[2018] CCJ 2 (OJ)

IN THE CARIBBEAN COURT OF JUSTICE

Original Jurisdiction

Application No TTOJ2018/003

Between

Jason Jones	**Applicant**
And	
Council of Legal Education	**First Respondent/Proposed Defendant**
Council for Human and Social Development	**Second Respondent/Proposed Defendant**
Council for Trade and Economic Development	**Third Respondent/Proposed Defendant**

THE COURT,

composed of A Saunders, President and J Wit, D Hayton, W Anderson and D Barrow, Judges

having regard to the Interlocutory Applications filed on the 9th day of August 2018 by the Caribbean Community on behalf of the Second and Third Respondents/Proposed Defendants and the 13th day of September 2018 by the First Respondent/Proposed Defendant seeking to dismiss the Application for Special Leave to commence proceedings under Article 222 of the Revised Treaty of Chaguaramas, filed on the 18th day of July 2018, to the Response of the Applicant filed on the 4th day of September 2018, to the written submissions of the First Respondent/Proposed Defendant and the Caribbean Community on behalf of the Second and Third Respondents/Proposed Defendants filed on the 18th day of September 2018, to the written submissions of the Caribbean Community on behalf of the Second and Third Respondents/Proposed Defendants filed on the 19th day of September 2018, the written submissions of the Applicant filed on the 25th day of September 2018 and to the Case Management Conference held on 1st day of October 2018

and after considering the oral submissions on behalf of:

- **The Proposed Applicant**, by Dr. Emil Crowne, Attorney at law

- **The Caribbean Community**, by Dr. Corlita Babb-Schaefer

- **The Proposed Respondent**, by Dr. Lloyd Barnett

issues on the 9th day of November 2018 the following:

JUDGMENT

Introduction

[1] This is a decision on two applications to strike out the proceedings initiated by the Applicant, Mr. Jason Jones (hereafter Mr. Jones), on 18 July 2018 by way of an application for special leave to commence proceedings, pursuant to Article 222 of the Revised Treaty of Chaguaramas ("the Treaty"). Mr. Jones wishes to proceed against the Proposed Defendants, Council of Legal Education ("the Council"), Council for Human and Social Development ("COHSOD") and the Council for Trade and Economic Development ("COTED") because of their connection with the admission of persons to study law in the law schools established and operated by the Council.

Entry to the law schools

[2] Admission to practise law in most of the Contracting Parties to the Treaty is governed by the Agreement Establishing the Council of Legal Education (the Agreement). Pursuant to the Agreement, the Council operates three law schools: the Hugh Wooding Law School, the Norman Manley Law School, and the Eugene Dupuch Law School ("the law schools"). The law schools award a Legal Education Certificate ("LEC") and the Governments of the State parties to the Agreement agree to recognize the LEC as satisfying the institutional training and education requirements for admission to practise law in their territories. More significantly, by Article 5. 1 each State Party agrees that "no person shall be admitted to practise in [its] territory who does not hold such certificate."

[3] Article 3 of the Agreement regulates entry into the law schools. Stated shortly, as there was no disagreement as to its purport, the article provides that the holder of the Bachelor of Laws ("LLB") degree from the University of the West Indies (UWI) and, with certain limitations, from the University of Guyana (UG), is

automatically qualified for admission to study at the law schools. The holder of a degree from another university is required to sit and pass an entrance examination as a condition of admission for a very limited number of places available after admission of the automatically qualified graduates. In his affidavit in support of the application for special leave to commence proceedings, Mr. Jones deposed that he is a national of Trinidad and Tobago and holds a Bachelor of Laws degree from the University of London, which he obtained as an external candidate. He also holds a Graduate Diploma in Management Studies and degrees of Bachelor of Arts in Business Administration, Bachelor of Arts in Marketing, and Master of Laws in Oil and Gas Law as well as a Graduate Diploma in Law.

