

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cv. #2011/03419

BETWEEN

DESMOND L. HAYNES

HAYNES PLUMBING '1990' LIMITED

CLAIMANT

AND

THE WATER AND SEWERAGE AUTHORITY OF
TRINIDAD AND TOBAGO

DEFENDANTS

BEFORE THE HONOURABLE MADAM JUSTICE DEAN-ARMORER

APPEARANCES

Mr. K. Hudson-Phillips Q.C. for the Claimant.

Mr. S. Singh for the Defendant.

JUDGMENT

Introduction

1. This was an application for judicial review. The first claimant held a Sanitary Constructor's Licence which had initially been granted by the defendant in 1974 and which had been renewed periodically until July 2011. When the defendant refused to renew the licence in July 2011, the claimants sought to have the decision reviewed on the ground that it was irrational and procedurally unfair.
2. In the course of this judgment, the court considered whether a sufficient public law element existed in these proceedings to render the decision reviewable. The court also considered the doctrine of legitimate expectation and the principles governing the grounds of irrationality in judicial review.

Procedural History

3. On 8th September, 2011, the Claimant filed, a Notice of Application for leave to apply for judicial review of the decision of the Water and Sewerage Authority (WASA) not to renew his licence to act as a licenced sanitary constructor to construct, execute and repair works authorised by section 66 of the *Water & Sewerage Authority Act* Ch.54:40¹.
4. By the application, the Claimants sought leave to apply for the following items of relief:
 - (i) *A declaration that the decision of the Defendant dated the 27th of June 2011 not to renew the licence of the First-Named Claimant to act as a sanitary constructor to construct, execute, repair or perform such works authorised by section 66 of the Water and Sewerage Act is unlawful, illegal and of no effect having been arrived at in circumstances which were procedurally unfair and or in breach of the rules of natural justice.*
 - (ii) *A declaration that the decision of the Defendant dated the 27th of June 2011 not to renew the licence of the First-Named Claimant to act as a sanitary constructor to construct, execute, repair or perform such works authorised by section 66 of the Water and Sewerage Act is irrational and or unreasonable.*
 - (iii) *An order of certiorari to remove into the High Court and quash the decision of the Defendant dated the 27th of June 2011 not to renew the licence of the First-Named Claimant to act as a sanitary constructor to construct, execute, repair or perform such works authorised by section 66 of the Water and Sewerage Act*
 - (iv) *An interim order that the Defendant do renew the licence of the First-Named Claimant to act as a sanitary constructor to construct, execute, repair or*

¹ Water & Sewerage Authority Act Ch.54:40

perform such works authorised by section 66 of the Water and Sewerage Act until the final determination of these proceedings

- (v) *An order that the Defendant do renew the licence of the First-Named Claimant to act as a sanitary constructor to construct, execute, repair or perform such works authorised by section 66 of the Water and Sewerage Act*
- (vi) *Special Damages in the sum of \$262,000.00*
- (vii) *Damages*
- (viii) *Interest on all sums found to be due to the Claimants at such rates as this Honourable Court thinks fit pursuant to its equitable jurisdiction and or section 25 of the Supreme Court of Judicature Act Chap. 4:01 of the Laws of Trinidad and Tobago*
- (ix) *Costs*
- (x) *All necessary and consequential orders directions and such further and or other relief as this Honourable Court shall deem fit.*

5. The claimants advanced the following grounds in support of their application for judicial review:

- That the first claimant held a legitimate expectation that the intended defendant would not refuse to renew his work permit without good reason without giving him a proper opportunity to address any concerns it might have.
- The decision of the first defendant not to renew the licence was taken in circumstances which were procedurally unfair.
- The decision of the intended defendant was irrational and unreasonable.

6. On 28th October, 2011, this Court granted leave to the claimants to apply for judicial review of the June, 2011 decision of the defendant. On 29th September, 2011, the claimants amended their Notice of Application for leave to apply for Judicial Review.

By their amendment, the claimants sought an interim order in the following terms:

“...that the defendant do forthwith renew the licence of the first named defendant to act as a sanitary constructor to construct, execute repair or perform such work as authorised by section 66 of the Water and Sewerage Authority Act until the final determination of these proceedings.”

7. On the 8th November, 2011, this Court refused the interim order as sought for the reason that granting such an order would have had the effect of finally determining the proceedings. There was no appeal against the Court’s refusal to grant the interim order.

Evidence

8. The following affidavits were filed in these proceedings:

- The affidavit sworn by the claimant and filed herein on 8th September, 2011².
- The affidavit filed by the claimant on 4th November, 2011³.

9. The following affidavits were all filed on 22nd November, 2011 on behalf of the defendant:

- Affidavit of Carol Dos Santos.
- Affidavit of Isaiah Abdullah Pardais.
- Affidavit of Anthony Williams.
- Affidavit of Penelope Williams.

