[2023] JMCA Civ 11

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA

SUPREME COURT CIVIL APPEAL NO 118/2018

BETWEEN	**SUZETTE CURTELLO**	**APPELLANT**
AND	**THE UNIVERSITY OF THE WEST INDIES (Board for Graduate Studies and Research)**	**RESPONDENT**

Mrs Caroline Hay QC, Neco Pagon and Miss Kalisia Miller instructed by Caroline P Hay for the appellant

Christopher Kelman and Miss Stephanie Ewbank instructed by Myers Fletcher and Gordon for the respondent

27 April 2020 and 17 March 2023

F WILLIAMS JA

Background

[1] By notice and grounds of appeal filed on 4 December 2018, the appellant appeals against a decision of Rattray J (hereafter referred to as 'the learned judge') made on 6 November 2017. The orders made when the said decision was given are reflected in a formal order filed 18 December 2017 and were as follows:

> "1. The Respondent's preliminary objection is upheld.
> 2. The Applicant's Notice of Application for leave to obtain judicial review is refused.
> 3. No order as to costs."

The preliminary objection

[2] When the application came on for hearing before the learned judge, counsel for the respondent took a preliminary objection to it being heard. The objection (which was contained in a notice of preliminary objection dated and filed on 21 June 2017) was taken on the basis that the matter was *res judicata*, Sykes J (as he then was) having, on 11 November 2015, set aside his earlier *ex parte* order (made 27 October 2015) granting the appellant leave to apply for judicial review. That application before Sykes J was made on largely the same grounds as those the appellant sought to advance before the learned judge. The applicant's subsequent application before the learned judge was therefore, on the respondent's case, an abuse of the process of the court. A judge of coordinate jurisdiction could not rehear the application already heard and determined by Sykes J, a rehearing of that decision only being possible on appeal to the Court of Appeal, it was averred.

Further background

[3] The appellant is a graduate student at the University of the West Indies, Mona Campus ('the UWI'), enrolled in the Doctor of Philosophy ('PhD') programme in the Faculty of Medical Sciences, Department of Basic Medical Sciences. Her goal is to attain the qualification: "PhD, Biochemistry". She reached as far as completing and submitting her doctoral thesis. However, she and the Board for Graduate Studies and Research ('the Board'), which is the UWI's body responsible for the award of that and other post-graduate diplomas and degrees, had a dispute in relation to the assessment of that thesis. Two main issues arose between them. One issue was whether the Board was correct in its view and assertion that the appellant ought to complete nine credits in graduate-level courses by the end of the 2014/2015 academic year; and, even if not by then, to do so as a necessary condition to the appellant's being awarded the degree. The appellant's answer to this position is that the Board had waived that requirement. The other issue was whether her thesis had been fairly assessed; and, if so, whether she was required to resubmit her thesis within 18 months of being notified that it required revision and corrections, in keeping with regulation 3.30 of the Board's regulations. The appellant's

belief and contention is that her thesis was not fairly assessed and that no resubmission should be necessary: instead, she should be allowed to proceed to orally defend her said thesis. It is her view that, of the three persons who assessed her thesis, one is likely to be someone with whom she has had a less-than-harmonious relationship; and that the nature of that relationship influenced that third person to give an unfavourable assessment, though, objectively (on the appellant's contention) her thesis was not in need of review and resubmission. The remedy that she seeks in this regard is for an order for specific disclosure, requiring the Board to disclose who her internal and external examiners were. This information, she contends, will assist her in having the Board's decision judicially reviewed, should leave be granted.

[4] The respondent's position at all stages is a jurisdictional one: that the appellant's application for judicial review is, at best, premature. Jurisdiction for the resolution of a matter of this nature, the respondent asserts, lies, not in the Supreme Court of Judicature of Jamaica, but, at that time, in Her Majesty, Queen Elizabeth II, by virtue of her visitorial authority (and now, with Her Majesty's passing, in King Charles III). That authority, it was contended, is to be seen in section 6 of the Royal Charter establishing the University, which reads as follows:

> "We, Our Heirs and Successors, shall be and remain the Visitor and Visitors of the University and in 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."

[5] Before approaching the court through her application to Sykes J, the applicant had not sought to avail herself of the visitorial jurisdiction. Sykes J, in his written judgment discharging his previous orders, carefully traced the origins and history of the office of visitor and its connection to eleemosynary corporations/foundations. The nub of his ruling may be seen in para. [2] of his judgment, where he observed as follows:

> "From the learning derived from the cases, the court has decided that Miss Curtello ought to utilise the visitor system of UWI."

The particular orders that he made are contained in para. [63] of the judgment and were as follows:

> "[T] the claim form filed in this case has to [be] struck out and the leave to apply for judicial review set aside."

