[2022] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2021CV0005

BETWEEN	**DEBORAH CHEN**	**APPELLANT**
AND	**THE UNIVERSITY OF THE WEST INDIES**	**RESPONDENT**

Mrs M Gibson-Henlin and Ms Stephanie Williams instructed by Henlin Gibson Henlin for the appellant

Christopher Kelman and Matthew Royal instructed by Myers Fletcher & Gordon for the respondent

6, 7 December 2021 and 13 May 2022

BROOKS P

[1] I have read in draft the judgment of my sister Simmons JA. I agree with her reasoning and conclusion and have nothing to add.

SIMMONS JA

[2] This is an appeal from the decision of Henry-McKenzie J, made on 8 January 2021, striking out the appellant's claim for constitutional relief.

Background

[3] The appellant, Ms Deborah Chen, was a Doctor of Philosophy ('PhD') candidate at the University of the West Indies ('the UWI'). Her thesis, which was required for the completion of her studies, was submitted to the UWI on 26 May 2011. It was returned to her for corrections and re-submitted on 28 June 2013. On 17 March 2014, she was

advised during informal discussions with the chief supervisor that her thesis had been rejected. On 7 April 2014, she received written notification of that decision. Following a meeting regarding the rejection of her thesis, she was advised by the UWI that the thesis did not meet the requirements for an award of a PhD but could be re-submitted for the award of the MPhil degree.

[4] The appellant, who was dissatisfied with that ruling, indicated through her attorneys-at-law that she wished to exercise her right of appeal to the Senate pursuant to statute 25(2)(h) of the Royal Charter, Statutes and Ordinances governing the UWI ('the Charter'). (This reference is incorrect, as the relevant statute is statute 16(2)(k)). By letter dated 3 July 2014, she was informed by the UWI that she had exhausted all internal remedies, as her appeal had been determined by the Board of Graduate Studies. She was also advised that she had the option of referring the matter to the Visitor.

[5] By letter dated 28 July 2014, her attorneys-at-law wrote to the Lord Chancellor of Great Britain, informing him of the matter and requesting that a Visitor be appointed from Jamaica in order to save time and costs. The Head of Secretariat and Senior Clerk of the Privy Council, Mrs Ceri King, responded by letter dated 12 August 2014, stating that "…it [was] highly unlikely that the Visitor would be able to intervene in [the] case" as the matter was concerned with academic assessment which was outside of the Visitor's jurisdiction. The appellant, through her attorneys-at-law, by letter dated 14 August 2014, indicated to Mrs King that the matter was concerned with a breach of the Regulations for Graduate Diplomas and Degrees and not academic assessment.

[6] In the interim, by letter dated 15 August 2014, the appellant informed the UWI of her intention to refer the matter to the Visitor and requested that the UWI extend the time for the re-submission of her thesis pending the outcome of her case. Her request for an extension of time was refused on the basis that the UWI had no knowledge of the length of time the Visitor would take to conclude the matter. By letter dated 27 August 2014, it was suggested by the UWI that the appellant could make a more specific request regarding the time for the re-submission of her thesis.

[7] Mrs King, in her response to the letter of 14 August 2014 from the appellant's attorneys-at-law, advised the appellant that her query should be directed to the office of the Attorney General in the Bahamas, as the UWI was incorporated in that country. The rationale being that "…it would not …be appropriate for a Minister of the UK Government to advise the Queen on the exercise of Her Visitorial powers (or exercise them on her behalf) in relation to an institution incorporated in an independent Commonwealth country". The appellant's attorneys-at-law wrote to Mrs King disputing the referral to the Attorney General for the Bahamas and renewed their request for the appointment of a Visitor.

[8] By letter dated 29 September 2014, the appellant's attorneys-at-law wrote to the UWI, requesting "a stay of six months on the resubmission or until such time as the Visitor is formally appointed". The appellant was granted an extension of time to 31 December 2014.

[9] The matter of the appointment of a Visitor remained unresolved until 10 August 2017, when the appellant was informed by the Office of the Governor General of Jamaica that the Queen had delegated Her Visitorial function to the Honourable Mr Justice Paul Harrison (retired) ('Justice Harrison'). The UWI was informed of his appointment by letter dated 7 September 2017. The matter was not addressed during his tenure. By Instrument, dated 7 November 2018, the Charter was amended to provide for the appointment of a Visitor from within the region by the Council of the UWI and to give the Visitor jurisdiction to deal with matters that were commenced before his appointment.

[10] In May 2019, the Honourable Mr Justice Rolston Nelson ('Justice Nelson') was appointed as Visitor of the UWI. By letter dated 26 June 2019, addressed to Ambassador the Honourable Burchell Whiteman, OJ, Special Advisor to the Governor General of Jamaica, the appellant's attorneys-at-law indicated that they had received no communication in respect of the appellant's case, although a new Visitor had been appointed. They also indicated that they had been instructed to commence legal proceedings within 21 days if that state of affairs continued.

Proceedings in the court below

[11] On 3 April 2020, the appellant filed a claim in the Supreme Court against the UWI, in which she sought constitutional redress. The claim, which was amended on 2 July 2020, sought the following reliefs:

> "1. A declaration that the [appellant] has been deprived of her right of access to the [sic] an independent and impartial court and/or tribunal established by law under section 16(2) of the Charter of Fundamental Rights and Freedoms.
>
> 2. A declaration that the [appellant's] right to a fair hearing under section 16(2) of the Charter of Fundamental Rights and Freedoms has been breached.
>
> 3. A declaration that the [appellant's] right to a fair hearing within a reasonable time under section 16(2) of the Charter of Fundamental Rights and Freedoms has been breached.
>
> 4. An order that the [appellant] is entitled to damages to be assessed.
>
> 5. The costs of this claim and the costs thrown away in pursuing the Visitor's adjudication be the [appellant's] to be taxed if not agreed."

[12] The UWI responded by filing an application to strike out the appellant's statement of case or, alternatively, that the court declines to exercise its jurisdiction in relation to the claim. The grounds on which the application was based can be summarised as follows:

1. The dispute between the parties involved questions relating to the internal laws of the UWI and duties derived from those laws and was, therefore, within the exclusive jurisdiction of the Visitor;

2. Justice Harrison had been appointed to act as Visitor; and

3. As a consequence, the appellant had an alternative remedy of referring the matter to the Visitor.

[13] Henry-McKenzie J, in her consideration of the application, examined the jurisdiction of the visitor vis-à-vis the jurisdiction of the court, whether constitutional proceedings ought to have been invoked and whether the UWI was the proper defendant.

[14] On 8 January 2021, the learned judge concluded that the "visitorial authority is independent of and separate from that of [the UWI]". She stated at para. [36]:

> "…The defendant is not the visitor, nor is the visitor a member of the defendant university as listed in Statute 2 of the Charter. That said, I agree with the defendant that the appropriate party the matter should proceed against is the visitor. It is this Office that has perpetrated the delay, despite the fact that the university by its Charter maintained this visitorial jurisdiction."

[15] The learned judge also found that the appellant had an alternative remedy in judicial review. In concluding that the appellant's statement of case ought to be struck out, she stated that "[a] constitutional remedy is one of last resort and [ought] not to be used when there is available an adequate alternative remedy".

The application for fresh evidence

[16] By notice of application filed on 23 September 2021, the appellant sought to adduce the following as fresh evidence to this court:

> "the Jamaica Observer news article dated the 8th February 2021, 'Judiciary mourns Justice Paul Harrison'."

[17] On 6 December 2021, we refused the application.

[18] The purpose of the application was to establish the death of Justice Harrison, to whom Her Majesty the Queen had delegated Her Visitorial functions in respect of the UWI.

