REFUSAL OF SPECIAL LEAVE

Despite the uncertainty of the law applicable in Australia as to the first question and the novelty of the restriction introduced by Wanstall C.J. in addressing himself to the second question, which has become more confused because of the divergent approaches of English and Australian courts, the High Court refused the applicant special leave to appeal against the decision of the Full Court. Leave was refused in May 1978, which was after the High Court had heard argument in *Sankey v. Whitlam* but prior to the handing down of the decision in that case, in which Mason J. stated his views on this 'long standing controversy'.[54]

CONCLUSION

The decision of the Full Court of the Supreme Court of Queensland on the second question would seem to run counter to the recent English judicial statements and to be contrary to much Australian authority. The proliferation of tribunals which affect citizens' rights and the increasing political role of the police forces in this country highlight the significance of a further restriction on prerogative relief by a State Supreme Court in a case such as this. In the federal sphere, judicial review is to be expanded by the Administrative Decisions (Judicial Review) Act 1977 (Cth); in the State sphere however, while the alleged errors of law by a magistrate in a case such as this remain 'arguable' but not capable of supervision by a superior court, the State's constitutional edifice is in danger of further erosion.

FRANK BRENNAN*

PATEL v. UNIVERSITY OF BRADFORD SENATE

University — Visitor's jurisdiction — Action for declaration to secure re-admission of student — Whether court having jurisdiction — Matters and persons within university visitor's exclusive jurisdiction

This recent decision of Megarry V.-C., which has since been affirmed by the Court of Appeal,[1] resurrects the largely forgotten role of the visitor and places it at the centre of modern university life as the locus for the settlement of all internal disputes. This note outlines the decision and examines its applicability to Australian universities.

I A DISGRUNTLED STUDENT GOES TO COURT

The case arose in not uncommon circumstances: Patel (P), having failed his annual *and* supplementary examinations in first year computer science, was required to withdraw from his course. He applied for immediate re-admission in the new academic year, but after a review of his record and a consideration of his representations his application was refused. Thereupon P commenced proceedings against the university, seeking declarations that he had been unlawfully excluded from the university and was entitled to enter its grounds, an injunction and damages. The defendant university submitted that the court had no jurisdiction to hear the matter, the issues being within the exclusive jurisdiction of the visitor to the university.

Determination of this contention by the university was 'the one real point' in the case[2] and was resolved in a strikingly clear and comprehensive manner. His Lordship's

[54] (1979) 53 A.L.J.R. 11, 58.

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[1] [1978] 1 W.L.R. 1488; [1979] 1 W.L.R. 1066 (C.A.). Beyond affirming the correctness of Megarry V.-C.'s decision, the decision of the Court of Appeal adds nothing to his discussion of the issues in the case.

[2] [1978] 1 W.L.R. 1488, 1490.

conclusion was that the powers of the visitor are extant and extensive, as a summary of the learning, extending back to the seventeenth century, reveals:

II 'GO TO THE VISITOR, NOT TO THE COURTS . . .'[3]

A A visitor attaches to all corporations of a particular type as an incident of their foundation

The corporations concerned are those characterized as religious, together with certain lay corporations, namely those set up for charitable or educational purposes. These are eleemosynary corporations[4]—as distinct from civil corporations, which are established for various temporal (generally 'municipal' and 'commercial') purposes and are subject to the full jurisdiction of the courts.[5] The traditional examples of eleemosynary corporations are the colleges of Oxford and Cambridge (but not the universities themselves) and Eton, Harrow and Winchester.[6]

B The jurisdiction of the visitor is historically twofold

There was a formal visitation of the institution concerned once every five years. Here the visitor received a report on the activities and achievements of the institution, heard grievances and inspected the premises and the accounts. Certainly today 'such visitations are at least obsolescent'.[7]

The visitor has secondly a general jurisdiction: 'a standing, constant authority at all times to hear the complaints and redress the grievances of the particular members of the corporation'.[8] In the exercise of this aspect of jurisdiction the visitor may act at any time on the petition of a corporator.

