COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2021/PUB/jrv/00008

BETWEEN:

FOLANA BURROWS & ASHTON SMITH

Applicants

AND

BAHAMAS PHARMACY COUNCIL

Respondent

Before:	Mr. Justice Loren Klein
Appearances:	Ms. Tanisha Tynes-Cambridge for the Applicants
	Mr. David Higgins for the Respondent
Hearing Dates:	2 July 2021, final submissions July 2022

RULING

Klein, J.

Judicial review—Pharmacy Act 2009 ("The Act")—Pharmacy Regulations 2010 ("The Regulations")—Application by the applicants to be registered and licenced as pharmacists under the Act—Bahamas Pharmacy Council ("The Council")—Council implementing a Pre-Registration Examination ("PRE") and a fee of $400 as a condition-precedent to being registered—Whether ultra vires the Act and Regulations—Whether alternative remedy of statutory appeal ought to have been pursued—Relief in Judicial Review Proceedings—Discretionary Nature—Mandamus—Declaration

INTRODUCTION AND BACKGROUND

Introduction

1. This is an application for judicial review of the decision of the Bahamas Pharmacy Council ("the Council") to require the applicants, both pharmacy interns, to sit a Pre-Registration Exam ("PRE") and pay various fees associated with that exam as a condition to being registered under the *Pharmacy Act 2009* ("the Act") and *Pharmacy (Registration and Licensing) Regulations 2010* ("the Regulations"). The applicants claim these requirements are *ultra vires* the Act and Regulations.

The Application

2. The applicants filed an *ex parte* application for leave to apply for judicial review on 5 May 2021. The Court granted leave for the applicants to commence judicial review proceedings at a hearing on 31 May 2021, with notice to the respondent, who did not oppose the grant of leave.

3. The originating Notice of Motion commencing the proceedings was filed 10 June 2021 seeking, in the main, the following Orders:

(i) Mandamus against the Registrar of the Council to issue a certificate of registration and licence to practice to the applicants;
(ii) A declaration that the applicants have complied with ss. 9 and 12 of the Act;
(iii) A declaration that the Registrar has acted outside of the Act by requiring payment and administering an exam; and
(iv) An order prohibiting the Registrar from refusing to register and license pharmacists who have met the requirements under the Act and Regulations.

4. Although the Court set several hearing dates, the matter was adjourned on several occasions to allow the applicants to instruct new counsel. They were represented at various points by three different sets of attorneys. Both applicants filed affidavits in support of their claims on 23 March 2021. The Respondents filed the affidavit of Dr. Anne Rolle on 25 June 2021. Submissions were eventually filed by the applicants in June 2022.

5. The gravamen of the complaint centres around a requirement imposed by the Council in June 2018 for applicants for registration to sit what is called a Pharmacist Registration Examination ("PRE"). This exam was said to consist of four parts, at a cost of $100 each ($400 in total). This fee, the applicants say, is also not prescribed by the Regulations and therefore it has been unlawfully imposed. They claim, therefore, to be entitled to be registered and licensed, as they have complied with all of the requirements of the Act and Regulations in that regard.

6. The respondent counters that the power to administer the examination and set fees is implied in the statutory powers of the Council and is therefore not *ultra vires*. They further take the point that the applicants have failed to exhaust alternative remedies, namely the statutory appeal process provided by the Act against decisions of the Council.

ANALYSIS AND DISCUSSION

7. Based on the rival contentions of the parties, there are four main issues for the Court to decide:

(i) Whether the applicants failed to exhaust alternative remedies and whether they should be allowed to pursue judicial review, or be entitled to any relief as a result.
(ii) Whether the Council is empowered to insist on and administer the PRE as a pre-condition to registration.
(iii) Whether the Council is empowered to impose the additional fees associated with the examinations.
(iv) If the applicants are right in their claim, whether the relief sought can be granted against the respondent Council.