[19] The application was supported by the affidavit of Ms Charah Malcolm, filed on 23 September 2021. Ms Malcolm asserted in that affidavit that the information was relevant

to the appeal, as it established that the dispute could no longer be heard by the appointed visitor, which will cause further delay and prejudice to the appellant.

[20] The grounds on which the application was based were as follows:

> "1) Pursuant to section 28 of the Judicature (Appellate Jurisdiction) Act, the Court may if they think it necessary or expedient order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case and further may exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court on appeals in civil matters.
>
> 2) Pursuant to Part 2.15 of the Court of Appeal Rules, 2002, the court has all the powers and duties of the Supreme Court and may make any order or give any direction which is necessary to determine the real question in issue between the parties to the appeal.
>
> 3) The visitor is a party of interest in the matter for the court to determine whether the learned Judge in the Supreme Court erred as a matter of law in finding that the [UWI] is not the proper Defendant to the proceedings and that the matter should proceed against the Visitor.
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> 4) The evidence relates to a substantive issue in the Appeal.
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> 5) The evidence is credible.
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> 6) The evidence is not unfairly prejudicial to the Respondent.
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> 7) The evidence is such that, if given, it would probably have an important influence on the result of the appeal.
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> 8) It is in the interest of justice and the overriding objective of the Rules."

Appellant's submissions

[21] Mrs Gibson-Henlin QC, on behalf of the appellant, submitted that, where there has been a trial or hearing on the merits, fresh evidence cannot be admitted before this court. In this regard, reliance was placed on rule 1.16(2) of the Court of Appeal Rules, 2002 ('CAR'), which states that a party cannot rely on a matter not contained in the notice or counter notice unless either it was raised in the court below, or the court gives permission. However, where that evidence relates to matters that have occurred after the date of the trial or hearing, is likely to have an important influence on the case and is credible, the court may grant permission for it to be adduced. Reference was made to **Ladd v. Marshall** [1954] 3 All ER 745 and **Harold Brady v General Legal Council** [2021] JMCA App 27 ('**Harold Brady**') in support of that submission.

[22] Learned Queen's Counsel submitted that the event, which is the subject of the application, occurred after the delivery of the judgment, and as such, the first requirement in **Harold Brady** was satisfied.

[23] Where the influence of the fresh evidence on the outcome of the appeal was concerned, she reminded the court that Henry-McKenzie J had found that the appellant had an alternative remedy in judicial review. She argued that since Justice Harrison, who had been appointed as the Visitor, has died, that remedy is no longer available to the appellant. Queen's Counsel further argued that the affidavit evidence of Mrs Davies-Mattis that the new Visitor's jurisdiction had been extended to matters that arose prior to his appointment was of no assistance, as that was not communicated to the appellant prior to the filing of the affidavit. She also indicated that no communication had been received from Justice Nelson, who was appointed as the Visitor after the death of Justice Harrison, regarding the matter. In addition, she submitted that Justice Nelson's appointment and the extension of his jurisdiction do not cure the inordinate delay of over seven years in the treatment of the appellant's case. That delay, she argued, has rendered the appellant's research obsolete.

[24] Learned Queen's Counsel submitted that the UWI's amendment of the Charter was evidence that it was complicit in the "dysfunctional" application of the Visitorial jurisdiction to the appellant's case. She argued that this was relevant to the learned judge's finding that the Visitorial jurisdiction was separate and independent of the UWI and also the outcome of this appeal. In the circumstances, it was argued that the learned judge erred in striking out the appellant's statement of case.

[25] Finally, it was submitted that the evidence ought to be admitted as it was both credible and relevant.

Respondent's submissions

[26] Mr Kelman, on behalf of the respondent, submitted that the application ought not to be granted. He, too, relied on **Ladd v Marshall** and **Harold Brady**.

[27] Where the availability of the evidence was concerned, counsel submitted that the court was required to consider the scope of its authority to admit evidence that was not available at the time when the learned judge made her decision. He pointed out that, unlike the United Kingdom, there is no express provision in Jamaica dealing with this issue. He submitted that based on **R (Iran) and others v The Secretary of State for the Home Department** [2005] EWCA Civ 982, there should be a constrained approach in the exercise. Specific reference was made to para. 34 of that case where Brooke LJ stated:

> "34. In the ordinary run of litigation in the courts the legal rights of the parties fall to be decided in accordance with the facts as they appear to the first instance judge. There is little room for the admission of evidence of changed circumstances at the hearing of an appeal."

[28] Counsel indicated that in that case, the court observed that such applications had been granted where there was a change in circumstances after the grant of an injunction or where a change in circumstances after the trial falsified the basis on which discretionary relief had been granted. It was submitted that the appellant's dissatisfaction

with the length of time that it is taking for Justice Nelson to address her complaint can be dealt with by an application for an order of *mandamus*. There were, therefore, no exceptional circumstances justifying the grant of the order.

[29] It was also submitted that the appellant had not satisfied the second limb of **Ladd v Marshall**, as the fresh evidence is irrelevant to the appeal because the current Visitor has the jurisdiction to deal with the appellant's complaint. In the circumstances, it was argued that the evidence sought to be adduced would not affect the learned judge's finding that there was an alternative remedy.

[30] Where the finding that the Visitor and the UWI were separate and independent entities was concerned, counsel submitted that the Charter is not the UWI's document. He argued that the UWI is a creature of the Charter and derives its existence from that instrument. Counsel also pointed out that the Charter does not vest the UWI with any decision making power in respect of the Visitor. Mr Kelman stated that the office of the Visitor was created by the Charter, and the amended Instrument was issued under the seal of Her Majesty the Queen as it clearly states that "Her Majesty has allowed amendments to the Charter of the University of the West Indies…". Reference was made to the decision of this court in **Vanessa Mason v The University of the West Indies**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 7/2009, judgment delivered 2 July 2009 ('**Vanessa Mason**'), in support of that submission. In the circumstances, it was submitted that any assertion that the UWI maintains any supervisory power over the Visitor was wrong, and the evidence sought to be adduced was not likely to have an impact on the outcome of the appeal.

Discussion

[31] In our determination of whether or not to allow the appellant to adduce the fresh evidence, the conditions laid down in **Ladd v Marshall**, which were adopted by this court in **Harold Brady**, were applied. In **Harold Brady**, McDonald-Bishop JA at para. [38] stated that:

> "[38] … The principles extrapolated from **Ladd v Marshall** … establish that the court will only exercise its discretion to receive fresh evidence where:
>
> 1. the evidence the applicant seeks to adduce was not available and could not have been obtained with reasonable due diligence at the trial;
>
> 2. the evidence is such that, if given, it would probably have had an important influence on the outcome of the particular case, though it need not be decisive; and
>
> 3. although the evidence itself need not be incontrovertible, it must be such as is presumably to be believed or apparently credible."

[32] The learned judge of appeal noted that although the principles in **Ladd v Marshall** are the "starting point in considering fresh evidence applications in civil proceedings", the primary consideration is the interests of justice (see also **Rose Hall Development Limited v Minkah Mudada Hananot** [2010] JMCA App 26 at para. [17]). The **Ladd v Marshall** principles, therefore, guide the court in its determination of whether the admission of the fresh evidence would be in the interests of justice.

[33] In this matter, the evidence sought to be adduced satisfied the first condition laid down in **Ladd v Marshall**, as Justice Harrison had not yet died when Henry-McKenzie J gave judgment. The evidence was also credible.

[34] The remaining question was whether the admission of that evidence was likely to affect the outcome of the appeal. This required an examination of the grounds of appeal.