C Only the disputes of corporators are heard by the visitor; 'corporators' are defined to include those claiming membership of or seeking re-admittance or restoration to the corporation

Patel's case is important for the clarification of this issue, for it explains cases where parties, technically not members, have been turned away by the courts in favour of the visitor. As Megarry V.-C. put it:

> What I think must be the true principle can be expressed very simply. It is that one of the functions of the visitor is to decide all questions of disputed membership.[9]

D What are the 'complaints and grievances' which constitute proper subject matters for the visitor?

Kindersley V.-C. in *Thomson v. University of London*,[10] a case concerning a dispute over the award of a Gold Medal for the LL.D. examinations of 1861 after an error in the formula for calculating the class list had been discovered, held:

[3] *Ibid.* 1499.

[4] The word is defined by the *Shorter Oxford English Dictionary* as meaning 'of or pertaining to alms or almsgiving; charitable' and derives ultimately from the Greek 'elēemosunē' meaning 'compassionate'.

[5] Bridge J. W., 'Keeping Peace in the Universities: The Role of the Visitor' (1970) 86 *Law Quarterly Review* 531; 4 *Halsbury's Laws of England* (3rd ed. 1953) 408-14, 419-21; 15 *Halsbury's Laws of England* (4th ed. 1977) para. 284.

[6] Blackstone in 3 *Stephen's New Commentaries on the Laws of England* (8th ed. 1880) 7.

[7] [1978] 1 W.L.R. 1488, 1493. They have been superseded by statutory auditing and reporting requirements on an annual basis: *e.g.* Melbourne University Act 1958, ss. 46 and 41. *Cf.* Murdoch University Act 1973 (W.A.), s. 9(3) and the Charter of Incorporation of the University of Keele, North Staffordshire (Letters Patent, 1962) art. 3, for modern preservations of the general power of the visitor.

[8] *Philips v. Bury* (1694) 1 Ld. Raym. 5; 91 E.R. 900; Skin. 447, 494; 90 E.R. 198, 220, *per* Holt C.J. (K.B.).

[9] [1978] 1 W.L.R. 1488, 1497.

[10] (1864) 33 L.J. Ch. 625.

> Whatever relates to the internal arrangements and dealings with regard to the government and management of the house, of the *domus*, of the institution, is properly within the jurisdiction of the Visitor. . . .[11]

Matters involving property rights or public duties of the corporation, or strangers to the corporation (non-corporators), remain subject to intervention by the courts.[12]

E The visitor is not bound by any particular forms of action or procedure, except as set out in the terms of the original foundation;[13] the visitor is empowered to interpret the statutes of the institution:

> Each corporation has its own peculiar system of laws . . . [and] the interpretation of the statutes of the corporation has long been established as being part of the visitor's functions.[14]

F The jurisdiction of the visitor is exclusive

> Whilst his decision is final and is not appealable on its merits, the visitor is not free from all control by the courts. Thus prohibition will lie to restrain him from exceeding his jurisdiction, and so will mandamus if he refuses to exercise it.[15]

In the present case his Lordship shortly disposed of the matter before him by holding all the contentions of the plaintiff to be questions relating to the internal affairs (including membership) of the university, which accordingly fell to the visitor for decision. Megarry V.-C. adverted however to some of the reactions which he anticipated his decision would provoke, specifically, that 'the visitatorial jurisdiction in university life [is] a survival from past ages', requiring reform, abolition, or at least strict construction.[16] These reactions have surfaced in Australian treatment of the visitor's jurisdiction.

III THE VISITOR IN AUSTRALIA—DOES *PATEL* APPLY?

There is little doubt that all Australian universities are charitable corporations and thus have visitors. Australian universities are founded by legislation, whereas the usual practice in England is for incorporation to be by an exercise of royal prerogative in granting a charter. This has been held to be a difference without significance[17] and does not affect the nature of the charitable corporation—each university is established explicitly (or, in the case of the University of Melbourne, implicitly) for the 'promotion of learning' and 'the support of persons engaged in literary pursuits',[18] which

[11] *Ibid.* 634.

