

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 2003 HCV 2353

BETWEEN	LIBERAL ARTS COLLEGE JAMAICA LIMITED	CLAIMANT
AND	UNIVERSITY COUNCIL OF JAMAICA	DEFENDANT

IN CHAMBERS

HEARD: DECEMBER 23, 2003

Mr. Leighton Miller for Claimant.

Mr. Patrick Foster And Miss Julie Thompson for Defendant instructed by Director of State Proceedings.

Daye, J. (Ag.)

Liberal Art College of Jamaica Limited filed an application on the 3rd December 2003 for an interim injunction to restrain the University Council of Jamaica from withdrawing their accreditation of the B.Sc in Education and the B.Sc in Business Administration programmes offered by the College as of December 31, 2003. The same day, the 3rd December 2003, the College also filed a claim for damages for negligence and/or breach of statutory duty against the University Council of Jamaica and also sought an interim injunction.

On the 23rd October, 2003 Brooks J. had dismissed a similar application for interim injunction based on a previous Writ of Summons which bears a close resemblance to the present claim holding that the College could not secure an injunction for post-writ action of the Council which does not fall in the context of the Writ. The judge found that the College had failed to show it had a serious issue to be tried (per. Brooks, J. Liberal Arts College of Jamaica Ltd. et al v. University Council of

Jamaica Suit No. C.L. 2002/C-138, dated October 23, 2003). These are the events that lead to this present application for injunction. This application as framed in paragraph 1 of the College's notice for injunction is in the nature of a prohibitory injunction.

The principle which govern the grant or refusal of prohibitory interim injunction was laid down by Lord Diplock in American Cyanamid v. Ethicon [1975] 1 All ER 506 at 510-511. He said as follows:

- (a) The court must be satisfied that "there is a serious question to be satisfied", (ibid. p.510. paragraph d)
- (b) It is no part of the court's function at this stage of litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mutual consideration. These are matters to be dealt with at the trial.
- (c) Unless the material available to the court at the hearing of the interim application fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interim injunction.
- (d) In deciding where the balance of convenience lies the court should first consider whether (i) an award of damages would be an adequate remedy if the plaintiff succeed at trial and (ii) the defendant would be in a financial position to pay the damages. If the answer is yes to these questions, then no interim injunction should be granted. On the other hand if damages would not be an adequate remedy to the plaintiff if he succeed at the trial then the court should consider, if the defendant were to succeed at the trial whether the plaintiff's undertaking for damages would be an adequate remedy. If damages would be adequate for the defendant and the plaintiff is in a financial position to pay there would be no reason on this ground to refuse an interim injunction.

- (e) Where the position is evenly balanced between the plaintiff and defendant than the court ought to take measures to preserve the status quo

The Court of Appeal of Jamaica in National Commercial Bank v. Whitelock S.C.C. A. 67/81, delivered July 30, 1982 speaking through Kerr, P (Ag.) said Lord Diplock's third statement of principle above was not another principle different to the "serious question for trial" principle applicable to the grant or refusal of an interim injunction. He went further to say that if a party is not seeking the relief of a permanent injunction then this subsidiary principle will be inapplicable.

Mr. Leighton Miller submitted that the Claimant's application has satisfied the four criteria for an interim injunction. He argued that firstly there is serious question to be tried because of the importance of the University Council of Jamaica pronouncement on the status of an educational institution. He states that the Council decision on accreditation can determine the existence or survival of the College as an educational institution. He submitted further that as a result the Council therefore owes a duty of care to ensure that accreditation status is reasonably and fairly determined.

Secondly, he challenges the Council's claim that the College has failed to meet the terms and condition of the accreditation granted to them in March 2003. He contends the College has satisfied all the terms and conditions of the accreditation. The Council, he says, has no valid reason to withdraw the accreditation.

Thirdly, he submits that a loss of accreditation will result in a substantial fall in enrollment of the College. This is so because 90% of the enrollment is for the two programmes that the Council had accredited. He claims that the projected damage to the

College is likely to be three hundred & seventy-six million dollars (\$376,000,000.00). In the face of this the College faces bankruptcy. Therefore damages would not be an adequate remedy and the balance of convenience lies in favour of granting the injunction.

Fourthly, the position of the parties require that the status quo be maintained until judgment in the claim.