[35] The first ground relates to the finding of the learned judge that an alternative remedy in judicial review is available to the appellant. Henry-McKenzie J found that the appellant could apply for an order of mandamus to "compel the Visitor to exercise his authority". Mrs Gibson-Henlin QC argued that the death of Justice Harrison has left the appellant without a remedy and that the appointment of Justice Nelson as the Visitor and the amendment of the Charter, which has given him the jurisdiction to deal with matters

that arose prior to his appointment, do not assist the respondent, as there has been no communication from him in respect of the appellant's matter. Mr Kelman disagreed.

[36] The issue before the learned judge was whether there was an alternative remedy available to the appellant. When the judgment was delivered, Justice Harrison was alive, and the learned judge found that proceedings could have been brought against him, in his capacity as Visitor, in an effort to resolve the dispute between the parties. Justice Nelson is now the Visitor. The amendment to article 6 of statute 2A of the Charter gives a newly appointed Visitor the jurisdiction to deal with matters that were submitted to the Visitor before his or her appointment. The appellant's complaint would, however, not be eligible for Justice Nelson's consideration, as petitions which were filed before his appointment (as the first appointee under the amended article) are stated to be the responsibility of the previous Visitor. Article 6 states:

> "6. The Council reserves unto itself the right to appoint a regional figure of high judicial office as Visitor of the University, upon the recommendation of the President of the Caribbean Court of Justice, made in pursuance of a Special Resolution passed by a simple majority of members of the Council present and voting, for such a period and with such duties and powers as the Council shall see fit, and his or her decisions on matters within his or her jurisdiction shall be final. For the avoidance of doubt, such Visitor will be responsible for considering and resolving petitions, including those lodged prior to the date of his or her appointment that remain unresolved; **save only that petitions lodged prior to the date of the first Visitor appointment under this provision and remaining unresolved shall be so resolved by the previous Visitor (or delegate thereof, as the case may be) whose decision shall be final**." (Emphasis supplied)

[37] I have noted that based on the wording of the email dated 14 August 2017, from Kings House to the appellant, Her Majesty the Queen "delegated" Her Visitorial functions to Justice Harrison. The letter from Kings House to the Vice-Chancellor of the UWI, dated 7 September 2017, confirms that position. It stated that "…it was decided that His Lordship the Honourable Justice Paul Harrison, OJ, former President of the Court of

Appeal in Jamaica would be the person to deal with the appeals **on [H]er Majesty's behalf**" (emphasis supplied). Her Majesty the Queen, therefore, was the substantive Visitor during the first period. When Justice Harrison died, those duties would revert to Her Majesty the Queen. The appellant's complaint was not addressed by him. As such, the responsibility for its resolution would, therefore, rest with Her Majesty the Queen or Her delegate, against whom an order of mandamus may be sought. The admission of the fresh evidence would, therefore, have no impact on the outcome of this ground.

[38] The second ground is concerned with whether it is the respondent or the Visitor which is the proper party to the proceedings. In **Vanessa Mason**, Cooke JA stated at para. 26 that the UWI is a creature of the Charter (see article 1 of the Charter). The Visitor is also a creature of the Charter (see article 6).

[39] The appellant, in para. 22 of her affidavit in support of her fixed date claim form, has sought to lay the blame for the Visitor's delay in dealing with her matter at the feet of the UWI. It is my understanding that the appellant's position is that the UWI is a proper party to the claim as it had the power to both appoint and issue directions to the Visitor. If that is so, the UWI could possibly be liable in damages. This brings to the fore the issue of whether the Visitor has the jurisdiction to provide a remedy for the delay.

[40] In **Suzette Curtello v University of the West Indies** [2015] JMSC Civ 223 ('**Suzette Curtello**'), Sykes J (as he then was) stated:

> "[36] The idea is that the visitor is the court of the founder and his jurisdiction rests on the founder's right to decide who [sic] the power will be exercised. The visitor has full 'visitor's power to investigate and right wrongs arising from the application of the statutes or other internal laws of the institution' (Halsbury's Laws of England (vol. 35 (2015) para 629).
>
> [37] A legitimate question is, what are the powers of the visitor if he or she finds that some wrong has indeed been committed? The case of **Thomas** assists. The leading judgments of Lord Griffiths and Lord Ackner indicate that once a matter can be properly dealt with

> by the visitor then the visitor is empowered to grant remedies. **In some instances, the visitor can even award damages**." (Emphasis supplied)

[41] In **Thomas v University of Beckford** [1987] 1 ALL ER 834 ('**Thomas**'), Lord Griffiths at, pages 848-849, stated thus:

> "Miss Thomas relied also on the view expressed by the Lord Chancellor that a university has no power to award damages. He said ([1983] 1 All ER 88 at 91):
>
> > 'After considerable research, I have been unable to find any precedent in the long history of visitatorial powers in which a visitor has made such an order and in my view he has no such power.'
>
> This view is to be contrasted with that expressed by Burt CJ in *Murdoch University v Bloom* [1980] WAR 193 at 198, in which he said on the assumption that a breach of contract fell within visitatorial jurisdiction:
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> > 'If it were then I can see no reason why an action for damages if brought upon the breach of such a contract would not equally be a matter within the exclusive jurisdiction of the Visitor… '
>
> I prefer the view expressed by Burt CJ. **I can see no reason why the visitor as judge of the laws of the foundation should not have the power to right a wrong done to a member or office holder in the foundation by the misapplication of those laws. The visitor would be a poor sort of judge if he did not possess such powers.** Suppose, first, a case in which on appeal the visitor concluded that there had been no 'good cause' for the dismissal of a member of the academic staff and ordered the reinstatement of the member; I cannot entertain a doubt that the visitor would have power to order payment of arrears of salary between the date of dismissal and reinstatement. Suppose, second, a case in which the visitor concluded there had been no 'good cause' for the dismissal but relations between the dismissed member and the other members of the academic staff had so deteriorated that it would be inimical to the general health of the university to order reinstatement. Why in these circumstances should the visitor not proceed to right

> the wrong done to the member by ordering that a monetary recompense should be paid by the university in lieu of reinstatement. No doubt in calculating the sum he would be guided by those principles that the courts have worked out in cases of wrongful dismissal in which the courts refuse to enforce a contract of service wrongfully terminated but give monetary recompense instead, which the law labels as damages. To deny a visitor such a power is to deny him one of the fundamental functions of a judge which is to right a wrong, in so far as money can." (Emphasis supplied)

[42] Lord Ackner also addressed the issue of damages. He stated at page 852:

> "As regards the visitor's jurisdiction to award 'damages' I see no practical problem. The visitor in the course of his supervisory jurisdiction must be entitled, in order to ensure that the domestic law is properly applied, to redress any grievance that has resulted from the misapplication of that domestic law. Such redress may involve ordering the payment of arrears of salary in the case in which the visitor decides that the employment has not been determined, or compensation where the complainant has accepted the wrongful repudiation of his contract of employment."

[43] Based on **Suzette Curtello** and **Thomas**, the visitor has the jurisdiction to order compensation in appropriate circumstances. The evidence sought to be adduced, in our view, would be of no assistance in the resolution of those issues and, as such, would have no impact on the outcome of the appeal.

[44] Ground three seeks to challenge the learned judge's exercise of her discretion to strike out the claim. The claim was struck out on the basis that the appellant failed to pursue the alternative remedy that was available to her before filing the claim constitutional relief. In light of our finding that the responsibility for the consideration of the appellant's complaint reverted to Her Majesty the Queen on the death of Justice Harrison, the evidence sought to be adduced had no bearing on the outcome of this ground of appeal.

[45] It is for the above reasons that we refused the application to adduce fresh evidence.