[12] *Ibid.* See also *Bell v. University of Auckland* [1969] N.Z.L.R. 1031, 1032 (breach of contract of employment possibly outside visitatorial jurisdiction); *R. v. University of Saskatchewan, Ex parte King* (1969) 1 D.L.R. (3d) 721, 723 (enforcement of public duties contained in statute establishing university outside visitor's jurisdiction).

[13] *Thomson v. University of London* (1864) 33 L.J. Ch. 625; *Bishop of Ely v. Bentley* (1732) 2 Bro. P.C. 220 (H.L.); 1 E.R. 898; *R. v. Bishop of Ely* (1788) 2 T.R. 290; 100 E.R. 157.

[14] [1978] 1 W.L.R. 1488, 1493, 1497.

[15] *Ibid.* 1493, 1499. This dates back to *Philips v. Bury* (1694) 1 Ld. Raym. 5; 91 E.R. 900; Skin. 447; 90 E.R. 198.

[16] [1978] 1 W.L.R. 1488, 1499.

[17] *R. v. Dunsheath, Ex parte Meredith* [1951] 1 K.B. 127, 133 (D.C.); *R. v. Hertford College, Oxford* (1878) 3 Q.B.D. 693. *Cf.* Blackstone in 3 *Stephen's New Commentaries* (8th ed. 1880) 9.

[18] As to 'promotion of learning' see *e.g.* University of Western Australia Act 1911 (W.A.), Preamble; Monash University Act 1958, s. 5; Macquarie University Act 1964 (N.S.W.), s. 6, discussed in *Ryde Municipal Council v. Macquarie University* (1979) 53 A.L.J.R. 179, 183, *per* Gibbs J.; 184 f., *per* Stephen J.; 189 f., 192, *per* Aickin J. As to the University of Melbourne, see *Clark v. University of Melbourne* [1978] V.R. 457, 461, 465, *per* Kaye J.; *cf.* 60 Vict. No. 34 (Vic.) (University Act 1853), Preamble; Royal Letters Patent (14 March 1859); as to 'support of persons studying' see *e.g.* Melbourne University Act 1958, s. 32; *cf.* 60 Vict. No. 34 (Vic.) (University Act 1853), s. XIII; Monash University Act 1958, s. 31.

are the hallmarks of the eleemosynary corporation.[19] In all but six Australian universities there is specific legislative provision for a visitor in the person of the State Governor.[20]

The powers of the visitor are expressed in very broad terms in Australian practice: 'authority to do all things which appertain to visitors as often as to him seems meet' is a standard form of words.[21] We could conclude, there being no Australian authority to the contrary, that the exclusive jurisdiction of the visitor is intact.

Further, it should be noted which groups (of persons) may have recourse to the visitor. Today in most tertiary institutions in Australia, as in the United Kingdom, all staff, students and graduates are corporators, where once the body 'politic and corporate' consisted of the governing body alone.[22] Yet despite the large range of potential petitioners and the length of time the visitatorial remedy has been available since the inception of universities in Australia at Sydney and Melbourne in the early 1850s, the visitor's is a largely untried and unknown jurisdiction: one unwelcome, in the main, in the courts wherein it has been raised.

University of Sydney cases

In three cases before the New South Wales Supreme Court and in one before the High Court the question of the exclusive jurisdiction of the visitor has been raised.

Ex parte King, Re University of Sydney[23] involved the return of a rule nisi for mandamus to compel the university to enrol a prospective student who had been excluded by the operation of wartime entry quotas imposed by the Commonwealth. The university sought to defeat the enrolment 'upon every ground which the ingenuity of counsel could suggest',[24] and in such inauspicious circumstances, as the sixth of seven alternative arguments, the exclusive jurisdiction of the visitor over the subject matter was raised. In the result the case was referred to the High Court as raising an *inter se* question, but two members of the Supreme Court, Davidson and Halse

[19] Bridge, *op. cit.* 534. Even the oldest authorities do not contain any more explicit definition of the purposes of an eleemosynary corporation: *e.g.* 1 *Blackstone's Commentaries* 470; *Philips v. Bury* (1694) 1 Ld. Raym. 5, 9; 91 E.R. 900, 903; Skin. 447; 90 E.R. 198; Shelford, *The Law of Mortmain* (1836) 23.