The Statutory framework

8. As indicated, the governing legislation is the *Pharmacy Act* 2009 and *Regulation*s 2010. The Act provides, *inter alia*, for the establishment of The Bahamas Pharmacy Council, whose functions include (among others) the following:

> "(a) to regulate and control the practice of pharmacy;
> (b) to govern and regulate the standard of practice for professionals involved in the practice of pharmacy;
> (c) to establish, develop and maintain standards of knowledge, skill and professional ethics for persons involved in the profession and practice of pharmacy;
> […]
> (e) to register all persons entitled to be registered under this Act;
> [….]
> (h) to issue licences under this Act;
> (i) to ensure compliance with the requirements of this Act;…"

9. *Part IV* of the Act provides for the "Registration of Pharmacists, Pharmacy Technicians and Other Practitioners" and *Part V* provides for "Licensing of Pharmacists, Pharmacy Technicians and Pharmacy Interns". Other parts of the Act deal with Disciplinary Proceedings, control of the sale and administration of drugs, prescriptions, and places used to store and distribute drugs. Under section 48, the Minister is empowered to make regulations, after consultation with the Council, generally for giving effect to the Act.

10. The main sections that fall for consideration are ss. 9(3), 12, 23 and 48. Some of the relevant provisions are set out below:

> <u>Section 9(3)</u>
>
> "s. 9(3): A person who after commencement of this Act applies to the Council to be registered as a pharmacist or pharmacy technician and who satisfies the Council that—
> (a) he can read, write and understand the English Language;
> (b) he is eighteen years of age or over;
> (c) he is not by reason of age or otherwise, incapable of operating or being employed in a pharmacy;
> (d) he is fit and proper, that is to say—
> (i) he has not been convicted of any offence under this Act;
> (ii) he has not been convicted of any offence under the Dangerous Drugs Act;
> (iii) he has not been convicted of any offence within the last five years of which, dishonesty or drug abuse is an element;
> (v) the Council is satisfied as to the character and competence of the applicant; and
> (e) he is qualified to be so registered,
>
> is entitled, upon application and on payment of the prescribed fee, to be issued a certificate of registration subject to such conditions that the Council may determine.
>
> (4) For the purposes of section 9(3)(e) a person is qualified—
> (a) to be registered as a pharmacist, if that person has not been disqualified or suspended from operating as a pharmacist whether within or outside The Bahamas and—

(i) holds a pharmacy degree from an accredited college or University; or
(ii) holds a certificate of competency in pharmacy in The Bahamas; and
(iii) has at least two thousand (2000) hours of practical experience in pharmacy under the supervision of a person who is licensed as a pharmacist in the jurisdiction where the training took place.

(b) [*sets out requirements for registration as pharmacy technician*]

(5) An application for registration under this section shall be made in the prescribed form and an applicant shall furnish to the Council—

(a) proof of his identity;
(b) evidence of his qualifications; and
(c) such further or other information as the Council may require in respect of the matters specified in paragraph (a) – (e) of subsection (3).

(6) A registration fee under this section shall be payable as prescribed."

Section 12 (1)

"12(1) A person who, after the commencement this Act, registers as a pharmacist or a pharmacy technician and who desires to practice as a pharmacist of pharmacy technician in The Bahamas, shall upon application in the prescribed manner and on payment of the prescribed fee, be entitled to have issued to him by the Council a licence, subject to such conditions as the Council may determine….

Section 23:

23. (1) Subject to subsection (4), any person aggrieved — (a) by the refusal of the Council to register him under this Act; or (b) by any decision of the Council to suspend his registration or to cause his name to be removed from the register, or to censure him, may within three months of the receipt of any such notice appeal in respect thereof to the Supreme Court and in relation to every such appeal, section 54 of the Magistrates Act shall apply *mutatis mutandis* as if the matter in respect of which the appeal is brought were a judgment or order of the Magistrate's Court.

(4) Notwithstanding subsection (1), no appeal shall be made under this section against a refusal of an application for registration where the registration is conditional upon the applicant's satisfying the Council that he is qualified to be registered under this Act."

Section 48:

"48. (1) The Minister may, after consultation with the Council, make regulations generally for giving effect to the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the Minister may after consultation with the Council make regulations—

[…]

(e) prescribing the fees to be paid under this Act, which from time to time may be varied;
(m) prescribing the requirements which must be satisfied by persons applying for or training as technicians, pharmacist or inspectors;
(n) prescribing the examinations to be passed and other requirements to be satisfied whether in addition to, or as an alternative to the passing of certification exams by persons apply for registration as a technician or pharmacist;…"

(3) Any regulations made by the Minister under subsection (2) (e) shall be exempt from the provisions of section 32 of the Interpretation and General Clauses Act but shall be subject to affirmative resolution of the House of Assembly.
(4) In subsection (3), "affirmative resolution of the House of Assembly" in relation to subsidiary legislation means that such legislation does not come into operation unless and until affirmed by a resolution of that House."