The appeal

[6] In her notice and grounds of appeal filed in this matter, the appellant has sought to challenge the learned judge's decision on the following grounds:

> "A. The learned Judge below fell into error when he interpreted letter dated August 16, 2016 from Buckingham Palace to the Appellant as affirming the Visitorial Jurisdiction of the Queen of England, Her Majesty Elizabeth II ('Her Majesty the Queen') and in finding that the Visitorial Jurisdiction was available to the Appellant arising from that letter and at the time of the filing of her action in the Court below.
>
> B. The learned Judge below fell into error when he interpreted letter dated September 2, 2016 from Kings House Jamaica to the Appellant as affirming the Visitorial Jurisdiction of Her Majesty the Queen and in finding that the Visitorial Jurisdiction was available to the Appellant arising from that letter and at the time of the filing of her action in the Court below.
>
> C. The learned Judge below fell into error when after retiring to consider his ruling on the preliminary objection, he allowed into evidence as 'fresh evidence' letter dated September 7, 2017 from Kings House Jamaica to the Respondent purporting to indicate that arrangements had now been made and settled for 6 Petitions to Her Majesty the Queen (unrelated to the Appellant) to be heard within the region when, such evidence:
>
> i. failed to satisfy the requirements set out in Ladd v Marshall [1954] 3 All ER 745;

ii. was only capable of affirming what the Respondent already knew at the hearing of the application for leave - at the time the Appellant had filed her present action there was no settled accessible Visitorial Jurisdiction available to her;

iii. revealed the fact that the Respondent had either misled the Court, concealed relevant information from the Court of matters peculiarly within its sole knowledge or was less than forthright in the Court below in earlier proceedings filed by the Appellant in Claim No. 2015 HCV 05012 Suzette Curtello v University of the West Indies (Graduate Studies Board) where the Appellant sought similar relief against the Respondent in the form of judicial review. As such the Respondent was seeking to take advantage of an abuse of the process of the Court and the letter ought to have been rejected by the learned Judge;

iv. In the earlier proceedings the Respondent had represented to the Court below that the Visitorial Jurisdiction was settled and available to the Appellant when in April 19, 2017 the Respondent confirmed that it knew that was not the case.

D. The learned Judge below fell into error when he applied the doctrine of res judicata and upheld the preliminary objection to the application for leave to obtain judicial review. The weight of judicial authority in Jamaica establishes that the doctrine of res judicata does not readily lend itself to applications for judicial review because there is no lis between the parties. It was therefore wrong in both fact and law for the learned Judge to hold that the Applicant's application for judicial review was premature."

[7] These are the orders sought in the notice and grounds of appeal:

"1. An Order that the Respondent's preliminary objection is dismissed.

2. A Declaration that at the time of the commencement of these proceedings, the appellant had no alternate means of redress.

> 3. An Order that the Appellant's Notice of Application for leave to obtain judicial review is granted.
>
> 4. Costs
>
> 5. Further or other relief as this Honourable Court deems just."

[8] By amended notice and grounds of appeal filed on 17 January 2019, the appellant has added the following as ground E:

> "E. The learned Judge below improperly exercised his discretion by failing to give reasons for refusing the Appellant's application for leave to obtain judicial review where those reasons were plainly required on the evidence thus entitling this Honourable Court to examine the application afresh and exercise its own original discretion to grant the reliefs sought."

The position with regard to the letters

[9] The appellant had written a letter dated 10 February 2016 to Her Majesty, stating in part: "I was sent to you the Visitor of the University of the West Indies Mona by the Supreme Courts [sic] of Jamaica in my quest for justice for the award of my degree…".

[10] Three letters have been referred to in the notice and grounds of appeal. It is important to set them out in full, as they play a significant role in this appeal.

[11] The first, dated 16 August 2016, written on what appears to be the letterhead of Buckingham Palace, was received in response to that of the appellant, and reads as follows:

> "16th August, 2016
>
> Dear Miss Curtello,
>
> The Queen has asked me to thank you for your letter of 27th June, and to say that Her Majesty has taken careful note of the views you express.

Perhaps I might explain, however, that this is not a matter with which The Queen can assist you. Nevertheless, as a constitutional Sovereign, Her Majesty acts through her personal representative, the Governor General, on the advice of her Jamaican Ministers.

I have, therefore, been instructed to forward your letter to the Governor General of Jamaica so that he may be aware of your approach to The Queen and may consider the points you raise.

Yours sincerely,

Miss Jennie Vine

Deputy Correspondence Coordinator"

[12] The second letter, dated 2 September 2016, is written on what appears to be the letterhead of Kings House, Jamaica, and is in the following terms:

"Ref. No. GGS 11 Vol. 10

September 2, 2016

Ms. Suzette Curtello
Lot 1 Goldsmith Villa
August Town
Mona P.O.
Kingston 7

Dear Ms. Curtello,

His Excellency The Governor-General is in receipt of a copy of your letter dated February 10, 2016 addressed to Her Majesty Queen Elizabeth II. It is noted that the Palace has written to you indicating that your letter would be forwarded 'to the Governor-General of Jamaica so that he may be aware of your approach to The Queen and may consider the points you raise.'

I write to advise that there is no basis for His Excellency The Governor-General's intervention even as an intermediary. He is not the Visitor of the University of the West Indies and has not been asked or directed by Her Majesty to assume that role. Any consideration of your appeal by His Excellency would therefore be inappropriate in the situation.

This Office will seek clarification from the Palace on the matter of the Visitor. Once a response is received you will be advised further.

With every good wish,

Sincerely,

Dionne Tracey Daniel (Mrs.)
Governor-General's Secretary"

[13] The third letter mentioned in the notice and grounds of appeal is dated 7 September 2017. It, again, is written on what appears to be the letterhead of Kings House, Jamaica and reads as follows:

"September 7, 2017

Professor Sir Hilary Beckles
Vice-Chancellor
University of the West Indies
Mona
Kingston 7

Dear Vice-Chancellor

Re: Appeals to The Visitor, University of the West Indies

I write in relation to appeals which were directed to Her Majesty The Queen as University Visitor by six members of the UWI community as set out in the accompanying list.