[20] The six universities for which no provision in respect of a visitor is made in the founding legislation are: Australian National University; University of New South Wales; University of New England; University of Queensland; Griffith University; James Cook University of North Queensland. The Crown as founder is the visitor: *Patel* [1978] 1 W.L.R. 1488, 1492, 1501. In *Thomson v. University of London* (1864) 33 L.J. Ch. 625, 633, Kindersley V.-C. came close to regarding provision for a visitor in the founding charter or Act as definitive.

[21] This formula is used in: Melbourne University Act 1958, s. 47; Monash University Act 1958, s. 42; La Trobe University Act 1964, s. 42; Deakin University Act 1974, s. 38; University and University Colleges Act 1900 (N.S.W.), s. 17 (University of Sydney); *cf.* Tasmania University Act 1951 (Tas.), s. 16(1): 'as and when he sees fit'. The South Australian formula differs slightly: 'The Governor shall be the Visitor to the University with the powers and functions appertaining to that office': University of Adelaide Act 1971 (S.A.), s. 20; Flinders University of South Australia Act 1966 (S.A.), s. 24. A further variant is 'with full authority and jurisdiction to do all such things and entertain such causes': Macquarie University Act 1964 (N.S.W.), s. 30; University of Newcastle Act 1964 (N.S.W.), s. 30; University of Wollongong Act 1972 (N.S.W.), s. 36. Compare these with 'shall exercise . . . such general powers as usually pertain to the office of Visitor of a university as well as such particular powers as may be conferred . . .': Murdoch University Act 1973 (W.A.), s. 9(1); *cf.* University of Western Australia Act 1911 (W.A.), s. 7.

[22] *Patel* [1978] 1 W.L.R. 1488, 1500. *Cf.* Bridge, *op. cit.* 538. See *e.g.* Melbourne University Act 1958, s. 4, amended by Melbourne University (Amendment) Acts 1967 and 1974. Sydney University remains an exception: University and University Colleges Act 1900 (N.S.W.), s. 7.

[23] (1944) 44 S.R. (N.S.W.) 19 (F.C.).

[24] *Ibid.* 24, *per* Jordan C.J., who expressed no opinion as to the merits of the issue.

Rogers JJ., indicated that the visitatorial jurisdiction was not applicable on the facts of the case, since the applicant was a stranger to the university and the extent of visitatorial power to enforce 'statutory rights of members of the public' and the corresponding public duty of the university under its Act was doubtful.[25]

It should be noted that the corporation of the University of Sydney consisted of twenty-six Fellows of the Senate. The prospective student was seeking the enforcement of a purported statutory right of entrance to and enrolment in the university's courses, but not membership of the corporation itself. It would seem doubtful whether the visitor's power over questions of membership (recognized by Halse Rogers J.[26]) would cover the university's discretion to exclude applicants. Such doubts are generally removed by the inclusion of the students as corporators.[27]

Concurrently with *King's* case the High Court heard a challenge to the regulations setting up the entry quotas in *R. v. University of Sydney, Ex parte Drummond*.[28] Counsel for the applicant advanced the arguments against the Court declining jurisdiction just discussed; the university did not argue at all. The Court, by a majority, held the regulations bad and granted mandamus to compel matriculation. Only Starke J. made reference to the visitor, indicating that he did *not* think

> that this provision is obsolete . . . it is there to be used in case of need. A similar clause has been invoked on more than one occasion in the University of Melbourne.[29]

The issue was raised more squarely the following year in *Ex parte McFadyen*.[30] Here a dentistry student had been refused a supplementary practical examination, allegedly because of bias. Having appealed unsuccessfully in turn to the Dean, the Senate and the visitor, he sought mandamus to force the visitor to hear his case.

Mandamus was refused. In strongly worded judgments Davidson and Halse Rogers JJ. each held that mandamus would constitute the visitor an 'appellate tribunal' contrary to the 'express and emphatic' legislative provision that 'the management of the affairs, concerns and property of the University is vested entirely in the Senate'.[31] Their Honours made explicit a number of the policy factors which influenced them, and the most important of these will be examined briefly, since they may be matters which again influence the courts.

