LORD JUSTICE SEDLEY:

History

1. The appellant was a student at the respondent university between 1992 and 1995, reading for a first degree in humanities. For her final examination she had to submit a paper by 14 April 1995. She chose to do a presentation and academic write-up on *A Streetcar Named Desire*, and she worked on these using her father's computer. She made the mistake many of us make once, and once only: she failed to make a backup copy of her work. On the last day before the deadline all her stored data were lost from the hard disk. All the appellant was able to put in were some notes copied from a Methuen commentary.

2. The university's Board of Examiners failed her for plagiarism. The appellant says that she had in fact explained the reason for her poor submission to her tutor so that the examiners could be informed; but in the event the Academic Appeals Board accepted that she had not set out to deceive and referred the paper back for remarking. The Board of Examiners marked it 0. The appellant appealed once more to the Academic Appeals Board without success. But on further appeal to the Governors' Appeal Committee it was decided that the mark of 0 was not *"an appropriate academic response"*, and her assessment was referred back to the Academic Board under paragraph 23 of Annex A5 to the respondent's Student Regulations.

3. What appears to have happened is that the Academic Board, taking itself to be seized once more of the appeal, rejected it. Its secretary wrote to the appellant on 23 July 1996 to say that the board's members had advised the Vice-Chancellor that a mark of 0 was permissible so long as the examiners had treated the paper as a failure rather than as plagiarism, and that the chair of the Board of Examiners had confirmed that this was what they had done. The Vice-Chancellor as chair of the Academic Board had accordingly not upheld the appeal.

4. Under the respondent's Student Regulations this gave the appellant one more attempt to obtain her degree. But Regulation 6.5.4 says:
"A candidate who satisfies the examiners for the award of a classified degree at the second attempt shall not normally be awarded a degree classification higher than a Third Class."

5. The appellant resat her finals and was awarded a third class degree, which is not good enough for the further career options which she wanted and still wants to pursue. In mid-1998 (the exact date is in dispute) she issued the present proceedings in the Halifax County Court.

Issues

6. The claim is pleaded in contract. It is to the effect that the Appeal Board misconstrued the meaning of plagiarism, awarded a mark beyond the limits of academic convention and failed to take into account the claimant's explanation. The first two of these, as can be readily seen, travel deep into the field of academic judgment; the third goes nowhere, since the finding of plagiarism was abandoned.

7. After filing a defence the university applied to strike out the claim on the ground that such breaches of contract were not justiciable. His Honour Judge Walker, having been shown two decisions of this court refusing permission to appeal in similar cases, acceded to the application. It is against his order striking out the action that Mr Moncaster, on Miss Clark's behalf, now appeals with this court's permission.

8. For reasons set out in the judgment of the Master of the Rolls, it is not appropriate to treat the brief reasons given by judges of this court when refusing permission to appeal as if they constituted binding authority. It is therefore not out of disrespect that I make no further reference to the decisions cited to Judge Walker. His briefly expressed decision was to the effect that alleged breaches of contract by universities are not justiciable by the courts.

9. For reasons to which I will come, this proposition is in my judgment too wide. First, however, it is necessary to return to the particulars of claim. It emerged in the course of argument that Miss Clark's case in contract could be more tenably put in two ways not so far pleaded. First there was arguably a failure of the Academic Board to comply with the decision of the Governors' Appeal Committee: on remission, it repeated exactly what the governors had held not to be an appropriate academic

response to her performance by confirming the mark of 0. Secondly, there was evidence from the university itself that the resit was treated as an opportunity only to obtain a third class degree: if so, this was arguably in breach of Regulation 6.5.4, which allows for the possibility of doing better. We allowed Mr Mulholland to amend his claim to add these elements, and it is on the claim as amended that the appeal has turned.

10. On the suggestion of Ward LJ both parties, at the conclusion of the argument, undertook to explore mediation as a means of resolving the dispute. It was apparent that, now that the issues had been better crystallised, they were more capable of resolution by agreement. Very shortly before the deadline set by the court an agreement - appended to this judgment - was reached. It is nevertheless appropriate that we should give a reasoned judgment on the question of jurisdiction, not least because the parties themselves have now accepted that in certain circumstances the action may proceed.

Jurisdiction: status.