11. The Regulations provide for various forms, and sets out in the 2nd Schedule the fees for various applications. These include a fee of $100 for registration as a pharmacist, pharmacy technician or other practitioner, and similarly a fee of $100 for the issuance of a licence to practise as a pharmacy technician or pharmacy intern.

The Evidence

Folana Burrows- First Applicant

12. Ms. Burrows is a "Pharmacist 1" at the Public Hospitals Authority and stationed at the Rand Memorial Hospital, Grand Bahama ("Rand"). She is a graduate of the University of Technology, Jamaica, with a Bachelor of Pharmacy Degree and has undertaken 2,041 hours of practical experience at the Rand. She was granted a licence to practise as a Pharmacy Intern on 5 February 2020 by the Council, which apparently she did not renew. On 31 August 2020, Ms. Burrows applied to the Council to be registered and for a licence to practice pharmacy in accordance with Forms 3 & 4 of the Regulations, and submitted the documents required under the Act and the prescribed fee of $200. On 22 September 2020 she received an email from the Council which indicated that her "examination results" remained outstanding from her application for registration and licensing.

13. As mentioned, this was a reference to the PRE implemented by the Council, which is discussed further below. She objected to this and formed the view that the PRE was not prescribed under the Act, and that the 2nd Schedule of the Regulations does not require any additional fees as part of the application process. She therefore took advice and filed for judicial review.

Ashton Smith- Second Applicant

14. Ms. Smith is a Pharmacy Intern at Heaven Sent Pharmacy in Nassau. She is also a graduate of the University of Technology, Jamaica, with a Bachelor of Pharmacy Degree, and has undertaken 2,192 hours of practical experience at Heaven Sent Pharmacy. She was also granted a licence to practice as a Pharmacy Intern, on 24 December 2019. The facts did not disclose whether she renewed this licence. On 17 July 2020, she submitted the relevant application forms (Forms 3 & 4) to be registered and licensed as a pharmacist, and paid the requisite fees on 1 September 2020.

15. On 4 September 2020, she received an email from the Council indicating receipt of her documents but informing her that the "*application process for examination & registration and licensing has been separated*" and that she was required to sit the PRE, which consisted of three parts and four papers, at a cost of $100 each. These were described as follows: **Part I** (two papers), Foundations in Pharmacy Practice; **Part II**, Pharmacy Law and Ethics; and **Part III,** Objective Structured Clinical Examinations ("OSCE"). She also took legal advice and sought judicial review of this additional requirement for her to be registered and licensed.

Dr. Anne Rolle

16. Dr. Anne Rolle is the Registrar of the Council, a position which she held for 8 years prior to the filing of her affidavit. She indicated that "*the Council is tasked with the statutory responsibilities of ensuring the protection of the health and safety of the public by ensuring that Pharmacists are competent and fit to practice*". Thus, in addition to meeting the fitness and technical requirements, the applicant must be competent pursuant to s. 9(3) of the Act. In this regard, the Council established the Pharmacy Registration Examination, which was explained as follows:

> "6. The Pharmacy Registration Examination ("PRE") is a mandatory requirement established by the Council to assess competence. The results of the PRE serve to inform the Council as to the applicant's competence and satisfy the Council of a national competency standard in the face of the multiplicity of academic degrees obtained and presented by the prospective Pharmacist."

17. In the lead-up to the implementation of the PRE, the Council published notices in the *Tribune* and *Nassau Guardian*, advising prospective applicants for registration that with effect from 30 June 2018 the Council would require all applicants to take the PRE. The substance of the notice was as follows:

> "The Bahamas Pharmacy Council wishes to advise all prospective applicants for registration as pharmacists under the provisions of the Pharmacy Act that with effect from 30th June 2018 the Council shall require all applicants to take the Pharmacists Registration Examination ("PRE"). The examination shall include testing of the core competencies for pharmacy practice in the following areas: Foundations in Pharmacy Practice, Pharmacy Law and Ethics and an Objective Structure Clinical Examination (OSCE)."

