Case No: QB/2006/APP/0157

Neutral Citation Number: [2006] EWHC 1565 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 29th June 2006

Before:

THE HON. MR JUSTICE GRAY

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Between:

GEORGE VAN MELLAERT	**Appellant**
− and −	
OXFORD UNIVERSITY AND OTHERS	**Respondent**

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The Appellant did not appear and was not represented on 10 May;
via telephone conference on 17 May 2006
CLIVE LEWIS (instructed by **Berrymans Lace Mawer, Solicitors**) for the **Respondent**

Hearing dates: 10 & 17 May 2006

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE GRAY

Mr Justice Gray:

1. This is an appeal, pursuant to permission granted by Nelson J after a telephone hearing, against a decision of Master Eyre on 15 August 2005 striking out the Claim Form and particulars of claim of Mr Van Mellaert. The principal defendant is Oxford University but the Claimant has joined as defendants several academic members of the teaching staff at the University.

2. The Claimant is a Belgian national. He attended various universities in Belgium. He qualified as a member of the Brussells bar in 1995. Following various appointments as an associate at firms of solicitors in London, the Claimant was admitted as a solicitor in England and Wales in 2001. According to his curriculum vitae he has since 2001 been in practice as an independent lawyer. It is my understanding that, since these proceedings were commenced, the Claimant has returned to Belgium and is now living there. I agreed to hear his appeal by means of a telephone link so as to avoid him having to incur the expense of travelling to England to present his appeal in person. The University has been represented at the hearing by Mr Clive Lewis of counsel.

3. Reverting to the academic career of the Claimant, he was registered as a research student at Oxford University with effect from the Michaelmas term 1999 under the supervision of Mr A. A. Zuckerman on the subject of "Abuse of Process". He was transferred to D.Phil Status in 2001. He applied for the appointment of examiners in June 2003 on the nomination of Mr Zuckerman. Mr Ben McFarlane (St Peter's College) and Professor Loic Cadiet (University of Paris) were appointed as examiners.

4. The Claimant submitted his doctoral thesis in August 2003. The oral examination (or "viva") took place on 19 November 2003. The two examiners thereafter submitted a joint written report which recommended that the Law Board should offer the Claimant a choice between (a) reference of the thesis back for revision for re−examination for the D.Phil degree or (b) reference of the thesis back for revision for re−examination for the M.Litt degree.

5. The report, as made available to the Claimant, ran to eight pages. It includes a number of academic criticisms of the quality of the Claimant's thesis. These criticisms include a lack of direction and a failure to develop a sustained critical analysis of the subject matter. The authors express the opinion that potentially interesting points are ignored by the Claimant in order to proceed with a general, rather superficial overview. They are critical of the Claimant for failing to draw upon ideas from other legal systems in proposing improvements to the Belgian law. Another criticism is that the thesis contains repeated and basic spelling errors and terms which are imprecisely used. Their conclusion is that the thesis is not of the standard required for either the D.Phil or M.Litt degrees.

6. Annexed to the recommendations is a further page, to which the examiners say they would prefer that the Claimant should not have access. They say:

> "The examiners wish to note that they took into consideration a letter from the candidate's supervisor advising of a methodological obstacle and a personal problem faced by the candidate".

That letter from Mr Zuckerman is dated 21 October 2003. The so−called methodological obstacle described by Mr Zuckerman was that the Claimant had encountered serious obstacles in obtaining materials and information about abuse of process in Belgian litigation. Belgian scholars, practitioners and judges are said to have largely refused to provide information about the subject. The personal problem is the effect on the Claimant of what Mr Zuckerman describes as a bitter and contentious divorce.

7. By letter dated 9 February 2004 addressed to the Chair of the Board of Faculty of Law of the University the Claimant expressed serious concerns about his D.Phil examination. The letter included the following contentions: that examiners were out to "get me"; that they grilled him for almost three hours and had great prejudice against him; that their report was biased, unfair and in bad faith as well as being vague, contradictory and subjective; that each of the examiners was inadequate; that Professor Cadiet, the French examiner, gave the impression of being completely ignorant about the thesis, probably because of impaired understanding due to a language barrier; that the English examiner, Mr McFarlane, was unable to follow and understand questions asked by Professor Cadiet in French; that Mr McFarlane was very inexperienced and insecure and so on.