² Filed in support of the application for leave to apply for judicial review.

³ Filed in support of the application for interim relief.

- Affidavit of Carol Doyle.
 - Affidavit of Sean Chase.
10. There was no cross-examination in this matter and the facts were to be gleaned from the filed affidavits.

Facts

1. The first claimant graduated as a plumber from the John Donaldson Technical Institute in 1974 and received a National Certificate of Plumbing.
2. He applied to WASA for a Sanitary Constructor's Licence. This was granted in 1974 pursuant to the *Water and Sewerage Act* Ch. 54:40
3. The first claimant started his own business and incorporated Haynes Plumbing and Metal Works Ltd. In 1990, the company name was changed to that of the second claimant, Haynes Plumbing 1990 Ltd.
4. The first claimant was able to renew his licence at biennial intervals from 1974 to July, 2011. The licences were valid for a period of two years and the defendant deposed without contradiction that his licence was renewed over the years without incident.
5. The year 2007 marked a change in the renewal policy employed by the defendant. Sanitary Constructors Licences were no longer granted for an indeterminate periods. From 2007, they were renewable subject to performance reports.
6. On 3rd July, 2011, the first claimant attended the offices of the defendant with a view to having his licence renewed. He was then handed a letter the terms of which are set out below:

*“Arising out of the findings of an investigation into sewer connection at
Edinburgh Commercial Centre the Authority has evidence of acts of*

misconduct taken place. Accordingly the decision made that your licence will not be renewed”⁴

7. The decision to refuse to renew the claimant’s licence was confirmed in the affidavit of Penelope Williams for the defendants. Ms. Williams deposed that the defendant received an anonymous letter in October, 2010. The letter contained allegations against the first claimant. Ms. Williams deposed that at a meeting of the audit committee on 22nd June, 2011, a decision was taken not to renew the licence of the first claimant. According to the evidence of Ms. Penelope Williams it was decided that Mr. Haynes licence which was to expire on 25th June, 2011 would not be renewed.

“ as a result of the findings of the audit report ...”.

8. In his affidavit of 22nd November, 2011, Anthony Williams deposed that he knew nothing of the matter before the letter was given to the Mr. Haynes. Mr. Williams also deposed that on 31st October, 2012, he called Mr. Haynes to inform him of the new procedure.

9. At paragraph 12 of his affidavit, Mr. Williams had this to say:

“I did call Mr. Haynes on the 31st October, 2011, to inform him of the new procedure for acquiring a licence...”

10. The Court observes that Mr. Williams felt the need to inform Mr. Haynes notwithstanding the fact that his licence had long expired. In my view Mr. Haynes’ testimony serves to unmask the defendant’s argument that the claimant’s licence could not be renewed because it had already expired. It is clear from the evidence of Mr. Haynes that the defendant was seeking out licence holders to inform them of the new procedure regardless of whether or not their licences had expired.

⁴ See the November, 11, 2011 affidavit of the first claimant, exhibit D.H. 5.

Law

Water and Sewerage Authority Act Ch. 54:40

1. The defendant authority is empowered by section 69 of the *Act*⁵ to grant licences to sanitary constructors. Section 69 (1) provides as follows:

“The Authority may in accordance with such requirements as may be provided by regulations grant licences authorising persons to construct execute repair or perform work required of the owner of any house under section 66 in connection with house sewers and water closets as the Authority thinks fit. The persons shall be styled licensed Sanitary Constructors and shall obey the orders of the Authority or anyone authorised by the authority.

2. Section 69(3)⁶ confers on the defendant the power to suspend or cancel a licence. Subsection 3 provides:

“The Authority may in its discretion suspend or cancel the licence of a sanitary constructor who is guilty of misconduct in the performance of his duties ...”

3. Subsection (5) prohibits work on sewers etc. by any person other than a licensed sanitary constructor:

“No person other than a Licensed Sanitary Constructor may do any work in relation to a collecting sewer, house sewer, water closet or soil pipe and

⁵ Water and Sewerage Authority Act Ch. 54:40.

⁶ *Ibid* at s. 69 (3).

notwithstanding any written law to the contrary any unlicensed person who does that work ... is liable on summary conviction to a fine ...⁷

4. In *NH International Caribbean Ltd. and UDeCott v Karamath*⁸, Justice of Appeal Kangaloo considered whether the decision of the Respondent, UDeCott bore a public law element. In that case, the learned Justice of Appeal held that the tendering procedures followed by UDeCott did not contain a public law element.