The primary question as to whether conferring the 'entire management and superintendence over the affairs, concerns and property' of the university excludes the jurisdiction of the visitor, must be decided by construction of the instrument of foundation involved. The provision here in question has been judicially considered as it applies to the University of Melbourne[32] in such a way as to suggest that the reasoning of the court in *McFadyen* is incorrect.

The Full Court of the Victorian Supreme Court in *Clark v. University of Melbourne (No. 2)*[33] has recently approved the interpretation of the wide, discretionary management power of the University Council as being subordinate to the legislative powers of the Council, which was first settled by the visitor to the university in

[25] *Ibid.* 31, *per* Davidson J.; 43, *per* Halse Rogers J. The entry quotas were held invalid in *R. v. University of Sydney, Ex parte Drummond* (1943) 67 C.L.R. 95.
[26] (1944) 44 S.R. (N.S.W.) 19, 43 (F.C.).
[27] *Supra* 294 n. 22.
[28] (1943) 67 C.L.R. 95.
[29] *Ibid.* 109. There had at that time been three visitations at the University of Melbourne: see *Clark v. University of Melbourne (No. 2)* [1979] V.R. 66 (F.C.).
[30] (1945) 45 S.R. (N.S.W.) 200 (F.C.).
[31] *Ibid.* 204 f., *per* Davidson J.; 205 f., *per* Halse Rogers J. Nicholas C.J. in Eq. agreed with the two judgments.
[32] University and University Colleges Act 1900-1934 (N.S.W.), s. 14(2); *cf.* Melbourne University Act 1958, s. 15, discussed in *Clark v. University of Melbourne (No. 2)* [1979] V.R. 66 (F.C.).
[33] [1979] V.R. 66 (F.C.).

1870.[34] The importance of this interrelationship lies in the restrictions which the founding Act places on the legislative powers. Section 17 of the Melbourne University Act 1958 provided that the Council may legislate 'subject to this Act . . . so far as [its statutes and regulations] are not repugnant to any existing law or to the provisions of this Act'.[35] It is submitted that by this process of reasoning the wide management power may only be exercised subject to any statute or regulation and the express provisions of the Act, including section 47, which provides for a visitor. Far from the powers given to the Council in management ousting the jurisdiction of the visitor, the specific provision for a visitor and the statement of his powers in full and general terms operate to limit the powers of the Council.

The policy factors which reinforced the construction on which *McFadyen* is based may be summarized as follows:

(1) The obscurity of the provision — as Halse Rogers J. put it:

> I think . . . that probably nobody until *Ex parte King* . . . ever thought that there was any possibility of intervention by the visitor . . . it was never contemplated by the Legislature or by anybody from the time the Act was passed . . . that it did anything more than give the Governor an official connection with the University.[36]

Starke J.'s dicta in *Drummond's* case stand against this, and Halse Rogers J. in *King's* case recognized that lack of use, 'of course, does not really touch the question as to whether he is invested with the powers suggested'.[37]

Furthermore, failure to argue the jurisdiction in appropriate cases should not affect the matter: 'no oversight such as there may have been in the *University of Aston* case[38] can alter the law'.[39]

(2) The difficulty in invoking the visitor's intervention: this arises in comments of Davidson J. in *King's* case, where he regarded mandamus as 'more convenient, beneficial, and effective, than compelling an aggrieved person to undertake a practically unknown form of procedure before the Governor'.[40] By way of contrast, Megarry V.-C. in *Patel* thought this one of the strongest policy arguments in favour of the continued existence of the jurisdiction:

> In place of the formality, publicity and expense of proceedings in court, with pleadings, affidavits and all the apparatus of litigation (including possible appeals . . .), there is an appropriate domestic tribunal which can determine the matter informally, privately, cheaply and speedily, and give a decision which, apart from any impropriety or excess of jurisdiction, is final and will not be disturbed by the courts.[41]

(3) The legal substance of a view based on reluctance to create an appellate tribunal over the Council has already been discussed. Furthermore, to deny litigious students or other corporators recourse to the visitor will not stop them appealing instead to the courts; indeed, in considering the appropriate forum for such an appeal, Diplock L.J. in *Thorne v. University of London*[42] preferred exactly the opposite view to *McFadyen*:

> The High Court does not act as a court of appeal from university examiners; and, speaking for my own part, I am very glad it declines this jurisdiction.

