[2015] JMCA Civ 29

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 36/2012

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (Ag)

BETWEEN	**UNIVERSITY OF TECHNOLOGY JAMAICA**	**APPELLANT**
AND	**COLIN DAVIS**	**1ST RESPONDENT**
AND	**SHARON HALL**	**2ND RESPONDENT**

Gavin Goffe and Jermaine Case instructed by Myers Fletcher and Gordon for the appellant

Miss Kashina Moore and Miss Jessica Ffolkes instructed by Nigel Jones and Co for the respondents

28, 29 April and 29 May 2015

PHILLIPS JA

[1] I have read, in draft, the judgment of my learned brother Brooks JA. I agree with his reasoning and conclusion and have nothing further to add.

BROOKS JA

[2] This is an appeal from the judgment of the Supreme Court handed down on 27 January 2012. The learned trial judge ruled that the University of Technology Jamaica

(UTech) had failed to establish that its employee, Mr Colin Davis, had breached the terms of a bond agreement (the bond) made between them. That failure, the learned trial judge found, prevented UTech from recovering, in its claim against Mr Davis, monies that were paid to him as salary and grants during the period of three and a half years that he was on study leave from his employment. He was, at the time, pursuing a doctorate in Higher Education Management at the University of Indiana in the United States of America.

[3] UTech contended in this appeal that the learned trial judge was wrong to so find. It asserted that evidence of Mr Davis' failure to complete the course of study was before the learned trial judge. In the absence of completion, UTech continued, Mr Davis is obliged, as the bond stipulates, to repay the monies paid to him during that time. The learned trial judge was therefore in error, according to UTech, to require it to show that the course of study was not completed in a reasonable time.

[4] Mr Davis and his guarantor on the bond, Ms Sharon Hall, supported the learned trial judge's reasoning and conclusion. They asserted that it was UTech that breached the bond when it forced Mr Davis to prematurely terminate his course of study and return to work. They contended that in any event Mr Davis has, since his return to work, faithfully performed his duties as an employee for the time required by the bond. UTech, therefore, they asserted, has no legal or moral claim against him for any of the monies paid to him during his period of study.

[5] The issues on this appeal are, firstly, whether the learned trial judge was correct in finding that UTech had failed to prove that Mr Davis had not completed his course of study in accordance with the requirements of the University of Indiana or even within a reasonable time and, secondly, what interpretation should be given to UTech's proposal to Mr Davis, approaching the end of his second year of study, that he return to work at the end of the fourth year. He was, at the time of that proposal, indicating that he needed three to four more years of study leave.

The background facts

[6] Mr Davis was, at the time of his application for study leave, an internal auditor at UTech. He had been employed there since 1996. His application was made in early 2000. In it, he stated that the duration of the course was three years and that he required study leave of three years. He was informed of its approval by a memorandum dated 12 June 2000.

[7] Mr Davis needed financing for his course of study. After granting him study leave for three years, UTech also agreed to pay him his full salary for two years and to pay him for one year at half his salary. At his request, UTech also granted him, in December 2000, a loan of J$1,000,000.00 and a grant of US$9,000.00. The loan was recorded in a document which he signed that month.

[8] He commenced his course in January 2001. He was, however, initially on vacation leave until 24 July 2001 and his study leave did not begin until sometime

during July or at the latest, on 1 August of that year. His memorandum dated 3 January 2001, and addressed to UTech's president, stated:

> "With regards [sic] to our previous conversation on the above caption, I am now putting in writing a formal request for permission to proceed on One Hundred and Forty (140) days vacation leave with effect from January 8 to July 24, 2001, after which **the three and a half years study leave** will commence with effect from July 25, 2001.
>
> Your kind approval is hereby being sought to effect this request." (Emphasis supplied)

[9] The approval was granted, but only for three years. It is to be noted that although in 2000, he had asked for only three years study leave, he was, based on the timeline set out in his memorandum, seeking to extend that study leave by a further six months. On this last application, Mr Davis would have been expecting to return to work in or about January of 2005. Based on the approval, however, he would only be away from UTech for three and a half years based on the accumulation of the vacation leave and the approved study leave. He would, therefore, have had to return to work by August 2004.