The notice and grounds of appeal

[46] By notice of appeal, filed 22 January 2021, the appellant has challenged the learned judge's finding that the office of the Visitor was responsible for the delay in addressing her complaint. She also challenges several findings of law. The grounds of appeal are:

> "a. The learned judge erred as a matter of law in finding that the Appellant has an adequate alternative remedy in judicial review as the matter relates to the failure by the Respondent to provide her with a Tribunal in accordance with section 16(2) of the Constitution.
>
> b. The learned judge erred as a matter of law in finding that the University of the West Indies is not the proper Defendant to the proceedings and that the matter should proceed against the Visitor.
>
> c. The learned judge erred as a matter of fact and/or law in striking out the Appellant's claim as the Claimant has a cause of action against the Respondent which could, be addressed by an amendment to make the appropriate application, if so advised."

The appeal

Ground a - The learned judge erred as a matter of law in finding that the Appellant has an adequate alternative remedy in judicial review as the matter relates to the failure by the Respondent to provide her with a Tribunal in accordance with section 16(2) of the Constitution.

Appellant's submissions

[47] Counsel for the appellant, Mrs Gibson-Henlin, commenced by outlining the history of the matter during which, she said, the appellant was sent "on a series of excursions from the United Kingdom, to the Bahamas, to the United Kingdom, to The Governor General of Jamaica, to the United Kingdom and to the Governor General of Jamaica". She accepted that the decision whether to grant or refuse an application to strike out a claim involved the exercise of the learned judge's discretion and, as such, will not be set aside

by this court unless it can be shown that the learned judge was "manifestly wrong in coming to that decision whether as a matter of fact, law or both". Reference was made to **Hadmor Productions Limited and others v Hamilton and others** [1982] 1 All ER 1042 ('**Hadmor Productions**'), which is applied by this court in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 ('**John Mackay**').

[48] Mrs Gibson-Henlin submitted that the learned judge, in arriving at her decision, failed to appreciate that prior to the appointment of Justice Harrison as the Visitor, there had already been a delay of four years in dealing with the appellant's complaint. In those circumstances, she argued, the appellant's rights under section 16(2) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ('the Constitution'), by which she was entitled to a fair hearing by an independent and impartial tribunal within a reasonable time, would have already been engaged.

[49] Queen's Counsel stated that the delay continued even after Justice Harrison's appointment, as during his tenure as the Visitor, no steps were taken by the UWI to convene a hearing of the appellant's case. Justice Harrison's appointment, therefore, did not resolve the issue of the delay, which was further exacerbated by his death. Mrs Gibson-Henlin pointed out that, to date, there has been no hearing of the appellant's complaint before any Visitor of the UWI.

[50] Mrs Gibson-Henlin submitted further that the learned judge misinterpreted the definition of an available alternative remedy. She stated that such a remedy must not only be available at law but must also be effective to cure the breach of the appellant's constitutional rights. In the circumstances of this case, she submitted that there was no alternative remedy available to the appellant. Mrs Gibson-Henlin stated that it was on that basis that the appellant's case could be distinguished from that in **Fritz Pinnock and Ruel Reid v Financial Investigations Division** [2020] JMCA App 13 and **Attorney General of Trinidad and Tobago v Ramanoop** [2006] 1 AC 328 ('**Ramanoop**'). She submitted that in those cases, a parallel remedy existed. As such, constitutional relief would not have been appropriate unless it could be shown that the

legal redress available was inadequate. Mrs Gibson-Henlin pointed out that in **Ramanoop,** the court stated that the key consideration is the adequacy of the alternative remedy. She stated that the UWI's contention is that the alternative remedy is for the appellant to wait for the Visitor to deal with her case. This, she submitted, was unsatisfactory as there has been no indication of when this is likely to occur.

[51] Mrs Gibson-Henlin also submitted that the newly appointed Visitor does not have jurisdiction to entertain the appellant's complaint as his jurisdiction takes effect from the date of his appointment. The appellant, in those circumstances, she argued, remains in limbo without a remedy.

[52] Queen's Counsel pointed out that there has already been a delay of over six years, and if the appellant is to utilise the "alternative remedy", there will be a further delay for an indefinite period. Reliance was placed on the dicta of Brooks J (as he was) in **Dr Matt Myrie v The University of the West Indies and others** (unreported), Supreme Court of Judicature of Jamaica, Claim No 2007 HCV 04736, judgment delivered 4 January 2008 ('**Myrie**'), to make the point that the Visitor was expected to deal with disputes "informally, privately, cheaply and speedily and give a decision".

[53] Mrs Gibson-Henlin directed the court's attention to the fact that there were six outstanding appeals to the Visitor, including that of the appellant, as at 7 September 2017. This, she submitted, indicated that the system was fraught with delay. She also asserted that the UWI was aware of the problem. In the circumstances, the learned judge, it was submitted, should have focused on the power and the responsibility of the UWI to amend the Charter to ensure that the tribunal functioned in keeping with section 16(2) of the Constitution as the Visitor is its judicial arm.

[54] It was also submitted that the appellant could not have brought proceedings against Her Majesty the Queen and that the UWI ought to have taken steps to change the Visitor if the system was not functioning efficiently. Mrs Gibson-Henlin also asked the court to note that when the appellant was directed to seek the Visitor's intervention, it

was known that Her Majesty the Queen was not prepared to play any part in the appointment of a new Visitor (see letter dated 22 August 2014 from the Privy Council Office to Henlin Gibson Henlin).

[55] Mrs Gibson-Henlin submitted further that the appropriate forum to address the breach of the appellant's constitutional right to a fair hearing within a reasonable time was the court and not the Visitor, as the Visitor could not deal with the issue of delay. The learned judge, she said, failed to appreciate that the Visitor's jurisdiction is confined to the issue of the appellant's dispute with the UWI regarding her thesis. She submitted that the learned judge, therefore, fell into error in finding that there was an alternative remedy to address the issue of delay.

[56] Queen's Counsel also submitted that there is no evidence that the Visitorial jurisdiction is available to the appellant or that the UWI has put the Visitor in a position to deal with her case. It was submitted further that even if the appellant could have applied for declarations and an order of mandamus pursuant to part 56 of the Civil Procedure Rules, 2002 ('CPR'), judicial review would not have provided the appropriate remedy. It was submitted that although rule 56.1(b) provides for applications for relief under the Constitution, that is not the same as a claim for constitutional relief. The appellant's only remedy, it was submitted, is for constitutional relief in respect of which she can seek damages for the delay as the Visitor does not have the jurisdiction to make an award of damages.

[57] In the circumstances, the learned judge erred when she found that judicial review was an alternative remedy to the claim for constitutional relief.

Respondent's submissions

[58] Mr Matthew Royal, counsel for the respondent, submitted that the learned judge correctly identified the issue as being "[w]hether the proceedings under the constitution ought really to be invoked in the case where there is an obvious available recourse at common law". He submitted that the learned judge's finding that the appellant has an

available remedy in judicial review was correct. Counsel accepted that the Visitor enjoys an exclusive jurisdiction. It was, however, submitted that this jurisdiction is subject to the supervisory jurisdiction of the court and is compellable by prerogative writs. Therefore, it was always open to the appellant to seek an order for a mandamus compelling the Visitor to exercise his jurisdiction (see **Suzette Curtello** and **Thomas**).

[59] It was submitted that it was improper for the appellant to seek to avoid the proper forum of judicial review and rely on a claim for constitutional relief, which is a special and unique remedy. Reliance was placed on the finding of Lord Nicholls of Birkenhead in **Ramanoop**, who found that where a parallel remedy exists, there would have to be some special feature, such as the arbitrary use of state power, to justify seeking constitutional relief.