11. The University of Lincolnshire and Humberside is one of the new universities brought into being by the Education Reform Act 1988. Section 121 gave the status of bodies corporate to advanced further education institutions meeting statutory enrolment criteria of which ULH (as I will call it) was one. By s. 123 they are called higher education corporations. The Further and Higher Education Act 1992 gave all such institutions the full status of a university and made provision for their internal government, but without altering their legal character. Such an institution, therefore, unlike the majority of the older English and Welsh universities, has no Charter and no provision for a Visitor: if it had, it is common ground that the present dispute would lie within the Visitor's exclusive jurisdiction: see ***Thomas v University of Bradford*** [1987] AC 795 and (where no Visitor has been appointed) *Patel v* ***University of Bradford Senate*** [1978] 3 All E R 841. But ULH is simply a statutory corporation with the ordinary attributes of legal personality and a capacity to enter into contracts within its powers.

12. The arrangement between a fee-paying student and ULH is such a contract: see ***Herring v Templeman*** [1973] 3 All E R 569, 584-5. 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 be jejune and inappropriate. This is not a consideration peculiar to academic matters: religious or aesthetic questions, for example, may also fall into this class. It is a class which undoubtedly includes, in my view, such questions as what mark or class a student ought to be awarded or whether an aegrotat is justified. It has been clear, at least since ***Hines v Birkbeck College*** [1986] Ch. 524 (approved in ***Thomas***), that this distinction has no bearing on the availability of recourse to the courts in an institution which has a Visitor. But where, as with ULH, there is none, the decision of the New Zealand Court of Appeal in ***Norrie v University of Auckland Senate*** [1984] 1 NZLR 129 and the remarks of Hoffmann J in *Hines* at 542-3 open the way to the distinction as a sensible allocation of issues capable and not capable of being decided by the courts. It would follow, I think, that the issues which the courts remitted with obvious relief to Visitors in such cases as ***Thomson v. University of London*** (1864) 33 L.J.Ch. 625 (which concerned the award of a gold medal), ***Thorne v. University of London*** [1966] 2 QB 237 and ***Patel v. University of Bradford Senate*** [1978] 1 WLR 1488 (both of which concerned the plaintiff's academic competence) would still not be susceptible of adjudication as contractual issues in cases involving higher education corporations.

13. It is on this ground, rather than on the ground of non-justiciability of the entire relationship between student and university, that the judge was in my view right to strike out the case as then pleaded. The allegations now pleaded by way of amendment are, however, not in this class. While capable, like most contractual disputes, of domestic resolution, they are allegations of breaches of contractual rules on which, in the absence of a Visitor, the courts are well able to adjudicate.

Jurisdiction: abuse of process

14. But Mr Vineall, in a scholarly argument on behalf of ULH, submits that this is only the beginning. The relationship is also a public law one: ULH is a statutory body with public functions, and Miss Clark

has a sufficient interest to seek judicial review of its acts and omissions towards her. This, he submits, is the route she ought to have taken, making it an abuse of process to sue, well beyond the three-month period, in contract.

15. That judicial review is available in such a case seems plain on first principles. A number of such applications have been reported - for example ***R v Manchester Metropolitan University, ex parte Nolan*** [1994] ELR 380 - in none of which any challenge has been offered to the court's jurisdiction. It follows, Mr Vineall submits, that pursuant to the rule in ***O'Reilly v Mackman*** [1983] 2 AC 237 any attempt to sue a higher education corporation in contract should be struck out, at least if it seeks to take advantage of the more generous time limit for such actions.

16. For reasons explained fully in the judgment of Lord Woolf MR, the ground has shifted considerably since 1982 when ***O'Reilly v Mackman*** was decided. The critical decision for present purposes was in fact not ***O'Reilly v Mackman***, where the issues were purely public law ones and the problem therefore entirely procedural, but the companion case of ***Cocks v Thanet District Council*** [1983] 2 AC 287 which decided that where private law rights depended on prior public law decisions they too must ordinarily be litigated by judicial review. That this could not, however, be a universal rule was established not long afterwards by their Lordships' decision in ***Wandsworth LBC v Winder*** [1985] AC 461 in relation to public law defences to private law actions, notwithstanding the availability of collateral challenge. And in ***Roy v Kensington, Chelsea and Westminster Family Practitioners Committee*** [1992] 1 AC 624 their Lordships made it clear that it was not necessarily an abuse of process to elect to sue in contract for statutory payments where the public law element was not dominant. The present class of case is if anything stronger from this point of view than ***Roy***, for where in ***Roy*** a statutory relationship happened to include a contractual element, here it is a contractual relationship which happens to possess a public law dimension. Both are a long way from the situation in ***Cocks.***