[10] In July 2003, Mr Davis confirmed the approved position, that is being away for three and a half years, but asked that vacation leave accumulated during the period that he was on study leave be granted to him so that he could continue his course. That extension, if granted, would have allowed him to be away for almost four years.

[11] The payment of the monies during the time of his study leave, was, as mentioned above, secured by the bond. The essence of the bond was that in exchange

for UTech's disbursing these sums, he would complete his course of study in accordance with the requirements of the University of Indiana, return to work at UTech and continue in UTech's employ for five years. A document, in those terms, was signed by Mr Davis and Ms Hall in June 2001, but it was not put in evidence during the trial. In the correspondence leading up to the signing of the bond, Mr Davis asserted that the arrangement was for study leave for three years.

[12] In August 2001 Mr Davis requested further financial assistance to continue his studies. UTech made him a further grant of J$250,000.00 and a further loan of J$150,000.00. Thereafter, some cracks in the relationship between the parties began to materialise. Staff at UTech requested from Mr Davis, a report on the progress of his course of study. There was concern over his delay in providing it. Some less than cordial correspondence accompanied the issue.

[13] A report was eventually sent in August 2002 when Mr Davis sought further financial assistance. UTech made a further grant of US$12,500.00.

[14] On 1 September 2003 Mr Davis requested further financial assistance. It came in the wake of other correspondence about the absence of a report of his academic performance during the period 2002-2003. On receiving the request for more money, UTech baulked. It asked him for information on his academic progress. On 4 September 2003, Dr Howard-Hamilton of Indiana University sent UTech an e-mail stating that Mr Davis was in good academic standing and had taken a full load of courses each semester. In response to a question from UTech, Dr Howard-Hamilton, in

an e-mail dated 5 September 2003, spoke to the amount of time required for Mr Davis to complete his studies. She said:

> "He will be continuing his studies for approximately 3-4 more years. The master's certificate is combined with the doctorate."

[15] During the consideration of his application for further financial assistance, Mr Davis corresponded with UTech's president Dr Rae Davis. Mr Davis made it clear to Dr Rae Davis that his financial situation was dire. His circumstances included the fact that he was in arrears with his payment to the University of Indiana. In an e-mail of 4 September 2003, Mr Davis indicated however, that he was planning to do his qualifying exams in October 2003 and that, thereafter, he would move on to do his dissertation. That was expected to last one year. He repeated that it was his plan to complete the degree within four years. That period would be covered by three years' study leave supplemented by vacation leave both before and after the study leave.

[16] During that correspondence Dr Rae Davis made a proposal which has proved to be important both in the court below and in the appeal. He said in an e-mail of 11 September 2003:

> "Dear Colin,
>
> ...To the matter at hand. This is what we propose:
> 1) You will return to work by January 2005.
> 2) We will extend your leave with full pay to December 31, 2004.
> 3) We will freeze loan repayments until you return to work.
>
> You can respond by e-mail, the formal document will follow."

[17] On 22 September 2003, after a telephone conversation with Dr Rae Davis, Mr Davis responded to that e-mail. He said that he would "work with [Dr Rae Davis'] proposal". He repeated his request for a further grant because of his financial straits. On 29 September 2003, Dr Rae Davis responded to the request. He said in an e-mail:

> "Dear Colin,
>
> I am now able to respond with some specifics.
> Firstly we had to make some assumptions about your needs to December 2004. We used information from the web-site you provided. These are our estimates:
>
> | | |
> |---|---|
> | Sept. 2003 – May 2004 | US$29,418 |
> | Summer 2004 | 7,990 |
> | Sept. – Dec. 2004 | 9,500 |
> | Total | 46,908 |
>
> or Approx J$2.8m
>
> Then we had to look at the other side of the equation:
> Half pay for August 2003 – July 2004 – Appr J$800,000.00
> This suggests that you will need an additional J$2.0m to make it to Dec. 2004.
>
> I am proposing the following;
> A grant of J$1.0m and a loan of J$1.0m (repayable on return to work)
>
> Rae Davis"

[18] It is apparent that this latter proposal was also accepted. In an e-mail of 3 October 2003 Mrs Pauline Bonnick of UTech corresponded with Mr Davis in order to get monies paid over to him. She ended her e-mail by informing him that they would send him a formal letter and that his bond form would "be updated accordingly".

