[2015] JMCA App 27A

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 47/2015

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**DUKE ST JOHN-PAUL FOOTE**	**APPLICANT**
AND	**UNIVERSITY OF TECHNOLOGY JAMAICA (UTECH)**	**1st RESPONDENT**
AND	**ELAINE WALLACE**	**2nd RESPONDENT**

John Thompson, Donovan Foote and Able-Don Foote for the applicant

Gavin Goffe and Jermaine Case instructed by Myers, Fletcher & Gordon for the respondents

12, 13, 14 May and 31 July 2015

MORRISON JA

Introduction

[1] The applicant was at all material times a student enrolled in the faculty of law of the 1st respondent ("the university"). The 2nd respondent ("the registrar") is the registrar of the university.

[2] The university was established by virtue of section 3(1) of the University of Technology, Jamaica Act ("the Act"), and its charter is set out in the first schedule to the Act. Pursuant to article 11(2) of the charter, the council of the university is vested with "general control over the conduct of the affairs of the University and shall have all other such functions as may be conferred upon it by the Statutes".

[3] Section 5 of the Act provides that the Governor-General, or the person for the time being performing the role and functions of that office, shall be "the Visitor of the University". The section goes on to provide (in paragraph (b)) that, in the exercise of his visitorial authority, the Governor-General may, among other things, "hear matters referred to him by the Council".

[4] By a fixed date claim form filed on 20 January 2015, the applicant sought, among other things, a declaration that, by preventing him from sitting his December 2014 end-of-semester examinations, the university had breached its contract with him. By notice dated 9 February 2015, the respondents took the preliminary objection that the court had no jurisdiction to entertain the claim, because the matters complained of by the applicant fell within the exclusive jurisdiction of the visitor. On 3 March 2015, Lindo J (Ag) upheld the preliminary objection and dismissed the claim, with costs to the respondents to be agreed or taxed. The applicant's application for leave to appeal having been refused by the learned judge, he now renews it before this court.

The background to the application

[5] By letter dated 20 August 2014, the applicant was advised by the university that he had been selected for admission to the university to pursue the degree of Bachelor of Laws in the academic year 2014-2015. The academic year was scheduled to commence on 25 August 2014. As requested, the applicant confirmed his acceptance of the offer of a place by paying the non-refundable enrolment commitment fee of $15,000.00 on 21 August 2014. Once this was done, the next step was for the applicant to complete the enrolment process, by selecting his modules (courses) and paying tuition fees for the first semester. For the first semester, the university's regular enrolment period, which commenced on 14 July 2014, was due to end on 22 August 2014. But it was subsequently extended to 30 September 2014 and then again to 15 October 2014, when enrolment was finally closed.

[6] The university's Undergraduate Student Handbook 2014-2015 ("the handbook") offered three fee payment options to students. Options 1 and 2 required payment by the student of 100% of the total tuition costs for all modules selected by 22 August 2014 and 30 September 2014 respectively. Option 3 required payment of (i) a minimum of 80% of the total tuition costs of all modules selected by 30 September 2014; and (ii) all outstanding balances by 31 October 2014. The handbook also provided that "[o]nce registered with the minimum 80% payment, students will be allowed to sit final examinations"; and that "[s]tudents on this part payment plan are required to settle all outstanding balances by Friday October 31, 2014". And then, under the rubric, "Penalties For Non-Compliance", it provided that a student will be deemed to be in

arrears if "an expected payment is not received on or before the due date"; and that students "who are in arrears may be de-listed".

[7] The applicant did not pay 100% of his fees, which the university calculated to be $246,310.00, by the dates stipulated in options 1 and 2. It is accordingly common ground that he fell under option 3. While the applicant's position was that the total due from him was $230,000.00, nothing now appears to turn on this difference.

[8] The applicant's first payment on account of fees, a payment of $100,000.00, was made on 10 October 2014. He then made a second payment of $130,000.00 on 30 October 2014 and, by his reckoning, this completed the payments due from him for fees for the first semester. The university took no issue with the date of the applicant's first payment (it having been made within the extended enrolment deadline). However, it considered that the applicant, having paid only $100,000.00, which was less than the 80% due as at that date under option 3, had not completed the enrolment process and was therefore not enrolled for the first semester. This is how the registrar articulated the university's position (at para. 11 of her affidavit filed on 28 January 2014):

> "As a result of the [applicant's] failure to pay all, or at least 80% of his school fees by October 15, 2014, he did not complete the enrolment process and was thus not enrolled as a student of UTech for the semester. The deadline of October 30, 2014 to pay the balance owed is only applicable to enrolled students, that is, students who have satisfied the requirement of paying at least 80% of their fees by the deadline, which in this case was extended to October 15, 2014."

[9] On or about 1 November 2014, the applicant, who had up to that time been attending classes in his chosen modules, discovered that he had been de-listed from the university. The practical result of this was that since, as the registrar explained (at para. 12 of her affidavit), "[o]nly enrolled students are allowed to sit exams at the University", the applicant fell to be barred from sitting the end-of-semester examinations scheduled to commence on 2 December 2014. This was confirmed by the registrar at a meeting with the applicant and his parents in early November 2014.

[10] On 18 November 2014, aggrieved by the university's stance, the applicant commenced an action in the Supreme Court by way of a fixed date claim form against the university and others ("the first action"). The applicant's claim was for a declaration that, in the light of his payment of $130,000.00 on 30 October 2014, the university had acted in breach of the terms and conditions contained in the handbook. Also on 18 November 2014, the applicant filed an *ex parte* notice of application for court orders seeking an interim order restraining the registrar from preventing him –

> "…from attending classes, using the library's facilities AND accessing the UTECH online PORTAL for information necessary for him to prepare for his assignments, presentations, and impending examination scheduled to be written in December, 2014."

