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Case No: CO/13044/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2013

Before :

THE HONOURABLE MR JUSTICE MALES

- -

Between :

The Queen on the application of Hazim Mustafa	**Claimant**
- and -	
The Office of the Independent Adjudicator for Higher Education	**Defendant**
- and -	**Interested Party**
Queen Mary, University of London	

- -
- -

Mr David Lawson and **Mr Leon Glenister** (instructed by **Fisher Meredith LLP**) for the **Claimant**
Ms Aileen McColgan (instructed by **E J Winter & Son LLP**) for the **Defendant**

Hearing dates: 17th May 2013

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Approved Judgment

Mr Justice Males :

Introduction

1. The Harvard academic and songwriter Tom Lehrer recommended plagiarism as the route to academic success, wealth and fame, but his tongue was firmly in his cheek. For universities and other educational bodies plagiarism is no laughing matter, especially with the vast scope for such activity presented by the internet. Nor is it for those students who are accused of having committed plagiarism, perhaps wrongly, and who may wish to appeal against any such finding. The question raised by this case is whether a university's decision that a student has committed plagiarism is final or whether it can form the subject of a complaint to the Office of the Independent Adjudicator for Higher Education ("the OIA").

2. During the academic year 2007-8 Mr Hazim Mustafa was a student at Queen Mary University of London studying for a Master's degree in project management. One element of the course required him to submit an essay on the risk management of a large technology based project. Mr Mustafa submitted an essay entitled "Identification of risks for Dubai Metro", but this essay was awarded no marks on the grounds that parts of it were plagiarised. Aggrieved by that decision, Mr Mustafa appealed unsuccessfully to an examination offence panel of the university. He appealed further, again without success, and eventually made a complaint to the OIA. The OIA rejected the complaint on the ground that the existence (and if so, the extent) of plagiarism was a matter of academic judgment, with the consequence that the university's finding of plagiarism could not form the subject of a complaint to the OIA.

3. This claim for judicial review, brought with the permission of Sir Stephen Sedley, challenges the decision of the OIA to reject the complaint on this ground. The issue on which permission was given was "whether the determination of plagiarism is *necessarily* a matter of judgment and so always outside the OIA's jurisdiction". However, in addition to that issue of general principle the question also arises whether, even if there may be cases where a determination of plagiarism need not involve an academic judgment, this is or may be such a case.

4. Mr Mustafa had other complaints about his treatment by the university, but those complaints were rejected by the university authorities and by the OIA. Permission to challenge the OIA's decision relating to those other matters was refused.

The legislation

5. The OIA is designated pursuant to section 13 of the Higher Education Act 2004 as the operator of a scheme for the determination of "qualifying complaints" against universities and colleges including Queen Mary. "Qualifying complaints" are defined by section 12, which provides as follows:

> "**Qualifying complaints**
>
> (1) In this Part 'qualifying complaint' means, subject to subsection (2), a complaint about an act or omission of a qualifying institution, which is made by a person –

(a) as a student or former student at that institution, or

(b) as a student or former student at another institution (whether or not a qualifying institution) undertaking a course of study, or programme of research, leading to the grant of one of the qualifying institution's awards.

(2) A complaint which falls within subsection (1) is not a qualifying complaint to the extent that it relates to matters of academic judgment."

6. The rules of the scheme established by the OIA provide that:

"3. The Scheme does not cover a complaint to the extent that:
…

3.2 it relates to a matter of academic judgment."

7. Accordingly the OIA cannot consider a complaint to the extent that it relates to matters of academic judgment. The critical question, therefore, is whether Dr Mustafa's complaint to the OIA that the university had wrongly found him guilty of plagiarism related to a matter of academic judgment. That would necessarily be so if a determination that plagiarism has been committed is always a matter of academic judgment, but it would also be so if on the facts of this case the university was making an academic judgment.

Background

8. Mr Mustafa's course required him to submit one piece of coursework and to sit seven exams at the end of the course. The coursework, worth 30% of the total marks, was meant to be undertaken in groups but unfortunately Mr Mustafa was unable to find a group to join and therefore had no alternative to working on his own. He was, however, allowed extra time to complete the work. Even so, he was unable to submit a finished essay by the deadline of 9 April 2008 and handed in what he accepts was an incomplete piece of work about the oil industry in Vietnam. A week later, he went to see the course lecturer, Dr Keith Arundale, who told him that the essay was not referenced and that it failed to address the tasks set.

9. Mr Mustafa's exams began on 1 May 2008. At a meeting on 8 May with Dr Ray Smith (the head of the faculty) and Dr Stuart Peters (his supervisor) Mr Mustafa was told that the essay which he had submitted would be treated as a draft and that he would be allowed until 16 May 2008 to submit a final version. Mr Mustafa decided, however, to write about the Dubai metro system instead of the Vietnam oil industry. That meant he had to start all over again and complete the work within eight days, but that was his choice. He submitted the final version on that day.

10. This work had to be done during the period when Mr Mustafa was also sitting exams. He failed those exams, he says because the work required to be done to complete his coursework did not allow time for proper revision and because he was exhausted,

stressed and depressed at the limited time he had been given to submit the final version of his essay.