18. The affidavit related that the Council responded to the application of the first applicant on 14 may 2019 and informed her of the requirement to sit the PRE. In response, they received a letter dated 20 May 2019 from counsel and attorney-at-law for the first applicant objecting to the need to sit the PRE and pay the required fees. It stated in part:

> "…unless and until the Minister exercises his statutory authority to amend the Regulations by adding (additional) examination requirements and increasing or altering the prescribed fees, and those amendments to the Regulations are affirmed by a resolution of the House of Assembly, the existing statutory requirements and prescribed fees must be applied."

Summary of the parties' contentions

Applicants

19. As indicated, the main point taken by the applicants is that the requirement to sit the PRE and pay the exam fee of $400 is *ultra vires* the Act and Regulations. They accept that the Minister has the power, after consultation with the Council, to make Regulations prescribing the requirements for the registration and licensing of pharmacists pursuant to s. 48 of the Act, and that such Regulations were made on 29 January 2010. But they note that nowhere in the Act or Regulations is the Council empowered to require the applicants to sit an additional exam to determine competency or pay fees additional fees not prescribed by Regulations. Secondly, they argue that alternative remedy of a statutory appeal was not available to them, because sub-section (4) of s. 24 excludes the ability to appeal in cases "…*where the registration is conditional upon the applicant's satisfying the Council that he is qualified to be registered under this Act*."

Respondent

20. The respondent argues firstly that the applicants had available the alternative remedy of pursuing a statutory appeal to the Supreme Court against any refusal to register them, which they should have pursued before resorting to judicial review. In this regard, they point out that s. 23 of the Act provides for any person aggrieved by a decision of the Council to refuse to register them, to remove their name from the register or censure them, to appeal to the Supreme Court within three months of the receipt of notice of that decision.

21. They rely for this proposition on the case of **R v Inland Revenue Commissioners, ex parte Preston** [1985] AC 835, where the House of Lords said [at 862, per Lord Templeman]:

> "Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers. Judicial review should not be granted where an alternative remedy is available. […] Judicial review process should not be allowed to supplant the normal statutory procedure…" .

Earlier in that case, Lord Scarman observed that [pg. 852]: "…*it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision*."

22. The respondent contended that apart from the statutory appeals process, the applicants could have approached the court on a construction summons, relying on the observation of Sykes J in **Meadows, Dennis and Blaine, Betty Ann et al** 2012 JMSC Civ 110, that an applicant who wished to challenge a decision based on the interpretation of a statute should make an application for that purpose, seeking declaratory relief.

23. Secondly, they argue that properly construed, the Act empowers the Council to impose the PRE and the associated examination fees, relying in particular on s. 9(3), which provides that the Council is "…*entitled, upon application and on payment of the prescribed fee, to be issued a certificate of registration subject to such conditions that the Council may determine*."

24. To shore up this submission, they submit that the approach to the interpretation of legislation should be to ascertain the objective intention of Parliament by considering the words

used and the entire statute in context (**Sussex Peerage Case** (1843) All ER 55, and **Black-Clawson International Ltd. v Papierwerke Waldorf Aschaffenburgh** [1975] AC 591. In the latter case, Lord Reid said [at pg. 631]:

> "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking not what Parliament meant but the true meaning of what they said."

25. They also cite the well-known case of **Attorney General v Prince Ernest Augustus** [1957] AC 436, where Viscount Simonds said [at 460-46]:

> "For words, particularly general words, cannot be read in isolation: there colour and content are derived from their context, and I use "context" in its widest sense, which I have already indicated as including not only enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia*, and the mischief which I can by those and other legitimate means, discern the statute was intended to remedy."

26. Applying this interpretative approach, they submit that while the PRE and the $400 fee are not mentioned in the Act and Regulations, when the provisions of the Act are read compendiously alongside its purpose, it is clear that the Council is empowered to include the exam as a condition for registration.