[4] As the holder of an LLB degree from an institution other than UWI, Mr. Jones was required to write an entrance examination for admission into one of the law schools. In 2015, he paid the requisite fees at the Norman Manley Law School and sat the entrance examination but was unsuccessful. In 2016, he again wrote the examination and was again unsuccessful. In 2017 he applied again to sit the examinations but then chose not to sit them as he was "too disenchanted and discouraged with the entire process".[1] Mr. Jones contends that this process of admissions into the law school as required by the Council has deprived him of the ability "to complete [his] professional training in Trinidad and Tobago as well as other CARICOM Member States."

The Application for special leave to commence proceedings

[5] For an individual to be allowed to commence proceedings in the Original Jurisdiction of this Court he or she must satisfy the requirements set out in Article 222 of the Treaty. This provision states:

ARTICLE 222

Locus Standi of Private Entities

[1] Mr. Jones' Affidavit at page 8 of the Record

Persons, natural or juridical, of a Contracting Party may, with the special leave of the Court, be allowed to appear as parties in proceedings before the Court where:

(a) the Court has determined in any particular case that this Treaty intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly; and

(b) the persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit mentioned in paragraph (a) of this Article, and:

(c) the Contracting Party entitled to espouse the claim in proceedings before the Court has:

(i) omitted or declined to espouse the claim; or

(ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and

(d) the Court has found that the interest of justice requires that the persons be allowed to espouse the claim.

[6] In his application for special leave, Mr. Jones contends that the proposed respondents continue to infringe the rights and benefits, intended to enure to him, contained in the Treaty in Articles 35 (acceptance of diplomas, certificates and other evidence of qualifications), 36 (prohibition of new restrictions on the provision of services), 37 (removal of restrictions on provision of services) and 46 (movement of skilled community nationals). These Articles are reproduced in the Appendix to this Ruling. His complaint, as distilled from the application and the accompanying proposed Originating Application, on which he would rely if granted special leave, is that:

a. The automatic acceptance of holders of law degrees from UWI into the law schools in the English-speaking Commonwealth Caribbean regardless of the class of degree awarded or marks obtained is discriminatory and violates Articles 35, 37 and 46 of the Treaty,

b. The requirement that holders of non-UWI degrees sit an entrance exam to fill remaining spots (if any) also impacts Article 36 and Articles 35, 37 and 46, especially in light of the fact that, i) the graduating class size from the UWI is uncapped and there exists the "very real possibility" that there will be no additional positions available; and ii) there is an agreement with Hugh Wooding Law School ("HWLS") to admit the 25 top performers from the University of Guyana while the remaining students are required to sit the entrance exams.

c. The Government of Trinidad and Tobago ("GOTT") was aware of this "longstanding discriminatory treatment, unjustified barriers to entry and restrictions on the provisions of legal services" and has failed to espouse a claim. This is evinced by a report emanating from a Task Force appointed by the Cabinet of the GOTT in 1997.

d. This discriminatory practice is highlighted in a survey conducted by The Association of Caribbean Students for Equal Access to the Legal Profession ("ACSEAL") and a Report prepared through a Survey on Legal Education in CARICOM Member States (2017-2018).

[7] The remedies Mr. Jones would seek, if allowed to commence proceedings, are declarations that (a) the automatic acceptance of UWI LLB holders to the law schools is a violation of the Treaty and/or (b) the requirement for non-UWI LLB degree holders to write an entrance examination to enter the law schools is a breach of the Treaty. He specifies that if the Court were to make either declaration the Court should "expressly indicate that non-discriminatory entry requirements be enacted, recognizing that the actual entry criteria will ultimately be left to the Respondents and/or the professional law schools." He would ask for damages and costs, as well.

The Community's Preliminary Objection

[8] On 9th August 2018, the Caribbean Community ("the Community"), pursuant to Part 23 of the CCJ Original Jurisdiction Rules 2017 ("the Rules"), filed an interlocutory application for orders that:

i. The Court has no jurisdiction to entertain a claim against the Council;
ii. COHSOD and COTED are not competent respondents /defendants; and
iii. The application for special Leave and the proposed Originating Application are manifestly ill-founded, and are accordingly, manifestly inadmissible.

