CASE NOTES

Thomas v University of Bradford (No 2) [1992] 1 All ER 964: The End of a Saga?[1]

Over the past decade cases involving the visitatorial jurisdiction have increased in number, prompting a great deal of discussion on the role of the visitor and its continuation within the English legal system. The leading case in the field is *Thomas v University of Bradford* [1987] AC 1 in which the House of Lords dealt with an earlier episode in the long drawn out saga of the dismissal of Miss Brenda Thomas from her employment as lecturer in sociology at the University of Bradford.

The Education Reform Act 1988 s.206 sought to remove from the visitor's jurisdiction any dispute relating to a member of the academic staff which concerns his appointment or employment or the termination of his appointment or employment. In future such disputes are to be subject to the jurisdiction of the courts. Section 206, however, provides that until the relevant date a dispute of the kind caught by s.206 may be referred to the visitor and if it is so referred the jurisdiction of the court will be ousted. The relevant date is the date on which the statutes of the institution in question are amended to introduce appeal or grievance procedures.

The curiosity value of the case of *Thomas v University of Bradford (No 2)* [1992] 1 All ER 964 is that it is an addition to the small band of visitatorial decisions reported in a leading series of law reports. After her procedural rebuff in the House of Lords Miss Thomas had not immediately appealed to the visitor. Instead she initiated new proceedings in the courts once the Education Act 1988 was passed. After an unsuccessful attempt to stay these proceedings the university petitioned the Visitor of the University of Bradford to determine her case and the jurisdiction of the court was thereby ousted. Thus it was that at last (and not at her choosing) that the complaint of Miss Thomas came before the Visitor.

The Visitor of the University of Bradford was Her Majesty the Queen and the Lord Chancellor appointed the then Vice Chancellor of the Chancery Division to act on behalf of the Visitor but before the substantive hearing of the appeal Sir Nicolas Browne-Wilkinson V-C was appointed a Lord of Appeal in ordinary. However having been appointed he continued to act on behalf of the Visitor.

Issue

The essential issue in the case before the Visitor was the extent to which the Visitor can upset a finding that an academic has been removed for good cause. In the event the conclusion reached by Lord Browne-Wilkinson was that the right to remove a member of the academic staff of the University for good cause under the relevant

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[1] Suzy Hughes LLB (Manchester)

statute (statute 30) did not depend on whether, objectively, good cause existed but on the University Council's assessment of what was good cause. The Visitor's role was not to hear an appeal by way of a full rehearing from the decision of the Council but to ensure that the decision had been properly reached in accordance with the laws of the University.

The Facts

The University of Bradford presented its petition dated 17 July 1990 to the Visitor of the University requiring him to adjudicate upon the dispute between Brenda Margaret Thomas and the University.

Miss Thomas was appointed as a lecturer in sociology at the University in 1973. Her contract of employment provided that she could only be removed from office in accordance with the University's statutes, ordinances and regulations. Statute 30 provided that, subject to the terms of their appointment, members of the academic staff could not be removed from office except for good cause within para (4) and in pursuance of the procedure specified in para (2).

In 1982 the Vice-Chancellor of the University instructed Miss Thomas to attach herself to a particular "named person" for the following academic year. Miss Thomas refused to comply with this instruction on the ground that it was unreasonable for her to do so, given what she claimed was the attitude of this particular "named person" towards her in the past, and that the instruction conflicted with her academic freedom.

The University's Vice-Chancellor warned Miss Thomas that if she continued to disobey his instruction, the matter would be dealt with under statute 30. Miss Thomas continued to refuse to be attached to the particular "named person" and a joint committee was set up under statute 30 to consider her removal from office for failure to follow the instruction.

It was decided that the matter should be proceeded with under statute 30 and not ordinance 13 and regulation 23, which provided a more detailed procedure for disciplinary proceedings against members of the University in respect of conduct unacceptable to the University. This was accepted by Miss Thomas.

After hearings at which Miss Thomas presented her version of the matter through her Counsel, the committee unanimously recommended to the Council that Miss Thomas be removed from office.

The Council reconsidered the case, hearing further submissions from Miss Thomas, and likewise concluded that Miss Thomas be removed from office.

In September 1984 Miss Thomas issued a writ against the University in the Chancery Division. This claimed damages for wrongful dismissal and alleged procedural irregularities. The University took the point that the irregularities alleged went to the construction of the University's statutes and therefore fell within the exclusive jurisdiction of the Visitor.