11. On 29 June 2008 Mr Mustafa received an e-mail from Dr Smith, stating that he had failed six of his exams and that his coursework was being reviewed for suspected plagiarism. On 10 July 2008 he was told by the assistant academic registrar that:

> "The specific allegation is that 32% of your essay matches with a website on railway technology and that other sections of your essay match other websites without appropriate referencing."

12. At a meeting on 18 July 2008 it was explained to Mr Mustafa that his essay included extensive quotation without the use of quotation marks. Mr Mustafa's response was that although he had not used quotation marks, he had made it sufficiently clear by the use of square brackets referring to sources at the end of paragraphs that he was indeed quoting from them. He referred to coursework by other students which, he said, had contained a similar amount of quotation, but which had not attracted an allegation of plagiarism.

13. In September 2008 Mr Mustafa resat the exams which he had failed, but he failed them again. He says that this was because they were very close together, and he was stressed and depressed.

14. An examination offence hearing took place on 27 January 2009. The panel asked whether extensive but nevertheless referenced quotation constituted plagiarism. Reference was made to the university's Academic Regulations for the year 2007-8, referred to below.

15. The examination offence panel upheld the decision that Mr Mustafa had committed plagiarism. The minutes of the hearing include the following passage:

> "The Panel noted that the essay read as a continuous piece of narrative and without the proper use of quotations it was not possible or very difficult to determine which text was taken from an external source and which was Mr Mustafa's own work. This was especially misleading as it was now evident that the text had been quoted verbatim.
>
> Mr Mustafa agreed with this point however he stated in response that as this section of the essay was the introduction concerning the background of the client and contained no statistical data he did not need to reference it in the same manner as the main body. …"

16. The panel's decision was recorded as follows:

> "The panel were content that Mr Mustafa had been provided with sufficient guidance in regards to the plagiarism offence and that he had not made effective use of the guidelines available to him. When reading the dissertation it was not possible to determine quotes from sources. The Panel

> summarised that it was standard academic practice to ensure that any text included in a piece of work that was not your own should be clearly put into quotations [*sic*] marks.
>
> Upon consideration of the evidence presented to it and the representations of the Assistant Academic Registrar and Mr Mustafa, the Panel agreed that the allegation of plagiarism on the part of Mr Mustafa was proven and that an examination offence had been committed."

17. It is Mr Mustafa's case that these minutes, produced some time after the hearing, do not accurately or at any rate fully reflect what happened before the panel. They do not refer to the discussion about whether extensive but referenced quotations constituted plagiarism. I see no reason to doubt that such a discussion occurred. Equally, however, I see no reason to doubt that the minutes accurately record the reasons for the panel's decision.

18. Mr Mustafa appealed on the ground that the panel had misdirected itself and that although he had quoted extensively in his essay, he had made a proper acknowledgement that he was doing so. Accordingly, he maintained that even if the essay could have been regarded as being of poor academic quality, it could not properly be regarded as plagiarism. He contended also that the penalty imposed, namely failure in the relevant module, was unfair.

19. However, this appeal was dismissed. The Chair of the appeal panel, Professor Paul Wright, commented that he could find no evidence of misdirection. He referred to the passages from the minutes set out above, and continued:

> "The appeal therefore seems to rest on the definition of what is proper acknowledgement and the Panel, correctly in my view, summarised 'that it was standard academic practice to ensure that any text included in a piece of work that was not your own should be clearly put into quotation marks'. I should add that this was not a question of a patch-work of properly referenced quotations but large sections of text lifted directly from the referenced web sites. Indeed, within the plagiarised sections, occasional sentences appear in quotations, presumably quotes in the original work that were then copied verbatim."

20. Mr Mustafa then submitted his complaint to the OIA on 15 June 2009.

21. I should add for completeness that Dr Mustafa's complaint to the OIA also included other complaints, including that he should not have been asked to complete what was supposed to be a group work assignment on his own; that he had been discriminated against as other students had referenced their work in the same way as he had; that he had been given an impossible deadline in the middle of the exam period; and that the university had treated him unfairly in failing to treat the pressure which he was working under to complete his coursework as an extenuating circumstance, which ought to have been taken into account when marking his exams. So far as the plagiarism issue was concerned, his complaint was expressed as being that the university had "applied a definition of plagiarism that is contrary to standard academic

practice" -- a complaint which certainly sounds as if it involves an exercise of academic judgment.

The Academic Regulations

22. The definition to which Mr Mustafa was referring was that contained in the university's Academic Regulations for the year 2007-8. These included Regulation 2.74, which emphasised that work submitted must be the candidate's own work and that quotations must be properly attributed. It provided:

> "Projects, dissertations, and all material submitted for assessment, including coursework which does not count towards the final mark for module, shall be the candidate's own work (except where group work specifically forms part of the assignment). Quotations from the published or unpublished work of other persons must always be attributed, both at the appropriate point in the text, and in the bibliography at the end of the piece of work. Extensive quotations, close paraphrasing, copying from the work of another person, including another student, or using the ideas of another person, without proper acknowledgement, may constitute plagiarism, which is an examination offence, and shall be dealt with in accordance with the Regulations Covering Examination Offences."