27. With respect to the additional fees, the Respondent submits that, while admittedly the Regulations set out the specific fees for registration and licensing of a pharmacist, the Council has the discretion by virtue of s. 9(3), which allows it to impose further conditions they deem necessary, for registration.

Relevant legal principles

28. The first principle to highlight is that judicial review is not concerned with the substantive merits of a decision: see **Chief Constable of the North Wales Police v Evan** [1982] 1 W.L.R. 1155, 1173. Thus, it should be made plain that the issue here is not whether a PRE should be added to the requirements for registration or not, but whether the decision-maker followed the correct statutory procedure for implementing that requirement. As I observed in **Dwayne Woods et. al. v Dion Foulkes et. al**.: [2021/PUB/jrv/00016]:

> "Central to the function of judicial review is that the court is not concerned with the merits of the decision (i.e., whether it is right or wrong) or even with underlying determination of facts. In the exercise of its supervisory powers, the court scrutinizes the decision-making process to determine its lawfulness or overall fairness (*Kemper Reinsurance Co. v Minister of Finance* [1998] 3 WLR 630 at 638). Thus, the grounds for judicial review are normally expressed in terms of a decision being: (i) *illegal* (e.g., exceeding statutory powers); (ii) *irrational* or '*Wednesbury'* unreasonable (e.g., an outrageous decision that no sensible person considering all the material would have arrived at); (iii) *procedurally improper* (e.g., a decision arrived at by an unfair process), or (iv) in breach of a *legitimate expectation* (e.g., a decision that unfairly reneges on a practice or previous promise of a decision maker)."

Ultra vires or illegality

29. In the celebrated case of **Council of Civil Services Unions v Minister for the Civil Service** [1985] A.C. 374, Lord Diplock stated [at 410] that a "…*decision maker must correctly understand the law that regulates his decision-making power and give effect to it*". This means that a decision-maker not only cannot exercise powers that he does not possess (i.e., he must stay within the four corners of the statute), but must also properly exercise those which are granted. If he fails to do so, his decision can be challenged for illegality. In practice, this ground can often overlap with procedural impropriety. In **R v Lord President of the Privy Council, ex parte Page and Boddington** [1993] AC 682, Lord Brown-Wilkinson conveniently summarized the position as follows (701 c-e):

> "The fundamental principle [of judicial review] is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all cases, save possibly one, this intervention by way of prohibition or certiorari is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a *Wednesbury* sense...reasonably. If the decision-maker exercises his power outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting *ultra vires* his powers and therefore unlawfully….".

Alternative remedies

30. It is trite that the existence of an alternative remedy may act as a discretionary bar to the availability of judicial review, or the grant of any relief (see **IRC v Preston**, *supra*). However, this is not a hard and fast rule, and leave may still be granted where there are exceptional circumstances, or where the alternative remedy is not adequate, or where there are other reasons that make the alternative remedy inappropriate (*R v Hallstrom, ex parte Waldron [1986] 1 QB 824 at 852*, per Glidewell LJ; and *Lacroix v Stipendiary & Circuit Magistrate Derrence Rolle-Davis and another [2013] 3 BHS J. No. 68*, per Winder, J.).

Applications of the principles to the facts of this case

31. I deal first with the question of alternative remedies. Strictly speaking, the alternative remedy point should be taken at the permission or grant of leave stage, although it is a factor that might lead the court to refuse the grant of relief in the exercise of its discretion. However, as the respondent made submissions on the point, the Court will consider them for completeness. In any event, as has been mentioned, the respondent did not object to the grant of leave.

32. I would reject the argument that there were alternative remedies available to the applicants in this case, for reasons that I shall endeavour as follows. Firstly, I do not see any clear evidence that the mechanism for the appellate process was ever properly triggered. In this regard, it is to be noted that s. 23 provides for an appeal to be made within 3 months of the receipt of any "notice" either refusing or suspending registration, removing the person's name from the register, or censuring them. What the applicants are complaining about is not strictly the refusal of the Council to register them, as no such decision was made. They were invited to sit the exam, but they challenged the decision of the Council to impose what they contend are unlawful requirements for qualification for registration. Thus, there was no notification of any decision which was

appealable. For example, in **R (on the application of Anufrijeva) Secretary of State for the Home Department** [2003] UKHL 36, Lord Steyn said [at 26]:

> "Notice of a decision is required before it can have the character of a determination with legal effect because the individual must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice."