[11] That same day, 18 November 2014, without notice to the university, the application was heard and granted by Lindo J (Ag), in the terms sought, for a period of seven days. The matter was then adjourned to 25 November 2014 for an *inter partes* hearing. By letter dated 20 November 2014, explicitly in response to this order, the

university invited the applicant to attend at its office of admissions to "complete the necessary documentation to add the modules that [he] would be pursuing during Semester 1 Academic Year 2014/2015 as part of [his] LLB Course of Study". This notwithstanding, on 24 November 2014 the university filed an acknowledgement of service indicating its intention to defend the applicant's claim.

[12] On 25 November 2014 (the return date fixed by the judge for the *inter partes* hearing), the applicant discontinued the first action, "after the [university] had complied with the Court Order by relisting [him], giving [him] Financial Clearance, access to the University online portal and an Examination Card and a Timetable to do[the] Exams Scheduled for Academic Year 2014/15 in SEM 1". As a result of the first action being discontinued on 25 November 2014, the interim injunction, which would have in any event expired on that date, therefore fell away completely. Accordingly, in an immediate response to this development, the registrar sent a letter dated 28 November 2014 to the applicant:

> "I write to confirm that you filed a Notice of Discontinuation of [the first action] on Tuesday November 25, 2014, the date on which the interim injunction against the University expired, without appearing before the judge or seeking permission from the court as required by the rules of court. No extension was given.
>
> Consequently, please note that the status quo reverts to that which existed prior to the Order of the Court. This would mean that all the steps that the University took in observing the provisions of the Order of the Court will be discontinued. It also means that you will not be able to sit the examinations in the AY 2014/2015 Semester 1 Final Examinations."

[13] In the result, the applicant was not allowed to sit the December 2014 examinations, despite the fact that the university sent him the first semester final examination timetable (by e-mail dated 28 November 2014); and a document headed "Examination Guidance" (by e-mail dated 1 December 2014).

[14] At the beginning of the second semester in January 2015, the applicant was permitted to register for three non-legal modules. However, he was not allowed to register for the four legal modules which he wished to pursue. The reason given by the university was that the applicant, not having sat the first semester examinations, lacked the necessary pre-requisites for enrolment for the second semester legal modules. So the applicant felt obliged to go back to court.

[15] In his fixed date claim form filed against the university and the registrar on 20 January 2015, the applicant sought a declaration that the university's action in preventing him from sitting the December end-of-semester examinations was wrongful. Although the actual terms of the declaration asked for are wide, the essence of the applicant's complaint is captured in the final paragraph (paragraph 9) of the fixed date claim form:

> "The UTECH is in **Breach of Contract** with the [applicant] for that the [applicant] (Duke Foote) a student at UTECH having **accepted an offer** in a **Letter of Commitment** sent to him dated August 2014 for admission to the University to pursue a course of study in law, **paid** his commitment fees – **guaranteeing his** place in the University and subsequently **paid his 100% fees** before the due date of the 31st October 2014, **completed his course work, test and presentations had a**

> **right/privilege to sit his final 2014 exams** which right/privilege was denied/withheld from him by the Registrar and Enrollment Officer (the servant [sic] and/or agents of the UTECH) who excluded him from entering the examination room when he attended to write said exams in December 2014." (Emphases and underlining in the original)

[16] On this basis, the fixed date claim form asked for orders that the university (i) make special arrangements for the applicant to sit the first semester exams; and (ii) be restrained from preventing the applicant's confirmation of his module selection for the second semester of the academic year 2014-2015.

[17] In his affidavit sworn to on 20 January 2015 and filed in support of the claim, the applicant substantially rehearsed the history which he had outlined in the affidavit which he had filed in support of the first action, supplemented by the details of what had transpired between him and the university after he had obtained his interim injunction in that action. This is how the applicant summarised his complaint (in paragraphs 36 and 37 of the affidavit):

> "36) That even though I have been **enrolled** and received **Financial Clearance for Semester 2**, it is only for the three (3) non-legal subjects/modules **but not for the four (4) legal modules** and classes have now started for those modules but I am prevented from doing them on the grounds that I did not write my Semester 1 exams **which was no fault of my own**, because I was prevented from doing so by the Registrar even though I had satisfied all the requirements needed to be satisfied **pursuant to the provisions of The UTECH JA. Handbook 2014/15 page 226, FAQ's No. 8:** for writing same. **Therefore I pray this Honourable Court hear this Fixed Date Claim Form as a matter of urgency at its first hearing.**

> 37) I pray this Honorable [sic] Court grant the reliefs sought herein as a matter of urgency as it seems harsh, unreasonable and oppressive for the University to continue to deny me my right to pursue my legal education even after having denied me my right, to write my exams in circumstances where the University held, and is **still holding my fees for writing said exams** merely because the injunction I had obtained from this Honorable [sic] Court to enforce my rights; **had expired**." (Emphases in the original)

[18] On 22 January 2015, the applicant sought and obtained from Laing J, again without notice, an interim injunction restraining the university from preventing him from confirming his choice of four legal modules for the second semester. The matter was then adjourned to 9 February 2015 for an *inter partes* hearing. On the day fixed for that hearing, the university filed notice of the preliminary objection that ultimately triggered Lindo J (Ag)'s order dismissing the fixed date claim form. The notice was in the following terms:

> "**TAKE NOTICE** that on February 9, 2015 at 12:00 noon or any adjourned hearing of the [applicant's] application for an injunction, the [respondents] will seek leave of this Court to argue as a preliminary objection that this Court has no jurisdiction to hear the [applicant's] application. The basis of this objection is that the matters contained in the [applicant's] application relate to the [university] internal policies and procedures which are within the exclusive jurisdiction of its Visitor who is the Governor General of Jamaica pursuant to section 5 of the University of Technology, Jamaica Act." (Emphasis in the original)

[19] After a two-day hearing on 9 and 10 February 2015, Lindo J (Ag) upheld the preliminary objection, on the ground that the applicant's claim falls "within the exclusive jurisdiction of the Visitor of the [university]". Accordingly, the learned judge dismissed

the fixed date claim form and, as I have already indicated, refused leave to appeal and awarded the university and the registrar their costs, to be agreed or taxed. The learned judge gave no written reasons for her decision.

