In the Court of Appeal Civil Division

Constitution:
Beldam L.J.
Ward L.J.

DRAFT: 14.11.95

Draft judgment to be handed down on 15.11.9
at 10 a.m. [illegible] to counsel and
their instructing [illegible] the substance
may be communicated to clients not more th
one hour before the giving of judgment.

Mr Adabayo Bankole

- v -

Chartered Association of Certified Accountants

Beldam L.J.:

Mr Adabayo Bankole was the plaintiff in an action brought against the Chartered Association of Certified Accountants in the Wandsworth County Court. On 29th July 1994 His Hon. Judge Sich, after granting the plaintiff leave to appeal out of time, dismissed his appeal from the decision of the district judge striking out his claim. Judge Sich held that the court had no jurisdiction to entertain his action but contrary to the defendant's submissions held that, had the plaintiff's claim been pleaded in contract, it was "just about arguable" and he would not have dismissed it as disclosing no course of action. After judgment the plaintiff sought leave to appeal. Judge Sich spent some time explaining to the plaintiff that if he wished to appeal further he would have to apply to this court within twenty-eight days and in view of the plaintiff's failure to comply with time limits previously he emphasised their strict nature. However it was not until 12th October 1994 that the plaintiff lodged his application for leave to appeal and accordingly he asks this court to enlarge his time.

On 5th August 1994 the plaintiff had written to the County Court asking for a transcript of the hearing and of the judgment given but by 13th September he had received no reply. Eventually on 26th October he was told that there was no tape recording or transcript of the proceedings. After issuing his notice of application for leave to appeal on 10th October he continued to press the court for a reply and eventually received notes of the judgment prepared by the defendant's solicitors and approved by the judge. He applied in person for leave to appeal, ex parte, on 8th June 1995. The court decided to adjourn the plaintiff's application to be heard inter partes with the appeal to follow if leave was granted.

The plaintiff aspired to become a certified accountant and accordingly became a student member of the defendant association ("the association"), which requires students to pass examinations at three levels: the preliminary examination; the professional examination and a final examination. To sit the examinations a student requires a qualification comparable to that needed to enter a United Kingdom University. The student has to complete the five sections of level one before attempting level two.

In June 1991 the plaintiff obtained provisional passes in two sections of level one conditional on his completing the level by December 1992 which he did not do. However the association allowed him to re-register as a student and extended his time to June 1993 to allow him to sit the remaining papers and to keep his provisional passes. In June 1993 he sat the three additional

sections in cost and management accounting, law and business mathematics and information technology. However he failed to achieve the necessary level of marks to pass in any of these subjects. He was aggrieved and considered that there must be a flaw in the association's marking procedures. On 9th September he telephoned the association requesting a copy of his examination answers. He wanted to compare the answers with those issued as model answers so that he could be reconciled with the marks that had been given him. The association said that it was not their policy to provide a copy of his examination answers. On 22nd September he wrote to the registrar of the Examinations Department of the association asking for copies of his papers. The association re-iterated that it did not provide students with copies of their examination scripts under any circumstances. The plaintiff then asked for a re-mark of his June 1993 examination papers. In November 1993 the association pointed to the Students' Handbook which clearly states that the association does not enter into correspondence concerning the results of examinations. Nevertheless the association advised him that his marks had been checked and found to be correct. This did not satisfy the plaintiff who persisted in his request for a copy of his examination script. The association stood firm and the plaintiff instructed solicitors to issue proceedings in the County Court to obtain a copy of his script and for an injunction restraining the association from destroying the original. The plaintiff then issued proceedings claiming that the association owed him a duty of care in the marking of the examination scripts, that it had been negligent in the exercise of its duty

whilst marking his papers and had failed to award the appropriate marks for the work he had done. In the result the plaintiff was said to have failed the exam and had suffered loss and damage, including lost employment prospects, anxiety and distress and lowered professional standards. He accordingly claimed:

> "(a) Restoration of the correct and appropriate academic standing in relation to the marks obtained within the June 1993 examination sitting.
>
> (b) Progression to the proceeding level of the examinations (level two) and claimed damages."