17. There is a useful discussion of the present situation in paragraphs 3-078 to 3-083 in the current (1995) edition of De Smith, Woolf and Jowell *Judicial Review of Administrative Action*. Since it was published the Civil Procedure Rules have given substance to its suggestion that the mode of commencement of proceedings should not matter, and that what should matter is whether the choice of procedure (which will now be represented by the identification of the issues) is critical to the outcome. This focuses attention on what in my view is the single important difference between judicial review and civil suit, the differing time limits. To permit what is in substance a public law challenge to be brought as of right up to six years later if the relationship happens also to be contractual will in many cases circumvent the valuable provision of RSC Order 53 Rule 4(1) - which, though currently due to be replaced by a new Civil Procedure Rule, is unlikely to be significantly modified - that applications for leave must be made promptly and in any event within three months of when the grounds arose, unless time is enlarged by agreement or by the court. Until the introduction of the CPR this was a dilemma which could be solved only by forbidding the use of the contractual route - a solution which, as ***Roy*** demonstrated, could not justly be made universal. But as Lord Woolf MR explains in his judgment, the CPR now enable the court to prevent the unfair exploitation of the longer limitation period for civil suits without resorting to a rigid exclusionary rule capable of doing equal and opposite injustice. Just as on a judicial review application the court may enlarge time if justice so requires, in a civil suit it may now intervene, notwithstanding the currency of the limitation period, if the entirety of circumstances - including of course the availability of judicial review - demonstrates that the court's processes are being misused, or if it is clear that because of the lapse of time or other circumstances no worthwhile relief can be expected.

18. The present case is, however, not one in which I would consider it right to strike out or stay the action on this ground. The whole paradigm has shifted in the course of argument. It is true that Mr Vineall has not come equipped to argue abuse on the basis of the present issues, nor Mr Mulholland to answer it. But given the way the case has developed, the exploration of the legal situation and the sensible agreement to attempt ADR, this would not be a proper case to stifle on procedural grounds, late though it was brought.

Conclusion

19. Accordingly I would allow this appeal to the extent of restoring the action. For the rest, a written agreement has now been reached as to how the university will proceed and as to the circumstances in which, if at all, the action may be further prosecuted. I would accordingly stay the restored action with liberty to apply.

LORD JUSTICE WARD

20. I agree.

LORD WOOLF MR :

21. I agree with the judgment of Lord Justice Sedley and with what he proposes should be the outcome of this appeal. I, however, add a judgment of my own because this appeal raises two points which deserve separate attention which are of general importance

The effect of the Civil Procedure Rules on O'Reilly v Mackman

22. It is over eighteen years ago that Lord Diplock made his speech in ***O'Reilly v Mackman*** [1983] 2 AC 237, which has had such a strong influence on the development of public law in this jurisdiction. Generally, since that time, the courts have continued to follow the statement as to the practice which should be adopted when bringing a claim against a public body that Lord Diplock made in that case. Lord Diplock indicated that in his view it would, *"as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority to infringe rights of which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O.53 for the protection of such authorities". (At p.285D-E)*

23. Although the speech of Lord Diplock is extremely well known it is important to place the passage just cited from his speech in its context. First it is to be noted that counsel for the plaintiffs had *"conceded that the fact that by adopting the procedure of an action begun by writ or by originating summons instead of an application for judicial review under O.53 ... the plaintiffs had thereby been able to evade those protections against groundless, unmeritorious or tardy harassment that were afforded to statutory tribunals or decision making public authorities by O.53."* (At p.284B-D) Lord Diplock also pointed out that an advantage of O.53 was that the court had an opportunity to exercise its discretion at the outset of the proceedings rather than would have happened at that time in proceedings begun by originating summons at the end of the proceedings. This was an important protection in the interests of good administration and for third parties who may be indirectly affected by the proceedings. As Lord Diplock said :
"Unless such an action can be struck out summarily at the outset as an abuse of the process of the court the whole purpose of the public policy to which the change in O.53 was directed would be defeated." (*At p.284 G-H)"*

24. Lord Diplock went on to indicate that why O.53 was not made an exclusive procedure was because he considered that the Rules Committee and the Legislature were content to rely upon the inherent power of the High Court to prevent abuse of its process whatever might be the form taken by that abuse. (At p.285 A-D)

25. Lord Diplock was however at pains to point out that what he had said with regard the exclusivity of O.53 was a *general* rule. He recognised that there could be exceptions. He identified an exception in the case of collateral issues and went on to say that other exceptions should in his view be developed on a case by case basis. This is what has since happened.

26. Pending the report of Sir Jeffrey Bowman's Committee on the Crown Office Proceedings, O.53 has not been subject to detailed amendment by the Rules Committee, but it is included in Schedule 1 to the CPR. The proceedings now have to be initiated by use of a "claim form", maintaining the principle that all proceedings under the CPR are to be commenced in the same way (see O.53 r5 (2)(a). In relation to the protection of the public and the interests of the administration which it provides, O.53 has not been amended. However already O.53 is part of the new code of civil procedure created by the CPR. It is subject to the general over-riding principles contained in Part 1.