33. Secondly, I agree with the contention of the applicants that their situation comes within the proviso to the s. 23 right of appeal at sub-section (4), which precludes an appeal "…*against a refusal of an application for registration where the registration is conditional upon the applicant's satisfying the Council that he is qualified to be registered under this Act*."

34. The argument was put by the respondent in its written case as follows [at 30]:

> "[T]he Applicants could have appealed the decision pursuant to section 23 of The Pharmacy Act as the Act provides that an applicant can appeal the Council's refusal to register them, provided that their registration is not conditional upon the applicant satisfying the Council that he is qualified to be registered under the Act. The Respondent further submits that the Applicants are eligible to apply for an appeal under the Act because their registration is not conditional on them satisfying the Council that they are qualified as <u>they have both already satisfied the elements to be qualified under the Act, however, what they have not satisfied the Council [is] that they are competent, which the Council must be satisfied of before they register the applicants as pharmacists</u>. The PRE-Examinations is the Council's means of ensuring an applicant's competence."

35. With respect, this argument is not only circular, it completely misses the mark. Section 9 of the Act sets out two limbs of criteria for eligibility to be registered as a pharmacist: (i) at 9(3)(a-d) it sets out general fitness requirements; and (ii) at 9(4)(a) it sets out professional or academic requirements, which include experience. The Council has added the PRE as part of the general fitness requirements under (3)(d)(iv) ("character and competence of the applicant"). The Council's statement that the applicants have "*both already satisfied the elements to be qualified under the Act*" can only be a reference to sub-section (3)(e) —"*he is <u>qualified</u> to be so registered*"—which is defined to mean the possession of the academic or professional qualifications and experience set out at (4)(a) in the case of an application for registration as a pharmacist. But this overlooks the obvious fact that the imposed requirement to satisfy the Council that they meet the requirements at (3)(d)(iv) (as now expanded to include the PRE) are also part of the criteria to qualify for registration.

36. As their registration is conditional on them satisfying the Council that they have sat and passed the PRE as part of the requirements under (3)(d)(iv), in my view it is caught by the proviso. Any other interpretation would beg the question as to why the applicants were not registered and licensed, as the Council itself stated in its submissions that they have both satisfied the elements to be qualified for registration and licensing under the Act.

The question of lawfulness of the PRE

37. The scope of a decision-maker's powers and duties is generally a matter of statutory interpretation, although there are common law factors to be taken into account. The modern

approach is to apply what is called a 'purposive construction', which is really a composite approach that gives primacy to statutory purpose insofar as it can be derived from a textual, contextual and holistic construction of the Act (**R v Secretary of State for the Environment, Transport and the Region, ex p Spath Holme Ltd**., [2001] 2 A.C. 249, 396-97, per Lord Nicolls of Birkenhead). I do not understand the cases relied on by the respondent, although of some vintage, to be saying anything different from the more modern authorities.

38. The respondent relies on various sections of the Act to found a power for the Council to add the PRE as part of the registration criteria: s. 4, which sets out the general duties and functions of the Council (several of which are set out above); s. 9(3), which provides for the Council to issue a certificate of registration subject to "*such conditions that the Council may determine*" (repeated at s. 12 with respect to the issuance of licences); and s. 17, which provides for the Council to take disciplinary action against a person found guilty of a breach of the Act. The respondent further submitted that when the Act is read holistically, it is clear that the respondent has the authority to establish, develop and maintain standards of knowledge, skill and professional ethics for the persons involved in the profession and practice of pharmacy, which it contends would extend to adding the PRE.

39. I agree that the statutory context should be looked at carefully in determining a decision-making body's statutory powers. And there can be no gainsaying that the Council has the substantive powers it has cited to regulate the pharmaceutical profession within The Bahamas, in conjunction with the responsible Minister, in this case the Minister Responsible for Health. However, I apprehend that the respondent has construed the applicants' challenge as an attack on its statutory powers and duties (which it is not) as opposed to the question of whether or not the exercise of those powers are consistent with the statutory scheme and process. In my judgment, on a plain reading of the statute, the Council has misdirected itself in law in seeking to impose the additional qualifying elements by the informal process it chose.