Whitford J and the Court of Appeal rejected those arguments and refused to stay the action; but the House of Lords felt that the matters did fall within the exclusive jurisdiction of the Visitor and the application having been amended to ask for a striking out order struck the action out.

After the passing of the Education Reform Act 1988 Miss Thomas brought a second action against the University for wrongful dismissal, claiming for the first time that the University had not established good cause, and repeating the complaint that it had not followed the correct procedure for removing academic staff from office as laid down in ordinance 13 and regulation 23. The University moved to strike out this new action.

Hoffmann J refused to strike out the action, declaring that until the Visitor's jurisdiction was invoked, the Court had jurisdiction to hear the matter. That was in the circumstances a concurrent jurisdiction.

The Decision

Jurisdiction

Lord Browne-Wilkinson said that it was outside his jurisdiction to determine whether Miss Thomas had a legitimate grievance against her treatment by the University before 1980. This was because it had not been part of the University's case against Miss Thomas. More importantly he held that the right to remove a member of the academic staff for good cause did not depend upon whether, objectively, good cause existed. This right was conferred exclusively on the University Council by statute 30. The decision whether there was good cause or not was to be left to the Council and not to the judgment of the Visitor.

Lord Browne-Wilkinson defined his role as Visitor as limited to considering whether, on the facts placed before the joint committee, the conduct complained of was capable of being held to be good cause by a reasonable joint committee, whether there was any misdirection in law in reaching that conclusion, whether the joint committee failed to take into account relevant matter or whether it took into account irrelevant matter, or whether the conclusion reached by the committee was so unreasonable that no joint committee could have reached it.

It was not his role to hear an appeal by way of full rehearing from the decision of the Council but to exercise a supervisory jurisdiction to ensure that the decision of the joint committee and the Council has been properly reached in accordance with the laws of the University.

Having looked at the evidence that had been placed before the joint committee and the submissions made by both sides, Lord Browne-Wilkinson concluded that the joint committee properly came to the conclusion that the Vice-Chancellor's instruction was reasonable and that failure to follow it by Miss Thomas was good cause for her removal.

Procedural Failures

It was part of Miss Thomas's case that the University should have adopted the procedures laid down by ordinance 13 and regulation 23 and not the procedures under statute 30.

The University submitted that the ordinance 13 procedure was not applicable to Miss Thomas's case, since that procedure only applied to cases where members of staff were guilty of disruptive conduct of the kind epitomised by the sit-ins of the 1970s. The University relied on Ordinance 13(4) in support of their submission which

provided:

> "4. The University by this Ordinance declares that the following will be the types of conduct in respect of which it could take action in pursuance of the powers vested in it and referred to in Clause 2: (a) Conduct which obstructs the teaching, study, research or administration of the University. (b) Conduct which obstructs any member, officer, or servant of the University in the performance of his duties, or which obstructs a visitor to the University from going about his legitimate business in the University. (c) Conduct which endangers the safety of, or injures the person of, any member, officer or servant of the University, or a visitor to the University on legitimate business in the University."

Lord Browne-Wilkinson rejected this submission. He found that although this Ordinance might have been first made primarily to deal with University sit-ins, it was drafted in such broad terms as to cover any allegation that conduct of a member of the academic staff warranted action by the University and was not limited to conduct which came within clause (4). Furthermore Miss Thomas's conduct amounted to "conduct which obstructs the teaching study, research or administration of the University" and so clearly fell within ordinance 13.

Since ordinance 13 procedure was not followed there was, prima facie, a breach of the University laws, and Miss Thomas's dismissal would have been invalid. Lord Browne-Wilkinson found, however, that there had been acquiescence on Miss Thomas's part in accepting statute 30 as the correct procedure to be followed and she had, therefore, waived her right to insist that the procedure as laid down by her contract be followed. There were numerous other complaints of "irregularity" but Lord Browne-Wilkinson found there was nothing in them.

Accordingly he concluded that there was no ground on which he should declare invalid the decision of the University to remove Miss Thomas from office.

Observations

(1) Lord Browne-Wilkinson, in reaching his decision, applied principles from judicial review cases. He refused to grant Miss Thomas the relief she sought, finding that she had acquiesced in a mere irregularity and, therefore, forfeited the right to relief. This decision was made even though acquiescence and waiver had not been pleaded by the University.