27. In addition, if proceedings involving public law issues are commenced by an ordinary action under Part 7 or Part 8 they are now subject to Part 24. Part 24 is important because it enables the court, either

on its own motion or on the application of a party, if it considers that a claimant has no real prospect of succeeding on a claim or an issue, to give summary judgment on the claim or issue. This is a markedly different position from that which existed when ***O'Reilly v Mackman*** was decided. If a defendant public body or an interested person considers that a claim has no real prospect of success an application can now be made under Part 24. This restricts the inconvenience to third parties and the administration of public bodies caused by a hopeless claim to which Lord Diplock referred.

28. The distinction between proceedings under Order 53 and an ordinary claim are now limited. Under Order 53 the claimant has to obtain permission to bring the proceedings so the onus is upon him to establish he has a real prospect of success. In the case of ordinary proceedings the defendant has to establish that the proceedings do not have a real prospect of success.

29. A university is a public body. This is not in issue on this appeal. Court proceedings would, therefore, normally be expected to be commenced under Order 53. If the university is subject to the supervision of a visitor there is little scope for those proceedings (***Page v Hull University Visitor*** [1993] AC 682). Where a claim is brought against a university by one of its students, if because the university is a "new university" created by statute, it does not have a visitor, the role of the court will frequently amount to performing the reviewing role which would otherwise be performed by the visitor. The court, for reasons which have been explained, will not involve itself with issues that involve making academic judgments. Summary judgment dismissing a claim, which if it were to be entertained, would require the court to make academic judgments should be capable of being obtained in the majority of situations. Similarly, the court has now power to stay the proceedings if it came to the conclusion that, in accordance with the over-riding objective, it would be desirable for a student to use an internal disciplinary process before coming to the court. (See CPR 1.4(1)(e))

30. One of Lord Diplock's reasons which he gave in ***O'Reilly v Mackman*** for his concern about an ordinary civil action being commenced against public bodies when a more appropriate procedure was under O.53 was the fact that in ordinary civil proceedings the claimant could defer commencing the proceedings until the last day of the limitation period. This compares unfavourably with the requirement, that subject to the court's discretion to extend time, under O.53 proceedings have to be commenced promptly and in any event within three months. If a student could bypass this requirement to bring proceedings promptly by issuing civil proceedings based on a contract, this could have a very adverse affect on administration of universities.

31. This is a matter of considerable importance in relation to litigation by dissatisfied students against universities. Grievances against universities are preferably resolved within the grievance procedure which universities have today. If they cannot be resolved in that way, where there is a visitor, they then have (except in exceptional circumstances) to be resolved by the visitor. The courts will not usually intervene.

32. While the courts will intervene where there is no visitor normally this should happen after the student has made use of the domestic procedures for resolving the dispute. If it is not possible to resolve the dispute internally, and there is no visitor, then the courts may have no alternative but to become involved. If they do so, the preferable procedure would usually be by way of judicial review. If, on the other hand, the proceedings are based on the contract between the student and the university then they do not have to be brought by way of judicial review.

33. The courts today will be flexible in their approach. Already, prior to the introduction of the CPR the courts were prepared to prevent abuse of their process where there had been an inordinate delay even if the limitation period had not expired. In such a situation, the court could, in appropriate circumstances, stay subsequent proceedings. This is despite the fact that a litigant normally was regarded as having a legal right to commence proceedings at any time prior to the expiry of the limitation period. (See ***Birkett v James*** [1978] AC 297)

34. The courts approach to what is an abuse of process has to be considered today in the light of the changes brought about by the CPR. Those changes include a requirement that a party to proceedings should behave reasonably both before and after they have commenced proceedings. Parties are now under an obligation to help the court further the over-riding objectives which include ensuring that

cases are dealt with expeditiously and fairly. (CPR 1.1(2)(d) and 1.3) They should not allow the choice of procedure to achieve procedural advantages. The CPR are as Part 1.1(1) states a new procedural code. Parliament recognised that the CPR would fundamentally change the approach to the manner in which litigation would be required to be conducted. That is why the Civil Procedure Act 1997 (Section 4(1) and (2)) gives the Lord Chancellor a very wide power to amend, repeal or revoke any enactment to the extent he considers necessary or desirable in consequence of the CPR.