23. As can be seen, this regulation suggests that "extensive quotations" may constitute plagiarism, at any rate if made "without proper acknowledgement". There was some debate as to whether the words "without proper acknowledgement" qualify "extensive quotations", but in my judgment they clearly do. Extensive quotations *with* proper acknowledgement may indicate poor scholarship (although that is evidently a matter of academic judgment) but cannot sensibly be regarded as plagiarism.

24. In my judgment there is nothing in the record of the panel's decision or that of the appeal panel to suggest that either body considered that "extensive quotations" would themselves amount to plagiarism even if properly acknowledged. On the contrary, the observation of Professor Wright that "the appeal therefore seems to rest on the definition of what is proper acknowledgement" demonstrates that the issue was whether there was proper acknowledgement and not whether there would be plagiarism even if quotations were properly acknowledged.

25. It is, however, worth noting that according to the university's Regulations, plagiarism need not involve a deliberate intention by the student to present another's work as his own. This was stated expressly in a later version of the Regulations, but at all times the allegations against Mr Mustafa were that he had presented the information lifted from the various websites as if it were his own, regardless of any intention to mislead.

26. The Student Handbook provided to students contained this section on plagiarism:

> "**Plagiarism**

> Plagiarism means copying what somebody else has written, or taking their ideas, and trying to pass it off as your own work. …
>
> **What is Plagiarism?**
>
> 1. If you quote a source (a book, an internet site, etc) word-for-word and don't enclose the words in inverted commas, this is plagiarism. It doesn't matter if it's only a two- or three-word phrase or expression; it is still plagiarism, and you may be picked up for it. …
>
> 2. You will sometimes want to quote long passages (ie. more than a single line or so) from some source in your work. The way to do this is by indenting the quoted passage (ie. moving it as a block to the middle of the page). If your quotation is long enough to need indenting, you don't need to use inverted commas as well; the indentation is enough to indicate that you are quoting someone else's words, and you won't be accused of plagiarism; but see further point 4. below.
>
> 3. If you paraphrase (ie., express in your own words) a source, you don't need to use inverted commas at all, so long as the words you use are entirely your own; …
>
> 4. For *all three* of these methods are quoting for paraphrasing sources you use in your own work, there must be a reference. What this means is that you must indicate, ideally in a footnote, where your quotations, or are the ideas in your paraphrase, come from. …"

The OIA decision

27. The decision of the OIA was issued on 20 September 2010. It was made by the Adjudicator, Mr Robert Behrens, who found that the complaint was partly justified. In relation to the plagiarism issue, he stated at paragraph 33 that:

> "Whether or not plagiarism exists (or the extent of the plagiarism) is a matter of academic judgment, with which the OIA cannot interfere. However, the setting of the penalty is not a matter of academic judgment. We can, therefore, consider whether the University properly applied its procedures and whether the penalty applied was reasonable and proportionate."

28. Despite this, the Adjudicator did consider at some length the university's regulations relating to plagiarism and the guidance provided to Mr Mustafa as to the use of quotation marks and referencing. He concluded that, although there may have been some inconsistency in the guidance provided to students generally, Mr Mustafa had been advised by Dr Arundale to put quotes within quotation marks, and therefore had

not been disadvantaged by any such inconsistency. However, in the course of dealing with this issue the Adjudicator repeated at paragraph 47 that:

> "The EOP's decision that the allegation of plagiarism was proven is a matter of academic judgement of the College which falls outside the scope of my review."

29. The Adjudicator then dealt, again in some detail, with Mr Mustafa's complaint that the university had misinterpreted the definition of plagiarism in its own regulations. Mr Mustafa's argument was that the university had treated "extensive quotations" as amounting to plagiarism even if those quotations were properly acknowledged, and that this was a misinterpretation of the regulations. The Adjudicator rejected this argument, concluding that Mr Mustafa was not found to have committed plagiarism for having used extensive quotations, but because he had not properly acknowledged the quotations which he had used. However, the Adjudicator recommended that the regulations should be made clearer, noting that a later version had adopted different punctuation, which did make clear that (for the purpose of the regulations and contrary, in my view, to normal usage) "extensive quotations" could by themselves constitute plagiarism. It was because of what the OIA regarded as a lack of clarity in the 2007-8 regulation that the complaint was found to be partly justified, although this did not affect the university's decision in Mr Mustafa's case in view of the basis on which he had been found to have committed plagiarism.

30. For what it is worth, I agree with the university that the 2007-8 regulation (in contrast with the regulations in both earlier and later years) was clear on this point in stating that extensive quotation would amount to plagiarism only if the quotation was not properly acknowledged. It seems to me that it was the later version of the regulation which potentially re-introduced a lack of clarity by equating plagiarism with the extensive use of acknowledged quotations. I note, however, that in the 2011-12 year the reference to "extensive quotations" was deleted altogether.