The test for the grant of leave to appeal

[20] Rule 1.8(9) of the Court of Appeal Rules ("the CAR"), 2002 provides as follows:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[21] This court has on more than one occasion accepted that the words "a real chance of success" in rule 1.8(9) of the CAR are to be interpreted to mean that the applicant for leave must show that, in the language of Lord Woolf MR in **Swain v Hillman and another** [2001] 1 All ER 91, at page 92, "there is a 'realistic' as opposed to a 'fanciful' prospect of success". Although that statement was made in the context of an application for summary judgment, in respect of which rule 15.2 of the Civil Procedure Rules 2002 ("the CPR") requires the applicant to show that there is "no real prospect" of success on either the claim or the defence, Lord Woolf's formulation has been held by this court to be equally applicable to rule 1.8(9) of the CAR (see, for instance, ***William Clarke v Gwenetta Clarke*** [2012] JMCA App 2, paras [26]-[27]). So, for the applicant to succeed on this application, it is necessary for him to show that, should leave be granted, he will have a realistic chance of success in his substantive appeal.

The proposed grounds of appeal

[22] The applicant proposes a total of seven grounds of appeal, which are as follows:

> "1. The learned Judge erred in law in finding that the issues involved in this matter are matters of academic Judgment/decision rather than a matter of legal process.
>
> 2. The Learned Judge erred in law in finding that the UTECH is not in breach of contract with the Appellant/Claimant by excluding him from entering the examination room when he attended to write his exams in December, 2014 even though the Respondent/Defendant had collected from the Appellant/Claimant examination fees to sit said exams.
>
> 3. The learned judge erred in law (in acting on her own initiative) by ordering that the Appellant/Claimant's Claim Form be struck out using her Case Management powers **when no such application had been made to the court** and **no opportunity whatsoever was given to the Claimant** (the party directly affected) **to make represent-ation**[sic].
>
> 4. The Honourable Mrs. Justice Audre Lindo erred in law in not complying with the requirements of the CPR 26.2 for the following reasons that:
>
> > The **first time** the **Claimant/Appellant became aware** that the Court **would act on its own initiative to strike out the Appellant/Claimant's Fixed Date Claim Form** was when the judgment was being read out by Mrs. Justice Audre Lindo (Ag.) on the morning of March 3, 2015.
>
> 5. That all the matters contained within the Appellant/Claimant's claim are matters concerning:-

(a) the internal policies and procedures of the UTECH and

(b) are within the exclusive jurisdiction of the "Visitor" pursuant to S.5 of the UTECH Jamaica Act.

6. The Learned Judge erred in law in striking out/dismissing the applicant's [sic] Claim Form when **No Notice** or **Grounds** of such an application to strike out the Appellant/Claimant's Fixed date Claim Form was [sic] ever served on the Appellant/Claimant or made to the Court.

7. The Learned Judge erred in law in striking out/dismissing the Appellant/Claimant's Claim Form which in effect denies him access to the Court which is his right under the Charter of Rights."

The submissions

[23] The submissions for the applicant were divided between Mr Donovan Foote, Mr Thompson and Mr Able-Don Foote.

[24] I hope that I do no injustice to Mr Donovan Foote's wide-ranging submissions by summarising them in this way:

i. In the absence of any application to dismiss/strike out the claim, the learned judge acted on her own initiative and ought therefore to have complied with the requirements of rule 26.2 of the CPR.

ii. In the particular circumstances of this case, the learned judge ought not to have dismissed the fixed date claim form, because (a) the matters complained of by the applicant, not

being matters relating to academic or pastoral judgment, did not fall within the jurisdiction of the visitor, and are therefore capable of being decided by the court; (b) despite the fact that the applicant had exhausted all his local remedies, the matter had in any event not been referred to the visitor by the council; and (c) in cases such as this, in which the university in question is established by statute, a different approach to the issue of the visitor's justiciability and the court's jurisdiction in university and student matters is warranted.

iii. The registrar, having directed the enrolment of the applicant in compliance with the order made by Lindo J (Ag) on 18 November 2014, was estopped in law from denying that the applicant was a duly enrolled student of the university.

[25] In support of his submissions on the limits of the visitorial jurisdiction, Mr Donovan Foote referred us to a number of authorities, mainly English, which I will have to consider in a moment.

[26] Casting his net even more widely, Mr Thompson referred us to section 16(2) of the Constitution of Jamaica ("the Constitution"), to make the point that any attempt to preclude a person's right of access to the courts for the purpose of determining his civil

rights or obligations is unconstitutional. On this basis, Mr Thompson queried the constitutional validity of the so-called exclusive visitorial jurisdiction.

[27] Finally, also taking a constitutional point, Mr Able-Don Foote referred us to section 15(1) of the Constitution, which proscribes, "except by or under the provisions of a law", the compulsory acquisition of any property. Therefore, it was submitted, given that section 3 of the Interpretation Act defines "property" to include "things in action", the applicant's right of action to enforce the obligations owed to him and breached by the university cannot be, in effect, "compulsorily acquired" by resort to the visitorial jurisdiction in this case.

[28] Mr Goffe, who appeared for the university and the registrar, made a couple of preliminary observations. First, that such rights as were given to the applicant by Lindo J (Ag)'s *ex parte* order granted on 18 November 2014 were not irreversible and could not extend beyond the seven day duration of the order itself. Second, Mr Goffe questioned why the learned judge had made this order *ex parte* in any event, bearing in mind the observations of the Privy Council in **National Commercial Bank Jamaica Limited v Olint Corp Limited** [2009] UKPC 16, on the limited circumstances in which it will be necessary for a judge to make an *ex parte* order (see per Lord Hoffmann, at para. 13).