[19] There was some delay, and further disaffection between the parties over the signing of a new bond. Mr Davis' frustration was palpable. He pointed out that he was

being pressured by the University of Indiana for payment. He complained of health challenges. He threatened to withdraw for a semester and declare bankruptcy to stave off the pressure. When asked for clarification as to his position, he said to Dr Rae Davis in an e-mail of 17 October 2003:

> "...If I accept CPT [optional curricular practical training visa option] that will only give me permission to work for a year in the U.S. This means I will only have a masters [sic]. What I am saying [is] I will work to pay my immediate [sic] debt becuause [sic] interest is accruing and I will cease attending class for this semester. The debt is important to clear and I am very uncomfortable and my emotional level is affecting my school work badly....By this time I was having daily headaches and attacks of vertigo...So my decision was not a fun one, it was practical and in the interest of my health.This will put me at odds with my return date to UTech, I will not be quitting I gave my word and...I shall return. However I am not able to sit out an entire semester and reach any point to return in December 2004. That is why I said that I will seek legal protection.
>
> To tell you the truth the amount being offered is not worth my health. I will have to pay back this money any way [sic] and the grant is really compensation for my leave, which I think I still have weight of industrial practise and law on my side. I only desist because of the effort and good will gestures on your part...."

Even if it may be said that his response did not clarify his intentions going forward, there was, however, a clear indication that Mr Davis was in a state of turmoil.

[20] Mr Davis signed the new bond on 29 October 2003. The bond was admitted into evidence. The grant and loan monies, mentioned by Dr Davis, were sent to Mr Davis thereafter. UTech paid him 50% of his salary for the period September 2003 to August 2004.

[21] The total sums paid out to Mr Davis in respect of loans, grants and salary are as follows:

Loans	J$2,150,000.00
Grants	US$43,949.15
Salary	J$4,052,319.90

[22] He returned to work at UTech in January 2005 and has continually worked at the institution since that time. Since his return he repaid the loans that UTech had made to him. He, however, resisted all demands for repayment of the salary and grants.

[23] UTech was not satisfied with the situation. It wanted back the money that it had paid out in grants and salary, which were secured by the bond. Mr Davis and his surety denied owing anything and UTech filed its claim against them. Utech insists that both salary and grants are to be repaid, while Mr Davis asserts that neither is to be repaid. Before turning to the learned trial judge's decision, it is necessary to set out the relevant portion of the bond.

The bond

[24] The question on which the decision in the court below turned is whether Mr Davis had fulfilled his obligation under the terms of the bond. The provision of the bond that dealt with this issue is clause 3. It states:

> "3. The Obligor [Mr Davis], in consideration of the foregoing [promise by UTech to pay the grants and salaries] has agreed that:
>
> (a) He/she **shall complete the said coursein accordance with the**

requirements of the educational institution aforesaid and that UTECH shall be entitled to request reports on the Obligor's work and conduct from the aforesaid educational institution and to take such action based on such reports as it deems fit including termination hereof.

(b) Upon satisfactory completion of the aforesaid course of study he/she shall recommence his/her employment with UTECH for a period of not less [than] *Five (5) Years* from the date thereof. UTECH shall be under no obligation to employ the Obligor, but **in the event that he/she is so employed, UTECH will accept his/her services in lieu of payment of the sum** [representing the grants and salary] set out in 2 hereof.

(c) **In the event of his/her failing to observe or perform 3(a) hereof, and in the event that he/she does not work with UTECH for the stipulated period** (including but not limited to where he/she is dismissed for cause) **he/she shall immediately and without demand pay to UTECH** or such other person entitled to the benefit of the agreement **the sum due with interest** thereon from the date of disbursement of each and any sum paid by UTECH calculated in pursuance hereof, at the rate of twenty-five per cent (25%) per annum as and for liquidated damages. The said sum repayable by the Obligor as hereinbefore set [out], may be increased at UTECH's sole discretion and in that event the Obligor shall pay the said increased sum together with interest thereon at the rate herein set out.

PROVIDED THAT in the event that the Obligor terminates the contract of employment at any time after the expiry of one half (½) of the stipulated period of service, UTECH may at its sole discretion abate the sum payable herein by such proportion as it shall deem fit.