[60] It was submitted that the office of the Visitor has never been vacant. However, there has been a delay whilst the decision-maker sought to resolve the matter as to the proper person to exercise the Visitorial authority. Therefore, at all material times, an order of mandamus could have been sought and issued to compel the Visitor to act. This remedy, Mr Royal stated, would have been quick and effective. The appellant, he submitted, has failed to explain why she did not utilise this remedy especially where she complains that her constitutional breach has become incurable with the passage of time.

Discussion

[61] This appeal arose from the learned judge's exercise of her discretion. It is settled that this court will not disturb such a decision unless, in the exercise of that discretion, the learned judge erred on a point of law or her interpretation of the facts, or made a decision that no judge "regardful of his duty to act judicially could have reached" (see **John Mackay** and **Hadmor Productions**).

[62] The appellant's complaint is that the learned judge, in her determination that the appellant has an alternative remedy, failed to consider whether the UWI had a duty to ensure that the Visitorial process functioned efficiently.

[63] In **Myrie**, Brooks J examined the origin, jurisdiction and role of the Visitor. He stated at page 3:

> "The UWI had its origins in 1948 as a College of the University of London. It achieved full university status when it was established by Royal Charter on 2nd April, 1962. By the Charter, the persons, who are from time to time its members, 'are constituted and incorporated into one Body Politic and Corporate with perpetual succession...'. A new Charter was issued on 25th August, 1972. It confirmed the status of the institution which had been created by the 1962 instrument. Clause 6 of each Charter provides that her Majesty Queen Elizabeth Il, her Heirs and Successors, 'shall be and remain the Visitor and Visitors of the University'. However, except for an express intention to inspect, neither of the Charters nor any of the statutes established thereunder provide any further guidance as to the duties or the authority of the visitor. It is therefore to the common law that we are obliged to look for enlightenment on the role of the visitor. All references hereafter shall be to the 1972 Charter ('the Charter').
>
> The office of visitor has its origins in the law regarding corporations. The office has particular relevance in respect of eleemosynary corporations. 'Eleemosynary corporations are those established for the perpetual distribution of the free alms or bounty of the founder to such persons as he has directed.' (Tudor on Charities 8th Ed. page 371) The principle behind the existence of the office of visitor, briefly stated, is that the founder of an eleemosynary corporation, whether it be a charity, educational institution or otherwise, is entitled to provide the laws by which the object of his bounty are to be governed. He is also entitled to establish himself or some other person whom he may appoint, as the sole judge of the interpretation and application of those laws. That sole judge is referred to as a visitor."

[64] In that case, Brooks J referred to the following paragraph in **Regina v Lord President of the Privy Council, Ex parte Page** [1993] AC 682, at page 695G-696B, where Lord Browne-Wilkinson, in addressing the jurisdiction of the Visitor, stated:

> "It is established that, a university being an eleemosynary charitable foundation, the visitor of the university has

> exclusive jurisdiction to decide disputes arising under the domestic law of the university. This is because the founder of such a body is entitled to reserve to himself or to a visitor to whom he appoints the exclusive right to adjudicate upon the domestic laws which the founder has established for the regulation of his bounty. ...
>
> Those propositions are all established by the decision of this House in *Thomas v. University of Bradford* [1987] A.C. 795 which held that the courts had no jurisdiction to entertain such disputes which must be decided by the visitor. However, *Thomas*'s case was concerned with the question whether the courts and the visitor had concurrent jurisdictions over such disputes. In that context alone it was decided that the visitor's jurisdiction is 'exclusive'. *Thomas's* case does not decide that the visitor's jurisdiction excludes the supervisory jurisdiction of the courts by way of judicial review."

[65] By virtue of article six of the Royal Charter, Her Majesty, the Queen was designated as the Visitor for the UWI. Article 6 states:

> "We, Our Heirs and Successors, shall be and remain the Visitor and Visitors of the University and in the exercise of the Visitorial Authority from time to time and in such manner as We or They shall think fit may inspect the University, its buildings, laboratories and general work, equipment, and also the examination, teaching and other activities of the University by such person or persons as may be appointed in that behalf."

[66] That situation remained until those duties were delegated to Justice Harrison in August 2017. Justice Nelson was appointed as Visitor in May 2019.

[67] There is no dispute that the appellant's complaint concerning the process by which the UWI determined her appeal in relation to the rejection of her thesis fell within the exclusive jurisdiction of the Visitor. Her contention is that the UWI's failure to ensure that the Visitorial process functioned efficiently has deprived her of her constitutional right to a fair hearing within a reasonable time and that, as a result, she is entitled to damages. This issue, it was argued, placed the matter outside of the Visitor's jurisdiction.

[68] For convenience, the period that is the subject of her complaint has been divided into two parts. The first period was from 3 July 2014 (the date when the appellant was advised by the UWI that she could refer her complaint to the Visitor) to 7 September 2017 (the date of the letter from the office of the Governor General to the Vice-Chancellor of the UWI, informing him of the delegation of Her Majesty's Visitorial responsibilities to Justice Harrison) ('the first period').

[69] The second period commenced with the appointment of Justice Nelson as the Visitor.

[70] Section 16(2) of the Constitution states:

> "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."

[71] Mrs Gibson-Henlin submitted that the UWI should bear the responsibility for the injury suffered by the appellant as a result of the inaction of the Visitor during this period. Queen's Counsel also argued that the UWI could and should have taken steps to amend the Charter to facilitate the appointment of a new Visitor when it became apparent that Her Majesty the Queen, was not going to address the appellant's complaint.

[72] The Charter is not the UWI's document, and the Visitor is not a member of the UWI (see statute 2 of the Charter, which lists the members). It may, however, be amended by the Council of the UWI subject to the approval of Her Majesty the Queen. This is stated in article 20(1), which reads:

> "20(1) The Council may at any time alter, amend or add to this Our Charter and the provisions thereof by a Special resolution in that behalf, and such alteration, amendment, or addition shall, **when allowed** by Us, Our Hiers or Successors in Council become effectual, so that this Our charter shall thenceforward continue and operate as though it had been originally granted,

> and made as so altered, amended, or added to in manner aforesaid." (Emphasis added)

[73] The issue of whether the UWI had a legal obligation to seek an amendment to the Charter was not fully explored in the court below, and its determination is not vital to the outcome of this appeal.

[74] Mrs Gibson-Henlin also sought to impugn the decision of the learned judge on the basis that an order of mandamus could not have been obtained against Her Majesty, the Queen. That is not so. As stated in **Regina v Committee of The Lords of The Judicial Committee of The Privy Council Acting for The Visitor of The University of London, Ex parte Vijayatunga** [1988] 1 QB 322 ('**Vijayatunga**'), whilst Her Majesty is immune from suit in her personal capacity, where the Visitor was Her Majesty in Council that is not the case. In this regard, I have noted that the amendment to the Charter is prefaced by the words "The Queen's Most Excellent Majesty in Council". In **Vijayatunga**, Kerr LJ stated at pages 331 to 332:

> "I then turn to the important passages in *Thomas v. University of Bradford* which deal with the supervisory jurisdiction exercisable by the courts by way of judicial review over the decisions of visitors. In that context Lord Griffiths said, at p. 825:
>
> > 'Finally, there is the protection afforded by the supervisory, as opposed to appellate, jurisdiction of the High Court over the visitor. It has long been held that the writs of mandamus and prohibition will go either to compel the visitor to act if he refused to deal with a matter within his jurisdiction or to prohibit him from dealing with a matter that lies without his jurisdiction. On mandamus see *Rex. v. Bishop of Ely* (1794) 5 Durn. & E. 475 and *Rex v. Dunsheath, Ex parte Meredith* [1951] 1 K.B. 127, and on prohibition, see *Reg. v. Bishop of Chester* (1791) 1 W.Bl. 22, and *Bishop of Chichester v. Harward and Webber* (1787) 1 Durn. & E. 650. Although doubts have been expressed in the past as to the availability of certiorari, I have myself no doubt that in the light of the modern development of administrative law, the

> High Court would have power, upon an application for judicial review, to quash a decision of the visitor which amounted to an abuse of his powers.'