8. In accordance with the Regulations the Claimant's letter was forwarded to the Clerk to the Proctors. Thereafter between February and May 2004 the Senior Proctor, Professor David Hills, conducted lengthy interviews (of which there are in the papers detailed notes) with Mr McFarlane, Mr Zuckerman and Dr Whitaker. Professor Hills retired as Senior Proctor in February 2004. His successor in that post recused himself from replacing Professor Hills. The Vice Chancellor of the University then appointed Professor David Womersley to replace Professor Hills in accordance with paragraphs 15 and 16 of the Regulations for the Investigation by the Proctors of Complaints under Section 22 of Statute IX. Professor Womersley re−interviewed those whom Professor Hills had interviewed and conducted an interview with the Claimant himself on 26 May 2004.

9. By letter dated 22 June 2004 Professor Womersley itemised the complaints made by the Claimant about his examination and his complaints about his supervision by Mr Zuckerman. For the reasons explained in some detail in that letter, Professor Womersley told the Claimant that:

> "The right to supplicate for the degree of D.Phil is crucially dependent on the writing of a thesis which satisfies two properly−qualified examiners that it merits the award of the

> degree of D.Phil and can be recommended to the responsible Faculty Board accordingly. It is this condition which you have as yet not satisfied and, as I have explained above, I can see no reason to believe either that your examiners were not properly qualified or that the examination of your thesis was not (to say the least) adequate and carried out in accordance with the Regulations of the University".

He added:

> "I find I can uphold no aspect of your complaint, either in what it alleges concerning the examination of your thesis (which I find to have been exemplary), or in what it alleges concerning the supervision you received from Mr Zuckerman - allegations I find to be both unproven in detail and discountenanced by Mr Zuckerman's evidently sincere desire to continue acting as your supervisor, to help you realise your academic potential, and to assist you in the writing of a thesis which will match the potential of your subject. I therefore conclude that there are no grounds for believing that, as you put it on page 10 of your complaint, you have not had ‘a fair and impartial examination of [your] thesis by independent and competent examiners'."

10. As he was entitled to do, the Claimant appealed against the decision of the Senior Proctor to the High Steward of the University, Lord Bingham of Cornhill. As I understand is common practice and permitted under the provisions of Regulation 11 of Council Regulation 31 of 2002, the High Steward appointed Professor Sir Bob Hepple QC of Cambridge University to consider the Claimant's appeal.

11. The Claimant addressed written submissions, running to 64 pages, to Professor Hepple.

12. Professor Hepple dismissed the Claimant's appeal and upheld all aspects of Professor Womersley's determination. His reasons for doing so are set out at some length in a written Decision dated 31 December 2004. Although by that time the Claimant had said that he no longer recognised the High Steward, Professor Hepple held at paragraph 11 of his Decision that the claim that the High Steward or his deputy is not independent was based on a fundamental misunderstanding of the University Statutes and the Council Regulations and was baseless. Professor Hepple also rejected a number of procedural points taken by the Claimant. As to the merits of the appeal, Professor Hepple set out the grounds of appeal. He described as extremely serious the Claimant's allegation that Professor Womersley's determination was "biased, unfair, flawed in fact and in law, contradictory, self−serving, autogratifying× patronising, belittling, ignores [my] position and arguments and violates [my] rights of the defence, is in bad faith, selective in its approach, partial, inaccurate and deceptive". Professor Hepple expressed the view that there was an abundance of primary evidence that is inconsistent with the allegations of conspiracy or abuse of process. He rejected the contention that it was objectionable that the viva was

conducted partly in English and partly in French and said there was no reason to doubt that the internal examiner (Mr McFarlane) could fully understand the questions put in French by Professor Cadiet. Professor Hepple concluded that, having considered the evidence as a whole, and all the surrounding circumstances, Professor Womersley's determination is fully supported by the evidence and there are no grounds of fact or law for reversing that determination.