[9] The Council also filed a preliminary objection pursuant to Part 23.1 of the Rules, on 13 September 2018, making similar objections to the Court's jurisdiction over the Council.

[10] It is convenient to deal first with the objection that a claim cannot proceed against COHSOD and COTED[2] because counsel for Mr. Jones accepted this as the case, although he would have the Community substituted for these Organs. The objection to proceeding against those two Organs is that they have no juridical personality and it is the Community that is possessed of that capacity, as provided by Article 228. The Court will return to Mr. Jones' proposal to replace these Organs with the Community as the proposed defendant.

[11] The second objection, that the Court had no jurisdiction over the Council, was based on the proposition that the provisions of the Treaty could not be enforced against the Council and the desired remedies could not be granted by the Court against the Council. The common position of the Council and the Community was, therefore, that the Council was not amenable to the Original Jurisdiction of the Court and cannot be made a defendant in any proceedings in that jurisdiction.

[2] COHSOD is responsible for the promotion of human and social development in the Community and, as focused in the application, shall promote the development of education through the efficient organisation of educational and training facilities in the Community; Article 17 2. (b). COTED is responsible for promoting trade and economic development of the Community and, as focused in the application, shall determine and promote measures for the accelerated development and marketing of services; Article 15 2. (d).

The Council was established by the Agreement Establishing the Council in 1971 and although the Treaty was made after the Agreement, in 2001, there is no mention of the Council or the Agreement in the Treaty. Article 10 of the Treaty identifies the entities which are the principal and other Organs of the Community and does not include the Council. Article 10 of the Treaty identifies the entities which are the principal and other Organs of the Community; Article 18 identifies its Bodies and Articles 21 and 22 its Institutions and Associate Institutions. None of these include the Council.

[12] In D*oreen Johnson v CARICAD*[3] this Court upheld a similar objection to jurisdiction in a claim brought against the Caribbean Centre for Development Administration (CARICAD), which the Court held was neither an Organ or Body of the Community nor an integral part of the Community. The Court stated[4] that Institutions and Associate Institutions of the Community are autonomous inter-governmental entities, which contribute to the achievement of the objectives of the Community but are not an integral part of the Community and proceedings cannot be commenced against them in this Court. It must be even more compelling a conclusion that proceedings cannot be commenced against the Council in this Court, as the Council is further removed from the Community, being not even an institution or associated institution of the Community.

[13] The counter by counsel for Mr. Jones to the objection to jurisdiction was to contend that the Council filed a request to be heard on the special leave application without any reservation of rights or qualifiers. On that submission, the Council "therefore attorned to the jurisdiction of the Court in this matter." The response of the Council to the argument of attornment was undeniable: the Council had sought to be heard specifically for the purpose of objecting to jurisdiction. Rather than attorning, the Council had participated only to object to the proceedings.

[14] The Court is satisfied, at this stage, that it has no jurisdiction over the Council and orders that the application for Special Leave to commence proceedings

[3] [2009] CCJ 3 (OJ)
[4] At [12] to [17]

against the Council be dismissed, in exercise of its general powers of case management in Part 19.1 (1)(k) of the Rules.

[15] As stated, the proposed claim cannot proceed against COHSOD and COTED, because they have no juridical personality. The Court must now consider, in light of the striking out of the prospective claim against the intended first respondent/defendant, the Council, whether to allow the application for special leave to commence proceedings to continue against the Community.

What remains

[16] What remedy could Mr. Jones claim in an amended intended Originating Application? In the current intended application, he would claim the declarations described in [8] above, being declarations that (a) the automatic acceptance of UWI LLB holders to the law schools is a violation of the Treaty and/or (b) the requirement for non-UWI LLB degree holders to write an entrance examination to enter the law schools is a breach of the Treaty.