[29] Turning to Mr Donovan Foote's submissions, Mr Goffe submitted that the learned judge was empowered by rule 26.1(2)(j) of the CPR to dismiss the fixed date claim form after ruling on a preliminary issue and that there was no rule requiring the court

to give notice to anyone before dismissing a claim. Further, that a dismissal of an action is not a sanction and accordingly Part 11 of the CPR had no application to this matter. In these circumstances, it was submitted, Lindo J(Ag) could not be faulted for, in the exercise of the court's case management powers, bringing the litigation to an end once she had concluded that the court lacked jurisdiction to entertain the claim.

[30] Mr Goffe's submission on the matter of the visitorial jurisdiction was that, in the light of a number of decided cases on the question in this jurisdiction, the learned judge's conclusion that the applicant's claim fell within the exclusive jurisdiction of the visitor was unassailable. Further, that the authorities relied on by the applicant were of no assistance in this case, since the universities with which those cases were concerned either had no visitor, or the jurisdiction of the visitor was in some manner limited by legislation that is without equivalent in Jamaica. Mr Case, who followed on from Mr Goffe on this point, very helpfully took us through the cases to make good the distinction for which Mr Goffe contended. And, as far as the question of exhausting local remedies is concerned, it was submitted that the applicant had done nothing to invoke the procedures set out in the handbook for the making of a complaint to the council.

[31] In assessing the applicant's chances of success in the light of the grounds put forward by him and the submissions made on both sides, I will consider the matter under the following heads: (1)The procedural issue; (2) The jurisdiction of the visitor; and (3) The constitutional points.

(1) The procedural issue

[32] The first thing to be observed is that the university did not make any application before Lindo J (Ag) in this case. The result of this, it seems to me, is that Part 11 of the CPR, which is concerned with applications for court orders "made before, during or after the course of proceedings" (rule 11.1), has no application in these circumstances.

[33] More to the point, I think, is rule 26.1(2)(j)of the CPR, which permits the court, as part of its general powers of management, to "dismiss or give judgment on a claim after a decision on a preliminary issue". To similar effect is the power given to the court in the context of an actual trial by rule 39.9 of the CPR, under the rubric "Dismissal of claim after decision on a preliminary issue", which states:

> "Where the court considers that a decision made on an issue substantially disposes of the claim or makes a trial unnecessary, it may dismiss the claim or give such other judgment or make such other order as may be just."

[34] On the face of it, whether taken singly or together, these provisions certainly appear to provide ample sanction for Lindo J (Ag)'s order, having found that the claim fell within the exclusive jurisdiction of the visitor, dismissing the fixed date claim form. But the applicant's further contention is that the court's powers were circumscribed by the provisions of rule 26.2 of the CPR, which deals with the making of orders by the court of its own initiative:

> "(1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.

> (2) Where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations.
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> (3) Such opportunity may be to make representations orally, in writing, telephonically or by such other means as the court considers reasonable.
>
> (4) Where the court proposes –
>
> (a) to make an order of its own initiative; and
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> (b) to hold a hearing to decide whether to do so,
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> the registry must give each party likely to be affected by the order at least 7 days notice of the date, time and place of the hearing."

[35] In my view, this rule has no application to this case. The learned judge had before her (i) the applicant's fixed date claim form; and (ii) the university's preliminary objection to it being heard. It seems to me that it was plainly implicit in the university's objection that the court had no jurisdiction to entertain the applicant's claim that, if the objection was upheld, the action would itself fall away completely as a necessary consequence. The dismissal of the applicant's claim was therefore not so much a step taken by the learned judge of her own initiative, as it was the logical corollary of her conclusion that the university's preliminary objection succeeded. The element of surprise, and hence potential unfairness, to the other side, which rule 26.2(2) of the CPR was obviously designed to obviate would, it seems to me, have been completely absent in the particular circumstances of this case. In my view, therefore, the applicant would have no realistic chance of success in an appeal on the procedural issue.

(2) The jurisdiction of the visitor

[36] This topic calls for a brief examination of the cases to which we were referred by counsel on both sides of this application. It may be convenient to begin with the leading modern authority on the jurisdiction of the visitor, which is the decision of the House of Lords in **Thomas v University of Bradford** [1987] 1 All ER 834. The issue in that case was whether the complaint by a member of the academic staff of a university that she had been wrongfully dismissed fell within the jurisdiction of the High Court or that of the university visitor. It was held that the jurisdiction of a university visitor, which is based on his position as the sole judge of the internal or domestic laws of the university, is exclusive and not concurrent with the court's jurisdiction. The scope of the visitor's jurisdiction included the interpretation and enforcement, not only of those laws themselves, but also of internal powers and discretions derived from them, such as the discretion which necessarily had to be exercised in disciplinary matters. Accordingly, if a dispute between a university and a member of the university over his contract of employment with the university involves questions relating to the internal laws of the university or rights and duties derived from those laws, the visitor has exclusive jurisdiction to resolve that dispute.

[37] Delivering the leading judgment, Lord Griffiths observed (at page 839) that "the exclusivity of the jurisdiction of the visitor is in English law beyond doubt and established by an unbroken line of authority spanning the last three centuries". And on the facts of the case under consideration, his conclusion (at page 847) was as follows:

> "…In the present case, the entire dispute is centred on the statute, ordinances and regulations of the university. Were they correctly applied and were they fairly administered? Such a dispute in my view falls within the jurisdiction of the visitor and not the courts of law, notwithstanding that its resolution will affect Miss Thomas's contract of employment…"

[38] And in a brief concurring judgment, Lord Ackner added this (at page 852):

> "… *The source* of the obligation on which Miss Thomas relies for her claim is the domestic laws of the university, its statutes and its ordinances. It is her case that the university has failed either in the proper interpretation of its statutes or in their proper application. Miss Thomas is not relying on a contractual obligation other than an obligation by the university to comply with its own domestic laws. Accordingly, in my judgment, her claim falls within the exclusive jurisdiction of the visitor, subject always to judicial review…"