By its defence the association asserted that the plaintiff's claim disclosed no cause of action and further that the court did not have jurisdiction to hear the claim or to grant the relief sought or any relief. The association applied to the District Judge for an order striking out the particulars of claim and on 26th May 1994 District Judge Tresman ordered that the particulars of claim be struck out on the ground that the court had no jurisdiction. She ordered the plaintiff to pay the costs of the action.

The plaintiff appealed to Judge Sich who, having granted the plaintiff leave to appeal out of time, dismissed his appeal and ordered the plaintiff to pay the costs. So the matter comes before this court.

The association is a body incorporated by royal charter and, as the plaintiff concedes, is a charity. Its charter was granted to the association on 25th November 1974 by royal prerogative. It states the association's principal objects and purposes as:

"To advance the science of accountancy, financial management and cognate subjects as applied to all or any of the professional services provided by accountants whether engaged in public practice (in partnership or through the medium of a body corporate or otherwise), industry and commerce or the public service; to provide the highest standards of competence, practice and conduct among members of the association so engaged; to protect and preserve their professional independence and to exercise professional supervision over them; and to do all such things as may advance and protect the character of the profession of accountancy ..."

To further the objects and purposes of the association it was granted powers including the power:

"(g) To provide means by the holding of examinations and other tests in the science of accountancy, financial management and cognate subjects for assessing the skill and knowledge of persons seeking admission to membership of the association and others and to issue certificates and diplomas to such persons on passing such examinations ..."

Other ancillary objects and powers, included the encouraging of the study of subjects by providing scholarships, bursaries, prizes, donations, etc.

The association has two classes of members: fellows and associates. Fellows and associates of the existing association immediately prior to the date of the charter became fellows and associates of the association. Honorary members or registered graduates or students of the existing association were granted similar status by the charter in accordance with the By-laws. Further the association was given the power under the charter to make By-laws and regulations prescribing the qualifications for and method of election to membership and the rights, privileges, obligations and conditions of membership and the manner in which

it could be suspended or determined.

Under the By-laws, membership of the association was by admission by the council. By-law 4 provided:

> "Associates
>
> No individual except as otherwise provided by these By-laws should be eligible for admission as an associate unless he has passed such examination or examinations as may from time to time be prescribed by the council and can show to the satisfaction of the council that he has had not less than four years approved accountancy experience ..."

All applications for admission to membership of the association had to be made to the council in the form and for the time being prescribed by the council. (By-law 9).

Power to create a class of registered students and to make regulations prescribing the conditions on which applicants could become and remain registered students of the association was contained in By-law 45. By-law 47 gave power to the council to make regulations for the qualifications of the association, including examination and testing and By-law 48 provided:

> "The council may from time to time appoint such examiners and assistants on such terms as to remuneration and otherwise as the council may think fit and may remove the same."

Exercising its powers under the By-laws, the council of the association made The Certified Accountants Membership Regulations 1991, which provided that an individual should be eligible for membership of the association if he had passed all the papers of the association's examinations as set out in Part 1 of Appendix

1 where the three levels of examination and the subjects to be studied are set out.

The handbook of the association given to all students stated in sec. 1.6:

> "The association requires all its members, graduates and students to comply with its rules of professional conduct and observe the By-laws and regulations of the association."

The handbook also contained full details of the annual subscriptions, examination fees and regulations for the conduct of examinations. A separate section set out the standards to be attained in the examinations.

Para. 4.12 said:

> "Students are notified of the overall examination marks obtained in each paper sat and whether they have passed or failed. The pass standard for all papers is 50 marks. The scripts of any students whose names fall just short of the pass mark will automatically be reviewed. The association will not therefore enter into correspondence on the results nor accept requests for scripts to be remarked."

Provision was made for provisional passes. There was no limit to the number of times a candidate could take any paper. Full details of the panel of examiners were set out in paras. 4.25 to 4.27.