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.

This Office was not initially aware of the total number of unheard appeals or of the dates on which each was made. We now realize that the required attention to these matters could be substantial and time-consuming.

I am proposing therefore that before Justice Harrison undertakes the tasks, having received the relevant information and available documents, he should discuss with the appropriate representative of UWI the procedure to be followed, the likely duration of the processing and determination and the costs incurred in the process.

You will appreciate that while the Governor-General of Jamaica is not the UWI Visitor, he has become involved as The Queen's Representative in the territory which houses the Administrative Centre of the University. He is, however, anxious to ensure that justice is done and that the Honourable Justice Harrison is appropriately treated and suffers no undue difficulty or disadvantage as a result of his engagement.

I look forward to your assistance and to a timely conclusion of the total exercise.

With every good wish,

Yours sincerely,

Ambassador the Honourable Burchell Whiteman, OJ
Special Advisor to
The Governor-General"

The grounds of appeal

[14] Grounds of appeal A and B both deal with the issue of whether the visitorial jurisdiction was available to the appellant at the time that she made her application for leave to apply for judicial review. It will, therefore, be convenient to discuss both grounds together. So as not to cause a return to previous pages, those grounds are again stated here and their terms are as follows:

Grounds: A. The learned Judge below fell into error when he interpreted letter dated August 16, 2016 from Buckingham Palace to the Appellant as affirming the Visitorial Jurisdiction of the Queen of England, Her Majesty Elizabeth II (Her Majesty the Queen) and in finding that the Visitorial Jurisdiction was available to the Appellant arising from that letter and at the time of the filing of her action in the Court below.

B. The learned Judge below fell into error when he interpreted letter dated September 2, 2016 from Kings House Jamaica to the Appellant as affirming the Visitorial Jurisdiction of Her Majesty the Queen and in finding that the Visitorial Jurisdiction was available to the Appellant arising from that letter and at the time of the filing of her action in the Court below

Summary of submissions

For the appellant

[15] In her written submissions, the appellant advanced submissions in relation to grounds A and B together. It will be recalled that these grounds reference the letters dated 16 August and 2 September 2016, from Buckingham Palace and King's House, respectively. The main contention with respect to them is that the learned judge erred in interpreting them to mean that the visitorial jurisdiction was available to the appellant at the time her application for judicial review was made.

[16] The appellant's central submission is that the visitorial jurisdiction was not available to her at the material time. There was, also, no alternative means of redress available to her in resolving her dispute with the respondent. The letters dated 16 August and 2 September 2016 make it clear that there were ongoing discussions with regard to the visitorial jurisdiction. Similarly, in respect of the letter dated 7 September 2017, it was submitted that if that letter was properly adduced into evidence (which is being denied), its contents would not permit a court validly to hold that the visitorial jurisdiction was settled. The reason for this is that the contents of this letter indicate that certain administrative steps had to be taken before the person proposed could be appointed visitor or the visitor's representative.

[17] It was also submitted that the fact that the visitorial jurisdiction was not settled effectively interfered with the appellant's rights to due process pursuant to the Charter

of Fundamental Rights and Freedoms ('the Charter'). Also, without access to the Supreme Court, the appellant had no real means of redress, it was submitted.

For the respondent

[18] In relation to grounds A and B, the respondent submitted that the learned judge was correct in interpreting the letters dated 16 August 2016 and 2 September 2016 to mean that the visitorial jurisdiction was available to the appellant. It was further submitted that there is no evidence to support the contention that the visitorial jurisdiction was unavailable. The letter dated 7 September 2017 confirms that the Honourable Mr Justice Paul Harrison, OJ, former President of the Court of Appeal was selected to adjudicate appeals to the visitorial jurisdiction on Her Majesty's behalf, it was argued.

[19] It was also submitted that, as a matter of law, the exclusive visitorial jurisdiction of the respondent is well settled, as can be seen in cases such as **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, para. 10(a) ('**Mason v the UWI**'); and in **Duke St. John-Paul Foote v University of Technology and another** [2015] JMCA App 27A, para. [54] ('**Foote v Utech**').

[20] Additionally, at para. 27 of its speaking notes dated 27 April 2020, the respondent argues in essence that the letters are not evidence of a decline of visitorial jurisdiction but reflect "merely a delay" in the exercise of the jurisdiction and that that delay is not a valid basis to displace the exclusive jurisdiction.

Discussion

[21] It is true that in cases such as **Mason v the UWI** and **Foote v Utech**, the courts found that the visitorial jurisdiction of those two institutions lay in Her Majesty. In **Mason v the UWI** (the respondent there being the respondent in this appeal) the court had to consider the sustainability of a preliminary point that the court had no jurisdiction to hear a claim challenging the appellant's expulsion from a hall of residence of the UWI. It was

unanimously held that the visitor enjoyed exclusive jurisdiction in matters of that nature and that there was no concurrent jurisdiction enjoyed by the courts and the visitor.

[22] For example, at para. 11 of the judgment, Cooke JA opined:

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

[23] Similarly, Harris JA, at para. 49 of the judgment, stated:

> "It is unquestionable that, as established by the authorities, questions of disputes arising between members of the University are exclusively within the province of the visitor."

