[2018] JMCA App 37

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 166/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

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

Mrs Caroline Hay QC and Neco Pagon instructed by Caroline P Hay Attorneys-at-Law for the applicant

Miss Maliaca Wong and Miss Amanda Montague instructed by Myers, Fletcher & Gordon for the respondent

9 October and 29 November 2018

PHILLIPS JA

[1] The application before us was to extend the time within which to file an application for permission to appeal, and for the time to be extended within which to appeal. An order was also sought for permission to file notice and grounds of appeal against the decision of Rattray J, given on 6 November 2017, within seven days of the order of this court.

Some procedural background facts

[2] In this matter, Miss Suzette Curtello (the applicant) was a graduate student at the University of the West Indies (the respondent). She had disputes with the respondent in respect of her doctoral thesis, resulting in her not being able to participate in a process to achieve the designation "PhD Biochemistry". The disputes having not been resolved by any action taken by the respondent, she endeavoured to have those disputes settled through the courts, by way of an application for judicial review of the decisions made by the respondent. Sykes J (as he then was) initially granted leave to proceed to judicial review, ex parte, but subsequently discharged the same on the basis of arguments put forward by the respondent that the matter should instead be dealt with by way of the respondent's visitorial authority. Subsequent applications to Rattray J and Wolfe-Reece J (Ag) did not advance her situation. The application for judicial review remained refused.

[3] The proposed notice and grounds of appeal annexed to the application for permission to appeal referred specifically to the orders of Rattray J, namely, the preliminary objection upheld by him, and that the application for leave to obtain judicial review had been refused. That preliminary objection was filed by the respondent on 21 June 2017. It was the respondent's contention, in making that objection, that the earlier application filed by the applicant on 26 October 2015, was largely in the same terms as the application before Rattray J. That application had been heard and determined by Sykes J on 11 November 2015, which is why the respondent had

claimed, in the preliminary objection, that the matter was *res judicata* and an abuse of the court's process.

[4] On 6 November 2017, the preliminary objection was upheld by Rattray J. On 21 November 2017, the applicant filed an application to extend the time within which to file the application seeking permission to appeal, and the time within which to appeal from Rattray J's order. The application had also asked for permission to file notice and grounds of appeal against Rattray J's order within seven days of the date of the order. The application was heard by Wolfe-Reece J (Ag), and on 20 July 2018, she refused both orders sought by the applicant. Leave to appeal her orders was granted.

[5] Pursuant to rule 1.8 of the Court of Appeal Rules 2002 (CAR), as permission to appeal Rattray J's order had been refused by Wolfe-Reece J (Ag), the application for leave to appeal Rattray J's order has been renewed before this court, as set out in paragraph [1] herein.

[6] The grounds of the application essentially were as follows:

> (1) The decision of Rattray J upholding the preliminary objection was wrong, being an unreasonable and irrational interpretation of the documentation before him, claiming that the visitorial authority of the respondent was applicable, in spite of the fact that the Queen of England and the Governor-General had declined to exercise visitorial authority.

(2) The respondent's letter dated 19 April 2017 confirmed that the position with respect to the visitorial authority was not settled. The respondent had misled the court on this point in earlier proceedings, and was seeking to take advantage of an abuse of the process of the court.

(3) The court appeared to entertain an application for fresh evidence after it had adjourned *cur adv vult*, in spite of the applicant's objection.

(4) The court's decision was against the weight of the evidence, having erroneously applied the doctrine of *res judicata* in circumstances where that doctrine does not readily lend itself to administrative law proceedings, as there is no *lis* between the parties.

(5) The applicant filed an application for extension of time to appeal, and for permission to appeal, on the basis that *inter alia* Rattray J had provided no reasons for refusing the application for permission to obtain judicial review.

(6) The applicant had erroneously filed an application to renew the application for leave to obtain judicial review. The applicant on further consideration

contended that notice and grounds of appeal ought to have been filed instead, but permission to appeal was required, and must first be obtained.

[7] The applicant relied on her affidavit filed in the Supreme Court on 14 May 2018, and that of Neco G Pagon filed on 25 May 2018. Both affidavits were stated to have been attached to the notice of application for permission to appeal filed 25 July 2018, but were not so annexed, although they were included in a core bundle filed in this court on 26 July 2018, to be utilised in the said application.