[39] Thus far the principle is clear. But Mr Donovan Foote submitted that the exclusive jurisdiction of the visitor has been qualified by later decisions which permit access to the courts in certain circumstances. The first of the cases relied on by him is **Pearce and others v University of Aston in Birmingham and another (No 1)** [1991] 2 All ER 461. In that case, the defendant university proposed to dismiss certain members of its academic staff, including the plaintiffs, on the ground of redundancy. Objecting to the university's proposals on the basis that they were in breach of its own internal laws, the plaintiffs sought an injunction restraining the university from proceeding with its compulsory redundancy programme. The university contended that the court had no jurisdiction to hear the dispute, because it was a dispute between

itself and members of its academic staff concerning the correct application of its internal laws and as such could only be heard by the visitor of the university. But the plaintiffs contended that, although as a general rule the visitor had jurisdiction over all internal university disputes, this position had been altered by certain provisions of the Education Reform Act, which came into effect on 29 July 1988. Section 206(1) and (2) of that Act provides:

> "(1) The visitor of a qualifying institution shall not have jurisdiction in respect of any dispute relating to a member of the academic staff which concerns his appointment or employment or the termination of his appointment or employment.
>
> (2) Subsection (1) above does not apply in relation to any dispute which is referred to the visitor of a qualifying institution before —
>
> (a) the relevant date; or
>
> (b) the date on which this section comes into force; whichever is the later."

[40] It was held by the Court of Appeal, disagreeing with the decision of the judge below who had struck out the statement of claim, that, while as a general rule under the common law all disputes between members of the academic staff and their university fell within the exclusive jurisdiction of the visitor, on its true construction section 206(1) of the 1988 Act, being expressed in unqualified terms, had the effect of excluding the visitor's former jurisdiction in respect of employment disputes between a university and members of its academic staff. It followed, therefore, that since the court always had jurisdiction except to the extent that statute or a rule of the common law

excluded it, the effect of section 206(1) was to restore the court's jurisdiction in such matters; while section 206(2) had the effect of preserving the visitor's jurisdiction in such disputes provided that they were referred to him before the relevant date but, unless and until such a reference was made and accepted by the visitor, members of the academic staff were at liberty to bring and continue proceedings in respect of such disputes in the courts. The rationale for the court's decision (which was by a majority) was best expressed by Russell LJ (at page 468):

> "…following *Thomas v University of Bradford* [1987] 1 All ER 834, [1987] AC 795, I am satisfied that only the visitor of the University of Aston would have had jurisdiction prior to 29 July 1988. But on that date there came into force s 206 of the Education Reform Act 1988. Its effect, together with ss 202 to 205, is to abolish the jurisdiction of the visitor, subject only to sub-s (2) of s 206. The visitor's jurisdiction having been excluded by express statutory provision, in my judgment the jurisdiction of the court must take its place.
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> Subsection (2) of s 206, however, does give the visitor jurisdiction and by necessary implication ousts the jurisdiction of the court in disputes existing after 29 July 1988 provided that such a dispute 'is referred to the visitor … before the relevant date'. That date has not yet arrived. There has been no such reference in this case. Unless and until such a reference is made and accepted by the visitor, in my judgment the plaintiffs are at liberty to bring and continue their proceedings in the courts. Hence, in my view, the statement of claim should not suffer the draconian step of being struck out..."

[41] Russell LJ's statement makes it clear, it seems to me, that this case effected no change in the common law position as reaffirmed by **Thomas v University of Bradford**. To the contrary, the result of the case turned entirely on the impact of the new statutory provisions which had then only recently come into force.

[42] The high-watermark of Mr Donovan Foote's submissions on the limitations of the visitorial jurisdiction was **Clark v University of Lincolnshire and Humberside** [2000] 3All ER 752. That was a case in which the claimant, who was a student at the respondent university ("ULH"), brought an action for breach of contract against it to challenge the mark of zero which she had been awarded in her final examination. On ULH's application, the judge in the court below struck out the claim on the ground that alleged beaches of contract by a university towards a student were not justiciable by the courts. One of the issues on appeal (the claimant having been allowed to amend her pleadings to claim breaches of contractual rules under the university's student regulations), was whether, in the light of the provisions of the Education Reform Act 1988, the judge's conclusion on justiciability was too wide. In a judgment with which Lord Woolf MR and Ward LJ agreed, Sedley LJ considered that it was. In a passage which I regrettably cannot avoid quoting at length, SedleyLJ explained the position in this way (at pages 755-756):

> "…
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> 11. The University of Lincolnshire and Humberside is one of the new universities brought into being by the Education Reform Act 1988. Section 121 gave the status of bodies corporate to advanced further education institutions meeting statutory enrolment criteria of which ULH (as I will call it) was one. By s 123 they are called higher education corporations. The Further and Higher Education Act 1992 gave all such institutions the full status of a university and made provision for their internal government, but without altering their legal character. **Such an institution, therefore, unlike the majority of the older English and Welsh universities, has no charter and no provision for a visitor: if it had, it is common ground**

that the present dispute would lie within the visitor's exclusive jurisdiction: see *Thomas v University of Bradford*…But ULH is simply a statutory corporation with the ordinary attributes of legal personality and a capacity to enter into contracts within its powers.