40. Firstly, it is to be noted (as mentioned) that the Act specifies the criteria for registration and licensing, both as to general fitness and technical qualifications. The Council has purportedly added the PRE to the general fitness criteria in paragraph (d)(iv) of sub-section (3). However, it is to be noted that sub-section (5) provides that an application under s. 9 shall be made in the prescribed form and the applicant shall furnish to the Council *"(c) such further or other information as the Council may require in respect of the matters specified in paragraph (a)–(e) of subsection (3*)." As indicated, sub-paragraph (d)(iv) relates to the character and "competence" of the applicant, and this is the limb on which the Council purports to hang the extra element of an examination. While the Council may request further or other information, sub-section 5 says nothing about an examination.

41. Further, s. 48 makes it plain that it is the Minister, after consultation with the Council, who has the power to "*prescribe the examinations to be passed and other requirements to be satisfied whether in addition to, or as an alternative to the passing of certification exams by persons applying for registration as a technician or pharmacist*". It does not provide for the Council to prescribe any exams, and the Council certainly cannot do so by simply giving notice in the

newspaper. Neither the Act nor the Regulations has been amended to provide for the administering of the PRE and the imposition of additional fees.

42. Moreover, Parliament has prescribed at 9(4)(a) for a person to qualify for registration as a pharmacist by having either: (i) a pharmacy degree *or* (ii) a certificate of "competency" in pharmacy in The Bahamas; *and* (iii) at least 2000 hrs. of practical experience. Requirements (i) and (ii) are to be construed disjunctively, so the Act already provides for a competency exam as one of the ways to professionally qualify for registration as a pharmacist. Thus, to add a further exam to assess competency is to add to what Parliament has already prescribed for, without going through the statutory procedure for validly adding such criteria.

43. The next point to be considered is the discretion of the Council to impose conditions for the registration or issuance of a licence. Such provisions are not uncommon in licensing statutes, and refer to conditions that might be lawfully imposed on the grant of registration or licensing to achieve specific statutory objectives. However, the conditions or qualifications that may be imposed are almost always spelt out in the legislation or accompanying regulations, so that there is complete transparency and the applicant knows what requirements he has to satisfy to be eligible.

44. In a case from this jurisdiction, the Privy Council made clear (albeit in a context involving nationality rights) that the imposition of limitations and qualifications on the grant of a right could not be done in such a way as to deprive the individual of the substance of those rights, and that the qualifications ought to be specified in the legislation (see **AG v Thomas D'Arcy Ryan** [1980] A.C. 718). There, Lord Diplock said [at 728-729]:

> "In their Lordships' view, this entails that exceptions and qualifications must be spelt out clearly in legislation, either primary or subordinate; they may not be left to the discretion of the executive. The description of the circumstances the existence of which in relation to an applicant are to deprive him of his legal right of insisting on being registered as a citizen must be set out in an Act of Parliament either in full detail in the Act itself or in more general terms in an Act which also confers power upon some executive authority to make subordinate legislation providing for more detailed descriptions of particular circumstances falling within those general terms. The circumstances so far as they involve matters of fact must be described in the legislation (whether it be primary or subordinate) in such terms that whether they exist or not can be determined objectively, so that a would-be applicant upon reading the legislation can know whether he falls within a category of person whose applications for registration may lawfully be refused notwithstanding that they satisfy the requirements of article 5(2) and (3)."

45. Although the Board in the **D'Arcy Ryan** case was considering legislation that purported to cut down on constitutional rights, the principle holds true with respect to licensing criteria under a statute. There is no doubt that the Council, through the Minister, can validly prescribe additional criteria for registration or licensing consistent with the statutory framework, subject to them being challenged only on the grounds of *ultra vires*, *Wednesbury* irrationality, or lack of proportionality. The applicants did not (and indeed could not) suggest otherwise. The key submission was that the exercise of that discretion must be guided by the statutory framework, both substantive and procedural, and that this was not observed in the instant case.