35. While in the past, it would not be appropriate to look at delay of a party commencing proceedings other than by judicial review within the limitation period in deciding whether the proceedings are abusive this is no longer the position. While to commence proceedings within a limitation period is not in itself an abuse, delay in commencing proceedings is a factor which can be taken into account in deciding whether the proceeding are abusive. If proceedings of a type which would normally be brought by judicial review are instead brought by bringing an ordinary claim, the court in deciding whether the commencement of the proceedings is an abuse of process can take into account whether there has been unjustified delay in initiating the proceedings.

36. When considering whether proceedings can continue the nature of the claim can be relevant. If the court is required to perform a reviewing role or what is being claimed is a discretionary remedy, whether it be a prerogative remedy or an injunction or a declaration the position is different from when the claim is for damages or a sum of money for breach of contract or a tort irrespective of the procedure adopted. Delay in bringing proceedings for a discretionary remedy has always been a factor which a court could take into account in deciding whether it should grant that remedy. Delay can now be taken into account on an application for summary judgment under CPR Part 24 if its effect means that the claim has no real prospect of success.

37. Similarly if what is being claimed could affect the public generally the approach of the court will be stricter than if the proceedings only affect the immediate parties. It must not be forgotten that a court can extend time to bring proceedings under O.53. The intention of the CPR is to harmonise procedures as far as possible and to avoid barren procedural disputes which generate satellite litigation.

38. Where a student has, as here, a claim in contract, the court will not strike out a claim which could more appropriately be made under Order 53 solely because of the procedure which has been adopted. It may however do so, if it comes to the conclusion that in all the circumstances, including the delay in initiating the proceedings, there has been an abuse of the process of the court under the CPR. The same approach will be adopted on an application under Part 24.

39. The emphasis can therefore be said to have changed since ***O'Reilly v Mackman***. What is likely to be important when proceedings are not brought by a student against a new university under Order 53, will not be whether the right procedure has been adopted but whether the protection provided by Order 53 has been flouted in circumstances which are inconsistent with the proceedings being able to be conducted justly in accordance with the general principles contained in Part 1. Those principles are now central to determining what is due process. A visitor is not required to entertain a complaint when there has been undue delay and a court in the absence of a visitor should exercise its jurisdiction in a similar way. The courts are far from being the ideal forum in which to resolve the great majority of disputes between a student and his or her university. The courts should be vigilant to ensure their procedures are not misused. The courts must be equally vigilant to discourage summary applications which have no real prospect of success.

The Status of Judgments on Applications for Permission to Appeal to the Court of Appeal

40. In support of his submissions, Mr Vineall relied upon the judgments of this Court on two different applications for permission to appeal. He has been able to find no authority which indicates the weight which it is appropriate to attach to such judgments. He submitted that decisions in cases where permission to appeal was refused should be regarded as binding precedents. He pointed out that so far as the applicant for permission is concerned a refusal is the end of the road. There is no right of appeal against a refusal of permission to appeal. He said that it would be inappropriate for a judge to set out in his judgment views which he was not satisfied were correct in view of the consequences of a refusal of permission.

41. There is force in Mr Vineall's submission. However if he were correct in his submissions, this would have very damaging consequences for the development of the law of this country. His submission ignores the reality of what happens on an application for permission. If there is an oral hearing on an application for permission, the hearing is normally intended to last no more than 20 minutes. A judge may deal with 7 or 8 applications in the one day. In each he will give judgments of differing lengths.

42. Until recently it would be unusual for any judgment on an application for permission to be reported. However, as a result of the development of specialists reports, even in relation to applications for permission, judgments are now commonly reported. However, the fact that they are reported does not alter the consideration which the judge can give to the terms in which his judgment is couched. Further more the judge is not usually referred to reports of other cases, or if he is referred to reports, he will have them drawn to his attention in a much more summary manner than would be the case on the hearing of an appeal.

43. Even if Mr Vineall had been right, when he submitted there is no decision which directly deals with the status of judgments of this court on applications for permission to appeal, it is well established that the court does not regard them as binding authorities. This is confirmed by the case of ***Anthonypillai Francis Robinson v. Secretary of State for the Home Department*** Immigration Appeal Tribunal [1997] Imm AR 568 at p. 580 where there is reference to the judgment of Simon Brown LJ in ***R. v. Kensington and Chelsea LBC ex parte Kihara*** 29 HLR 147. The court does not therefore have to follow the decisions given on applications for permission to appeal. They are at best only of persuasive weight. The court does not encourage reference to judgments given on applications for permission. However, if a court is prepared to be referred to such judgments, it should be clearly understood that they are not binding.

Order: Appeal allowed. No order as to costs here and below.

(Order does not form part of the approved judgment)