[8] In her affidavit filed 14 May 2018, before Wolfe-Reece J (Ag), the applicant endeavoured to explain why she had not filed the application for permission to appeal within 14 days of the order of Rattray J, delivered on the 6 November 2017, namely, 20 November 2017, but had instead filed an application to renew the application for judicial review, which, she said, had been filed in time. Additionally, she indicated that she had pursued obtaining reasons for the judgment of Rattray J, and she referred to correspondence to that effect, but stated that to date none had been provided. She indicated that she had endeavoured first to renew the application for judicial review, and then on further consideration and advice, had pursued an appeal of the order. On 21 November 2017, one day late, after the expiration of the time period prescribed in CAR to do so, the application for extension of time to apply for permission to appeal Rattray J's order, and for permission to appeal the same was filed. On 20 July 2018, the application was refused by Wolfe -Reece J (Ag). The application before this court was filed on 25 July 2018.

[9] The applicant continued to maintain that at the time of filing the initial application to obtain judicial review on 2 May 2017, there was no clear visitorial authority in place to assist her in resolving the dispute that she had with the respondent, relating to the completion of her PhD thesis. She insisted that the respondent had misled the court, and continued to do so, causing the court to believe that arrangements were in place for the dispute to be resolved under the visitorial authority. She contended further that without reasons from Rattray J, she was unable to say, with any certainty, why the respondent's preliminary objection had been upheld. As a consequence, she had been "shut out of help", and the Supreme Court was the only place where she would be able to obtain assistance in the circumstances.

[10] She indicated that she had filed an application in the court to obtain judicial review of the decision taken by the respondent, and leave had initially been granted by Sykes J. Sykes J had later discharged that grant of leave, when faced with the arguments by the respondent in respect of the visitorial authority. Rattray J had then upheld the preliminary objection on the basis of *res judicata*. When Sykes J had ruled on the point, she stated that she had attempted, pursuant to his direction, to access Her Majesty Queen Elizabeth II, but Her Majesty had declined jurisdiction.

[11] She referred to and relied on the letter dated 19 April 2017, from Myers, Fletcher & Gordon, attorneys representing the respondent, indicating that arrangements for the best option for access to the respondent's visitorial authority were being discussed. It was because of those events, she stated, that she had returned to the Supreme Court for relief.

[12] She referred to the letter of 7 September 2017, which the respondent had placed before Rattray J by way of a fresh evidence application, after the matter had been adjourned *cur adv vult*, and in spite of objection to the same by her attorneys on her behalf. She stated that the question as to whether the said letter ought to have been utilised by the learned judge, and also the interpretation that ought to have been placed on the letter, was a matter for the Supreme Court. She pointed out that she continued to be prejudiced by the delay, and the fact that there was no institution before whom she could have placed her case at the time of the filing of her application. There was, she said, nowhere else to turn for help to resolve the outstanding issues that she had with the respondent. She also stated that she had no confidence that the respondent would act in good faith given the history of the matter thus far.

[13] Neco Pagon, in his affidavit filed 25 May 2018, deponed that he was an associate on record representing the applicant in these proceedings. He annexed a letter dated 11 May 2018 from Queen's Counsel to, by then, Sykes CJ, requesting assistance in obtaining the reasons for judgment of Rattray J, as the date for hearing of the application for extension of time to file the application for permission to appeal, and the application for permission to appeal Rattray J's judgment had been fixed for 25 May 2018. In that letter, Queen's Counsel also indicated that the absence of the reasons for Rattray J's judgment was likely to prejudice the applicant at the hearing.

[14] The only affidavit filed by the respondent, specifically in response to the application before this court, was the one filed on 9 October 2018, after the arguments had been made by both counsel. The main purpose for filing the said affidavit, sworn to

by Miss Amanda Montague, one of the attorneys representing the respondent, was to annex the respondent's Royal Charter, which was referred to and relied on by the respondent at the hearing. As a consequence, its filing was not opposed by counsel for the applicant, and was approved by the court. Of great significance, counsel posited, is section 6 of the Royal Charter which states:

> "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."