12. The arrangement between a fee-paying student and ULH is such a contract: see *Herring v Templeman* [1973] 3 All ER 569 at 584–585. Like many other contracts, it contains its own binding procedures for dispute resolution, principally in the form of the student regulations. **Unlike other contracts, however, disputes suitable for adjudication under its procedures may be unsuitable for adjudication in the courts. This is because there are issues of academic or pastoral judgment which the university is equipped to consider in breadth and in depth, but on which any judgment of the courts would be jejune and inappropriate.** This is not a consideration peculiar to academic matters: religious or aesthetic questions, for example, may also fall into this class. It is a class which undoubtedly includes, in my view, such questions as what mark or class a student ought to be awarded or whether an ægrotat is justified. **It has been clear, at least since *Hines v Birkbeck College* [1985] 3 All ER 156, [1986] Ch 524 (approved in *Thomas*'s case), that this distinction has no bearing on the availability of recourse to the courts in an institution which has a visitor**. But where, as with ULH, there is none, the decision of the New Zealand Court of Appeal in *Norrie v Senate of the University of Auckland* [1984] 1 NZLR 129 and the remarks of Hoffmann J in *Hines v Birkbeck College* [1985] 3 All ER 156 at 164–165, [1986] Ch 524 at 542–543 open the way to the distinction as a sensible allocation of issues capable and not capable of being decided by the courts.…

13. It is on this ground, rather than on the ground of non-justiciability of the entire relationship between student and university, that the judge was in my view right to strike out the case as then pleaded. The allegations now pleaded by way of amendment are, however, not in this class. While capable, like most contractual disputes, of domestic resolution, they are allegations of breaches of contractual rules on which, in the absence of a visitor, the courts are well able to adjudicate…" (Emphases supplied)

[43] Three important points emerge clearly from this passage. First, ULH did not have a visitor. Second, had it been otherwise, the decision in **Thomas v University of Bradford** would have applied and the dispute between the claimant and ULH would have fallen within the exclusive jurisdiction of the visitor. Third, the distinction between issues involving a student's treatment at university, which are capable of being decided by the court, and those relating to academic or pastoral judgment,which are not, has no application in an institution which has a visitor.

[44] So in my judgment the decision in **Clark v University of Lincolnshire and Humberside** is clearly distinguishable, in that, unlike ULH, the university in the instant case has a visitor. It further seems to me that, to the extent that the decisions at first instance in **Winstanely v Professor Brian Sleeman and University of Leeds** [2013] EWHC 4792 (QB) and **R on the application of Jennifer Amanda McKoy v Oxford Brookes University** [2009] EWHC 667 (Admin), on which Mr Donovan Foote also relied, proceed on the basis of Sedley LJ's analysis in **Clark v University of Lincolnshire and Humberside**, they too are similarly distinguishable. Indeed, in neither case was the issue of a visitorial jurisdiction referred to at all.

[45] Finally in this series of citations, I should add the decision of the Court of Appeal of New Zealand in **Norrie v Senate of the University of Auckland** [1984] 1 NZLR 129 (mentioned by Sedley LJ in the extract quoted at paragraph [42] above), to which we were also referred by Mr Donovan Foote. The appellant in that case, a medical student of the respondent university, failed to pass his final year examinations and was

refused enrolment in the medical faculty for the following year. His application to the High Court for judicial review of the decision to refuse him enrolment was dismissed on the basis that his complaint was a domestic matter of the university falling within the exclusive jurisdiction of the visitor.

[46] On appeal, Woodhouse P said (at page 136) that "I do not regard the jurisdiction of the Visitor as exclusive but rather as subordinate to that of the Courts". And Cooke J expanded on the same point (at page 140):

> "…
> 1. When any question of law or natural justice is concerned the Courts retain, I think, their full jurisdiction, notwithstanding that the dispute arises in University affairs. Currently the English Courts appear to favour the concept that there are questions of natural justice and questions of law (such as may arise under internal statutes or contracts) over which the Visitor has an exclusive jurisdiction. With respect, I regard such an approach as inappropriate in New Zealand. The mere existence of the Visitor's jurisdiction does not seem an adequate reason for treating as ousted the ordinary and prima facie all-embracing authority of the Courts of general jurisdiction over justiciable disputes. Especially so in a society such as ours, where the Universities are large publicly-funded institutions, constituted by Acts of Parliament and discharging by delegation an acknowledged responsibility of the State.
>
> 2. But the Visitor's jurisdiction is a valuable one…One can be confident that Visitors in New Zealand — and commissaries or assessors appointed to assist or advise them — will act where necessary with appropriate independence and firmness. That is a major factor in my readiness to accept that the Visitor has a wide role: a role extending to ruling on questions of law (including contracts with members of

> the university) or natural justice, at any rate in the first instance. The Courts must retain, I think, ultimate powers of review of a Visitor's decision, but would usually be slow to interfere. The scope of ultimate review does not call for further discussion now…"

[47] However, the court went on to hold that, in the particular circumstances of that case, the dispute between the appellant and the university was a matter for the visitor. As Somers J observed (at page 147), "an issue of exclusion from a course of study between a member and the University is a matter properly within the jurisdiction of the Visitor". The appeal was therefore dismissed.

[48] Turning now to the Jamaican cases, the first in time of those to which we were referred is the decision of Brooks J (as he then was) at first instance in **Myrie v The University of the West Indies and others**, Claim No 2007 HCV 04736, judgment delivered 4 January 2008. The claimant in that case was a medical doctor. He was enrolled as a graduate student in the Doctor of Medicine programme offered by the University of the West Indies ("the UWI"). Having successfully completed part I of the programme and having been allowed to sit paper 1 of part II on the morning of 15 November 2007, he was prevented by the invigilator and security guards from sitting paper 2 in the afternoon of the same day. Fearing that the same fate would befall him in respect of further portions of the part II examinations scheduled to take place two weeks later, the claimant filed a claim and moved the court for an injunction to prevent the UWI from barring him from the future examinations.