[17] Without engaging with the Community's objection that the intended claims of breaches of the Treaty are manifestly inadmissible, it is nonetheless apparent that the proposed declarations speak to the operation of the Agreement, the Council and the law schools and the conduct and actions of the Council. The automatic acceptance of UWI LLB degrees is something done solely by the Council and its law schools. The requirement that others must write an entrance examination is applied solely by the Council and the law schools. Since the Court has found it has no jurisdiction over the Council (and the law schools) what could be the point of considering giving special leave to file an Originating Application against the Community, which Application would have as its object the making of either of the proposed declarations? The Community does not direct or control the Council; it does not manage or administrate the Agreement.

[18] As hinted in paragraph [2] above, the root of the problem for Mr. Jones and the many other persons in a similar position, according to the papers laid before the Court, of whom the Court must be mindful, is that the Agreement rather than the

Treaty governs the matters they wish to alter. The Agreement Establishing the Council of Legal Education is as much a treaty as is the Revised Treaty of Chaguaramas. It is not suggested that the Treaty overrides the Agreement or that the Agreement has been terminated or its operation suspended by implication under Article 59 of the Vienna Convention on the Law of Treaties ("VCLT"). Therefore, this Court must accept, the Caricom States which are parties to the Agreement must in principle continue to give full force to the Agreement, and the provisions of the Agreement which govern admission to the law schools. Thus, Article 3 of the Agreement, which provides that the Council shall give automatic admission into the law schools of UWI LL B degree holders, is not a matter of policy that the Council or the law schools can change. Article 3 would have to, and can only, be altered by the parties to the Agreement not by the Council or anyone else for that matter.

[19] The submissions of Mr. Jones and the Declarations he seeks to obtain from this Court seem to suggest that the application of Article 3 of the Agreement would not be compatible with the Treaty to the extent that such an application leads to an unjustified difference in treatment of, or discrimination between, holders of law degrees from UWI and those not from UWI. Article 30(3) or (4) VCLT, however, does not apply as the Agreement and the Treaty do not apply to the same subject-matter, but even if they did, Mr. Jones has not pointed to anything in the Treaty that would make it arguable that the application of Article 3 of the Agreement violates or could violate the Treaty. None of the Treaty provisions Mr. Jones has referred to (Articles 35, 36, 37 and 46) show even a glimmer of such a violation. Moreover, the one form of discrimination that is prohibited and targeted by the Treaty is discrimination on grounds of nationality (Article 7).

[20] It is a different question, whether Article 3 can be altered or overcome by making a claim for some relief against the Community, as to which this Court offers no view. Even more different considerations arise for Mr. Jones and the other non-preferred students in deciding whether they should go that route or should, alternatively or concurrently, seek relief in domestic, constitutional law proceedings against appropriate parties in relation to Article 3 or, indeed, the

entire regime governing professional training, qualification and admission to practice.

Dismissal rather than amendment at large

[21] In view of these considerations, the Court is satisfied that it is more efficient to dismiss the present application for special leave, rather than permit amendments that are entirely at large. This leaves it open for Mr. Jones to decide whether and how to seek the redress he claims.

[22] Accordingly, the Preliminary Objections to jurisdiction succeed and the application for special leave to commence proceedings must be dismissed.

ORDERS OF THE COURT

[23] The Application for Special Leave to commence proceedings is dismissed.

/s/ A Saunders

The Hon Mr Justice A Saunders (President)

/s/ J Wit

The Hon Mr Justice J Wit

/s/ D Hayton

The Hon Mr Justice D Hayton

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ D Barrow

The Hon Mr Justice D. Barrow

Appendix

ARTICLE 35 Acceptance of Diplomas, Certificates, and other Evidence of Qualifications

1. COHSOD, in consultation with the competent Organ, shall establish common standards and measures for accreditation or when necessary for the mutual recognition of diplomas, certificates and other evidence of qualifications of the nationals of the Member States in order to facilitate access to, and engagement in, employment and non-wage-earning activities in the Community.
2. The Member States shall establish or employ, as the case may be, appropriate mechanisms to establish common standards to determine equivalency or accord accreditation to diplomas, certificates and other evidence of qualifications secured by nationals of other Member States.
3. COHSOD shall also establish measures for the co-ordination of legislative and administrative requirements of the Member States for the participation of Community nationals in employment and for the conduct of non-wage-earning activities in the Community.