The learned Justice of Appeal considered English authorities: *Mass Energy v Birmingham City Council*⁹ (1994) 3 Env. L.R. 298 and *Ex p. Hibbit and Sanders*¹⁰ and culled the following principles from them:

“a. A tender process without statutory underpinning does not give rise to public law rights.

b. the nature of a tender process undertaken by a governmental body is not changed because of the governmental nature of the body.

c. If the obligation breached in tender procedures is fairness that obligation cannot be equated to the obligation of fairness of government departments ... because tender procedures are rooted in the common law right to contract¹¹”.

5. At paragraph 40 of his decision, the learned Justice of Appeal expressed his view as to whether there existed a public law element in the matter which engaged his attention.

Justice of Appeal Kangaloo, had this to say:

⁷ Ibid at s. 69 (5).

⁸ Civ. App. 95 of 2005 (unreported).

⁹ Mass Energy Ltd. v Birmingham CC [1994] 3 Env. L.R. 298.

¹⁰ R v Lord Chancellor ex parte Hibbits and Sanders (1993) COD 306.

¹¹ Civ. Appeal #95 of 2005 NH International & UdeCott v Hafeez Karamath per Kangaloo, J.A. at paragraph 21.

“In the circumstances largely because of the lack of statutory underpinning for the tender process ... but also because of the intrinsic commercial and contractual nature of the tender process itself I am afraid that the decision complained of does not have a sufficient public law element or flavour to be amenable to judicial review...” (see paragraph 40)¹².

Authorities on Fairness

6. In *R v Secretary of State for the Home Department Exp. Doody*¹³ Lord Mustill set out the following principles:

“1. where an Act of Parliament confers an administrative power, there is a presumption that it will be exercised in a manner which is fair.”

5. *Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result or after it is taken with a view to procuring its modification; or both*

6. *since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer...”¹⁴*

¹² NH International (Caribbean Ltd.) & Anor. v Karamath Civ App. 95 of 2005 per Kangaloo J.A. paragraph 21.

¹³ R v Secretary of State for the Home Department Exp. Doody [1994] 1 AC 531

¹⁴ Ibid.

7. The authority of *Mc Innis v Onslow Fane*¹⁵ represents, in my view, the locus classicus on the issue of fairness in respect of the suspension of licences and in respect of the refusal of a public authority to renew them. Megarry V.C. in that case identified three categories of decisions in respect of licences: there are firstly forfeiture cases; secondly the application cases and thirdly, the category referred to by Megarry V.C. as the third “*intermediate category: the expectations cases.*”

Megarry, V. C. had this to say:

*“...the legitimate expectation of a renewal of the licence ... is one which raises the question of what it is that has happened to make the claimant unsuitable for the licence for which he was previously thought suitable ...”*¹⁶

Reasoning and Decision

1. At the outset, the Court considered whether the impugned decision contained a sufficient public law element to render it reviewable.
2. The defendant relied on the learning contained in the decision of *NH v Karamath*¹⁷ in support of its submission that no public law element existed in this case. In my view the grant or the suspension of a licence is manifestly distinguishable from the award of a contract by the tendering process which had been considered by the Court of Appeal in *NH v Karamath*¹⁸. The first, obvious and most superficial reason is, of course, that the licence in these proceedings, had been granted pursuant to statutory powers invested in

¹⁵ *Mc Innis v Onslow-Fane* [1978] 3AER 1520.

¹⁶ *Ibid* at 1529

¹⁷ *NH International (Caribbean) Ltd. v Karamath Civ. App.* 95 of 2005.

¹⁸ *Ibid.*

the defendant, pursuant to section 69 of the *Water and Sewerage Authority Act* Ch 54:40¹⁹.

3. More importantly though, a licence which is granted by a public authority is embedded in public policy and permits the licence holder to perform acts which would otherwise be unlawful. Moreover, the grant, suspension or refusal of a licence is an act which frequently and certainly in this case, empowers public authorities to make decisions which have deep and far-reaching effects on the power of the licence holder to earn his livelihood. The factor of fairness in the exercise of this power therefore becomes very critical.
4. It is also my view that yet another factor distinguishes the instant case from *NH v Karamath*²⁰. The relationship between licence holder and authority is not contractual. No contract exists between the authority and the licence holder. The issue of the sanitary constructors licence is therefore not the exercise of contractual or commercial power, but of power conferred by statute on the defendant as a public authority.
5. Accordingly, I disagree altogether that the public law element is absent from the decision in question, and I hold that the decision of the defendant to refuse renewal of the sanitary constructor's licence is reviewable.
6. I turn now to consider the merits of the application for judicial review.
7. The first claimant had been a licenced sanitary constructor since 1974 and had enjoyed an uninterrupted tenure as such, with his licence being renewed periodically without query or incident.

¹⁹ Water and Sewerage Authority Act Ch 54:40

²⁰ NH International (Caribbean) Ltd. v Karamath Civ. App. 95 of 2005.