The application for permission

31. This claim for judicial review was issued on 20 December 2010. Permission was refused on paper by Nicola Davies J and again after an oral hearing by HHJ Thornton QC, but Mr Mustafa appealed against that refusal to the Court of Appeal. Sir Stephen Sedley granted permission, but on a limited basis as follows (which, it is fair to say, does not altogether reflect the way in which the case had been put by Mr Mustafa who at that stage was representing himself):

> "1. I think a viable point of law may be lurking here, namely whether the determination of plagiarism is *necessarily* a matter of academic judgment and so always outwith the OIA's jurisdiction. The OIA (paras 119 and *passim*) pretty clearly considers that it is.
>
> 2. While this must commonly be the case (e.g. re what amounts to an excessive quotation) there must also be cases where the allegation of plagiarism demands no academic judgment at all but is, for example, literal (e.g. non-use of inverted commas or

> indents) or technical. In such cases there is no apparent reason why the OIA's judgment should be excluded.
>
> 3. Whether the allegation … was justiciable by the OIA may accordingly require scrutiny of Dr Mustafa's text. I take this to have been the document at … which clearly does not use quotes or indents, but which equally clearly attributed passages to 4 outside sources listed at the end. If this is the entirety of the shortcoming it can well be said to need no academic judgment to identify it. The question was whether it fell within the college's definition of plagiarism. As to this, the partially adverse finding of the OIA about the lack of clarity in QMUL's regulations … may have a bearing.
>
> 4. I think this issue is arguable and grant permission accordingly. …"

32. It follows from the limited scope of this grant that regardless of the outcome of this claim for judicial review, Mr Mustafa will not be awarded the degree for which he was studying. Nevertheless, he is concerned, if he can, to have set aside the finding of plagiarism made against him.

Mr Mustafa's essay

33. Mr Mustafa's essay was submitted with a cover sheet which stated, above his signature, that:

> "I confirm that the contents of this report are entirely my own work and that nothing has been included from other sources without acknowledgement/reference."

34. The essay itself consisted of nine pages of single spaced type, with almost no passages in quotation marks and no indents. At the end of most paragraphs on the first four pages there were endnotes (a number in square brackets, either "[1]" or "[4]"), although in one paragraph dealing with "Financial Structure" there were references to either "[1]" or "[2]" after some but not all individual sentences. After the fourth page, there were no further such endnotes. Following the text of the essay was a table identifying various risks, their mitigation, and who was responsible for them, and finally, under the heading "References", four websites were identified. Thus the endnotes were references to these websites. There was, however, no reference in the text to the third website mentioned.

35. Simply by way of illustration, I quote the paragraph dealing with financial structure:

> "The total cost of the project is estimated to be $3.4bn U.S. Mashreqbank and Mizuho banks have signed a joint agreement to provide facility to be contracting consortium that won the contract to build the Dubai Metro. The sponsors of the project are the Roads & Transport Authority (RTA), The contracting consortium consists of the Japanese Obayashi, Kajima and Mitsubishi corporations and the Turkish, Yapi Merkezi [1], The

> consortium won Dhs12.45 billion Metro contract and also won a Dhs1.88 billion contract to carry out maintenance of the project for 15 years [1]. The driverless fully automated trains will be supplied by Kinki Sharyo under a US$456.2m contract to supply 385 cars [1]. In May 2007, Dubai Roads and Transport Authority (RTA) signed the agreement with the international consultant, Parsons Brinkerhoff Parsons Brinkerhoff Parsons Brinkerhoff International [*sic*] to carry out consultancy Services including the initial designs of Dubai Metro Purple line. The Design is expected for completion in June 2008. Parsons Brinkerhoff will prepare the initial designs to serve the airport & passengers, designed the interchanges for the Purple Line with the airports and both the Red & Green Lines, set the technical specifications of the project and specify the optimum technology for use in the metro, and to tender the project for construction and evaluate the bids [2]."

The university's procedure for detecting plagiarism

36. Following the grant of permission, Queen Mary has provided further information about its procedures, first for detecting potential plagiarism and then for determining whether such plagiarism in fact exists. In common with other higher education institutions it uses specialist software (the "Turnitin" programme) to compare students' work with the contents of a database of published material and other papers. The comparison results in "originality reports" which give figures, in percentage terms, for the similarities of a student's work to the contents of the database. Such reports are reviewed by academic or administrative staff to identify any cases of concern, which are then considered by academics, either those responsible for marking or in some departments a dedicated officer, for a decision. As I understand it, and in accordance with the university's definition of plagiarism, no attempt is made to determine whether the copying was intended to mislead.

37. Thus, although some elements of the procedure may be more or less mechanical, the decision whether a student's work constitutes plagiarism is always made by an academic with knowledge of the subject in question and with the ability to apply that knowledge to the student's work. The university's view is that the determination whether plagiarism exists always needs to be made by a person with appropriate academic experience and represents an exercise of academic judgment.

The parties' submissions

38. On behalf of Mr Mustafa, Mr David Lawson submitted, in outline, that:

    (1) whether plagiarism exists is not always a matter of academic judgment;

    (2) whether Mr Mustafa's work amounted to plagiarism was not a matter of academic judgment, but simply a matter of applying the university's definition of plagiarism to his essay (or, as Mr Lawson put it, applying rules to facts); and

(3) the opening sections of Mr Mustafa's essay expressly cited the sources relied on, which demonstrated that he was not seeking to pass off the contents of the paragraphs in question as his own work, or at any rate the OIA could properly so conclude.