Apart from the authority which this passage carries in any event, it is clear from the following paragraph at the conclusion of Lord Griffiths' speech that it formed part of the ratio of his decision. He continued:

> 'These considerations lead me to the conclusion that the visitatorial jurisdiction subject to which all our modern universities have been founded is not an ancient anachronism which should now be severely curtailed, if not discarded. If confined to its proper limits, namely, the laws of the foundation and matters deriving therefrom, it provides a practical and expeditious means of resolving disputes which it is in the interests of the universities and their members to preserve.'…

The identity of the visitor in this case

Mr. Laws made it clear that in his submission no question of immunity from suit was involved in this case on the ground that the visitor was Her Majesty in Council. There was no question concerning the immunity of Her Majesty in [H]er personal capacity, nor the possible immunity of the Queen in Council in the course of the exercise of legislative or prerogative powers by the sovereign. Mr. Laws submitted that the visitatorial jurisdiction exercised in the present case by virtue of the statutes scheduled to the University of London Act 1978 was analogous to subordinate legislative powers exercisable by Order in Council, which were susceptible to review by the courts on the ground of being ultra vires: see e.g. ***Reg. v. Her Majesty's Treasury, Ex parte Smedley*** [1985] Q.B. 657, 667B, *per* Sir John Donaldson M.R. Mr. Laws also pointed out that in a large number of cases, where the statutes or other provisions governing foundations did not designate any visitor, the visitatorial powers were vested in the Crown, but were nevertheless clearly subject to judicial review.

I accept the effect of all these submissions."

[75] The situation is the same in this jurisdiction. This was recognised in **Suzette Curtello** by Sykes J , who stated:

> "[40] It has been seen that the courts have given the visitor wide latitude in conducting his or her duties. The courts have said that there is power to intervene in some circumstances.
>
> [41] Megarry VC in **Patel** [**v University of Bradford Senate** [1978] 3 All ER 841] indicated that the visitor is subject to both prohibition and mandamus. Prohibition to stop him or her from exceeding the powers granted and mandamus to compel him or her to exercise the authority given."

[76] In **Thomas**, Lord Griffiths stated at page 849-850:

> "It has long been held that the writs of mandamus and prohibition will go either to compel the visitor to act if he refused to deal with a matter within his jurisdiction or to prohibit him from dealing with a matter that lies without his jurisdiction. On mandamus see ***R v Bishop of Ely*** (1794) 5 Term Rep 475, 101 ER 267 and ***R v Dunsheath, ex p Meredith*** [1950] 2 All ER 741, [1951] 1 KB 127 and on prohibition see ***R v Bishop of Chester*** (1747) 1 Wm Bl 22 and ***Bishop of Chichester v Harward and Webber*** (1787) 1 Term Rep 650, 99 ER 1300. Although doubts have been expressed in the past as to the availability of certiorari, I have myself no doubt that in the light of the modern development of administrative law, the High Court would have power, on an application for judicial review, to quash a decision of the visitor which amounted to an abuse of his powers.
>
> These considerations lead me to the conclusion that the visitatorial jurisdiction subject to which all our modern universities have been founded is not an ancient anachronism which should now be severely curtailed, if not discarded. If confined to its proper limits, namely the laws of the foundation and matters deriving therefrom, it provides a practical and expeditious means of resolving disputes which it is in the interests of the universities and their members to preserve."

Based on **Thomas** and **Vijayatunga**, the appellant could have sought an order of mandamus to compel the visitor to address her complaint.

[77] Where the period after the appointment of Justice Harrison ('the second period') is concerned, Mrs Gibson-Henlin has argued that an order of mandamus cannot be sought, as he is now deceased and the new visitor has no jurisdiction to deal with the appellant's complaint. I am in partial agreement with Mrs Gibson-Henlin. However, as stated at para. [44] of this judgment, the consideration of the appellant's complaint has reverted to Her Majesty the Queen, who, as Visitor, is compellable by an order of mandamus.

[78] The learned judge's finding that there was an alternative remedy available to the appellant has also been challenged on the basis that the Visitor has no jurisdiction to award damages for the injury caused by the inordinate delay in dealing with this matter.

[79] The learned judge recognised, at para. [29] of the judgment, that the appellant was seeking relief in respect of the delay in addressing her complaint. She stated:

> "[29] The issue lies in the fact that there is significant delay in the visitor exercising the authority to which the claimant has subjected herself. According to the claimant, her petition to the visitor has been floating in the system since 2014, with the petition not being considered to date and with no end in sight. This is rather unfortunate and unsatisfactory. It is this delay that brings her to this court to seek redress. The essence of the complaint is therefore not to have the court determine if the university had been wrong in rejecting her thesis, which is within the visitor's jurisdiction, but rather, if the six years' delay in accessing the visitor to have that issue determined, has breached her constitutional right to a fair hearing within a reasonable time before an independent and impartial tribunal. The claimant has brought a constitutional claim and is as such applying the '*general law of the land*' and not the internal laws of the university. The visitor is therefore not empowered with the jurisdiction to decide such a dispute, but the Supreme Court is. This

has long been recognised by our jurisprudence under the Constitution." (Italics as in the original)

[80] The issue of whether the visitor had the jurisdiction to award 'damages' based on the judgment was not addressed in the court below. Instead, the decision was based on the availability of an alternative remedy to ensure the hearing of the appellant's complaint.

[81] The learned judge addressed the issue thus:

> "[32] The question which however arises is this. Whether the proceedings under the Constitution ought really to be invoked in the case where there is an obvious available recourse at common law. The defendant has premised this application on the position that there is an adequate alternative remedy available to the claimant, and so the court should decline jurisdiction to hear the claim. The claimant has relied to a large extent on section 19(4) of the Charter of Fundamental Rights and Freedoms in support of this contention. It states:
>
> > '**Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law'**
>
> [33] Although the right to apply to the Supreme Court for redress when a human right has been, or is likely to be contravened, is an important safeguard of those rights, the notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law signifies the contravention of some human right guaranteed to individuals, is fallacious. Lord Diplock in ***Harrikissoon*** observed that the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the Constitution. He

pointed out that it was an abuse of the process of the court to summon this jurisdiction when it is being used to avoid the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action.

[34] In other words, Lord Diplock warned against the use of constitutional claims where there is a parallel remedy to invoke judicial control of administrative action. In ***Ramanoop***, the Board also expressed the same view, in that, where a parallel remedy exists, constitutional relief should not be sought unless the circumstances include some special features. They described a typical special feature as one which involves the arbitrary use of state power, but indicated that this was not an exclusive list. Although ***Ramanoop*** and ***Harrikissoon*** were decided prior to the Charter of the Fundamental Rights and Freedoms, the dicta in both are still apposite.