[49] The UWI took a preliminary point that the court had no jurisdiction to hear the application, because its charter provided for a visitor to whom the claimant ought to have applied for relief. Brooks J noted that, although successive charters of the UWI provided that Her Majesty, Queen Elizabeth II, her heirs and successors should be the visitor and visitors of the university, no further guidance was provided in them as to the duties and the authority of the visitor. The learned judge accordingly considered (at page 3 of the judgment) that it was "to the common law that we are obliged to look for enlightenment on the role of the visitor". After a characteristically thorough review of the learning on the topic, including detailed reference to both **Norrie v Senate of the University of Auckland** and **Thomas v University of Bradford**, the learned judge concluded as follows (at page 12):

> "…The UWI's charter having provided for a visitor, the visitor is the authority which has the jurisdiction to decide disputes arising under the domestic law of the institution. That jurisdiction is defined in the common law and the courts decline jurisdiction in such circumstances. Dr. Myrie, being a member of the UWI was obliged to follow its domestic procedures for applying for relief. His application to this court is therefore inappropriate…"

[50] **Vanessa Mason v The University of the West Indies**, SCCA No 7/2009, judgment delivered 2 July 2009, was a case in which an undergraduate student of the UWI sought to challenge the decision of the university authorities to expel her from the hall of residence in which she had resided as a contractual licensee. The decision to expel the claimant arose out of an altercation between her and a fellow student, in

which the claimant was alleged to have used "a number of expletives", contrary to the Charter of Hall Principles and Responsibilities ("the hall's charter").

[51] At first instance, R Anderson J upheld UWI's preliminary point that, because the matter fell within the jurisdiction of the visitor, the court lacked jurisdiction to hear the claimant's application for an injunction. This court considered that R Anderson J's decision was correct and dismissed the claimant's appeal. Cooke JA observed (at para. 10(a) of his judgment), that "[t]here can be no doubt that where the visitorial jurisdiction exists it is an exclusive jurisdiction". After referring to the hall's charter, the learned judge went on to say this (at para. 11):

> "…In this Charter under Section IV entitled General Responsibilities at paragraph 21, each student who lives in hall is enjoined, 'not to use expletives or to make derogatory and inflammatory remarks' [sic]
>
> It was the appellant's purported violation of this injunction that disciplinary proceedings were commenced against the appellant. Further, it is this alleged violation that triggered the termination of the agreement. In my view any determination as to the issue of breach of contract has to be resolved by subjecting the contract and the concomitant considerations to scrutiny. It was all an internal matter. Every aspect of this matter touched and concerned –
>
> (i) The Charter and especially the role of the visitor [sic]
>
> (ii) The Charter of Hall Principles And Responsibilities, and especially Section IV paragraph 21, and
>
> (iii) Ultimately the application of the rules of the University in so far as they were relevant to the issue.

> The essence of the complaint of the appellant is that the University contravened its internal laws. This being so the ineluctable conclusion is that in the appellant's dispute with the University, the visitor has exclusive jurisdiction."

[52] And, in arriving at the same conclusion in that case, Harris JA explained the basis of the visitor's jurisdiction (at para. 39):

> "The jurisdictional authority of the visitor is derived from the power to administer the domestic laws of a University. All members of the University are subject to the domestic laws. The visitor is empowered to interpret that [sic] law [sic] and apply them and by extension, determine questions of fact arising under those laws. As earlier indicated, the scope of the visitor's powers within the parameters of the domestic laws of a University, includes the right to resolve disputes among members…"

[53] Lastly, I must mention the decision of McDonald-Bishop J (as she then was) in **Okuonghae v University of Technology, Jamaica** [2014] JMSC Civ 138. In that case, the claimant, who was formerly employed to the university as a laboratory technologist, claimed damages against the university for unfair and unjustifiable dismissal, and for other consequential losses. In defence to the claim, the university took the identical point which it took by way of preliminary objection against the applicant in the instant case, which is that, by virtue of section 5 of the Act, the matters complained of fell within the exclusive jurisdiction of the visitor. Regarding this point as a jurisdictional issue, McDonald-Bishop J considered (at para. [9] of the judgment) that it therefore warranted "primacy of consideration before any other issue is examined". After a detailed review of the Act, the university's internal rules and regulations, the

claim and all the relevant authorities, the learned judge had no difficulty in concluding (at para. [43]) that –

> "...The matters in issue are purely connected to the internal laws, policies and processes governing the [university] and its employees like the claimant. They relate exclusively to the private or special rights of the [university] even if clothed by the claimant in the term 'breach of contract.' The complaint is, simply, that the [university] has failed to observe or adhere to its internal laws."

[54] The cases cited by the applicant and the university, involving a wide range of disputes between universities and students and staff, academic and non-academic, appear to me to support the following conclusions:

1. The authority and jurisdiction of the visitor are derived from longstanding principles of the common law.
2. At common law, the jurisdiction of the visitor is exclusive.
3. At common law, disputes (irrespective of how they are characterised) between students or members of staff and their university which centre on the interpretation, application and administration of the statute, ordinances and internal regulations of the university, are matters falling within the jurisdiction of the visitor and not the courts of law.

4. In jurisdictions, such as England and Wales, where the exclusive jurisdiction of the visitor has been qualified or abrogated by statute, a distinction may still fall to be drawn between issues involving a student's treatment at university, which are capable of being decided by the court, and those relating to academic or pastoral judgment, which are not.

5. In other jurisdictions, as **Norrie v Senate of the University of Auckland** demonstrates, it may be open to the courts to take a different approach to the question of the visitor's exclusive jurisdiction, although recognising, again, that some kinds of dispute will remain better suited to determination by the visitor.

6. In Jamaica, both at first instance and in this court, there has been a uniform application, based on the authority of **Thomas v University of Bradford**, of the common law principles stated at sub-paragraphs 2 and 3 above.

[53] It is against this background, I think, that the question of whether the applicant has a realistic chance of success in an appeal from Lindo J (Ag)'s decision in this case must be assessed. In making this assessment, it would obviously have been helpful to

know the learned judge's reasons for deciding to accede to the university's preliminary objection. But it seems to me that the learned judge must inevitably have accepted the authority of the previous decisions of the Supreme Court and of this court to which she would have been referred. Those decisions make it clear that the common law of Jamaica recognises the exclusivity of the jurisdiction of the visitor in relation to disputes between students and the university as to the proper interpretation and application of its internal regulations, in this case those contained in the handbook. On appeal, **Myrie v The University of the West Indies and others** and **Okuonghae v University of Technology, Jamaica** would both be highly persuasive, and **Vanessa Mason v University of the West Indies** would be binding authority in favour of affirming Lindo J (Ag)'s decision. In these circumstances, I am clearly of the view that the applicant has failed to show that he has an appeal with a realistic chance of success on this issue.