(d) He/she shall execute the above written obligation conditioned as is hereinafter expressed." (Emphasis supplied)

The findings in the court below

[25] The learned judge was of the view that the decision turned on whether UTech had proved that Mr Davis had failed to complete the degree within a reasonable time. She held that as the bond did not stipulate a time period in which Mr Davis was to have completed the degree, UTech, if it were to succeed in its claim, would have to show that a reasonable time for him to have done so, had elapsed. There were four specific findings that led to the learned trial judge's decision in favour of Mr Davis. They were:

1. Mr Davis would only have been in breach of the bond if he had failed to complete the degree in accordance with the University of Indiana's requirements.
2. The only evidence adduced concerning a reasonable time for completion was the e-mail from Dr Howard-Hamilton of the University of Indiana, who had said three to four more years were required for completion.
3. Dr Rae Davis' request for Mr Davis to return to work in January 2005 prevented Mr Davis from completing the

programme "unless alternative arrangements could have been put in place".

4. It was clear that Mr Davis was dependent on UTech for monetary assistance in order to pursue the programme and UTech did not provide any evidence that it discussed alternative arrangements with him.

The learned trial judge found, on those bases, that UTech had failed to make out a case of breach of contract against Mr Davis.

[26] The learned trial judge also dismissed Mr Davis' ancillary claim against UTech. In that claim he sought damages against UTech for breach of contract. The sum claimed was US$60,000.00, being the cost of completing the course. The learned trial judge's reason for dismissing the ancillary claim was as follows:

> "…the onus would have been on him to apply for additional study leave, with or without pay. He did not do so. His leave was terminated in December 2004. He remained at the University of Indiana until then. He has no basis for contending that UTech breached the agreement by preventing his completion."

The appeal

[27] Mr Goffe, on behalf of UTech, submitted that the evidence was clear that Mr Davis had not completed the degree and was not, up to the time of trial in 2011, enrolled in the course leading to the degree. The learned trial judge, he argued, was therefore in error in finding that UTech had not proved that Mr Davis had not completed the degree in a reasonable time. He submitted that once it had been established that

Mr Davis had not completed the degree up to the time of trial, it necessarily followed that he had not completed the degree in accordance with the requirements of the University of Indiana.

[28] Learned counsel submitted that the element of what was a reasonable time should be determined at the time of entry into the contract. He also pointed to several factors which, he submitted, constituted evidence as to what was the understanding of the parties when they entered into the bond. He submitted that they included the following:

1. Mr Davis represented in his application for study leave that the course would have taken three years.
2. He was expected back at work at the end of his study leave.

Learned counsel submitted that the learned trial judge ought not to have relied on the e-mail from Dr Howard-Hamilton. The information in that e-mail, he argued, did not state that the period was a requirement of the University of Indiana.

[29] Miss Moore, on behalf of Mr Davis, submitted that the learned trial judge was correct in relying on the e-mail from Dr Howard-Hamilton as it was the only information she had in order to identify what was a reasonable time for the completion of the course. Learned counsel argued that it was not even necessary to imply a term into the bond to determine what the time for completion was. Miss Moore submitted that a fair reading of clause 3(c) showed that Mr Davis was not in breach of the bond.

[30] Learned counsel submitted that even if Mr Davis had not completed the course at the University of Indiana, the fact is that he had, since his return, worked for UTech for in excess of five years. On her submission, clause 3(c) meant that UTech was only entitled to be repaid if Mr Davis did not complete the course and did not return to work for UTech. Having done the latter, she argued, UTech's claim for refund was misconceived.

[31] Learned counsel accepted that the latter submission did not form part of the learned trial judge's findings and was not the subject of a counter notice of appeal. She argued however, that she had raised it in her written submissions and so her advance of the argument orally would not have taken counsel for the appellant by surprise.

[32] Rule 2.3(3) of the Court of Appeal Rules (CAR) stipulates that a respondent who wishes this court to affirm a decision of the court below on grounds other than those relied on by that court must file a counter-notice of appeal. Morrison JA, at paragraph [95] of his judgment in **International Hotels (Jamaica) Limited v Proprietors Strata Plan No 461** [2013] JMCA Civ 45, pointed out the existence of the rule and stressed the use in the rule of the mandatory term "must".