Submissions

For the applicant

[15] Having related the unusual chronology of events in this matter, Mrs Caroline Hay QC for the applicant submitted that the case was all about the refusal of the visitor to assume jurisdiction. She went through five important items of correspondence namely the:

(i) letter from the applicant dated 10 February 2016 to Buckingham Palace;

(ii) letter in response dated 16 August 2016 from Miss Jennie Vine, Deputy Correspondence Coordinator, Buckingham Palace;

(iii) letter to the applicant dated 2 September 2016 from Mrs Dionne Tracey Daniel, the Secretary to the Governor-General;

(iv) letter dated 19 April 2017 from counsel for the respondent to Queen's Counsel; and

(v) letter dated 7 September 2017 from Mr Burchell Whiteman OJ, Special Advisor to the Governor-General, to Professor Sir Hilary Beckles, Vice-Chancellor of the respondent.

[16] The letters, she claimed, confirmed the position that the respondent's visitorial authority had been declined. Queen's Counsel argued that that new turn of events, subsequent to the decision of Sykes J, warranted a further and full review of the situation by the Court of Appeal, to assess: (i) whether Sykes J may have been correct when he set out the history and the function of the visitorial authority, and discharged the leave to obtain judicial review that he had originally granted; and (ii) whether Rattray J was correct in endorsing that position, bearing in mind the intervening events. In paragraph [54] of his reasons for judgment including and endorsing section 6 of the Charter cited above, Sykes J set out his understanding of the respondent's visitorial authority. He stated:

> "The UWI was established by royal charter in the exercise of the royal prerogative by Her Majesty Queen Elizabeth the Second who acted upon the advice of the Secretary of State for the Colonies. It is a corporate body under the charter with perpetual succession, a common seal

> and it can sue and be sued in its own name. Under article 6 Her Majesty, her heirs and successors 'shall be and remain the Visitor and Visitors of the University and in the exercise of [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'."

[17] Queen's Counsel submitted, however, that if a party was directed to access the said jurisdiction, and the party endeavoured to do so, but the body or person granted that jurisdiction declined to act, the court would have to consider whether Rattray J's ruling of *res judicata* in those circumstances would have been wrong. She therefore posited that the applicant would have a real chance of success in obtaining an order from this court, that she be permitted to have her application for judicial review heard by the Supreme Court.

For the respondent

[18] Counsel for the respondent, Miss Maliaca Wong, also went through the chronology of events, and argued that the applicant's application before it was made in error. Leave to appeal having been granted by Wolfe-Reece J (Ag), the applicant ought to have filed the notice and grounds of appeal, which had not been done to date. Counsel also submitted that an application ought to have been filed for permission to appeal, and for extension of time to appeal the judgments of Rattray J and Wolfe-Reece J (Ag), respectively, and that had not yet been done properly. She said that the applications before the court were inadequate, as there was no explanation for the

delay in the filing of the same, which was significant, bearing in mind that the decision of Rattray J had been given on 6 November 2017.

[19] Counsel referred to the Royal Charter, and relied heavily on section 6 of the same, which has already been set out in paragraph [14] herein. She also referred to the fact that Sykes J had set out with clarity, in his reasons for judgment, that the visitorial authority exists (as can be seen in the Royal Charter). The visitorial authority has, she submitted, been recognised in several other jurisdictions, and there are several authorities interpreting the relevant sections of the Royal Charter similar to that which grounds the respondent's jurisdictional point.

[20] Counsel submitted that Sykes J had acknowledged and accepted the principles emanating from the Court of Appeal in **Vanessa Mason v University of the West Indies** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 7/2009, judgment delivered 18 February 2009 (see paragraph [54] of his reasons for judgment, that the respondent acted through and by its visitor). She further contended that Rattray J had also acknowledged and accepted the principles espoused in **Vanessa Mason v UWI** as good law. Accordingly, she argued that since the point had been decided by a judge of coordinate jurisdiction, Rattray J cannot be faulted by upholding the preliminary objection, as that was an appropriate action and correct in law. The applicant, she submitted, had no real chance of success, and the application, for those reasons, ought to be refused.

Discussion and Analysis

[21] The background facts creating the issues in this case relate to whether the respondent had waived the academic requirement that the applicant complete nine credits of graduate level courses by the end of the 2014/2015 academic year, or in any event, as a pre-condition to her being awarded the designation "PhD Biochemistry". The applicant maintained that the requirement had been waived by the respondent. A further issue was whether the applicant was required to re-submit her PhD Biochemistry thesis entitled "DNA Vaccine versus Conventional Vaccine for Poultry Salmonellosis" for examination, revision and corrections, within 18 months, in accordance with regulation 3.30 of the University of the West Indies, Board for Graduate Studies and Research Regulations for Graduate Diplomas and Degrees.

