR (NSW) 723 in which the court, in reference to the maxim, said at 733:

"As a matter of the construction of the statute conferring the power, the application of the maxim, and its extent, must be considered with due regard to the purpose and objects of the statute, the character of the power which is conferred, the exigencies of the occasions which may arise with respect to its exercise, and other relevant considerations."

16 In *Re Reference under Section 11 Ombudsman Act 1976 for an Advisory Opinion* (1979) 2 ALD 86, Brennan J said at 94:

"It is often difficult to ascertain whether a given act is one which the authority may authorise another to perform on his behalf . . . and if an act is not one which may be so authorised, it cannot be effective to exercise the statutory power: *Jeffs v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551."

17 Section 136 of the Act is in the following terms:

"136 Delegation by Board and Registrar

(1) The Board may delegate to a person the exercise of any of its functions, other than this power of delegation.

(2) The Registrar may delegate to a person the exercise of:

(a) any of the functions of the Registrar under this Act, other than this power of delegation, or

(b) any functions delegated to the Registrar by the Board, unless the Board otherwise provides in its instrument of

delegation to the Registrar. "

18 In my opinion, s 136 is a complete answer to the plaintiff's contention. The first defendant had the power to appoint the third defendants. That was one of its functions. The first defendant delegated that function to the second defendant. Section 136(1) permitted it to do so. Pursuant to that delegated power, the second defendant appointed the third defendants. In doing so the second defendant exercised a function delegated to him by the first defendant.

19 This is not a case where it is difficult to ascertain whether a given act is one that the first defendant may authorise the second defendant to perform on its behalf. As a matter of construction of the Act that confers the power, no express restraint on the delegation would appear to exist. No argument was suggested in favour of the proposition that such restraint should be implied.

20 Thirdly, the plaintiff contended that a delegation to an unnamed and unidentified person was invalid on its face.

21 In *Owendale Pty Ltd v Anthony and Anor* (1966-1967) 117 CLR 539, the High Court said this at 563:

"The objections made for the plaintiff are, first, that a delegation must be to a named person not to the holder of an office or person performing the duties of an office . . . As to the first of these matters, there might perhaps have been some room for argument, were it not for the decision of Starke J in *Noble and Bear v The Commonwealth* (1943) 17 ALJ 184. Since then, delegations to the holders of specified offices have become commonplace in the administrative system of the Commonwealth; and provided that there be an identifiable person the holder of the office, I consider they are a valid exercise of a statutory power to delegate 'to any person'."

22 Section 49(1) of the *Interpretation Act 1987* is also relevant. It is in the following terms:

"49 Delegation of functions

(1) If an Act or instrument confers a power on any person or body to delegate a function, the person or body may, in accordance with the Act or instrument, delegate the function to a person or body by name or to a particular officer or the holder of a particular office *by reference to the title of the office concerned.*" (Emphasis added).

23 According to the plaintiff's argument, the delegation in question did not authorise the appointment of a named person, or the holder of a specified office. It was a delegation authorising the appointment of "two persons approved by the Registrar". According to this argument, that delegation fell outside both the terms of s 49(1) and the words of the High Court in *Owendale* (supra). Accordingly, it was ultra vires the power of delegation and therefore invalid.

24 The first defendant argues, however, that the appointment was in fact not a delegation at all. It was no more than an exercise of the already delegated power to *appoint* the third defendants.

25 The first defendant undoubtedly delegated to the second defendant the power to perform whatever task is recorded in the August 2003 delegation. That task required the second defendant to appoint or approve or nominate etc two (as yet unnamed) persons to, among other

things, conduct s 66 inquiries from time to time. The words used were descriptive of the task that had been delegated by the first defendant to the second defendant, and no more. They did not effect an appointment of the third defendants. In turn, no power to do anything was delegated to the third defendants until 29 October 2007 when the second defendant appointed them, in my view uncontroversially.

26 Hulme J considered effectively identical words to those of the August 2003 instrument in *Roehrich v New South Wales Medical Board* [2004] NSWSC 1264. His Honour had this to say at [79] -[80]:

"[79] The question arises whether, within the terms of s136 there was a proper delegation of the Board's powers to Professor Glover and Dr Kendrick. Does delegation to "two persons approved by the Registrar" - and who may or may not be known to the Board - amount to delegation "to a person" within that statutory provision?