Mr. Patrick Foster, Counsel for the University Council in his written submission and at the hearing contended the College has not satisfied the principle for the grant of an injunction. His concise and succinct submissions were framed as follows:

- (a) On the pleadings the thrust of the applicant's claim is one for damages for negligence or breach of statutory duty and not injunction. Thus the applicant is impliedly saying that damages is an adequate remedy.
- (b) On review of the affidavit of Dr. London of the Council and Dr. Chamber of the College it is evident that the applicant treated the terms and conditions of the grant of accreditation with contempt and demonstrates an unyielding attitude to the Council's effort to obtain compliance with the condition of accreditation.
- (c) An examination of the scheme of the University Council Act, which is the legislation the Council function under does not evince any intention of Parliament to confer on a private institution a right of accreditation either expressly or impliedly.
- (d) If the court grants an injunction it would in effect be granting accreditation to the College. The Court would be substituting its decision for the Council which is not the function of the Court.
- (e) The matter complained of by applicant falls within public law. If the College is dissatisfied with the Council's decision it should seek judicial review of their decision rather than bringing an action in private law.

Mr. Miller conceded that Mr. Foster is correct that Council did not breach any statutory duty. However, he contends that his argument that the Council has breached a duty at common law to the College is unassailable..

I ask myself the first question, does the application for interim injunction raises a serious question to be tried either of fact or law. I start by looking at whether there is any serious question of law. The question of law raised by the applicant are: (a) breach of statutory duty and (b) breach of a duty of care at common law.

Breach of Statutory Duty

The alleged breach of statutory duty the College claims is contained in its claim. The College seeks damages for breach of statutory duty in that the Council has wrongfully and without good and sufficient reason seeks to withdraw accreditation for two (2) of the applicant's programmes.

The obligation or duty of the Council is to be found in the **University Council of Jamaica Act** 1987. Section 4 of the Act specifically outline the functions of the Council:

- “to promote the advancement in Jamaica of education...
by means of the grant of academic awards and distinctions and
for that purpose –
- (a) to determine the conditions governing the grant of such awards and distinctions of
 - (b) to approve courses of study to be pursued by candidates to qualify for such grants....”

Further under section 5 of the Act the Council is empowered to grant and confer Degrees, Diplomas, Certificates and other academic awards to and on persons who have satisfied courses of study approved by the Council of Associated Institutions. The relevant language of the provisions of the Act touching the duty of the Council disclose that the Council has a public duty to promote the advancement of education and private

study and to award persons degrees who have satisfied the conditions they have established. No provision in the Act express or implied, casts on the Council a duty towards any educational institution. If there is no statutory duty on the Council then there can be no right the College has which has been breached. This does not mean that the Council can act arbitrary in the exercise of its function. This does not mean also that an educational institution cannot be adversely affected by the Council's decision or actions. If the Council has exceeded its powers or have wrongfully executed its function, then its actions is amenable to judicial review. In other words its actions should be tested in public law and not private law unless some specific right is created there. I am therefore of the view that no serious question of law of breach of statutory duty arise between the College and the Council. The applicant has failed to satisfy the first principle for the grant of an interim injunction.

Breach of Duty of Care at Common Law

The applicant in its Particulars of Claim avers that the Council owes it a duty of care to ensure that accreditation of its programmes is not unreasonably and/or unfairly withheld or denied. Is there such a duty of care at common law?. Firstly, the language in which their duty is framed is more aligned with a complaint that the Council wrongfully exercised its decision which has adversely affected the applicant. Again this type of complaint is more consistent with a body being aggrieved with a decision of a statutory body. The recourse of such a body is in public law by way of an action for judicial review. The test to determine the existence of a duty of care was formulated by Lord Atkins in **Donoghue v. Stevenson** [1932] A.C. 562 at 580. He said that one person owed another a duty of care in circumstances where such a person:

“.....must take reasonable care to avoid acts or omissions which you reasonably foresee would be likely to injure persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected”

The College would be a body that could be closely and directly affected by the acts or omissions of the Council. However, the College is contending that the Council has a duty to ensure that accreditation is not unfairly and unreasonably withheld. This supposed duty of care is framed widely and in terms of a public duty owed by the Council to the College. The duty claimed in my view falls outside the private law of the tort of negligence. Accordingly, the applicant would not have cause of action in negligence. A serious question of law would not arise for trial.

Issues of fact arise between the College and the Council whether they have complied with the terms and conditions of the grant of accreditation to their programmes given on the 1st July, 2003. These issues cannot stand on their own or independent of the law. Hence, it is also my view that no serious question of fact arises for trial.

Having found that no serious question of fact or law arises for trial I do not find it necessary to proceed to the next stage of whether the balance of convenience lies in favour of granting or refusing the interim injunction. In the circumstances, I dismiss their application for interim injunction. Leave to Appeal granted.

Courtney Daye
Acting Puisne Judge

December 29, 2003