[33] It does not appear that the provisions of rule 1.16 were brought to the learned judge of appeal's attention at that time. The latter rule may have an impact on the stringency of rule 2.3(3). That impact will not be identified or assessed in this judgment. It will be sufficient to say that rule 1.16 allows the court to give permission

to argue a point that was not contained in a notice of appeal or a counter-notice. The relevant portion states:

> "(2) At the hearing of the appeal no party may rely on a matter not contained in that party's notice of appeal or counter-notice unless-
>
> (a) it was relied on by the court below; or
>
> (b) the court gives permission.
>
> (3) However –
>
> (a) the court is not confined to the grounds set out in the notice of appeal or counter-notice, but
>
> (b) may not make its decision on any ground not set out inthe notice of appeal or counter-notice unless the other parties to the appeal have had sufficient opportunity tocontest such ground.
>
> (4) The court may draw any inference of fact which it considers is justified on the evidence."

[34] Rule 1.16 was considered by this court in **Gordon Stewart and Others v Merrick Samuels** SCCA No 02 of 2005 (delivered on 18 November 2005). P Harrison JA, as he then was, opined at page 14 of the judgment that the court could consider a point that was raised in the skeleton arguments of a party, which were served on the other party, even though it was not the subject of a notice or counter-notice of appeal.

[35] Miss Moore was allowed to argue the point as an indulgence. It followed, somewhat, from submissions that Mr Goffe had made. Indeed, in **International Hotels**, Morrison JA did consider, briefly, the submissions which had been advanced without the benefit of a counter-notice having been filed. He did so because the judge

in the court below had mentioned the point. It should be noted that this is a matter for the discretion of the court and not an open invitation to flout rule 2.3 of the CAR.

[36] Miss Moore also argued that the proposal by Dr Rae Davis for Mr Davis to return to work in January 2005 was weightier than a mere proposal. It was, as the learned trial judge found, an order to return home. It was, Miss Moore said, "an ultimatum". The signing of the 2003 bond in the context of Dr Rae Davis' e-mail was a case of "pressured acquiescence" on the part of Mr Davis. That signing should be read, Miss Moore submitted, against the background of Dr Howard-Hamilton's e-mail stipulating that Mr Davis needed three to four more years to complete the course.

The analysis

[37] Despite the spirited and well-structured submissions of Miss Moore, it does appear that the learned trial judge fell into error on a number of bases. Firstly, the learned trial judge erred in finding that the only evidence concerning what would have been a reasonable time for completion of the course was the e-mail from Dr Howard-Hamilton.

[38] Mr Goffe correctly submitted that the learned trial judge did seem to ignore, for the purposes of assessing what would have been a reasonable time for completion of the course, the evidence concerning the basis on which Mr Davis commenced his course of study. Not only did Mr Davis state on his application for study leave, that the course would have taken three years, but from the time of applying for permission to leave to

commence his course, he indicated that he would have been away for, at most, three and a half years.

[39] On several occasions after January 2001, he stated in correspondence that his course would have taken four years. That was solid evidence as to the expectation of the party financing Mr Davis' study leave. It was solid evidence as to what was a reasonable time for completion of the course. It could not, as Miss Moore submitted, only be Mr Davis' estimate as to the length of time that the course would have taken.

[40] Miss Moore also sought to support the learned trial judge's decision on this aspect by submitting that the bond was signed in 2003 in the context of Dr Howard-Hamilton's indication that three to four more years were required for Mr Davis to complete his course. It could not, therefore, learned counsel submitted, still be the contemplation of the parties that the duration of study was that which was stated in his application for study leave.

[41] There are two difficulties with Miss Moore's submission. The first is that the 2003 bond was signed after Mr Davis had agreed with Dr Rae Davis' proposal to return in January 2005. The second difficulty is that the bond was prepared and executed as a replacement for the 2001 bond. The 2001 bond was not admitted into evidence but it is not contested that the only difference between the two documents was the amounts to be provided by UTech as its part of the agreement. The learned trial judge seemed to have accepted that position at paragraph 41 of her judgment when she said:

> "…Although the Bond Agreement was resigned [sic] in October 2003, it is clearly an agreement that is reflecting the position of both parties since 2001."