[24] The conclusion arising from **Mason v UWI** and other similar cases, therefore, is that, in matters relating to disputes between students and the respondent, the visitor generally enjoys exclusive jurisdiction.

[25] That, however, is not the end of the matter, as, in my view, this appeal has factual circumstances giving rise to an issue which was not addressed in any of the cases cited that establish the exclusivity of the visitor's jurisdiction. That issue is this: what is the recourse of a litigant to whom the visitorial jurisdiction is not available? In the cases cited, it was accepted that the visitor had exclusive jurisdiction and no further question was raised. Here, however, the appellant contends that, quite apart from the general position that the visitor enjoys jurisdiction over a matter such as hers and that that jurisdiction is normally exclusive, she has sought to avail herself of that jurisdiction in obedience to a court ruling; and has not been able to do so, as that jurisdiction had been unavailable in real and practical terms.

[26] Those authorities, therefore, are conclusive and helpful up to a point. The question that arises is: based on the letters, has the appellant established that the visitorial jurisdiction was unavailable to her at the time she first filed her application for leave to

apply for judicial review and up to the time that her application was determined by the learned judge?

[27] In her letter to the visitor, the appellant sought to gain access to the jurisdiction in obedience to the order of Sykes J, and decided not to appeal that decision. The response to her letter in the letter from Buckingham Palace dated 16 August 2016 expressly states: "…this is not a matter with which The Queen can assist you". There could, perhaps, be no clearer declaration that the named visitor would not be acting in that capacity than is contained in those words. However, the letter's reference to the Governor-General leads to a consideration of the contents of that letter to his Excellency.

[28] So far as is relevant, that letter indicates that the appellant's letter was sent to the Governor-General to "consider the points" raised by the appellant, clearly indicating, on my interpretation, that the appellant's points were not going to be considered by her majesty (the visitor). This letter of 2 September 2016, states that "there is no basis for His Excellency The Governor-General's intervention even as an intermediary", further stating that he is not the visitor and that his consideration of the appeal would be "inappropriate in the situation". A fair interpretation of this letter leads to the underscoring of the unavailability of the visitorial jurisdiction to the appellant.

[29] That the jurisdiction was unavailable to the appellant is the unavoidable conclusion from these two letters. It is therefore not necessary to review the letter dated 7 September 2017, which the appellant regards as inadmissible for being in breach of the principles of **Ladd v Marshall**. However, although not necessary to the conclusion to which I have already come, a review of that letter is nonetheless instructive.

[30] That letter (I agree with the appellant's submissions) discusses arrangements that were being made to give practical effect to the visitorial jurisdiction, which means that, as at that date (7 September 2017 – more than a year after the last letter from King's House) the jurisdiction still remained unsettled.

[31] There being no visitorial jurisdiction available to the applicant at the material time, what was she as a student with an issue with the respondent to be resolved, to do? It could not reasonably be expected that she should have sat on whatever rights she might have had for an indefinite period.

[32] To my mind, in circumstances such as these, where the visitorial jurisdiction exists in theory or "on paper" but is practicably unavailable to a person who wishes to air a grievance with the respondent of the nature involved in this case, there can be no proper objection to that student seeking redress through the courts, as the appellant did in this case. Where she is alleging that the process by which the decision was arrived at to deny her the grant of her degree, was unfair, she seems to have chosen the most appropriate route in seeking leave to apply for judicial review. She will, of course, have to get over the threshold stated in **Sharma v Deputy Director of Public Prosecutions & Ors (Trinidad and Tobago)** [2006] UKPC 57 (30 November 2006), at para. (4), which is therein expressed thus:

> "(4) The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: *R v Legal Aid Board, Ex p Hughes* (1992) 5 Admin LR 623, 628; Fordham, *Judicial Review Handbook*, 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application."

[33] In light of this feature of the appellant's case, where the visitorial jurisdiction was practicably unavailable to her, the learned judge erred in upholding the preliminary point and regarding the matter as being *res judicata*: the availability of the jurisdiction in practical terms was never a matter before Sykes J, just the existence of the jurisdiction on paper and in general.

[34] Further, with regard to the respondent's contention that the letters do not evidence a declining of the exercise of the jurisdiction; but "merely delay", in my view, fairness

and the interests of justice require that the visitorial jurisdiction ought to be available to a party seeking redress against the respondent in a timely manner and without any undue hindrance or delay. If not, any delay would have to be considered as detrimental to a litigant seeking such an intervention. This is so in light of delay issues applicable to judicial review (see, for example, rule 56.6(1) of the Civil Procedure Rules ('CPR')).

[35] It cannot be overemphasized that, until the letter of 7 September 2017 was written (after the second application for judicial review had been filed) there was nothing to indicate a timely way forward. In any event, even with the writing of the letter of 7 September 2017, there were still unresolved issues associated with the appointment of the Honourable Mr Justice Harrison, set out in that letter. One striking confirmation of this is the fact that the appellant's name does not appear in the list of persons whose appeals were being considered to be dealt with, which was attached to that letter.

[36] The appellant, therefore, succeeds on this issue (incorporating grounds A and B). It is my view that the resolution of this issue and these grounds is sufficient to resolve the appeal in its entirety in favour of the appellant. However, I will still give brief consideration to the other issues in the appeal.