(3) The constitutional points

[54] The first point is the one taken by Mr Thompson on the strength of section 16(2) of the Constitution, which provides as follows:

> "In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."

[55] On this basis, the applicant contends that the court's decision that his complaint in this matter, which involves a question of his civil rights and obligations, falls within

the exclusive jurisdiction of the visitor, amounts to a denial of his constitutional entitlement to a fair hearing by an independent and impartial tribunal.

[56] While constitutional points naturally attract special attention, it seems to me to be possible to answer this point (obviously a thoughtful one) in at least two ways. Firstly, in this case, the office of the visitor is in fact established by law and nothing has been said on this application to suggest that, in pursuing his complaint to the visitor, the applicant will not be afforded a fair hearing before an independent and impartial tribunal. And secondly, as Lord Ackner pointed out in **Thomas v University of Bradford** (see para. [38] above), the manner of the exercise of the exclusive visitorial jurisdiction is always itself subject to judicial review. So the invocation by the university of the exclusive jurisdiction of the visitor in the case does not, in my view, in any manner derogate from the constitutional entitlement to a fair hearing before an independent and impartial tribunal.

[57] Then there is Mr Able-Don Foote's point that the invocation of the visitorial jurisdiction in this case in some way involves a compulsory acquisition of property contrary to section 15(1) of the Constitution, which provides as follows:

> "No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that –
>
> (a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and

(b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of –

(i) establishing such interest or right (if any);

(ii) determining the compensation (if any) to which he is entitled; and

(iii) enforcing his right to any such compensation."

[58] In this regard, it suffices to say, I think, that there is absolutely no element of "acquisition" of an interest or right involved in the law's insistence that a dispute between the applicant and the university falls within the exclusive jurisdiction of the visitor: such rights as the applicant has will be fully recognised and given effect to by the visitor, instead of by the courts.

Conclusion

[59] For the reasons which I have attempted to state, I consider that this application must be dismissed, on the ground that the applicant has not shown that he has an appeal with a realistic chance of success. The applicant would be well advised, it seems to me, to invoke formally the university's procedures for the handling of student complaints, as set out in the handbook (at pages 209-213), with a view to escalating his grievance to the level of the council and ultimately to the visitor. In the light of the unusual circumstances of this matter, my inclination is to make no order as to the costs of the application, but, in the event either party wishes to contend for a different order, I would propose that (i) written submissions on costs should be invited from the parties

within 21 days of this decision;(ii) the court should thereafter determine the issue of costs on paper within a further period of 21 days; and (iii) if no submissions are received from either party, there will be no order as to costs.

[60] I cannot leave this matter without making a comment on the use to which the court's jurisdiction to grant interim injunctions without notice has been put in this case. The court's power to grant interim injunctions is given by rule 17.1(1)(a)of the CPR. Applications for interim injunctions are specifically dealt with under rule 17.4. Rule 17.4(4) and (5) provides as follows:

> "(4) The court may grant an interim order for a period of not more than 28 days (unless any of these Rules permits a longer period) under this rule on an application made without notice if it is satisfied that -
>
> (a) in a case of urgency, no notice is possible; or
>
> (b) that to give notice would defeat the purpose of the application.
>
> (5) On granting an order under paragraph (4) the court must -
>
> (a) fix a date for further consideration of the application; and
>
> (b) fix a date (which may be later than the date under paragraph (a)) on which the injunction or order will terminate unless a further order is made on the further consideration of the application."

[61] The court's jurisdiction to grant *ex parte* injunctions is therefore limited to cases of urgency, in which no notice is possible, or cases in which the giving of notice will defeat the purpose of the application. Further, on the grant of an interim order, the

court must fix dates for the further consideration of the application and on which the interim order will come to an end without a further order.

[62] The misuse of the court's *ex parte* jurisdiction attracted specific comment from the Privy Council in **National Commercial Bank Jamaica Limited v Olint CorpLimited**, in which Lord Hoffmann observed (at para. 13) that, "[a]lthough the matter is in the end one for the discretion of the judge, *audi alterem* [sic] *partem* is a salutary and important principle". And further, that -

> "…even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none."

[63] In this case, Lindo J (Ag) granted an *ex parte* injunction on 18 November 2014 directing the university to allow the applicant access to its facilities for the purpose of preparing for the end-of-semester examinations which were scheduled to begin on 2 December 2014, that is, two weeks later. Then on 22 January 2015, Laing J granted an *ex parte* injunction restraining the university from preventing the applicant from registering to do four legal modules in the second semester. (Laing J also omitted, in breach of rule 17.4(5) of the CPR, to fix the date on which the interim injunction was to terminate.) In my view, there was no or no sufficient reason in either case for the court's *ex parte* jurisdiction to have been invoked, much less exercised, against the university which, as is apparent from the obvious ease with which the orders, once obtained, were served, was easily available for service. Judges who are called upon,

inevitably at short notice, to consider applications for interim injunctions are under a clear duty, it seems to me, to ensure that the provisions of rule 17.4(4) of the CPR are adhered to. To do otherwise, is plainly to provide judicial sanction for what Lord Hoffmann decried in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** (at para. 15) as "a tactical use of the legal process which should not be allowed".

PHILLIPS JA

[64] I have read in draft the judgment of my brother Morrison JA and agree with his reasoning and conclusion. There is nothing I wish to add.

SINCLAIR-HAYNES JA (AG)

[65] I too have read in draft the judgment of Morrison JA. I agree with his reasoning and conclusion and have nothing to add.

MORRISON JA

ORDER

Application for leave to appeal refused. Parties are invited to file written submissions on costs within 21 days of the date hereof. The court should thereafter determine the issue of costs on paper within a further period of 21 days. If no submissions are received from either party, there will be no order as to costs.