8. In the year 2007, the fees payable for the renewal of the licence had been increased from \$200.00 to \$500.00. Moreover from the year 2007, licences were not renewed automatically, but were renewable subject to performance reports.
9. Nonetheless, the first claimant secured renewals without any incident in 2007 and 2009.
10. It is therefore in this historical context that the court considered whether the claimant, in July, 2011 held a legitimate expectation that his licence would be renewed.
11. In my view, it is beyond argument that the case of the first claimant fell into the third expectation category identified by Megarry V.C. in *Mc Innis v Oslow Fane*²¹. The first claimant was entitled to know what occurred to render him unsuitable for a licence for which he had been previously considered suitable.
12. Legitimate expectation is inextricably bound up with the rules of natural justice.²² The doctrine does not necessarily require that the public authority meet the claimant's substantive expectations. However, the doctrine requires that the authority act fairly and afford the claimant an opportunity to be heard if it became necessary to make a decision which is contrary to his legitimate expectations.
13. In these proceedings, the claimants enjoyed the unobstructed renewal of the Sanitary Constructor's Licence for more than thirty years. In July, 2011, the first claimant's attempt to renew his license was met with a flat refusal with neither an explanation nor an invitation to provide reasons why his licence ought not to be refused. No explanation was forthcoming and the defendant was altogether unconcerned as to whether the claimants held a legitimate expectation. It is my view that in this way the defendant fell

²¹ *Mc Innis v Onslow-Fane* [1978] 3 AER 1520 at 1529.

²² *Attorney General v K.C. Confectionery Limited* (1985) 34 WIR 387 per Persaud JA at 409.

far short of the requirements of natural justice and I hold that the impugned decision was procedurally unfair.

14. The claimants have argued that the decision of the defendant was irrational in that the defendant, on the material before it could not reasonably have concluded that the first claimant was guilty of misconduct. In order to make a finding of this kind, the court would have been required to enter into an investigation as to the allegations of misconduct. As a reviewing court this court was ill-equipped to conduct that kind of investigation and will decline making a finding of irrationality on this basis.
15. There is however a separate aspect of the decision which the court has found to be irrational. When this claim was instituted the defendant provided what the court regarded as its very shocking explanation in the affidavit of Penelope Williams. The defendant not only acted on an anonymous letter, but did so without notifying the first claimant of its contents or without giving him an opportunity to contradict allegations made against him. In my view the action of the public authority constituted irrationality in the *Wednesbury*²³ sense as well as that contemplated by Lord Diplock in *CCSU v Minister for The Civil Service*²⁴ in that it was outrageous in this defiance of logic and accepted moral standards that no public authority that applied its mind to the question would have deprived the claimants of their means of livelihood on the basis of an anonymous accusation.
16. Accordingly, it is my view and I hold that the impugned decision was procedurally unfair, contrary to the legitimate expectation of the claimant and irrational.

²³ Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1947] 1 KB 223

²⁴ CCSU v Minister for The Civil Service [1984] 3 All ER 935

Relief

1. There will be judgment for the claimants in terms of the items of relief sought at paragraphs (i) (ii) and (iii) of the Notice of Application filed herein on the 8th of September 2011, i.e.

(i) A declaration that the decision of the Defendant dated the 27th of June 2011 not to renew the licence of the First-Named Claimant to act as a sanitary constructor to construct, execute, repair or perform such works authorised by section 66 of the Water and Sewerage Act is unlawful, illegal and of no effect having been arrived at in circumstances which were procedurally unfair and or in breach of the rules of natural justice.

(ii) A declaration that the decision of the Defendant dated the 27th of June 2011 not to renew the licence of the First-Named Claimant to act as a sanitary constructor to construct, execute, repair or perform such works authorised by section 66 of the Water and Sewerage Act is irrational and or unreasonable.

(iii) An order of certiorari to remove into the High Court and quash the decision of the Defendant dated the 27th of June 2011 not to renew the licence of the First-Named Claimant to act as a sanitary constructor to construct, execute, repair or perform such works authorised by section 66 of the Water and Sewerage Act.

2. The claim for damages was not argued. There was a submission that it should be adjourned. No reason was provided however. Moreover in my view there was no

analogous common law action in which the claimant could have recovered damages.
Accordingly, the court will refuse to award damages in this case.

3. The defendant do pay to the claimants, their costs of and associated with the application fit for two advocate attorneys at law, to be quantified by the Registrar of the Supreme Court in default of agreement.

Dated this 6th day of July, 2012.

M. Dean-Armorer²⁵
Judge

²⁵ Judicial Research Assistant – Ms. Kendy Jean.
Judicial Secretary – Mrs. Irma Rampersad.