39. Ms Aileen McColgan for the OIA submitted, again in outline, that:

(1) whether a piece of work contains plagiarism will always entail a question of academic judgment, however mechanical some aspects of the exercise may appear to be;
(2) in any event, the examination offence panel's decision in this case was a matter of academic judgment.

Review of the authorities

40. *Clark v University of Lincolnshire & Humberside* [2000] 1 WLR 1988 stated the general principle that issues of academic judgment are not justiciable in the courts. Sedley LJ gave some examples of such issues at [12] which included what mark a student ought to be awarded, which must be the paradigm case of an academic judgment, and also referred at [6] to a question whether a university appeal board had misconstrued the meaning of plagiarism as an issue which would require the court to "travel deep into the field of academic judgment". Lord Woolf MR said at [29]:

> "The court, for reasons which have been explained, will not involve itself with issues that involve making academic judgments. Summary judgment dismissing the 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."

41. There is, therefore, an exclusion area of "academic judgment" into which the courts will not intrude. The Court of Appeal did not, and did not need to, define the limits of that area. I was referred to three subsequent cases in which the exclusion area has been further considered.

42. In *S v Chapman* [2008] EWCA Civ 800, [2008] ELR 603 the disabled claimant claimed damages against the headmaster and board of governors of the special school which he had attended, claiming that they had negligently failed to provide him with an appropriate education. He said that the timetable and curriculum provided for him were not appropriate for maximising his potential and meeting his special educational needs. This claim was struck out. After referring to *Clark* and the decision of the judge at first instance that those matters were not justiciable, Ward LJ said:

> "45. In my judgment that reasoning applies here. I see no reasonable prospect of success for this claim. Father acknowledges that these issues give rise to questions of academic judgement on which opinions will differ. This is virtually acknowledged in the particulars of claim itself:
>
> > 'Instead of introducing [W] to a settled routine the School failed to ensure that his timetable was finalised

> until several weeks after the start of the term. Constant changes to the… timetable occurred as a result, which impacted adversely on [W]'s behaviour…'
>
> 46. Yet when there was a regular routine of the kind described by father to us in argument, the school is criticised. Since it is conceded that these questions give rise to a difficult balance of judgment on which opinions may legitimately differ, I cannot see how the claimant will ever satisfy the *Bolam* test (*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583) and establish that the school did not act in accordance with a practice accepted as proper by responsible bodies skilled in teaching autistic children."

43. It seems to me that there are two strands of reasoning here. The first was that the question of what measures were required in order to provide an appropriate education was a matter of academic judgment not justiciable in the courts. The second was that there was on the facts no prospect of the claimant satisfying the *Bolam* test. That second strand, however, leaves open the possibility that on appropriate facts (e.g. if the experts agreed that the academic judgment made by the particular school was outside the range within which views might reasonably differ) such a claim might be entertained and might succeed, notwithstanding that the criticism of the school was a criticism of an academic judgment made in good faith. On the facts of *S v Chapman*, however, it was unnecessary to explore further whether there was any tension between these two strands of reasoning.

44. In *Moroney v Anglo-European College of Chiropractic* [2008] EWHC 2633 (QB), [2009] ELR 111 the claimant attempted to present what was essentially a challenge to the marks awarded to him in other ways, as irregularities in the application of the defendant college's appeal regulations. Applying *Clark,* Underhill J struck out the claim, observing at [26] that:

> "I do not therefore think that it is even arguable that the mark was perverse or given in bad faith. It may have been harsh, but that is another matter: once it is established that the mark was given in the exercise of a bona fide judgment, it is incapable of being challenged in this court (and also, under the appeal regulations, by way of internal appeal). I note that a challenge to a mark of zero was held to be non-justiciable on essentially these grounds in *Clark* …"

45. Finally, in *Abramova v Oxford Institute of Legal Practice* [2011] EWHC 613 (QB) the claimant who had failed her professional exams brought a claim under section 13 of the Supply of Goods and Service Act 1982 alleging a failure of care and skill by the defendant college in the way it prepared her to take the exams and gave or failed to give her feedback following the taking of mock papers. The defendant argued that these claims were not justiciable because they required the court to evaluate academic judgments, which the court was not equipped to do. Burnett J referred to *Clark* and affirmed the principle that the court was not well placed to engage in questions which go to academic merit, but held at [58] that the claim did not infringe this principle:

> "The statutory mechanisms in place, which enable students to question the results of examinations have become more elaborate in the intervening 11 years. But the essence of Lord Woolf's point that a Court is not well placed to engage in questions which go to academic merit remains good law. That said, I do not consider that the claimant's attack of OXILP in this claim engages academic judgement in the sense being discussed by Lord Woolf. She is suggesting that the teaching was lacking in reasonable skill and care, rather than basing a claim on a disagreement about the outcome. She is not suggesting that OXILP should have awarded her a pass. Albeit perhaps reluctantly, she is constrained to accept that she failed the course because she failed Property Law and Practice three times. The classic example of an argument concerning academic judgement would arise if a student sought to suggest that his papers should have led to the award of a first class degree rather than a 2:1. That is a debate in which a court would be very reluctant to engage. But that is not this case. It is common ground that there was a contract between the claimant and OXILP. The claimant paid the course fee and OXILP agreed to provide the course, together with certain books and materials. Section 13 of the Supply of Goods and Services Act 1982 implied a term that the educational services would be provided with reasonable care and skill. The effect of that term was to imply a term that the educational services would be provided without negligence."