[22] The applicant was desirous of immediately proceeding to an oral examination and defence of her thesis, also in accordance with the said regulations. She therefore requested declarations to the above effect, and orders of certiorari and mandamus respectively.

[23] Initially, the applicant had seemed completely unaware of section 6 of the respondent's Royal Charter, and proceeded with her claim against the respondent (the Board for Graduate Studies and Research) in the first instance. Having not been successful at that level, she filed an application in the Supreme Court and was initially granted leave to proceed to judicial review by Sykes J. Subsequent to that, an application was made by the respondent before Sykes J, requesting that the court apply the principles emanating from the decision of a single judge of this court in **Vanessa**

Mason v UWI, which recognises the visitorial authority of the respondent. Sykes J was therefore invited to decline exercising jurisdiction in the matter, which he did. In fact, in granting the respondent's application, Sykes J made several other orders, and gave detailed reasons for the approach that he had taken. The relevant orders were:

> "1. The Court declines jurisdiction.
>
> 2. The Court sets aside leave to apply for Judicial Review.
>
> 3. Interim relief granted on October 27, 2015 is set aside.
>
> 4. Fixed Date Claim Form filed on November 3, 2015 is struck out.
>
> 5. No order as to Costs."

[24] In the penultimate paragraph of his reasons for judgment, Sykes J said this:

> "[**Thomas v University of Bradford** [1987] AC 795]... states that exclusive jurisdiction of the visitor is so well established that the remedy for commencing a claim when the [visitorial] jurisdiction is still available is to strike out the claim. It is not merely a stay of the proceedings. ... [**Duke St John-Paul Foote v University of Technology and Another** [2015] JMCA App 27A]... from the Court of Appeal of Jamaica has accepted that position. It means that in this case the claim form filed in this case has to [be] struck out and the leave to apply for judicial review set aside." (paragraph [63])

As a consequence, the fixed date claim form filed pursuant to the leave initially granted for judicial review was struck out. The application for leave was therefore renewed before Rattray J.

[25] The issue for determination in this application is whether in these circumstances we should grant permission to appeal. The refusal to grant leave to proceed to judicial review is clearly an interlocutory judgment, and therefore leave is required to appeal the same (see section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act). The rules are also very clear (see rules 1.8 and 1.8(7) of CAR), and there have been several cases in this court indicating what the applicant must show. The question is whether the applicant has a real chance of success. And this must be a real and not fanciful chance of success (see **Swain v Hillman and Another** [2001] 1 All ER 91 and **Mechanical Services Company Limited v Clinton Ellis** [2015] JMCA App 20). It is of significance to emphasize that the court's role at this stage is to briefly consider whether there is any merit in the proposed appeal which limits the discussion only to matters that are necessary to properly dispose of this application (see **Garbage Disposal & Sanitations Systems Ltd v Noel Green and Others** [2017] JMCA App 2).

[26] In dealing with the question of real chance of success, the following points come to mind:

(1) Subsequent to the judgment of Sykes J, certain things occurred, namely:

(i) the letter from the applicant to Her Majesty dated 10 February 2016 requesting assistance; and the response from Buckingham Palace dated 16 August 2016 indicating that Her Majesty could not assist;

(ii) the letter from the Secretary of the Governor-General to the applicant dated 2 September 2016 indicating that there was no basis for an intervention by the Governor-General, as he is not the visitor of the respondent, nor was he asked or directed to assume that role by Her Majesty;

(iii) the letter from Myers, Fletcher & Gordon dated 19 April 2017, indicating that they were unaware of the contents outlined in the correspondences from Buckingham Palace and the Governor-General's secretary, and further indicated that they were in dialogue with Buckingham Palace to determine the best options for the exercise of Her Majesty's visitorial authority; and

(iv) the letter from the special advisor to the Governor-General, dated 7 September 2017, which referred and attached a list of six unheard appeals directed to Her Majesty, and indicated that pursuant to communication between the Governor-General and

Buckingham Palace, a decision was made that The Honourable Mr Justice Paul Harrison OJ, former President of the Court of Appeal, would be appointed to deal with appeals on Her Majesty's behalf, after discussion with the respondent about the procedures to be adopted in dealing with these matters; and

(2) Rattray J's upholding of the preliminary objection appears to be a finding that the application for leave to proceed to judicial review was refused on the basis of *res judicata*. The application for permission to appeal was refused perhaps on that basis also.