(2) Despite the finding in favour of the University the victory of the latter was something of a Pyrrhic one since the late raising of the acquiescence point resulted in the University being penalised in costs down to the date when the point was raised.

(3) Following the growing debate on the function of the Visitor in tenure cases and on the visitatorial jurisdiction within the English legal system, particularly in the light of the creation of University Commissioners under the Education Reform Act 1988, it is welcome that Lord Browne-Wilkinson saw fit to define his role in the case as being akin to that of a court on judicial review and not an appellate one. He was there to determine whether the University had complied with its statutes, ordinances and regulations in removing Miss Thomas from office and not to look into the merits of the

Council's decision. It is to be hoped that this case lays to rest once and for all what the function of the Visitor is in cases where an internal body of the University comes to a decision on good cause or any other matter reserved to its assessment. If it does every University Visitor will justifiably heave a metaphorical sigh of relief.

(4) It remains to be said that the recent decision of the Court of Appeal in*R v Hull University Visitor, ex parte Page* [1991] 4 All ER 747 has introduced further difficulties in connection with the exclusive jurisdiction of the Visitor. The Court of Appeal held that misconstruing the University's statutes and acting upon that misconstruction would amount to an abuse of power and, therefore, be open to judicial review by the High Court. This represents a further inroad on a matter hitherto always considered to be within the exclusive jurisdiction of the Visitor, namely construction of the Statutes of the University.

(5) Accordingly if the *Page* case was correctly decided on this point (and it is understood this point is being appealed to the House of Lords) there is the further possibility, amounting to a disagreeable spectre, that the ruling by Lord Browne-Wilkinson and that of other similar high office holders acting as Visitors could be judicially reviewed by the High Court. Indeed on that basis the instant case could go once again, though by a slightly different route, namely via the Divisional Court and the Court of Appeal, to the House of Lords.

Oldham Borough Council v A-G (1992), *The Times* April 13

It is some time since the *cy-près* doctrine has been considered in the High Court. The interest of *Oldham Borough Council v A-G* is that it concerns a gift made by a donor of land to trustees "for the purposes of playing fields solely" and the ambit of s.13(1) and (2) of the Charities Act 1960.

Ina Clayton, by a deed of gift dated 6th April 1962, conveyed to the Oldham Borough Council as trustees some 23 acres of open space within the metropolitan borough "for the purposes of playing fields solely". The gift was undoubtedly charitable and the property was for years used as playing fields with six football pitches, a building containing facilities for teams playing and car parking ancillary to the recreational use. A proposal was made to develop the site. Such development and establishing replacement playing fields in the area would generate a surplus of £6,651,500. Some £2 million of that surplus could endow the replacement playing fields, leaving £4.5 million to be applied *cy-près*. The proposed development occasioned much local controversy, some of it grounded on alleged environmental argument.

Chadwick J held that the language of the gift was perfectly clear: the very land which was the subject matter of the gift was to be preserved and managed as playing fields for all time or, at the least, for as long as the law would allow. Prior to the enactment of the Charities Act 1960 there was no power under the *cy-près* doctrine to sanction a sale of the land for the purpose of enabling the playing field purpose to be carried out elsewhere, no matter how much more beneficial or expedient that might be: see *Re Weir Hospital* [1910] 2 Ch 124.

The question was whether s.13 Charities Act 1960 altered the law in any respect so far as the instant case was concerned. Section 13(1) undoubtedly extended the category of *cy-près* occasions as well as restating some of the old *cy-près* occasions. However, that subsection was subject to subsection (2) which reads:

> "(2) Subsection (1) above shall not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied *cy-près* except in so far as those conditions require a failure of the original purposes."

The learned judge held that subsection (2) had two effects, namely (a) to preserve the requirement that the donor had a general charitable intention and (b) to preserve the principle that the first task was to construe the written instrument.

The Council, for reasons which do not appear in the report in *The Times*, expressly disclaimed any reliance on circumstances which would entitle the court to proceed under the *cy-près* doctrine.

In addition to recitals in the deed of gift to the effect that the fields were to be used for the purposes of playing fields solely "the donees had declared in clause 3 of the deed of gift that they would hold the land upon trust to preserve and manage the same at all times hereafter as playing fields to be known as "the Clayton Playing Fields"." This language made it clear, the judge held, that only if there were circumstances for

cy-près application under s.13(1) (and it was conceded there were none) could there be such an application. The fields therefore fell to be dealt with in accordance with the crystal-clear directions of the donor.

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