[42] Another factor concerning the evidence of the time required for completion was the aspect of reports from the University of Indiana on Mr Davis' academic progress. The learned trial judge commented on the fact that UTech had not, as it was entitled to do, sought reports from the University of Indiana on Mr Davis' work and conduct. It appears that the learned trial judge felt bolstered by this omission, in finding that the only evidence as to a time for completion was Dr Howard-Hamilton's e-mail.

[43] UTech constantly asked Mr Davis for progress reports on his work. He usually only responded to those requests when he was seeking additional financing. The learned judge is correct that the only information from the University of Indiana, in late 2003, was Dr Howard-Hamilton's e-mail. The point is not critical, however, or definitive of the matter. As stated above, UTech did have other information to guide it in determining what would have been a reasonable time for Mr Davis to have completed the degree.

[44] The second basis on which the learned trial judge erred is that she found that "when Dr. [Rae] Davis requested that Mr Davis return to work by January 2005, it would have prevented him from completing the said program [sic], unless alternative arrangements could have been put in place" (paragraph 37 of the judgment). The statement suggests firstly, that the request bore a connotation of compulsion. Secondly, the learned trial judge seemed to have been of the view that it was for UTech

to have put those alternative arrangements in place. Indeed, the learned trial judge went on to say in paragraph 37 that "[t]here is no evidence from [UTech] as to whether such alternative arrangements were discussed with Mr. Davis at the time of his return to the institution".

[45] The learned trial judge was, with respect, in error in these aspects. Dr Rae Davis did not order Mr Davis' return to work or request his return as the learned trial judge seemed to have held. The UTech president made a proposal to Mr Davis, which Mr Davis accepted. It was open to Mr Davis to have rejected the proposal. Indeed, in his e-mail of 22 September 2003, the very e-mail in which he accepted Dr Rae Davis' proposal, Mr Davis indicated that he had been pursuing an alternative source of funding. He made a conscious decision to "work with" Dr Rae Davis' proposal instead of pursuing that alternative course.

[46] On the aspect of finances, it is to be noted that UTech had gone over and beyond the ambit of the original expectation for financial assistance to Mr Davis. There was no basis for asserting that it had any obligation to see to the continued financing of Mr Davis pursuit of the course.

[47] Further, Dr Rae Davis did not make his proposal in the context of an unreasonable time frame or an unreasonable financial position. His proposal would have allowed Mr Davis sufficient time to have completed his degree. Dr Rae Davis also offered Mr Davis additional funding and additional forbearance in respect of the terms of repayment. He did so in order to allow Mr Davis to complete the degree.

[48] This was done in September 2003. Mr Davis had, by then, completed 52 of the 75 course credits required for the degree. He, therefore, had 15 months in which to earn 23 more course credits and do a dissertation which would earn him the final 15 credits needed to satisfy the 90 credits needed overall. Mr Davis' response to the proposal was not that it was an impossible task, he said that he would "work with [the] proposal". He was in a very fragile state at the time but, in an e-mail dated 17 October 2003, he expressed appreciation to Dr Rae Davis for "the effort and good will gestures on [Dr Rae Davis'] part".

[49] That was not the impossible situation that the learned trial judge seemed to think that it was. Additionally, the learned trial judge seemed to be of the view, at least in analysing UTech's claim, that the onus was on UTech to have discussed alternative proposals with Mr Davis as to how he would have satisfied the requirements of the University of Indiana. Again, it is difficult to agree with the learned trial judge on this point. It was Mr Davis' pursuit of a degree programme. He had taken study leave in order to pursue his ambition. If the time came when he no longer had any vacation leave or study leave to allow him to complete his course, he was entitled to terminate his employment and continue his studies. That would have been his decision to make. The bond contemplated that eventuality. Clause 3(b) spoke to Mr Davis being required to recommence his employment after satisfactorily completing his studies, but that UTech was not obliged to employ him. Further, it must be noted that UTech had not committed itself to the complete financing of the course. It had agreed at the beginning to provide certain funding, namely two years at full salary and one year at

half salary. Nonetheless, it went over and above what it had originally committed itself to do. It would be unreasonable to require UTech to continue to finance Mr Davis for a period beyond that which was contemplated at the beginning of their arrangement. If it voluntarily wished to do so, as it in fact did, that was within its prerogative. It would be quite a different thing to say, however, that it was obliged to continue to finance his studies or to make alternative arrangements to allow him to do so.