After the papers had been set, the examiner was responsible subject to the approval of the association for recruiting a team of markers and instructing them and for ensuring that all scripts were marked as soon as possible after the examination. The

examiner did not himself undertake primary marking but was responsible for re-marking a sample of scripts from each of his team of markers to verify consistency of marking standards. Marking standards and procedures were the subject of para. 4.28 to 4.33.

I have felt it necessary to set out in some detail the contents of the charter, By-laws and Regulations for they are relevant to the arguments addressed to us with clarity, force and sincerity by the plaintiff.

The plaintiff argued that the judge was wrong to hold that the courts had no jurisdiction in his case. Firstly, although the association was a charitable corporation, the charter contained no provision for the appointment of a visitor and none had in fact been appointed. Further his dispute with the association would be outside the jurisdiction of any visitor if there was one. He was not a member of the association but merely a student seeking admission and the jurisdiction of the visitor only extended to disputes between the members and the corporation. The courts had drawn a distinction between the internal administration of a charitable trust and the way in which it was to accomplish its purpose. In the latter case the courts had intervened. In the present case in its dealings with him the association had failed to carry out its stated functions and purpose under its Royal Charter and, in particular, its obligation to provide proper means for assessing his skill and knowledge to enable him to seek admission to membership. He

referred us to two cases: Clephane v. The Lord Provost of Edinburgh [1869] LR 1 Scotch Appeals 417, and The Berkhampstead School case [1865] LR Equity Cases 102. These cases, he argued, showed that the courts do have power to intervene to ensure that a charitable body fulfils its obligations under its charter.

In my view the plaintiff misinterpreted these decisions. The intervention of the Court of Chancery in the affairs of charitable trusts exercised for the last four hundred years is separate from, and supplementary to, the control exercised by the visitor. Typically the Court of Chancery intervened to compel a charitable corporation to carry out the objects of the trust. There is, however, a clear distinction between the jurisdiction exercised by the Court of Chancery restraining a corporation from acting contrary to or beyond the purposes for which it was created and the jurisdiction of a visitor to deal with internal disputes. Nor does it make a difference that the Royal Charter granted the association no power to appoint a visitor. As Blackstone explained, the law distinguished between cases in which the King was to be regarded as the general founder of an eleemosynary foundation and those in which the founder was a private person:

> "... and in general the King being the sole founder of all civil corporations and the endower the efficient founder of all eleemosynary ones, the right of visitation of the former results according to the rule laid down to the King and the latter to the patron or endower." (Commentaries, bk 1, ch. 18, page 481).

Thus in all charitable corporations granted by royal charter the King was deemed to have reserved the power of visitation and as

the law developed, in the absence of special appointment, the Lord Chancellor acted as visitor on behalf of the King. This was made clear by Lord Romilly M.R. in Attorney General v. Dedham School [1857] 23 Beav. 350 page 356 in the passage quoted by Megarry V.-C. in Patel v. The University of Bradford Senate [1978] 1 WLR 1488. In Patel's case, a student who had formerly been a member of the university had been required to withdraw on failing his examinations twice, he sought similar relief to that claimed by the plaintiff in the present case. After a scholarly review of the cases the Vice-Chancellor said:

> "On the first point in this case I need say no more than that I have no doubt that subject to any appointment the Crown may be pleased to make the Crown is the visitor to the University of Bradford and that the Lord Chancellor is the proper person to exercise the visitatorial powers on behalf of the Crown."

An action claiming ancillary relief had been struck out in the case of Thorne v. The University of London [1966] 2 QB 237. The plaintiff had claimed damages for a negligent misjudgment of his examination papers for the intermediate and final LL.B. degree. Diplock L.J. emphasised that actions of that kind relating to domestic disputes between members of the University of London were matters to be dealt with by the visitor and that the court had no jurisdiction to deal with them. He quoted from the judgment of Vice-Chancellor Kindersley in Thompson v. London University [1864] 33 L.J.CH. 625 who said:

> "The holding of examinations and the conferring of degrees being one if not the main or only object of this university, all the regulations, that is, the construction of all the regulations and the carrying into effect of all those regulations as among persons who are actually members of the university or who come in and subject themselves to be at least pro hac vice members of the university - I mean

with respect to the degrees which they seek to have conferred upon them - all those are regulations of the domus: they are regulations clearly in my mind coming within the jurisdiction and the exclusive jurisdiction of the Visitor."