Ground C: The learned Judge below fell into error when after retiring to consider his ruling on the preliminary objection, he allowed into evidence as "fresh evidence" letter dated September 7, 2017 from Kings House Jamaica to the Respondent purporting to indicate that arrangements had now been made and settled for 6 Petitions to Her Majesty the Queen (unrelated to the Appellant) to be heard within the region when, such evidence: i. failed to satisfy the requirements set out in Ladd v Marshall [1954] 3 All ER 745; ii. was only capable of affirming what the Respondent already knew at the hearing of the application for leave - at the time the Appellant had filed her present action there was no settled accessible Visitorial Jurisdiction available to her; iii. revealed the fact that the Respondent had either misled the Court, concealed relevant information from the Court of matters peculiarly within its sole knowledge or was less than forthright in the Court below in earlier proceedings filed by the Appellant in Claim No. 2015 HCV 05012 Suzette Curtello v University of the West Indies (Graduate Studies Board) where the Appellant sought similar relief against the Respondent in the form of judicial review. As such the Respondent was seeking to take advantage of an abuse of the process of the Court and the letter ought to have been rejected by the

learned Judge; iv. In the earlier proceedings the Respondent had represented to the Court below that the Visitorial Jurisdiction was settled and available to the Appellant when in April 19, 2017 the Respondent confirmed that it knew that was not the case.

Summary of submissions

For the appellant

[37] The appellant pointed out that the application to adduce fresh evidence was filed just before the learned judge's decision was delivered. She contends that the learned judge erred in considering the letter dated 7 September 2017, as that letter, introduced into the proceedings by way of an application for leave to adduce fresh evidence, failed to meet the threshold requirements of **Ladd v Marshall**. These requirements are: (i) that it must be shown that the evidence could not have been obtained with reasonable diligence for use at trial; (ii) the evidence must be such that, if given, would have an important influence on the outcome of the proceedings, although it need not be decisive; and (iii) the evidence must be clearly credible.

[38] The appellant acknowledges that courts in this jurisdiction have accepted that in interlocutory proceedings (such as those from which this appeal has arisen) the principles in **Ladd v Marshall** ought not to be strictly applied (citing **Russell Holdings Limited v L&W Enterprises Inc**. **and ADS Global Limited** [2016] JMCA 39 ('**Russel v L&W**') and **Henriques v Tyndall & others** [2012] JMCA Civ 18. That notwithstanding, the contents of the letter were not new information, as the respondent has always known that there was no one in place to carry out the functions of visitor, it was submitted.

For the respondent

[39] The respondent also asserted that in **Russel v L&W** it was held that in interlocutory cases it is not strictly necessary to apply all the requirements of **Ladd v Marshall**, but submitted that, in this case, all the three requirements of **Ladd v Marshall** have been satisfied. In relation to the first requirement, the respondent submitted that the letter and its maker are external to the respondent, in that the letter comes from the special adviser to the Governor-General, and could not have been obtained with

reasonable diligence before the 2017 hearing before the learned judge. With respect to the second requirement, the respondent submitted that the letter had an important influence on the outcome of the case and is "demonstrative that the existence and availability of the Visitorial Jurisdiction continues…". The respondent also submitted that the letter easily satisfied the third requirement, in that the letter is both credible and incontrovertible, coming as it does from the executive. The letter, therefore, satisfied all the criteria and could properly have been admitted into evidence, it was argued.

Discussion

[40] In the first place, having regard to the fact that the learned judge gave no reasons for his decision, there is no way of knowing whether the letter of 7 September 2017 was actually admitted into evidence or relied on by him. This discussion may therefore be somewhat academic. Be that as it may, however, there is no issue between counsel for the parties that, as cases such as **Russell v L&W** have outlined, in interlocutory matters, such as the proceedings giving rise to this appeal, there is no need for the strict application of the principles outlined in **Ladd v Marshall**. Nevertheless, the requirements may be considered.

[41] In relation to the first requirement, that the material ought not to have been discoverable with due diligence, inasmuch as it mentions the outcome of discussions which took place in the period leading up to the writing of the letter, it could be accepted that that requirement is satisfied. In relation to the second requirement (that the evidence would have an important effect on the outcome of the case) this one is difficult to resolve. The reason for this is that, whilst it speaks to steps taken to make the jurisdiction practicably available, it mentions steps yet to be taken and so does not present a settled and definitive position. It could be said that the fact that steps were then being taken to make the jurisdiction effectively available is, in itself, proof that the visitorial jurisdiction was not, in fact, available at the time the appellant had her claim struck out by Sykes J. Concerning the third requirement (that the information ought to be credible) it is accepted that the letter satisfies that criterion.

[42] It is therefore doubtful that, strictly speaking, the letter satisfied all the requirements of **Ladd v Marshall**; but, having regard to **Russell v L&W**, the learned judge had a discretion and could still have admitted it into evidence. Even if he did so, however, it is uncertain how much further that letter would have affected his decision, as (in agreement with a part of the appellant's submissions) it speaks to steps being taken, and not yet finalized, to make the jurisdiction effectively available. However, as previously indicated, it is impossible to say in the absence of reasons, whether the learned judge considered the letter.

[43] The appellant fails on this issue, though the concern remains that it cannot definitively be said that the letter was permitted as fresh evidence.

Ground D: The learned Judge below fell into error when he applied the doctrine of res judicata and upheld the preliminary objection to the application for leave to obtain judicial review. The weight of judicial authority in Jamaica establishes that the doctrine of res judicata does not readily lend itself to applications for judicial review because there is no lis between the parties. It was therefore wrong in both fact and law for the learned Judge to hold that the Applicant's application for judicial review was premature.