(3) Wolfe-Reece J (Ag) refused the application for extension of time and permission to appeal Rattray J's order.

(4) No reasons have been provided for the orders from Rattray J and Wolfe-Reece J (Ag).

[27] The proposed grounds of appeal made various queries. Proposed ground (A) queried whether the letter from Buckingham Palace confirmed the visitorial authority, and whether the jurisdiction, if it currently exists, was available to the applicant at the time when her application was filed in the court below.

[28] Proposed ground (B) asked whether the letter from the Governor-General confirms the visitorial authority of Her Majesty, and lends any credence to it being available at the material time.

[29] Proposed ground (C) queried whether Rattray J was correct in allowing the letter of 7 September 2017 from the Special Advisor to the Governor-General into evidence, after retiring to consider his ruling on the preliminary objection, and whether in any event it purported to indicate that arrangements in respect of the visitorial authority of the respondent were then in place. That ground also queried whether the letter of 7 September 2017 ought to have been adduced into evidence bearing in mind: (i) the principles of **Ladd v Marshall** [1954] 3 All ER 745 dealing with the principles applicable to the admissibility of fresh evidence; (ii) would it only have confirmed that there was no settled accessible visitorial arrangements available to the applicant; and (iii) in the light of the information contained therein, would the respondent have misled the court into believing that such arrangements were in place, thereby seeking to take advantage of the judge and abusing the process of the court; and further (iv) would any earlier representation that the visitorial authority was in place be in error, as the arrangements may not yet have been fully settled.

[30] Proposed ground of appeal (D) challenged the ruling of the learned judge in upholding the preliminary objection on the basis of the doctrine of *res judicata* as that doctrine, the applicant stated, was inapplicable in the circumstances.

[31] The orders sought by the applicant were that the preliminary objection ought to have been dismissed, and even more importantly, the applicant contended, was that it was clear that at the time of the commencement of these proceedings, there was no other alternative means of redress.

[32] In arguments before us on this application, the applicant submitted forcefully that although the letter of 7 September 2017 ought not to have been adduced into evidence, the letter confirmed that the visitorial authority was not functioning, or not in operation at the material time. As a consequence, leave to obtain judicial review ought to have been granted.

[33] The respondent's answer to that was that the correspondence does not disclose any cessation of the jurisdiction of the visitor. In fact, Her Majesty was, and remained, the visitor, so there is, and was no vacancy in that office. Indeed, to the contrary, the correspondence confirms that, and indicates how the visitorial authority will be exercised on behalf of Her Majesty. Additionally, the letter of 7 September 2017 was properly adduced as it had complied with all the principles applicable to the reception of fresh evidence. Counsel pointed out that although all three conditions had been satisfied, in **Russell Holdings Limited v L&W Enterprises Inc and Another** [2016] JMCA Civ 39, the Court of Appeal held that in interlocutory cases, it is not strictly necessary to apply all the requirements of **Ladd v Marshall**.

[34] It may be of some interest to mention here, that at the hearing of the application before us, the applicant had filed an application to adduce fresh evidence of a news

article published in The Gleaner online, dated 14 August 2018, entitled "UWI To Replace Queen Elizabeth II As Its Visitor" by Brian Walker, Staff Reporter (relating to an alleged interview with the respondent's campus registrar). In the course of oral submissions, however, counsel withdrew the application, perhaps persuaded by comments from the bench of the substantially hearsay nature of the proposed evidence.

[35] It is clear to me, that the real issue of controversy between the parties is the existence, authority, and operation of the visitorial authority of the respondent. However, as indicated, this application is one of permission to appeal, and is not dispositive of the substantive issues in controversy between the parties. The applicant is desirous of getting the opportunity to argue the above grounds of appeal before the full court. The respondent is saying there is no merit, whatsoever, in the applicant's contentions. My role, as indicated, is to consider the submissions, and give my opinion on the merit of the application, but not to determine the same.

[36] There is no doubt, from a reading of the Royal Charter, and also from the authorities on the subject, that the respondent has been regulated by the Royal Charter since 2 April 1962. The Charter provides that Her Majesty Queen Elizabeth II is the visitor of the respondent, and therefore has visitorial authority over the respondent. One of the objects of the respondent is set out at section 2(a) and reads thus:

> "To provide a place or places of education, learning and research of a standard required and expected of a university of the highest standard, and to secure the advancement of knowledge and the diffusion and extension of arts, sciences

> and learning throughout Our Territories of the West Indies, British Guiana, British Honduras and the British Virgin Islands."