[35] There is no evidence before me to rule that this case is one such special case. There is also no doubt that an adequate alternative remedy was available to the claimant. In fact, it has been affirmed by the Court of Appeal that the exercise of this exclusive visitorial jurisdiction is always itself subject to judicial review. The claimant therefore has an adequate remedy in judicial review, which gives the court the authority to exercise its prerogative powers of issuing writs of certiorari, prohibition and, of relevance here, mandamus to compel the visitor to exercise his authority. The claimant's grievances could therefore be properly addressed in judicial review. There was no need for her to proceed by way of a constitutional motion when there is available an adequate alternative [remedy] that is more than capable of dealing with her complaints of delay. As was pointed out by the court in ***Ramanoop***, an alternative remedy is not inadequate merely because it is slower or more costly than constitutional proceedings. A constitutional remedy is one of last resort and not to be used when there is available an adequate alternative remedy." (Emphasis as in the original)

[82] In **Ramanoop**, Lord Nicholls of Birkenhead stated:

"23 The starting point is the established principle adumbrated in ***Harrikissoon v Attorney General of Trinidad and Tobago*** [1980] AC 265. Unlike the constitutions of some other Caribbean countries, the Constitution of Trinidad and Tobago contains no provision *precluding* the exercise by the court of its power to grant constitutional redress if satisfied that adequate means of legal redress are otherwise available. The Constitution of The Bahamas is an example of this. Nor does the Constitution of Trinidad and Tobago include an express provision *empowering* the court to decline to grant constitutional relief if so satisfied. The Constitution of Grenada is an instance of this. Despite this, a discretion to decline to grant constitutional relief is built into the Constitution of Trinidad and Tobago. Section 14(2) provides that the court 'may' make such orders, etc, as it may consider appropriate for the purpose of enforcing a constitutional right.

24 In *Harrikissoon's* case the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant. Speaking in the context of judicial review as a parallel remedy, Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action. Permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have. Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is made '*solely* for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right': [1981] AC 265, 268 (emphasis added).

25 In other words, **where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the**

> **court's process.** A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.
>
> 26 That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But 'bona fide resort to rights under the Constitution ought not to be discouraged': Lord Steyn in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 307, and see Lord Cooke of Thorndon in *Observer Publications Ltd v Matthew* (2001) 58 WIR 188, 206." (Emphasis supplied)

[83] As stated in para. [43] of this judgment, the visitor has the jurisdiction to order an appropriate remedy which may include compensation.

[84] Having concluded that the responsibility for the hearing of the appellant's complaint following the death of Justice Harrison has reverted to Her Majesty the Queen and that the visitor has the jurisdiction to award 'damages', I agree with the learned judge that the appellant has an available alternative remedy in judicial review. The court also has the jurisdiction to award damages. Rule 56.1(4)(b) of the CPR states:

> "In addition to or instead of an administrative order the court may, without requiring the issue of any further proceedings, grant-
>
> (a) ….
>
> (b) restitution or damages;"

This issue was addressed in **Cenitech Engineering Solutions Limited v National Contracts Commission and others** [2021] JMFC Full 2, which was referred to by the respondent. Para. [20] states:

> [20] The principle, to be gleaned from the English cases, is summarised by Stuart Sime in his treatise '**A Practical Approach to Civil Procedure**'. In his 5th edition at page 500 Sime wrote:
>
> > 'An award of damages may be made on an application for judicial review, but only in conjunction with the other remedies available in judicial review claims (CPR r 54.3(2). Damages may be awarded if the court is satisfied that, if the claim had been made in ordinary proceedings, the applicant could have been awarded damages'."

[85] I also agree with the learned judge that there are no special features which necessitated the commencement of constitutional proceedings. In the circumstances, this ground of appeal fails.

Ground b- The learned judge erred as a matter of law in finding that the University of the West Indies is not the proper Defendant to the proceedings and that the matter should proceed against the Visitor.

Appellant's submissions

[86] Mrs Gibson-Henlin submitted that the learned judge, in arriving at her decision on this point, misinterpreted the law. She argued that the UWI, as the institution responsible for establishing the office of the visitor and the Visitorial mechanism for dispute resolution, must be the proper party to the claim. As such, the UWI had the responsibility to remedy any shortcomings in the system, which she described as being anachronistic.

[87] It was submitted further that the UWI, by directing the appellant to utilise a system that it knew was fraught with delay and was either non-functioning or non-existent, breached the appellant's right to a fair hearing. This, she said, is especially so when viewed in light of the letter dated 22 August 2014 that the appellant received from the Privy Council Office, stating that:

> "…in previous cases relating to the University of the West Indies, Her Majesty's Government has advised that it would not, in any case, be appropriate for a Minister of the UK Government to advise the Queen on her exercise of her

> Visitorial powers (or to exercise them on her behalf) in relation to an institution incorporated in an independent Commonwealth country."

[88] The UWI, she stated, despite being aware of the situation, has maintained the visitorial system of dispute resolution. It was submitted that the delay, in this case, has been prejudicial to the appellant and even more so, as Justice Harrison died without hearing her complaint.

[89] Mrs Gibson-Henlin argued that the learned judge, therefore, erred when she failed to appreciate the distinction between the jurisdiction of the visitor and the duty of the UWI to ensure that its Visitorial system provided an effective mechanism to resolve disputes as prescribed in the Charter and guaranteed in the Constitution.

[90] Queen's Counsel also submitted that judicial review would not be an appropriate remedy as Justice Harrison, who was the visitor at the relevant time, is now deceased. The appellant, she stated, will suffer further prejudice if she is required to restart the process of having a visitor selected to hear her complaint. In any event, her matter would not be first in line, as there are prior complaints waiting to be heard. Mrs Gibson-Henlin submitted that the appellant's matter is, therefore, in limbo with no effective remedy other than constitutional relief.

[91] Mrs Gibson-Henlin stated that the appellant had been unable to obtain any relief from the Visitor, and consequently, she sought relief in the court. However, even in that arena, justice has been denied to the appellant contrary to rule 1.2(2)(d) of the CPR, which states that the court's overriding objective is to deal with cases "expeditiously and fairly".

Respondents submissions

[92] Mr Royal submitted that, in resolving this issue, the real consideration is which party perpetrated the delay, that is the subject of this complaint. Counsel submitted that the UWI is not that party and is equally affected by the delay in determining the dispute. The Visitor, he argued, has always enjoyed exclusive jurisdiction pertaining to domestic

disputes between the UWI and its members. Any uncertainty as to whom should exercise that jurisdiction does not in any way affect the soundness of the jurisdiction.

[93] He noted that in several decided cases where issues arise between a university and its members, the named defendant is the visitor, who is independent of the university. Reference was made to **The Queen v The Dean & Chapter of Chester** 15 QB 511, **The King v The Bishop of Ely** (1794) 5 Term Rep 475 and **Regina v Committee of the Lords of the Judicial Committee of the Privy Council Acting for the Visitor of the University of London, Ex parte Vijayatunga** [1988] QBD 322, in support of that submission. Furthermore, the respondent has no power to control the conduct of the visitor and, therefore, could not have prevented the delay.

Discussion

[94] The appellant has asserted that the UWI is a proper party to the claim, as its liability has arisen due to its knowledge that the Visitorial process was not functioning efficiently or at all and its failure to take steps to procure the amendment of the Charter in light of the vintage and number of petitions to the visitor that are outstanding. The contents of the letter, dated 7 September 2017, from Kings House Jamaica to the Vice-Chancellor of the UWI indicated that, at that date, there were six outstanding appeals to the visitor. I have noted that the list which accompanied that letter indicates that the matters pre-dating that of the appellant were filed as early as July 2010. Based on the contents of that letter, it may, without more, be inferred that the Visitorial process was not functioning efficiently. The appellant has asserted that the UWI ought to have taken steps to remedy the situation and is, therefore, liable for the delay.