Summary of submissions

For the appellant

[44] Citing **The Children's Advocate (Diahann Gordon Harrison) v Sydney Bartley** [2015] JMCA Civ 53, counsel for the appellant submitted that issue estoppel (along with *res judicata* in general) does not arise in judicial review proceedings. It was further submitted that, at the application-for-leave stage, the merits of the case are not discussed.

[45] Additionally, it was submitted that, although the proceedings from which this appeal arise and the 2015 application feature the same or similar allegations; seek the same or similar relief and the parties are the same, the second application is different in that it adds to the first the appellant's efforts to invoke the jurisdiction of the visitor and to show that there was no one to exercise the jurisdiction.

[46] Reference was made to cause of action estoppel and to the case from the Supreme Court of **Fletcher and Company Limited v Billy Craig Investments Limited and Scotia Investments Limited** [2012] JMSC Civ 128. Based on dicta in that case, it was submitted that, for cause of action estoppel to be found, there needs to be a prior determination on the merits, which is not the case in the instant proceedings. Neither, it was submitted, does issue estoppel arise, as that too has as one of its requirements a prior determination on the merits.

[47] Reference was also made to the possibility of the existence of an abuse of process by the respondent in this case.

The respondent

[48] On behalf of the respondent, reference was made to **Arthur JS Hall & Co (a firm) v Simons, Barratt v Ansell (t/a Seddon (a firm), Harris v Scholefield Roberts & Hill (a firm)** [2000] 3 All ER 673, as a basis for submitting that the learned judge was correct in applying the doctrine of *res judicata*, and upholding the preliminary objection. That was so, it was submitted, as the matter in this case was already determined by the court in 2015 and the doctrine holds that once a matter is determined, it cannot be re-litigated, save on appeal. The appellant's action in bringing her 2017 application constituted an abuse of process, it was submitted. A judge of coordinate jurisdiction could not re-hear or set aside the 2015 ruling, it was argued. In this case, the appellant elected not to appeal the 2015 decision.

[49] It was further submitted that the cases cited by the appellant were distinguishable, with the issue of the visitor's jurisdiction having been put directly in issue and so cannot be re-litigated.

Discussion

[50] Although the principles of *res judicata*, cause of action estoppel and issue estoppel have been by now well traversed, it may be helpful, by way of reminder, to briefly set out the law at this point. All three principles were discussed by Morrison JA in the Belize

Court of Appeal in the case of **Belize Port Authority v Eurocaribe Shipping Services Limited and Another** Civil Appeal No 13/2011, judgment delivered 29 November 2012 at para. [43]. This is what, after a review of several authorities, was said:

> "[43]: On the basis of these authorities, I would therefore conclude that the doctrine of res judicata in the modern law comprehends three distinct components, which nevertheless share the same underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter. The three components are: (i) cause of action estoppel, which, where applicable, is an absolute bar to relitigation between the same parties or their privies; (ii) issue estoppel, which, where applicable, also prevents the reopening of particular points which have been raised and specifically determined in previous litigation between the parties, but is subject to an exception in special circumstances; and (iii) **Henderson v Henderson** abuse of process, which gives rise to a discretionary bar to subsequent proceedings, depending on whether in all the circumstances, taking into account all the relevant facts and the various interests involved, 'a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before' (per Lord Bingham, in **Johnson v Gore Wood & Co (a firm)**, at page 499). There can be no doubt, in my view, that, in **Johnson v Gore Wood (a firm)**, the House of Lords was concerned to circumscribe somewhat more closely the limits of **Henderson v Henderson** abuse of process and to confine its applicability to cases of real misuse or abuse of the court's processes, or oppression."

[51] The dicta of Diplock LJ in **Thoday v Thoday** [1964] P 181 at pages 197-198 are also useful:

> "...'Estoppel' merely means that, under the rules of the adversary system of procedure upon which the common law of England is based, a party is not allowed, in certain circumstances, to prove in litigation particular facts or matters which, if proved, would assist him to succeed as plaintiff or defendant in an action... ...[Estoppel per rem judicatam] is a generic term which in modern law includes two species. The

> first species, which I will call '**cause of action estoppel**,' is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam...The second species, which I will call '**issue estoppel**,' is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled.... If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was...." (Emphasis added)

[52] As has been discussed in relation to grounds A and B, to some extent the issue of the visitor's jurisdiction has been put in issue. However, the second application before the learned judge carried with it a variation or new element in that one of its bases was that the visitorial jurisdiction which the appellant sought to access, was not available to her, as the letters show. That was a new element that was not previously considered by Sykes J or the learned judge. The added dimension to the application that was otherwise previously decided by Sykes J was: whether the appellant whose efforts to access the visitorial jurisdiction were unsuccessful because no settled arrangement was in place for someone to perform the functions of visitor, should be permitted to approach the court to seek redress. That matter not having been previously decided in the earlier applications, the learned judge erred in upholding the preliminary objection and applying the principle of *res judicata*.

[53] It is clear as well that the appellant is correct in her submissions, supported by the authorities that were cited, that her application was not determined on its merits. The appellant, therefore, succeeds on this issue.

Ground E. The learned Judge below improperly exercised his discretion by failing to give reasons for refusing the Appellant's application for leave to obtain judicial review where those reasons were plainly required on the evidence thus entitling this Honourable Court to examine the application afresh and exercise its own original discretion to grant the reliefs sought.