[37] Section 3 states that the respondent is both a teaching and an examining body, and pursuant to that status, has the power set out in section 3(a) which states:

> "To grant and confer, under conditions laid down by the University, Degrees and other academic distinctions to and on persons who shall have pursued a course of study approved by the University and shall have passed the examinations or other tests prescribed by the University. Provided that Degrees representing proficiency in technical subjects shall not be conferred without proper security for testing the scientific or general knowledge underlying technical attainments and provided further that at least one external and independent examiner shall be appointed by the Senate for examinations in each subject or group of subjects forming part of the course of studies required for University Degrees, excluding the examinations for matriculation in the University."

[38] In **Dr Matt Myrie v The University of the West Indies and Others** (unreported), Supreme Court, Jamaica, Claim No 2007HCV04736, judgment delivered 4 January 2008, decided by Brooks J (as he then was), Dr Myrie challenged the University as he had been barred by the invigilator and the University security guards from sitting examinations allegedly on the basis that he was ineligible to do so. The question of the jurisdiction of the visitor came into sharp focus. On page 3 of the judgment the learned judge said this:

> "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 free alms or bounty of the founder of 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."

[39] The learned judge drew further learning on the subject from the Halsbury's Laws of England, 4th Edition Reissue, Volume 15(1) at paragraph 495, which states in part:

> "... the visitor has untrammelled power to investigate and right wrongs done in the administration of the internal laws of the foundation. A dispute as to the correct interpretation and fair administration of the domestic laws of the university, its statutes and its ordinances falls within the jurisdiction of the visitor, subject to the supervisory jurisdiction of the High Court, and therefore the court usually lacks jurisdiction in the first instance to intervene. However a decision of the university visitor may be amenable to judicial review."

[40] In **Vanessa Mason v UWI**, Harrison JA, in dealing with a challenge from Ms Mason to the decision of the University to evict her from the hall where she had been residing on the Mona Campus, endorsed the House of Lords' pronouncement on the jurisdiction of the visitor in **Page v Hull University Visitor** [1993] 1 All ER 97. It was stated in the headnote that:

> "...Because a university was an eleemosynary charitable foundation and the visitor was the sole judge of the law of the foundation, which was its peculiar or domestic law rather than the general law of the land, the visitor had exclusive jurisdiction to determine disputes arising under the domestic law of the university and the proper application of those laws to those persons within his jurisdiction. Accordingly, the court had no jurisdiction to determine those matters or to review a decision made by the visitor on questions of either fact or law, whether right or wrong, provided his decision was made within his jurisdiction (in the narrow sense of acting within his power under the regulating documents to enter into the adjudication of the dispute) and in accordance with the rules of natural justice. However, judicial review would lie against the visitor if he acted outside his jurisdiction (in the narrow sense) or if he abused his powers in a manner wholly incompatible with his judicial role or acted in breach of the rules of natural justice. It followed that the Divisional Court had had no jurisdiction to review the visitor's construction of the university statutes..."

[41] As a consequence, there is much to be said for the efficacy and authenticity of the exclusive operation of the visitor, and for the use of that office as opposed to the courts. Indeed, on the question of the efficacy and easy access to the visitor, Megarry VC in **Patel v University of Bradford Senate and Another** [1978] 3 All ER 841 put it this way. He said:

> "... In place of the formality, publicity and expense of proceedings in court, with pleadings, affidavits and all the apparatus of litigation (including possible appeals to the Court of Appeal and, perhaps, the House of Lords), there is an appropriate domestic tribunal which can determine the matter informally, privately, cheaply and speedily, and give a decision which, apart from any impropriety or excess of jurisdiction, is final and will not be disturbed by the courts. This aspect of the matter has been the subject of repeated high judicial approval..." (page 852)

[42] However, even accepting that the above accounts in respect of the visitor are entirely true and accurate, this matter really concerns whether there is likely success on appeal with regard to the claim that the visitor, Her Majesty, or her representatives here in Jamaica, have declined to act, and therefore access to the visitorial authority has fallen away. This was the issue raised by the applicant at the hearing before Rattray J, when she posited that new subsequent events had occurred since the direction given by Sykes J in his reasons for judgment, which had been duly pursued by her.