In Patel v. The University of Bradford, Megarry V.-C. held that it was within the jurisdiction of the visitor to determine whether a member had been lawfully amoved and whether such a former member was entitled to be reinstated or admitted though he was careful to restrict the effect of his judgment to such disputes.

The plaintiff placed great emphasis on the fact that he was a student and not a member. But he was seeking admission as a member and had embarked upon the necessary steps to achieve a qualification which would entitle him to be admitted. I do not think that the distinction he seeks to draw is valid. His dispute with the association about the marking of his papers was essentially related to his seeking to be admitted to membership and was within the jurisdiction of the Visitor, had one already been appointed.

I find support for this view in the opinion of Lord Browne-Wilkinson in R. v. Hull University Visitor, Ex p. Page [1993] AC 682 at page 700 where he said:

"In my judgment this review of the authorities demonstrates that for over 300 years the law has been clearly established that the visitor of an eleemosynary charity has an exclusive jurisdiction to determine what are the internal laws of the charity and the proper application of those laws to those within his jurisdiction. The courts inability to determine those matters is not limited to the period pending the visitor's determination but extends so

> as to prohibit any subsequent review by the court of the correctness of a decision made by the visitor acting within his jurisdiction and in accordance with the rules of natural justice. This inability of the court to intervene is founded on the fact that the applicable law is not the common law of England but a peculiar or domestic law of which the visitor is the sole judge. This special status of a visitor springs from the common law recognising the right of the founder to lay down such a special law subject to adjudication only by a special judge, the visitor."

Nor in my opinion does it matter that no Visitor had actually been appointed for in such a case the power of appointment still exists. The plaintiff referred us to correspondence he had had with the Lord Chancellor's Department concerning the visitorial procedure and the denial by the Visitor's office of any power to appoint in connection with the association. It was the unsatisfactory nature of this correspondence that largely persuaded the court to adjourn the plaintiff's ex parte application to be fully argued inter partes.

In a separate argument the association submitted that the judge was wrong to hold that, if the plaintiff's particulars of claim were amended to include a claim in contract, his claim would "just about be arguable". The association contended that, even if framed in contract, no cause of action was disclosed. I would agree with this submission. The plaintiff claimed that the association would be vicariously liable for negligence on the part of the person appointed to mark his paper; he did not argue that the association had failed to take proper care in the establishment of a scheme of marking papers nor that in the appointment of examiners or the approval of markers it had failed to exercise proper care. In my view, by submitting himself for

examination with a view to qualifying for membership of the association, the plaintiff agreed to the terms and conditions of the association's examinations and agreed to his papers being marked in the manner decreed. On any reasonable interpretation of the association's conditions they do not in my opinion bear implication of a term that the association will be liable for fault on the part of a marker of the examination papers.

The plaintiff also argued that the association owed him a concurrent duty of care in tort and that it would be liable for negligence on the part of markers of the paper. He said that the association had assumed responsibility for marking the papers and it would be reasonable in the circumstances to hold that they were under such a duty. Mr Wilken for the association pointed out in this and other contexts the difficulties facing the association in arranging for the marking and assessment of 80,000 examination papers annually.

This is not a case in my judgment in which a concurrent remedy in tort should be held to exist. In any event the liability argued for by the plaintiff is far wider than the liability which I would hold existed in contract. The obligation of the association was to take reasonable care in making the arrangements and approving the appointments set out in their examination conditions. No breach of such a duty is alleged by the plaintiff. For these reasons I do not believe that even framed in contract the particulars of claim disclosed a cause of action against the association.