Summary of submissions

For the appellant

[54] In briefest summary, the appellant submits that the learned judge's failure to give reasons for his decision, amounts to a free-standing ground of appeal, in that the appellant does not know on what basis her application was refused. The learned judge's failure to give reasons, it was argued, goes against the general principle that a judge has a duty to give sufficient reasons for his or her decision (citing **Russell v L&W**) and against the principle of open and transparent justice (citing **Flannery and anor v Halifax Estate Agencies Limited (t/s Colleys Professional Services)** [2000] 1 WLR 377; and **English v Emery Reimbold & Strick Limited (consolidated actions)** [2002] EWCA Civ 605).

[55] At para. 50 of the written submissions, the appellant contends that she "does not understand why she lost the application below" as there were several issues before the court. One concern is that the appellant does not know if the fresh evidence was permitted and relied on.

For the respondent

[56] It was submitted that, while reasons would have been helpful, the absence of reasons, without more, cannot entitle the appellant to an order setting aside the decision of the learned judge, though that might be an appropriate result in some circumstances.

[57] The court was reminded (with reference to **Hadmor Productions Limited and others v Hamilton and others** [1982] 1 All ER 1042) that it ought not to exercise an independent discretion of its own; but should do so only if convinced that the learned judge's decision must be set aside due to error.

[58] The respondent also sought to distinguish the cases of **Flannery v Halifax**, **English v Emery** and **Baird v Thurrock** on the basis that those cases involved trials with oral evidence and factual issues to be resolved and that those factors were not present in the instant case.

Discussion

[59] The modern position is that it is desirable and helpful for a judge to give reasons for his or her decisions. Doing so helps a losing party to know why he or she lost and helps a successful party know why he or she won. It is also true, as both sides acknowledge, that failure by a judge to give reasons can, but does not always, lead to a decision being overturned on that basis alone. Is this such a case? In my view it is not. Without a doubt, reasons in this case would have been helpful. For one, providing reasons in this case would have removed the uncertainty faced by all as to whether the learned judge in this case used the letter of 7 September 2017. It would also help to reveal the thought process by which the learned judge arrived at his decision.

[60] It is difficult to accept, however, the appellant's contention that she does not know how or on what basis the matter was decided; and that the appeal should be allowed on this basis alone. The reason for this is that in his decision the learned judge's first order was stated thus:

> "The Respondent's preliminary objection is upheld."

[61] To ascertain what that preliminary objection entailed, one need only to review the notice of preliminary objection, filed on 21 June 2017. The notice of objection reads as follows:

> "1. The Claimant's earlier application dated October 26, 2015, which was largely in the same terms as the instant one, having already been heard and determined by this Honourable Court (per Sykes J.) on the 11th day of November, 2015, is res judicata and therefore this application constitutes an abuse of process.
>
> 2. As between these parties, unless and until reversed by the Court of Appeal, the decision of Sykes, J. is res judicata, and a judge of coordinate jurisdiction cannot re-hear the application and/or set it aside: (per the Privy Council decision in *Leymon Strachan v the Gleaner Company Limited* PC Appeal No. 22 of 2004."

[62] It is to be remembered that the requirement to give reasons will vary from case to case. This may be seen, as follows, in the dicta of Henry LJ in the case of **Flannery and another v Halifax Estate Agencies Limited (Trading as Colley's Professional Services)** at pages 381-382:

> "We make the following general comments on the duty to give reasons.
>
> (1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in *Ex parte Dave*) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.
>
> (2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.

> (3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter." (Emphasis added)

[63] In these circumstances, although reasons would have been helpful, the fact that none were given does not rise to the level of importance that requires the appeal to be set aside on that basis alone. Therefore, the appellant has not made out her case on this issue.

The remedy of mandamus

[64] Counsel for the respondent also argued that, instead of seeking to take the route of judicial review, the appellant could and ought to instead have sought an order of mandamus to compel the visitor to exercise her function. In other words, the respondent is saying that that is where her remedy lies.

[65] On the other hand, counsel for the appellant argued that proceeding by way of judicial review was the best approach.

Discussion

[66] In his article entitled "An Historical Account of the Rise and Fall of Judicial Review", (1985) 15 VUWLR, 127, Robert H Howell described mandamus thus:

> "The writ of mandamus is a device for securing by judicial means the enforcement of public duties. It is a command issued in the name of the Crown from a superior court of record, requiring an inferior authority to perform a public duty that has been imposed upon it." (Emphasis added)

[67] In Halsbury's Laws of England/Judicial Review (Volume 61A (2018)) at para. 127, the general nature of mandatory orders is briefly discussed as follows:

> "127. Inferior tribunals.
>
> A mandatory order may be made to require tribunals exercising an inferior jurisdiction, to hear and determine according to the law.

> Both statutory and in certain cases non-statutory tribunals may be subjected to mandatory orders."

[68] These definitions or descriptions given in these quotations fit within this court's experience of mandamus or mandatory orders being granted to compel an inferior tribunal or person obliged to perform a public duty, to perform that duty. However, the question arises as to whether such an order can be made against the King, who is now the visitor in this case. Here, we are dealing, not with an inferior tribunal, but with the King himself. In the same volume 61A of Halsbury's Laws of England, the following is stated at para. 133:

> "(ii) Public Offices and Duties in Respect of Which a Mandatory Order Will not Lie
>
> 133. Mandatory orders against the Crown and Crown servants.
>
> As no court can compel the Sovereign to perform any duty, no mandatory order will be made against the Crown personally."