[80] I was referred to no authority on the question and I have found none. Although my mind has vacillated on the issue, ultimately I have reached the view that the delegation was valid and that the reference "to a person" does not require that the Board itself specify the person (or persons) to whom the delegation is made."

27 The plaintiff submitted that this decision was wrong and that I should not follow it. Although I have taken a slightly different approach to his Honour, I am not prepared to say that the decision is wrong. Neither the approach taken by me nor by his Honour assists the plaintiff in the present case.

28 The plaintiff's third proposition is without substance.

29 In addition to these matters the plaintiff raises what I shall describe as a species of natural justice point. (In describing the proposition in that way I do not intend to derogate from its significance to the plaintiff, or its validity when properly understood). In summary the plaintiff says:

29.1 The first defendant has for many weeks been in possession of the information that has prompted it to schedule an inquiry. Despite this, it has only recently nominated 12 November 2007 as the date when it should take place. This has given the plaintiff insufficient time to prepare for the inquiry and is demonstrative of unseemly haste on the part of the first defendant having regard to the history of this matter.

29.2 The first defendant's decision to require the plaintiff to attend before a s 66 inquiry is motivated not by a proper consideration of the matters to which s 66 refers but to an illegitimate consideration of complaints and threats of legal action made by or on behalf of the plaintiff, which are referred to in the minutes of the Performance Committee on 23 October 2007. The plaintiff says that, viewed objectively, an inquiry is neither warranted nor justified.

29.3 The significance of the consequences for the plaintiff, having regard to the powers of the first defendant set out in s 66, inform the taking of an expectant approach by the first defendant concerning any decision likely adversely to affect or to reflect upon the professional standing and competence of the plaintiff. This includes the very conduct of the s 66 inquiry itself. See, for example, *Levine J in X v New South Wales Medical Board* (1993) 32 ALD 330 at 331-332 as follows:

"It is not gainsaid that s 66 of the Act provides the board with extraordinary powers. It needs but the application of common sense to appreciate the possible if not inevitable adverse consequences to a registered medical practitioner against whom an Order is made under s 66(1). The powers are so draconian that they can be made, as it were, *ex parte* (s 66(2)) and a recognition of the draconian nature of those powers is, in my view, contained in subs (4) by requiring the complaints that give rise to the operation of s 66 be treated as s 52 complaints . . ."

30 The response of the first defendant is to emphasise that the primary function of s 66 is protective and that the plaintiff's application should be considered as an application to restrain the exercise of statutory powers conferred for the protection of the public. The Court should in those circumstances be slow to enjoin the defendants in all but the most exceptional circumstances. The first defendant emphasises the plaintiff's medical practice history in support of the proposition that the scheduled s 66 inquiry is neither premature nor unwarranted. The so-called draconian consequences for the plaintiff are by no means inevitable, particularly having regard to the terms of subs (1) (i.e. "*if* at any time it is satisfied"), and to the relatively high threshold that conditions the exercise of the power (i.e. "necessary for the purpose of protecting the life or physical or mental health of any person"). Moreover, the first defendant has power - indeed, undoubtedly a duty - to hear and consider any appropriate application that may be made by or on behalf of the plaintiff for an adjournment or, failing an adjournment, matters put on his behalf going to the merits of the investigation.

31 In my view, as already indicated, the plaintiff's challenge to the first defendant's appointment of the third defendants is without merit. Nor have I discerned the existence of factors that would convince me, even on an interlocutory basis, that the restraint of the third defendants in their proposed conduct of a s 66 inquiry with respect to the plaintiff is warranted. Despite his concerns about such things as lateness, surprise and delay, the plaintiff has not pointed to any specific (procedural) prejudice to him. There is no certainty that any of the powers conferred upon the third defendants by s 66(1) will be exercised to the detriment of the plaintiff and there are good reasons to permit the inquiry to proceed having regard to the protective function which it is both intended and designed to serve.

Orders

32 In my opinion, the plaintiff has not made out a case for the grant of an interlocutory injunction on any of the bases alleged. The application should be dismissed with costs.

33 I will hear the parties on any application for orders or directions for the further conduct of the matter.

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