46. However, the claim failed on the merits.

47. It seems probable that the statutory mechanisms to which Burnett J referred included the Higher Education Act 2004 and the establishment of the OIA, with its exclusion of complaints to the extent that they relate to matters of academic judgment. The court's general approach to review of OIA decisions was considered in *R (Siborurema) v Office of the Independent Adjudicator* [2007] EWCA Civ 1365, where it was held that the OIA is subject to judicial review, but that "the court should recognise the expertise of the OIA and is likely to be slow to accept that his choice of procedure was improper. Similarly, I should not expect the court to be easily persuaded that its decision and in consequent recommendation was unsustainable in law" (see Moore-Bick LJ at [70]). This was not, however, a case where the OIA's jurisdiction was in issue. While the courts will respect the decisions made by the OIA on matters within its jurisdiction, this ruling does not deal with how the courts should approach a case where the issue is whether the exclusion in section 12(2) applies.

48. The only authority to which I was referred which considered the scope of the statutory exclusion of matters of academic judgment in section 12(2) of the 2004 Act was *R (Cardao-Pito) v Office of the Independent Adjudicator* [2012] EWHC 203 (Admin), a decision of HHJ Gilbart QC. The complaint made by the claimant included allegations about the supervision he had received, alleged bias or prejudice against him and the mark awarded for his research paper. Judge Gilbart addressed the extent to which these complaints could be considered by the OIA as follows:

> "96. … It is clear to me that some part at least of those complaints was inadmissible. The actual marks awarded, and the choice of examiner, can only relate to matters of academic judgment, and are thus outside the remit of the OIA scheme. But it does not follow that the effect of his supervisor's conduct upon him, which includes the effect upon his performance in his research paper, is excluded from consideration. In the language of the Rules
>
> 'The scheme does not cover a complaint to the extent that (3.2) it relates to a matter of academic judgment.'
>
> 97. In my view, that is intended to exclude appeals where the central subject matter of the complaint is a dispute about an academic judgment. Typical examples would be those whose substance is to dispute an academic assessment of the quality of a piece of work, or where issues are raised about the performance of a student in tutorials or seminars. But that does not serve to exclude complaints which do not relate to such a dispute, albeit that its subject matter can have an *effect* on the ability of the student to pursue his or her course of study. It cannot be doubted that misconduct, omissions or failures by an HEI which adversely affect a student are subject to the scheme. It would be extraordinary if it could exclude consideration of misconduct or failures by the HEI simply because their effects showed up in a poor performance of the student in his/her coursework or examinations. The claimant's complaint about the conduct of his supervisor, and of its effect upon his ability to write his research paper, was not a complaint which related to a matter of academic judgment. It was one which related to the conduct of an academic, which is a quite different question. The fact that it had an effect on the marking given to his paper is not a question related to a matter of academic judgment within the ambit of the exclusion in Rule 3.1."

Discussion

49. Just as the courts have identified the existence of issues of academic judgment which are non-justiciable, so the statute contains an exclusion of certain kinds of complaints, which the OIA is prohibited from considering. The cases subsequent to *Clark* have confirmed the existence of an area of non-justiciability for the courts and have affirmed that a paradigm case of academic judgement is the question of what mark to award. They have also been cautious in determining what constitutes an exercise of academic judgment, lest the area of non-justiciability be spread too wide, with the consequence that there may be no remedy for what are really breaches of contract or other civil wrongs. Otherwise, and not surprisingly, the extent of the area of exclusion remains undefined. It will have to be considered case by case, with the possibility that nice questions may arise, the answers to which will no doubt be affected to some extent by whether the issue raised is one which the court regards itself as competent to determine.

50. So far as the OIA is concerned, however, the question is one of statutory interpretation, with an absolute prohibition on complaints which are excluded from the definition of "qualifying complaint" by section 12(2). Mr Lawson submitted that the exclusion should be narrowly construed, as it represents an exclusion from what is intended to be a broad and general scheme to deal with complaints, and further that the statutory prohibition should be co-extensive with the area of non-justiciability accepted by the courts, as it would be odd if there are complaints which the courts can consider but the OIA cannot (or *vice versa*). In my judgment there is force in these submissions, but it is unnecessary to decide in this case how far they should be accepted.

51. The exclusion of OIA jurisdiction contained in section 12 of the Act and repeated in rule 3 of the OIA's rules applies "to the extent that it [the complaint] relates to matters of academic judgment". This does not exclude in its entirety any complaint which involves a matter of academic judgment, but does so only "to the extent" that the complaint "relates to" such a matter. I respectfully agree with Judge Gilbart that the exclusion applies where the central subject of the complaint is a dispute about an academic judgment and that complaints where such disputes are peripheral are not intended to be excluded. This is a helpful way of looking at the matter, though it is always preferable to apply the words of the statute rather than to gloss them. Questions may arise, therefore, as to the extent to which the OIA can consider a complaint which does involve a matter of academic judgment, but where the correctness of that judgment is not a central issue. An example may be a complaint that a finding of plagiarism had been reached by a process which was unfair. Indeed the OIA did consider -- and rejected -- Mr Mustafa's complaint that the finding of plagiarism against him was unfair because other students had done what he had.