[69] One reason for this statement is that a mandatory order originally flowed from the Crown. Another is the fact that attachment or some other order for contempt is the possible consequence of a breach of a mandatory order.

[70] In the case of **R v Powell** (1841) 1 QB 352, 361, Lord Denman CJ made the following observation:

> "That there can be no mandamus to the Sovereign there can be no doubt, both because there would be an incongruity in the Queen commanding herself to do an act, and also because the disobedience to a writ of mandamus is to be enforced by attachment."

[71] Similarly, in **R v Lords Commissioner of the Treasury** (1872) LR 7 QB 387, Cockburn CJ at page 394 made the following observation:

> "[W]e must start with this unquestionable principle, that when a duty has to be performed, (if I may use that expression), by

> the Crown, this court cannot claim even in appearance to have any power to command the Crown, the thing is out of the question. Over the Sovereign we can have no power."

[72] It is perhaps arising from a similar philosophy that section 16(1)(a) was included in our Crown Proceedings Act, proscribing the granting of injunctions and orders in the nature of injunctions against the Crown. That provision reads as follows:

> "16. -(1) In any civil proceedings by or against the Crown the Court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that-
>
> (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties…"

[73] Against this background, and even if some of the historical trappings of the order of *mandamus* might be said to have fallen away, an order of *mandamus* or a mandatory order would clearly not be suitable in these circumstances.

[74] Additionally, there is another concern with the respondent's submission that, instead of going the route of judicial review, the appellant ought to have sought an order for *mandamus*. That this view is erroneous may be seen from a consideration of rule 56.1(3) of the CPR, which reads as follows:

> "56.1 (3) 'Judicial Review' includes the remedies (whether by way or writ or order) of –
>
> (a) certiorari, for quashing unlawful acts;
>
> (b) prohibition, for prohibiting unlawful acts; and

> (c) mandamus, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case."

[75] It should be apparent from a reading of this provision that mandamus is in fact one of the remedies available by way of judicial review and that the respondent's contention in relation to mandamus, could, from one perspective, be seen as unwittingly underscoring the appropriateness of the means by which the appellant is attempting to seek redress.

[76] The respondent's contention in this respect has, therefore, not been made out.

Another case

[77] A recent decision of this court (the case of **Deborah Chen v The University of the West Indies** [2022] JMCA Civ 19), is somewhat similar to the instant appeal in that the litigation in that case also arose out of that appellant's dissatisfaction with the assessment of her thesis. The route that she chose for seeking redress was a constitutional claim. In that appeal, this court agreed that judicial review, the alternative remedy available to her, was the one she ought to have pursued. There were, however, several distinguishing features that make the instant appeal different from that case. For one, that decision appears to have been made on the basis of the amended charter of the University (amended on 7 November 2018). In the instant appeal, it was the original charter that was applicable at the time the appellant approached the court seeking leave to apply for judicial review in 2015. In relation to the issue of mandamus, in para [74] of that judgment, the following observation was made:

> "[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"." (Emphasis added)

[78] It was held that, in circumstances in which the visitor was not Her Majesty, but "Her Majesty in Council" mandamus could issue against her. In this case, based on a reading of the original charter, the visitor was not at the relevant time Her Majesty in Council; but Her Majesty. Article 6 of the charter specifically states:

> "We, Our Heirs and Successors, shall be and remain the Visitor and Visitors of the University…"

[79] It is doubtful, therefore, that mandamus could issue against the Crown in the particular circumstances of this case. However, even if that is possible, in the instant case the application for mandamus would be made in the course of judicial review proceedings, as is being pursued by the appellant.

Conclusion

[80] The appellant has succeeded on the first and most substantial issue in this appeal and that relating to *res judicata*, thus entitling her to have her appeal allowed. The visitorial jurisdiction, though it existed in theory, was effectively not available to the appellant at the material time. It also would seem to be just that we should award costs of the appeal to the appellant, to be agreed or taxed, given the inconvenience and likely expense to which she must have been put to be able finally to establish her right. However, we are open to consider submissions from the respondent, in the event that it is of a different view on the question of costs. In the light of that, I propose that the orders she prays be granted as follows:

i. The appeal is allowed.

ii. The decision of the learned judge is set aside.

iii. It is hereby declared that at the time of the commencement of these proceedings, the appellant had no alternative means of redress.

iv. The appellant's application for leave to obtain judicial review is granted.

v. Costs of the appeal are awarded to the appellant to be agreed or taxed, unless within seven days from the date of this order, the respondent files and serves written submissions on costs, and the appellant, within seven days of being served, files similar submissions in reply, after a consideration of which submissions, the court will make a final order as to costs.

[81] The supplemental submissions filed without permission were not considered by the court. The court also wishes to apologize for the delay in the delivery of this judgment.

P WILLIAMS JA

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

STRAW JA

[83] I too have read the draft judgment of my brother F Williams JA. I agree with his reasoning and conclusion.

F WILLIAMS
ORDER

i. The appeal is allowed.

ii. The decision of the learned judge is set aside.

iii. It is hereby declared that at the time of the commencement of these proceedings, the appellant had no alternative means of redress.

iv. The appellant's application for leave to obtain judicial review is granted.

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