[50] The learned trial judge's reasoning in respect of Mr Davis' counter-claim seemed to recognise that the onus was on him, and not UTech, to organise his affairs. She said at paragraph 42:

> "Bearing in mind, the email correspondence of Mr. Davis as to the purported length of time that the course would take, and the time he had applied for to do the course, the onus would have been on him to apply for additional study leave, with or without pay. He did not do so. His leave was terminated in December 2004. He remained at the University of Indiana until then. He has no basis for contending that UTech breached the agreement by preventing his completion…."

The learned trial judge's reasoning in this regard is, with respect, correct. It should, however, also have been given effect in her reasoning in respect of the claim.

[51] The third basis on which the learned trial judge erred in her findings is that, it is clear, as Mr Goffe submitted, that by the time the claim had been filed in November 2008 or at latest when the trial commenced in October 2011, Mr Davis had not completed the degree and was no longer enrolled in the doctoral programme. It was impossible, therefore, for it to be said that he had completed "the said course in accordance with the requirements of the" University of Indiana. It is true that he

returned to work at UTech but that was not sufficient performance of his obligations under the bond.

[52] Clause 3(c) of the bond required him to satisfactorily complete the course and thereafter work for five years in UTech's employ. Both were required. One was insufficient. Miss Moore's interpretation to the contrary is incorrect. On her submission an obligation to repay the monies would only arise if Mr Davis failed to do both things. In her written submissions at paragraph 11, learned counsel stated that UTech "must establish that [Mr Davis] failed to observe 3(a) of the Bond Agreement [the obligation to complete the degree] **and** that [he] did not work with UTech for the stipulated period" (her emphasis).

[53] A fair reading of the clause does not support Miss Moore's interpretation, and a simple test proves it to be flawed. If Mr Davis were to have satisfactorily completed his doctorate and thereafter failed to work with UTech, would it not be unthinkable to say that he had no obligation to repay the funds used to finance his education? Miss Moore's position was, however, a point taken only on appeal. It was, wisely, not the position taken by Mr Davis in the court below, and the learned trial judge did not address it. As mentioned above, Miss Moore was allowed to argue it, but it proved to be without merit.

[54] Based on this analysis, the learned trial judge erred in denying UTech its claim. UTech has proved that Mr Davis did not satisfy the requirement of satisfactorily completing his course of study. Under the provisions of clause 3(c), Mr Davis is obliged

to repay the monies set out in the bond. There is no dispute as to those amounts. They are US$43,949.15 and J$4,052,319.90 with interest thereon.

Conclusion

[55] The learned trial judge erred in ignoring the evidence concerning the length of time Mr Davis and UTech had agreed between themselves as to how long he would have been away on leave. UTech having performed all its obligations under the bond, it was for Mr Davis, if he found that he could not complete his course within the agreed time, to so arrange his affairs that he could complete it and satisfy UTech that he would do so in a reasonable time.

[56] Instead, Mr Davis did not complete the degree. He abandoned the course. He could not properly say, thereafter, that he was not obliged to repay the monies advanced to him in pursuance of the bond. He had breached the bond and UTech should have judgment in its favour.

The amount for which the judgment should be entered

[57] There is authority for the principle that where the loss is in both foreign and Jamaican currency the court should express the judgment in Jamaican dollars using the rate of exchange at the date of assessment as the conversion date (see **Sheila Darby v The Jamaica Telephone Company Limited and Another** (1988) 25 JLR 164). In light of the age of the matter, the fact that the exchange rate has changed dramatically since 2005 and the interest rate cited in the bond does not seem to distinguish between

United States Dollars and Jamaican Dollars, it may be best to have submissions from counsel on the sum for which the judgment should be entered.

McDONALD-BISHOP JA (Ag)

[58] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing further that I can usefully add.

PHILLIPS JA

ORDER

1) The appeal is allowed.
2) The judgment of the Supreme Court handed down on 27 January 2012 is set aside.
3) Counsel for each of the parties shall file and serve written submissions on or before 19 June 2015 as to the sum and currency in which judgment is to be entered and the rate of interest to be applied to the sum due.
4) The court will make an order, thereafter, as to the sum in which judgment is to be entered for the appellant.
5) Costs to the appellant both here and below to be taxed if not agreed.