13. The Claimant commenced the present proceedings in or about January 2005. He is claiming up to £3million compensation because his thesis was referred back for further work. His Particulars of Claim are not in the papers lodged with the court. This matters not, since, as will appear in the following paragraph, they were shortly superseded by amendment.

14. The Defendants applied to strike out the Claimant's Claim Form and Particulars of Claim. Master Eyre took the view that the Claimant's Statement of Case failed properly to identify the Defendants; was devoid of proper particulars; failed to disclose any real cause of action; did not comply with Part 16 and Practice Direction 16 of the CPR and accordingly infringed CPR 3.4(2)(a) and (b) of the CPR. Accordingly Master Eyre ordered that the Claimant by no later than 29 July 2005 should file and serve on the Defendants Amended Particulars of Claim removing those defects and more particularly setting out his allegations in chronological order, clearly and fully, but as succinctly as possible and, more particularly,

a) making clear to which Defendant (or Defendants) each allegation relates;

b) if a communication be alleged, stating what was its content and whether it was oral or written and in either case saying between which individuals it occurred and

c) if an event be alleged, stating all of the relevant circumstances, including the place, date and individuals involved.

Master Eyre also ordered the Claimant to give proper details of the source and scope of any duty alleged in relation to each Defendant and to give proper particulars of any allegation of fault (whether victimisation, unfair treatment, abnormality, intrigue, bias, dishonesty, incompetence, bad faith or otherwise). In the meantime Master Eyre stayed the action. The Claimant re−submitted Amended Particulars of Claim on 25 July 2005. These new Particulars were considered by Master Eyre on 15 August 2005. He took the view that the reformulated Statement of Case did not cure the defects identified in his earlier order and accordingly struck out the Claim Form and Particulars of Claim.

15. The Claimant was refused permission to appeal on the papers by Grigson J on 26 October 2005 but, as I have already indicated, permission was granted by Nelson J on 9 February 2006.

16. The first question which I have to consider is whether the Master was right to strike out the Amended Particulars of Claim. In addition I have to consider two questions raised by the Respondent University's Notice, namely:

a) whether the Claim Form and Particulars of Claim disclose reasonable grounds for bringing the claim or alternatively

b) whether the claim raises justiciable issues suitable for adjudication by a court and

c) whether the Respondent is entitled to summary judgment on the ground that there is no reasonable prospect of the Claimant succeeding in his claim.

17. Before turning to those questions, however, I should deal with an argument which has been advanced by the Claimant that he has been denied "equality of arms" to the extent that his rights under Article 6 of the European Convention on Human Rights are infringed. The Claimant's complaint is that he is put at a substantial disadvantage in that he is unable to afford legal representation, whereas the Respondent has ample funds and has in consequence been able to instruct solicitors and counsel.

18. I have to say that I am not impressed with this complaint. In the course of the hearing, I enquired of the Claimant whether he had applied for Legal Aid. His answer, as I understood it, was that he had been applying for Legal Aid since January 2006 but that he could not find a law firm which was prepared to take his case. He added that he had obtained Legal Aid. It remains unclear why, if indeed the Claimant did make an application for Legal Aid, it would have been refused. I have no reason to doubt that the Claimant is impecunious, as he claims, and his residence in Belgium is no reason for refusing him legal aid in this country. The European Court in *Steel & Morris v United Kingdom* [2005] 41 EHRR 22 held at paragraph 60 that the institution of a legal aid scheme is one of the means whereby a state may guarantee litigants' rights under Article 6(1). It appears to me to be through the Claimant's choice that he has not availed himself of legal aid. As a qualified solicitor within this jurisdiction he must be aware of his entitlement in this regard. Moreover, the fact that the Claimant is a solicitor must reduce the disadvantage to him, in comparison with other untrained litigants, of being deprived of legal assistance. It appears to me that the Claimant is in a very different position from that of the claimant in *A.B. v Slovakia* (Application No. 41784/98).