Whilst it is unfortunate that the plaintiff and the association have been unable so far to persuade the Lord Chancellor's Visitors Department to appoint a visitor, I am sure that that is the appropriate procedure for resolution of disputes between students and the association. As has often been said, the courts are not an appropriate forum for this kind of dispute. What is required is an informal, private, cheap and speedy procedure for mediating such disputes. No doubt if the association is unsuccessful in its attempt to persuade the Lord Chancellor on behalf of the Crown to appoint a visitor, serious consideration will be given to an alternative procedure.

Finally in a notice of cross-appeal the association contended that the judge had been wrong to extend the plaintiff's time for appealing from the order of the district judge. It is said that he had no evidence on which to exercise his discretion in the plaintiff's favour. The plaintiff explained to the judge why he was late in giving notice of appeal from the decision of the district judge. I consider that there was material upon which Judge Sich could properly exercise his discretion to extend the plaintiff's time. Mr Wilken also argued that this court ought not to extend the plaintiff's time to give notice of his application for leave to appeal. It had been fully explained to him that there were strict time limits by Judge Sich and no adequate explanation for the delay had been given. With considerable hesitation, we decided that as the plaintiff had clearly indicated his intention to proceed with an application for leave to appeal soon after the decision and had then tried

to obtain a transcript of Judge Sich's judgment which he believed to be necessary, we ought in the circumstances to extend his time. We considered that we should grant him leave to present his arguments and the parties agreed that we should treat the arguments on the application as the arguments on appeal. Effectively therefore we extended the plaintiff's time and granted him leave to appeal but for the reasons I have indicated I would dismiss his appeal.

Ward L.J.:

The written grounds upon which the applicant relies are threefold.

1 Because the Association is not a university, the authorities upon which His Honour Judge Sich relied (Thorn -v- University of London (1966) Q.B. 1237, Patel -v- University of Bradford Senate (1978) 1 W.L.R. 1488, and Reg. -v- Hull University Visitor, Ex Parte Page (1993) A.C. 682) have no application. That is to misunderstand how the jurisdiction of the visitor arises. In the classical statement of his position, Holt C.J. explained in Philips -v- Bury (1694) Holt 715 that:-

> "Private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them: and therefore if there be no Visitor appointed by the founder, I am of opinion that the law doth appoint the founder and his heirs to be Visitor. The founder and heirs are patrons and are not to be guided by the common known laws of the Kingdom. But such corporations are, as to their own affairs, to be governed by the particular laws and constitutions assigned by the founder,"

He put it more succinctly that:-

> " Patronage and visitation are necessary consequents one upon another."

For a more modern statement of the scope of the visitatorial jurisdiction, I adopt

the speech of Lord Griffiths in Thomas -v- Bradford University (1987) 1 A.C. 795 at 814 -5:-

> "The jurisdiction stems from the power recognised by the common law in the founder an of eleemosynary corporation to provide the laws under which the object of his charity was to be governed and to be sole judge of the interpretation and application of those laws other by himself or by such persons as he should appoint as a visitor"

The Chartered Association of Certified Accountants was established by Royal Charter: it is a charity: it is an eleemosynary corporation. By dint of research for which this applicant has won my admiration, especially in the light of the fact that he has failed to persuade the respondent's examiners to pass his paper on Law, the applicant is able to refer us to the Attorney-General -v- The Earl of Clarendon (1810) 17 Ves. 491 where the Master of the Rolls says at p498:-

> "Eleemosynary Corporations are the subject of visitatorial jurisdiction: and where, for the want of an heir of the founder, Crown becomes the Visitor, it is by petition to the Great Seal and not by Bill or Information, that the removal of a Governor from the Corporate Character, which he de facto holds, is to be sought."

(The Applicant cited this case as authority for the proposition that the court had power to interfere, but he did not appreciate that the reason for the interference there was that the Chancery Court was concerned with maladministration by the governors of revenues designed to provide scholarships. It was a case of breach of trust which was always a matter for the Chancery Court, not the visitor .) It is, therefore, well settled that:-

> "Wherever the Crown funds a charity, this court treats the Crown as the permanent authority and Visitor of the charity, unless where the Crown has thought fit to appoint a special Visitor: and in these cases, it is necessary to apply to the Lord Chancellor, by petition, in his visitatorial character, to exercise jurisdiction on behalf of the Crown as Visitor,"

per the Master of the Rolls in Attorney General -v- The Dedham School (1857) 23 Beaver 355 at 356.