46. I therefore find that the Council misdirected itself in law by imposing the additional criteria for registration as a pharmacist without an amendment to the Act or Regulations for that purpose. While the publication of the notice in the newspapers may have been prudent to head off any possible challenges on the grounds of legitimate expectation, it did not insulate the Council from the challenge on the grounds of *ultra vires.*

The fee issue

47. The same position obtains with respect to the imposition of the additional fee of $400 in connection with the examination. In fact, the Act makes it plain that fees can only be prescribed by the Minister and, secondly, that any fees prescribed by the Minister require the affirmative vote or approval of the House of Assembly (s. 48 (2-4)). No further elaboration is needed on this point.

Availability of remedies

48. There is one final point to be addressed, and that is whether the applicants are entitled to the remedies sought, even if they are right in their claim. The reliefs sought by the applicants include declarations, a mandatory order and a prohibitory order. As mentioned, the remedies in judicial review are discretionary, and the Court may apply different considerations in determining whether it is appropriate to grant a particular remedy based on the particular facts and nature of the case.

49. As I observed in **R v Minister Responsible for Commonages, ex parte John Wesley Percentie et. al.** (20202/PUB/jrv/00033), unreported, 2 June 2021) [at 47], mandamus is only available where the decision-maker is legally obliged to take a certain course of action or, as has been put by the learned authors of a leading judicial review text, where it is "*the sole legally permissible result*" (Supperstone, Goudie, *Judicial Review*, 5th Ed., para. 16.6.2).

50. Both sections 9(3) and 12 provide that a person who has satisfied the Council that they have satisfied the statutory requirements is entitled upon application and paying the prescribed fees to be registered and licensed. It is to be noted that the Council accepted that the applicants were "*qualified*" to be registered and licensed, but this was clearly only in relation to the technical or professional qualifications. As mentioned, the Act grants a discretion to the Council to require further information in respect of being satisfied as to an applicant's general fitness. I have found that this discretion does not extend to imposing further examinations and payment of fees without legislative *imprimatur*. However, the existence of this discretion does mean that there may be other valid grounds on which the Council may refuse an application for registration as a pharmacist, and therefore I cannot command the Council to register and licence the applicants in this case. This is because the Court is always conscious not to fetter the discretion of a public body to make the decisions entrusted to it by Parliament, as long as it complies with the law and statutory framework.

51. But I am equally convinced that the Council has misdirected itself in law by imposing the PRE and additional fees without seeking to amend the Act for that purpose. As indicated, nobody is taking issue with the reasoning of the Council to add the additional examination. Its public policy reasons for doing so are eminently sound. But if the additional requirements are to be

imposed, they must be done in the manner provided for by the statute, which is by interpolation into the Act or Regulations. I will therefore grant mandamus to the Council, but only to require them to reconsider the application of the applicants according to the law, as has been declared by the Court.

52. The court has wide powers to grant declarations of rights at the behest of litigants who seek to have their rights declared, but it does not grant general declarations, and the remedy is a discretionary one. In **Financial Services Authority v Rourke** [2002] CP Reg 14, Neuberger J. said:

> "…the power to make declarations appears to be unfettered. As between the parties in the section, it seems to me that the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court's satisfaction. The court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court has to consider whether, in all the circumstances, it is appropriate to make such an order. […]
>
> It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration."

53. Having regard to the above principles, I would make the declarations sought at paragraphs (i) and (iii) of the Originating Motion. But I am not of the view that it would be appropriate to grant the prohibition sought by the applicants, which is in effect a mandatory order, since it purports to prevent the Registrar from *refusing* to register and licence applicants "*who have met the requirements under the Act*". I would refuse this for the reasons stated at paragraph 50.

CONCLUSION AND DISPOSITION

54. For all the reasons given above, I would allow the challenge of the applicants in part and grant the following declaration and orders:

(i) A declaration that the applicants have complied with the requirements of ss. 9 and 12 of the Act with respect to the existing statutory requirements for registration and licensing as pharmacists.
(ii) A declaration that the Council acted unlawfully by requiring the applicants to sit the PRE and pay a fee of $400, without an amendment of the Act or Regulations for that purpose.
(iii) An order of mandamus compelling the Council to reconsider the application of the applicants according to law.

55. I further grant costs to the applicants, to be taxed if not agreed.

Klein J.,
25 March 2025