[43] It would seem to me, that if those items of correspondence can be given an interpretation which the applicant has submitted is favourable to her, then the question which must arise, is whether the Court of Appeal ought to determine if the Supreme Court is the appropriate forum against that of the visitor of the respondent, for the disposal of the applicant's challenge to the respondent's decision in respect of the grant of her doctoral degree.

[44] The applicant has relied on the fact that Rattray J has not provided reasons for upholding the preliminary objection, relying on **Flannery and Another v Halifax Estate Agencies Ltd (Trading as Colleys Professional Services)** [2000] 1 WLR 377, where the court held that a judge was under a duty to explain why he had reached a decision, and that the scope of the duty however depended on the subject matter of the case. The court held further that the duty to supply reasons showing why one side's case was preferred to another's, was inherent in the duty of the court

showing fairness to both parties. This court will also have to address the importance of the failure of the judge to give reasons in this case. The court will also have to assess whether, and to what extent, if at all, the principle of *res judicata* arises in relation to the position taken by Rattray J in this case.

[45] It appears, therefore, that there are several issues that ought to be placed before the full court in respect of which the applicant may have a real chance of success. Has the visitor declined jurisdiction? What is the interpretation and effect to be placed on all the relevant items of correspondence, including whether the letter of 7 September 2017 ought to have been allowed in evidence at that stage of the proceedings as fresh evidence? Should Rattray J have upheld the preliminary objection? Does *res judicata* apply in these circumstances? What is the effect, if any, of Rattray J failing to provide any reasons for his decision? If the visitor has declined jurisdiction is that situation temporary, bearing in mind the provisions and effect of the Royal Charter? What would be the consequences of that in law? Could that be considered a denial of access to protection of one's rights? Is the Supreme Court therefore the correct forum to decide whether judicial review ought to be granted with any other relevant remedies?

[46] Finally, I have to say that I will not dwell much on the procedural aspect of this application as I do not agree with counsel for the respondent that the applicant was not properly before the court. The application, though confusingly worded, was one to extend time to file the application, for permission to appeal Rattray J's judgment, and for extension of time to file notice and grounds of appeal in respect of Rattray J's

judgment. That was the correct approach bearing in mind what had transpired in the court below. The leave to appeal granted by Wolfe-Reece J (Ag) to appeal her own order was neither here nor there, as what was essential was the application for extension of time and permission to appeal Rattray J's order, and that is what was done.

[47] In addition, the explanation for the delay was given. The route taken by the applicant was an unnecessarily tortuous one by the various applications filed, but the chronology of events showed an intention, by the applicant, to pursue the litigation, and in one instance, due to certain advice received, she had filed the application one day late. In respect of the application before us, it had been filed within 14 days of the order made by Wolfe-Reece J (Ag) which was when the applicant would have known that the necessary application had been refused, and that it had to be renewed in this court.

[48] There also is no question that the applicant will and continues to suffer harm as she is weighed down by not knowing when and how her dispute with the respondent will be resolved, so that ultimately the outcome of her educational travails can be ascertained. The burden that the respondent bears also cannot be overlooked either, as the responsibility of upholding educational standards rests with them, and as one of, if not the oldest, established places of higher learning in the country, they too no doubt would wish to have this matter resolved, and matters fundamental to their operation settled.

[49] In my opinion, there is a real chance of success on this appeal. I would therefore make the following orders:

1. Extension of time granted to make an application for leave to appeal Rattray J's order of 6 November 2017.
2. Permission granted to appeal Rattray J's order of 6 November 2017.
3. Permission granted to file and serve notice and grounds of appeal on or before 7 December 2018.

[50] On the issue of costs, the applicant was indeed late in filing her application for permission, which itself was so poorly worded that it prompted an argument from counsel for the respondent that the application was not properly before us. In the light of that, the circumstances outlined in paragraphs [46]-[48] herein, and in spite of the fact that she has succeeded on this application, I would make the following order on costs:

4. One half the costs of this application to the respondent to be taxed if not agreed.

SINCLAIR-HAYNES JA

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

F WILLIAMS JA

[52] I too have read the draft judgment of Phillips JA and agree with her reasoning and conclusion.

PHILLIPS JA

ORDER

1. Extension of time granted to make an application for leave to appeal Rattray J's order of 6 November 2017.
2. Permission granted to appeal Rattray J's order of 6 November 2017.
3. Permission granted to file and serve notice and grounds of appeal on or before 7 December 2018.
4. One half the costs of this application to the respondent to be taxed if not agreed.