19. Reverting to the question whether Master Eyre erred in the exercise of his discretion when striking out the claim on the basis of the Claimant's failure to comply with his order of 9 June 2005, I have considered the two revised versions of the Particulars of Claim which are said to have been resubmitted on 20 April and 25 July 2005 respectively. Since I take the view that the issues upon which I should concentrate are those raised by the University's Respondent's Notice, I do not propose to conduct a detailed analysis of the revised Particulars. Suffice it to say that on my reading of those Particulars, the Claimant did little, if anything, to remedy the defects identified

by Master Eyre. I think that the Master was perfectly entitled to take the view that the revised versions of the Particulars remained substantially deficient and that he was justified in striking out the claim.

20. I turn now to the question which appears to me to be at the heart of this appeal, namely the question raised in the Respondent's Notice whether the Claim Form and Particulars of Claim in their re−formulated and amended form disclose reasonable grounds for bringing the claim. (I will consider hereafter the extent to which, if at all, the issues raised by the Claimant are properly justiciable in the courts). I have set out at some length in paragraphs 7 above the nature of the Claimant's complaints about his examination and about the examiners themselves; the rejection of those complaints by the senior proctor and his reasons for doing so and the dismissal of the Claimant's appeal by Professor Hepple on behalf of the High Steward and his reasons for doing so.

21. In my judgment the reformulated Particulars of Claim do not disclose reasonable grounds for bringing the claim. To put it another way, I do not think that the claim has a realistic prospect of success. The examiners were eligible for appointment under the relevant Regulations. The internal examiner had undertaken research in the relevant areas of work. His relative youth was no reason for disqualifying him. The external examiner was proposed by the Claimant himself. In the particular circumstances of the Claimant's thesis into an aspect of Belgian law, it was appropriate to appoint a French academic lawyer with experience of European legal codes and procedures. There were valid reasons for saying that it would have been impolitic to appoint a Belgian lawyer who might deprecate criticisms of the Belgian system to the disadvantage of the Claimant. I agree with the conclusions of Professor Womersley and Professor Hepple (see pages 157−8 and 291−3 respectively).

22. I do not accept that the criticisms made by the Claimant of the fact that part of the viva was conducted in French have any validity either. Professor Cadiet's first language is French. So it was that it was agreed at the outset of the interview that his questions would be asked in French and answered in English. I see nothing objectionable or irregular about this: the Claimant is fluent in English and French. The evidence indicates that Professor Cadiet's English is good enough for him to have understood the Claimant's thesis and his answers to questions during interview. There is no basis for any suggestion that Professor Cadiet and Mr McFarlane were unable to understand one another. The two of them were fully competent to assess the thesis. I find myself in agreement with the comments made by Professor Womersley and Professor Hepple at pages 157−8 and 292.

23. In my view there is a second formidable difficulty in the way of the Claimant's appeal. The root of the Claimant's complaint against the University relates to the criticisms made of his thesis by the two examiners which constituted their reason for recommending that the thesis be referred back to the Candidate for further re−submission. It is quite apparent from reading through the examiners' written reasons that their recommendation was based upon their opinion, as academics in the field, of the academic quality of the Claimant's thesis. Mr Clive Lewis, who has

appeared on behalf of the Respondent and for whose submissions I am grateful, has referred me to a number of authorities which support the proposition that questions of academic judgment are generally treated by the courts as being non−justiciable and unsuitable for adjudication in the courts. In *Clark v University of Lincolnshire & Humberside* [2000] 1 WLR 1988 Sedley LJ expressed the proposition thus at paragraph 12:

> "The arrangement between a fee−paying student and [the University] is such a contract× Like many other contracts, it contains its own binding procedures for dispute resolution, principally in the form of the student regulations. Unlike other contracts, however, disputes suitable for adjudication under its procedures may be unsuitable for adjudication in the courts. This is because there are issues of academic or pastoral judgment which the University is equipped to consider in breadth and in depth, but on which any judgment of the courts would jejune and inappropriate. This is not a consideration peculiar to academic matters: religious or aesthetic questions, for example, may also fall into this class".