52. Obviously, the exercise of academic judgment does not encompass everything which academics do, and not all judgments which academics have to make will qualify as academic judgments. The exclusion applies only to those matters which involve the exercise of a certain kind of judgment which, beyond saying that it is "academic", the statute does not define. It is, however, the nature of the judgment which determines whether the judgment qualifies for the label "academic", and not whether the decision is easy or difficult. But there must still be an exercise of judgment. That said, the courts have at least been willing to consider whether an academic judgment was made *bona fide* or whether it was perverse (see the passage from *Moroney* cited above), and it may be that these qualifications are also implicit in the exclusion in section 12(2) of the 2004 Act.

53. When such questions do arise, they will go to the jurisdiction of the OIA. The OIA has a duty to consider those complaints which fall within the definition of "qualifying complaint" and cannot consider those which do not. The role of the court, therefore, will be to determine one way or the other whether or to what extent the complaint is excluded from consideration by the OIA by virtue of section 12(2), and not merely to review the OIA's decision on that point for rationality. However, although such questions will no doubt arise and may present difficulties, in my judgment the present case does not require exploration of the outer limits of the area of exclusion and the broad issue of principle identified by Sir Stephen Sedley does not in truth arise.

54. To my mind, it is reasonably clear that the question whether plagiarism has been committed often (and perhaps usually) will require an exercise of academic judgment,

but that it need not necessarily do so. Take the case, for example, where a student lifts wholesale an article from the internet which he presents as his own work without attribution or other acknowledgement. The computer programme will demonstrate 100% copying and no judgment is required, academic or otherwise, in order to determine that there has been plagiarism. It may be that such a case will be referred to an academic to decide what to do, but that will be a decision on what to do about the plagiarism and not a determination whether plagiarism has taken place – or even if it is, it is not a determination which requires any exercise of judgment.

55. It is unnecessary to consider in this case whether a decision on penalty relates or may relate to a matter of academic judgment. The OIA decided that it did not, and therefore that it could consider the penalty imposed. I should not necessarily be taken to agree with that view and would prefer to reserve my opinion. It seems to me that a decision as to what penalty it is necessary to impose in order to maintain the integrity of academic qualifications at the institution concerned may be said, at least in some senses, to require an exercise of judgment which can properly be described as academic. I recognise, however, that such a construction of the statutory exclusion is rather wide. As it is, however, the OIA upheld the university's decision on penalty and that aspect of its decision is not challenged.

56. Once the possibility is accepted that some decisions that plagiarism has been committed may not require an exercise of academic judgment, the question arises whether the OIA's decision is tainted by an error of law. If the OIA had decided that it could not consider the complaint merely because it involved an allegation of plagiarism, without considering whether determination of that allegation related to a matter of academic judgment, that would have been an error of law. However, I do not regard the OIA as having so decided. Its decision, as I read it, was not that *any* determination of whether plagiarism existed was *necessarily* a matter of academic judgment, but that on the facts *this* particular determination was.

57. Sir Stephen Sedley referred to paragraph 119 of the OIA decision as suggesting that the OIA considered that the determination whether plagiarism had been committed was necessarily a matter of academic judgment in every case. That paragraph was contained in a section of the decision in which the adjudicator responded to Mr Mustafa's comments on a draft decision which had been sent to him. It reads as follows:

> "119. As Ms Mitchell [representing Mr Mustafa] noted, the OIA considered that the Academic Regulations as supplemented by the Student Guide 2007/08, indicated that the lack of quotation marks to identify sources constituted plagiarism. It is not for the OIA to consider whether the Academic Regulations were in accordance with purported commonly accepted academic conventions because this is a matter of academic judgment which falls outside the scope of the OIA's review. In paragraphs 43 to 61 above, the OIA found that the College upheld the allegation of plagiarism on the basis that it was not possible to determine the quotes from the sources and that it was standard academic practice to ensure that any text that was not the student's own should be clearly put in quotation marks. I note that in both the Stage 1

> Plagiarism Appeal and the Stage 2 Plagiarism Appeal Ms Mitchell, Mitchell acknowledged that the extended quotations were not contained within quotation marks nor were they indented. The OIA considers that the determination of plagiarism involves an academic analysis of the student's work and that the determination of plagiarism is a matter of academic judgment which falls outside the scope of the OIA's review. The OIA therefore was unable to review whether the College's finding of plagiarism was reasonable in the circumstances. We note in Ms Mitchell's letter to the OIA dated 30 September 2009 that she recognised the element of academic judgment in the determination of plagiarism when she said: 'Turnitin UK identifies similiarities between texts, it does not detect plagiarism. Turnitin originality reports need to be interpreted by members of academic staff...'."