ARTICLE 36 Prohibition of New Restrictions on the Provision of Services

1. The Member States shall not introduce any new restrictions on the provision of services in the Community by nationals of other Member States except as otherwise provided in this Treaty.
2. Without prejudice to the provisions relating to the right of establishment, persons providing services may, in order to provide such services, temporarily engage in approved activities in the Member State where the services are to be provided under the same conditions enjoyed by nationals of that Member State.
3. The Member States shall notify COTED of existing restrictions on the provision of services in respect of nationals of other Member States.
4. For the purposes of this Chapter, "services" means services provided against remuneration other than wages in any approved sector and “the provision of services” means the supply of services:
    (a) from the territory of one Member State into the territory of another Member State;

(b) in the territory of one Member State to the service consumer of another Member State;

(c) by a service supplier of one Member State through commercial presence in the territory of another Member State; and

(d) by a service supplier of one Member State through the presence of natural persons of a Member State in the territory of another Member State.

ARTICLE 37 Removal of Restrictions on Provision of Services

1. Subject to the provisions of this Treaty, Member States shall abolish discriminatory restrictions on the provision of services within the Community in respect of Community nationals.
2. Subject to the approval of the Conference, COTED, in consultation with other competent Organs, shall, within one year from the entry into force of this Treaty, establish a programme for the removal of restrictions on the provision of such services in the Community by Community nationals.
3. In establishing the programme mentioned in paragraph 2 of this Article, COTED shall:

(a) accord priority to services which directly affect production costs or facilitate the trade in goods and services which generate foreign exchange earnings;

(b) require the Member States to remove administrative practices and procedures, the maintenance of which impede the exercise of the right to provide services;

(c) establish measures to ensure the abolition of restrictions on the right to provide services in respect of activities accorded priority treatment in accordance with sub-paragraph (a) of this paragraph, both in terms of conditions for the provision of services in the territories of Member States as well as the conditions governing the entry of personnel, including their spouses and immediate dependent family members, for the provision of services;

(d) take appropriate measures to ensure close collaboration among competent national authorities in order to improve their knowledge of the conditions regarding relevant activities within the Community, and

(e) require the Member States to ensure that nationals of one Member State have on a non-discriminatory basis, access to land, buildings and other property situated in the territory of another Member State for purposes directly related to the provision of services, bearing in mind the importance of agriculture for many national economies.

ARTICLE 46 Movement of Skilled Community Nationals

1. Without prejudice to the rights recognised and agreed to be accorded by Member States in Articles 32, 33, 37, 38 and 40 among themselves and to Community nationals, Member States have agreed, and undertake as a first step towards achieving the goal set out in Article 45, to accord to the following categories of Community nationals the right to seek employment in their jurisdictions:

    (a) University graduates;

    (b) media workers;

    (c) sportspersons;

    (d) artistes; and

    (e) musicians,

recognised as such by the competent authorities of the receiving Member States.

2. Member States shall establish appropriate legislative, administrative and procedural arrangements to:

    (a) facilitate the movement of skills within the contemplation of this Article;

    (b) provide for movement of Community nationals into and within their jurisdictions without harassment or the imposition of impediments, including:

        (i) the elimination of the requirement for passports for Community nationals travelling to their jurisdictions;

        (ii) the elimination of the requirement for work permits for Community nationals seeking approved employment in their jurisdictions;

        (iii) establishment of mechanisms for certifying and establishing equivalency of degrees and for accrediting institutions;

(iv) harmonisation and transferability of social security benefits.

3. Nothing in this Treaty shall be construed as inhibiting Member States from according Community nationals unrestricted access to, and movement within, their jurisdictions subject to such conditions as the public interest may require.
4. The Conference shall keep the provisions of this Article under review in order to:

(a) enlarge, as appropriate, the classes of persons entitled to move and work freely in the Community; and

(b) monitor and secure compliance therewith.