Similarly in *R v Judicial Committee ex parte Vijayatunga* [1990] 2 QB 444, the Court of Appeal held that there had been no misdirection in the Committee's concluding that the choice of examiners involved the exercise of an expert judgment which was not clearly wrong and into which they should not therefore intrude; accordingly, it was held that there was no ground for the courts to intervene by way of judicial review. In the same case the Court of Appeal held that it was not appropriate to characterise the jurisdiction of the visitor of the University as being appellate or supervisory. Finally, in *R v Cranfield University ex parte Bashir* [1999] ELR 317 the Court of Appeal approved what Mann LJ had said in *Vijayatunga* at page 459:

> "The issue in this case was as to whether the examiners appointed by the University to examine the Applicant's thesis were competent so to do× This seems to me wholly a matter of academic judgment in which this court should not interfere".

24. In the light of those authorities it appears to me that the validity of the reasons which led the examiners to make the recommendation which they did in relation to the Claimant's thesis is a matter of academic judgment with which it would be inappropriate for the court to interfere. By parity of reasoning it would be equally inappropriate for the court to permit to be questioned in these proceedings the validity of the reasons which led the Senior Proctor and after him Professor Hepple to dismiss the Claimant's appeals in so far as they related to the validity of the examiners' reasons for recommending re−submission of the Claimant's thesis.

25. I accept that there may be aspects of the Claimant's examination, as well as of the appeals to the Senior Proctor and the High Master into which it would not be inappropriate for the court to intervene. Thus the court would no doubt in a suitable

case intervene if it were shown that there had been a material procedural irregularity or if actual bias on the part of one tribunal or another were demonstrated or if it could be shown that there was some procedural unfairness to the Claimant.

26. With one possible exception, however, I do not think there is anything about the way in which the University dealt with the Claimant which would justify interference on the part of the court. For example, there is nothing in the Claimant's complaint about the selection of Professor Cadiet as one of the examiners. As I have already said, there were sound reasons for appointing a French examiner who would have familiarity with Belgian court procedures. In any event Professor Cadiet's nomination was suggested by the Claimant himself. Having considered the contents of the examiners' recommendation and the interview with him conducted by the Senior Proctor, I do not consider that there is any substance in the claim that Mr McFarlane was unsuitable on grounds of age or for any other reason for appointment as an examiner. Permitting Professor Cadiet to ask questions of the Claimant in French was a sensible arrangement in all the circumstances and caused the Claimant no unfairness. I see no evidence of bias or unfairness or prejudice on the part of the examiners or on the part any other members of the University staff. Nor do I detect any procedural irregularity at any stage of the proceedings. For the reasons given by Professor Hepple the claim that the High Steward or his deputy is not independent is wholly unsustainable.

27. The possible exception to which I refer arises because of the addendum to the examiners' report to which I have referred in paragraph 6 above. The letter from Mr Zuckerman may have been one of the reasons which prompted Nelson J to grant permission to appeal in this case. It is dated 21 October 2003 and is addressed to Mr McFarlane. It made reference to matrimonial and health problems from which the Claimant was suffering at that time. The Claimant's case is that such matters had nothing to do with the examiners and that Mr Zuckerman, as his supervisor, ought not to have become involved in the examination.

28. It appears to me to be clear beyond argument, however, that, by writing that letter, Mr Zuckerman was trying to be helpful to the Claimant by letting the examiners know that he had personal problems which might have had an adverse effect on his performance at the examination. Equally clear is it, by saying that they took the contents of the letter into consideration, the examiners were saying that they had made allowance for those problems. To suggest that the reference made by the examiners to that letter undermined the process is to my mind far−fetched.

29. In all the circumstances I am satisfied that this appeal must be dismissed.