58. This is not, in my judgment, a decision that a determination whether plagiarism exists must always and inevitably involve an exercise of academic judgment, but a decision which was specific to the facts of this case.

59. Even if my interpretation of the OIA decision is wrong, however, and it does proceed on what I have held to be the wrong basis that such a determination necessarily involves an exercise of academic judgment, that is not the end of the matter. There would be no point in quashing the decision for error of law if on the facts the only possible conclusion is that the university's determination in this case did indeed involve an exercise of academic judgment -- or indeed, since the decision is for the court and not a decision for the OIA subject to review for rationality, if that is the conclusion which I reach. In that event, the error of law would be immaterial.

60. I do consider that the university's determination involved an exercise of academic judgment, the correctness of which is central to the complaint which Mr Mustafa wishes the OIA to consider, and indeed (if contrary to my view, this is the test) that this is the only possible conclusion. In order to explain that conclusion, it is necessary to focus on the nature of the issue which had to be determined. The issue here was not whether Mr Mustafa had lifted sections of his essay verbatim from the websites listed as his references. He admitted that he had. Nor was it whether he had set out such sections as quotations by using quotation marks or indents. He did not suggest that he had and it was obvious that he had not. Nor indeed was it whether "extensive quotations" with proper acknowledgement could constitute plagiarism. While that issue appears to have been raised in the course of argument, it was not the basis on which the case was decided. It is of course not at all unusual for the significance of points which feature in argument to fall away once the decision comes to be made.

61. Rather, the question was whether there had been a "proper acknowledgement" of what Mr Mustafa was doing, by means of the numbers in square brackets at the end of the paragraphs in question. This was precisely the issue correctly identified by Professor Wright as being the issue on which Mr Mustafa's appeal from the examination offences panel depended. In order to determine that issue it was necessary to have knowledge of academic conventions for making such acknowledgements and to apply that knowledge to what Mr Mustafa had done in order to reach a decision as to how these endnotes should be understood. It required consideration in the light of such

conventions of whether the endnotes were meant to signify that some or all of the preceding paragraph was a verbatim quotation from the reference cited or merely (as would be a common use of footnotes or endnotes) that the information contained in the paragraph had been derived from the referenced source. That required an exercise of judgment and the nature of that judgment was academic. Indeed a phrase such as "proper acknowledgement", which was the phrase used in the university's regulations, is inherently likely to involve an exercise of judgment.

62. Mr Lawson submitted also that it was significant that the endnotes were contained in paragraphs of an introductory or factual nature, and that the later sections of the essay containing Mr Mustafa's own analysis did not include them. However, that submission goes to the question whether there was plagiarism and not to the nature of the judgment required to be made in order to determine that question. The extent to which different paragraphs of the essay were properly to be characterised as introductory or factual as distinct from analytical and the significance of that characterisation for determining the existence of plagiarism were themselves matters of academic judgment.

63. The decision of the examination offences panel and of the appeal panel was that there had not been a proper acknowledgement -- that the way in which Mr Mustafa had referenced his sources was misleading as it was impossible or very difficult to determine which text was taken from an external source and which was Mr Mustafa's own work, and that what he had done was not in accordance with academic practice or the university's regulations. That decision may be right or wrong (although I am far from saying that it was wrong or unreasonable), but it was clearly an academic judgment not susceptible to review by the OIA.

64. The OIA correctly recognised that this was the basis on which the university had determined the issue of plagiarism.

65. Accordingly, I reject Mr Lawson's submission that this was merely a case of applying the rules to the facts. In my judgment that way of putting the matter begs the question whether applying the rules to the facts involves an exercise of academic judgment and therefore does not assist. Even if there may be cases in which applying the rules to the facts does not involve such a judgment, that was not the position here. The rule was that quotations must be properly acknowledged. Whether what Mr Mustafa had done satisfied that rule was a matter of academic judgment.

Other matters

66. Mr Mustafa sought permission to amend his grounds to raise two other points. These were that the OIA decision failed adequately to consider (or did not give adequate reasons concerning) "the discrimination issue" and "the group work issue". I refused permission to amend. Both issues were the subject of the application for permission to bring judicial review which was refused twice in this court and was only granted on appeal on the limited basis described above. I accept that I have a discretion even now to grant permission, but good reason for doing so would be required. One such reason might be if, in order to deal properly with the ground on which permission has been granted, it is necessary to take account of the arguments on a ground for which permission has been refused (see e.g. *R (Smith) v Parole Board* [2003] EWCA Civ 1014, [2003] 1 WLR 2548 at [16]), but that is not this case. In my judgment there is

no good reason to grant permission on these further issues, which do not appear to have merit, and which it is far too late to attempt to resurrect in an application served only a few days before the hearing.

Conclusion

67. The claim for judicial review of the OIA decision is dismissed. That means that the finding by the university that Mr Mustafa had committed plagiarism will stand. In fairness to him, however, it should be made clear that this is not a finding of moral turpitude on his part, as the university's definition of plagiarism includes the use of extensive quotations without proper acknowledgement, but does not depend on any finding that a student intended to mislead or to claim the work of others as his own. The university has made no such finding against Mr Mustafa.