[95] The amendment to article 6, which gives the Council of the UWI the power to appoint a regional Visitor and extends his or her jurisdiction to deal with matters that arose prior to appointment, was issued by "The Queen's Most Excellent Majesty in Council" on 7 November 2018. It was argued, based on that amendment, that the UWI always had the power to deal with the issue when it became evident that the Visitorial process was not functioning efficiently.

[96] Prior to that amendment, the UWI had no power to appoint a Visitor. This is borne out in the letter dated 7 September 2017, from the office of the Governor General to the Vice Chancellor of the UWI, informing him of the delegation of Her Majesty's jurisdiction to Justice Harrison to deal with appeals to the visitor on Her Majesty's behalf. It states in part:

> "The Palace had indicated to Her Majesty's representative in Jamaica, the Governor-General The Most Honourable Sir Patrick Allen an intention to have the cases heard within the region. After a period of communication between the Palace and this Office as well as between the Palace and Governors-General of Realm countries within the region, it was decided that His lordship the Honourable Justice Paul Harrison, OJ, former President of the Court of Appeal in Jamaica would be the person to deal with the appeals **on Her Majesty's behalf**." (Emphasis supplied)

[97] This decision and the subsequent amendment of the Charter occurred approximately three years after the appellant was advised by the UWI to refer her case to the visitor. The issues seem to be whether the UWI was aware that appeals were not being dealt with by the visitor at the time and, if so, whether more could have been done to assist the appellant. That issue was not fully explored in the court below. However, even if the answer to that question is in the affirmative, the fact still remains that it is the visitor who has the jurisdiction to hear the appellant's complaint and determine the appropriate remedy. The learned judge was, therefore, correct when she found that the UWI was not a proper party to the claim. As a result, this ground of appeal fails.

Ground c-The learned judge erred as a matter of fact and/or law in striking out the Appellant's claim as the Claimant has a cause of action against the Respondent which could, be addressed by an amendment to make the appropriate application, if so advised.

Appellant's submissions

[98] Mrs Gibson-Henlin submitted that if the appropriate remedy was judicial review, the learned judge could have made an order to amend the application to claim that remedy. This power stems from rule 26.9 of the CPR (see **Honiball and Another v**

Alele (1993) 43 WIR ('**Honiball**') and **Douglas Thompson v Peter Jennings** [2021] JMCA Civ 6 ('T**hompson**')).

[99] The conduct of the learned judge in striking out the application is inconsistent with rule 56.10 of the CPR 10, which provides that a claim for judicial review and constitutional relief can be joined in one single claim. As such, the learned judge could have treated the application as one for permission to commence judicial review proceedings having regard to the inordinate delay in the matter. This course would have caused the least prejudice to the appellant.

Respondent's submissions

[100] Mr Royal submitted that the cases relied upon by the appellant bear no factual or legal similarity to the present case. In **Honiball**, the issue was whether it was appropriate to raise the issue of fraud by motion in proceedings which were already underway or if this should have been done by initiating new proceedings. Also, in **Thompson**, the issue was whether it was appropriate for the respondent to have filed a bill of costs in proceedings where NCB had filed its application seeking leave to commence judicial review or whether separate proceedings should have been initiated. The CPR provision relied on was rule 26.9(2), which deals with the court's power to rectify matters where there has been a procedural error.

[101] The error in the appellant's case, it was submitted, was concerned with jurisdiction and not procedure. Counsel, having referred to paras. [32], [33] and [37] of the judgment in the court below, submitted that the learned judge correctly identified the issue as being whether the claim should have been one for constitutional relief or one for judicial review.

[102] The learned judge, it was argued, could not have relied on rule 26.9(2) of the CPR to rectify any error on the part of the appellant, as the error was one of substance rather than form. In any event, as the learned judge had determined that the proper party was the visitor, it would have been inappropriate to order a claim for judicial review against

the UWI. In the circumstances, it was submitted that there is no reason to disturb the decision of the learned judge on this point.

Discussion

[103] The claim in this matter, as stated in para. [11] of this judgment, was for constitutional relief and damages. The appellant has argued that the learned judge, having ruled that the appellant ought to have applied for judicial review, had the power to amend the pleadings to spare the appellant from having to commence fresh proceedings.

[104] Rule 26.9 of the CPR deals with the power of the court to rectify matters where there has been a procedural error. Rule 26.9(3) states:

> "Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right."

[105] In this matter, a claim for constitutional relief was filed in circumstances where an alternative remedy was available to deal with the appellant's case. In addition, the claim was brought against the wrong party. The appellant has argued that these defects could be cured by an amendment to the statement of case.

[106] Rule 56.7(1) to (3) states:

> "**Proceedings by way of claim which should be [an] application for [an] administrative order**
>
> (1) This rule applies where a claimant issues a claim for damages or other relief other than an administrative order but where the facts supporting such claim are such that the only or main relief is an administrative order.
>
> (2) The court may at any stage direct that the claim is to proceed by way of an application for an administrative order.
>
> (3) Where the appropriate administrative order would be for judicial review the court may give leave for the matter to

proceed as if an application had been made under rule 56.3."
(Emphasis supplied)

[107] Applications for judicial review and constitutional relief fall within the definition of applications for administrative orders.

[108] The central issue in the claim was concerned with the alleged failure of the UWI to ensure that the appellant's complaint was heard by the visitor within a reasonable time. An application for judicial review would, in my view, require substantial amendments to the claim as filed. In essence, the nature of the claim would be entirely different, and would most likely require the filing of a supplemental affidavit or additional affidavits. In light of the judge's ruling that the claim had been brought against the wrong party, the visitor would have to be substituted for the UWI.

[109] Rule 19.2 of the CPR deals with the change of parties. Rule 19.2(5) of the CPR states:

> "The court may order a new party to be substituted for an existing one if-
>
> (a) the existing party's interest or liability has passed to the new party; or
>
> (b) the court can resolve the matters in dispute more effectively by substituting the new party for the existing party."

[110] The circumstances that have given rise to this appeal are indeed unfortunate. A substantial amount of time was spent trying to ascertain who would exercise the powers of the visitor. Regrettably, this was not settled until 2017. I have, however, borne in mind that even if the claim was amended to seek judicial review, the UWI was not the proper party. The indisputable fact is that the identity of the visitor was always known. As stated previously, an order of mandamus could have been sought from the outset against Her Majesty the Queen. The learned judge found that it was the office of the visitor that "perpetrated the delay, despite the fact that the university by its Charter maintained this visitorial jurisdiction". That is entirely correct. There is, therefore, no

question of an amended claim proceeding against the UWI. In the circumstances, this ground of appeal has no merit.

Costs

[111] Rule 64.6(1) of the CPR provides that where "the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party". In other words, costs follow the event.

[112] The appellant had the benefit of counsel from the outset and should have commenced proceedings for judicial review. Instead, she filed a claim for constitutional relief, which according to the decisions of **Ramanoop** and **Harrikissoon,** should be a remedy of last resort and is not a "general substitute for the normal procedures for invoking judicial control of administrative action" (per Lord Diplock in **Harrikissoon**). The appeal having failed, there is no reason to depart from the general rule in respect of costs. In the circumstances, it is my view that costs should be awarded to the respondent.

[113] In light of the foregoing, I propose the following orders:

(1) The appeal against the judgment of Henry-McKenzie J made on 8 January 2021 is dismissed.

(2) Costs are awarded to the respondent to be agreed or taxed.

V HARRIS JA

[114] I, too, have had the privilege of reading in draft the judgment of my sister Simmons JA. I agree with her reasoning and conclusion, and there is nothing worthwhile that I could add.

BROOKS P

ORDER

(1) The appeal against the judgment of Henry-McKenzie J, made on 8 January

2021, is dismissed.

(2) Costs are awarded to the respondent to be agreed or taxed.