In the light of these authorities, I do not understand why the Lord Chancellor's Visitors' Office informed the applicant that they do not appoint Visitors in connection with the Chartered Association of Certified Accountants. It may well be that the Association has never before had occasion to call upon their services but nonetheless this is a matter which would clearly repay further consideration by all concerned.

2. The applicants second ground is that the visitatorial jurisdiction cannot extend to him because he is not a member of The Association. As defined, "members" do not include students. Accordingly he submits that, not being a member, he is not, in the words of Holt C.J. , "of the foundation." But, as Lord Coleridge C.J. observed in Queen -v- Hertford College (1878) 3 Q.B.D. 693 at 701:-

> "There are cases directly in point, and of great weight, which show that the authority of the visitor is as complete over admissions to fellowship as over amotion from or deprivation of them."

This was also dealt with by Lord Griffiths in Thomas -v- Bradford University at p.815:-

> "The explanation for the visitors' jurisdiction extending in cases of admission and removal from office (amotion) to those who are not corporators lies in the basis of his jurisdiction, namely, as the judge of the internal or domestic laws of the foundation. It is because those invariably provide for the conditions governing admission to and removal from membership of the foundation and sometime of offices on the foundation short of membership that jurisdiction in such matters lies with the Visitor."

3. The applicant submits that he can frame his cause of action in breach of contract. I disagree. The contractual terms upon which he has to derive such a claim would spring from such contract as was made between him and the Association to examine and be examined according to the Association's rules.Passing the examinations is a stepping stone towards membership. In my

judgment the contract relates solely to internal government and administration. Accordingly it is within the exclusive jurisdiction of the visitor:-

> "The line of demarcation between that class of questions which comes under the jurisdiction of the visitor on the one hand,and that class of cases which comes under the jurisdiction of this court, as a court of equity, on the other, is this, - whatever relates to the internal arrangements and dealings with regard to government and management of the house, of the domus, of the institution, is properly within the jurisdiction of the visitor, and only under the jurisdiction of the visitor, and this court will not interfere in those matters: but when it comes to a question of ... any breach of trust ... or any contracts by the corporation, not being matters relating to the mere management and arrangement and details of their domus, then, indeed this court will interfere;"

per Sir Richard Kindlersley V.- C. in Thomson -v- The University of London (1864) 33 L.J. CH. 625 at 634. Similarly the House of Lords held that the visitor to Bradford University and not the court had the jurisdiction over Miss Thomas' claims relating to the termination of her contract of employment.

I characterise the nature of the dispute the applicant has with the respondent as one relating to the internal management of the Association. Accordingly I conclude that the court has no jurisdiction and that the judge was right to strike out the applicant's claim. As a matter of policy, I regard it as necessary to contain the determination of a purely domestic dispute within the Society because how such a body conducts itself is its own affair and regulation is best left to the Society, not to the court. As Lord Hardwicke put it in Attorney General -v- Talbot (1747) 3 at ATK. 662 at 674:-

> " It is a more convenient method of determination of controversies of this nature, it is at home, forum domesticum and...it is a much less expense than suits at law, or in equity: and in general, I believe, such appeals have been equitably determined."

For these reasons and for the further reasons given by Lord Justice Beldam with which I agree, I would likewise refuse his application.

I add only this by way of footnote and exhortation: I do not encourage this

applicant to pursue his complaint further with the Lord Chancellor. It is likely only to add his disappointment. He has shown tenacity in pursuit of his appeal and has applied himself thoroughly to its preparation: he made his submissions with courtesy and with confidence. It may be that he did not do himself justice in his examinations. He would be better advised to take up the opportunity provided by the rules of his Association to re-sit these papers and to get on with his professional life in that way.