[34] *Ibid.* 70 f.; (1871) 2 *Australian Jurist* 87. The Governor sat with Molesworth J. as assessor.

[35] Melbourne University Act 1958, s. 17, since amended by Melbourne University (Amendment) Act 1978, s. 3(1), deleting reference to repugnancy.

[36] (1945) 45 S.R. (N.S.W.) 200, 205 (F.C.).

[37] (1944) 44 S.R. (N.S.W.) 19, 43 (F.C.).

[38] *R. v. Aston University Senate, Ex parte Roffey* [1969] 2 Q.B. 964 (D.C.). In fact counsel in this case conceded that the particular university did not have a visitor: *Patel* [1978] 1 W.L.R. 1488, 1501; [1979] 1 W.L.R. 1066, 1068 (C.A.).

[39] *Patel* [1978] 1 W.L.R. 1488, 1500.

[40] (1944) 44 S.R. (N.S.W.) 19, 31 (F.C.).

[41] [1978] 1 W.L.R. 1488, 1499.

[42] [1966] 2 Q.B. 238, 242.

Finally, it may be noted that the New South Wales Supreme Court in *Ex parte Forster, Re University of Sydney*[43] regarded the matter as still open. The Full Court declined to issue mandamus to compel the re-enrolment (or a consideration of re-enrolment) of an excluded student, and therefore found it unnecessary to consider the further question 'whether the matter in any event was not one within the exclusive jurisdiction of the visitor'. Dicta in three passages of the Court's judgment would suggest that their Honours considered the jurisdiction to be 'alive and well'.[44]

IV CONCLUSION

It has been seen that the traditional jurisdiction of the visitor to hear and resolve internal disputes is extensive, if little utilized in recent times. *Patel's* case provides the basis for the revival of the exercise of visitatorial powers, but with what consequences it is impossible to predict. Nonetheless, one may conclude with comments on three aspects of the future development of the jurisprudence in this area.

First, *Patel* seems to settle the basic principles to be applied when determining *locus standi*. Little difficulty may be expected in this regard in the future.

Secondly, the process of characterizing the subject matter of a dispute as 'internal' or 'domestic' may provide a means by which courts may increasingly reserve issues to themselves or the visitor likewise decline jurisdiction. This may occur because of the way in which Kindersley V.-C. left room for intervention by the courts in *Thomson v. University of London.*

Finally, the greatest unknown is the prospect of judicial review of the visitor's actions. For three hundred years the courts have expressed reluctance to interfere with the determinations of the visitor: in the face of this, will modern courts decline the application of *Anisminic*[45] 'error of jurisdiction' principles? Megarry V.-C. makes no specific reference to the point in *Patel*; but perhaps when he writes that '*apart from any impropriety or excess of jurisdiction* [a decision] is final and will not be disturbed by the courts',[46] his Lordship should be understood as importing the full range of judicial review for defects of jurisdiction in its modern sense.

PETER WILLIS*

MILLER v. MILLER[1]

Constitutional law — Inconsistency of New South Wales statute as to telephonic interception with Commonwealth legislation on same subject — Intention manifested by Commonwealth Act to represent whole law on subject — Invalidity of relevant New South Wales provisions to extent of inconsistency — The Constitution, s. 109 — Telephonic Communications (Interception) Act 1960 (Cth), ss. 4 and 5 — Listening Devices Act 1969 (N.S.W.), ss. 4, 6 and 7.

In this case a Full Bench of the High Court[2] considered whether section 7 of the Listening Devices Act 1969 (N.S.W.) was inconsistent with the Telephonic Communications (Interception) Act 1960 (Cth). The Court was also called upon to decide

[43] [1964] N.S.W.R. 1000 (F.C.).
[44] *Ibid.* 1010, *per* Sugerman, Else-Mitchell and Moffit JJ. Sugerman J. was counsel in *Drummond* and *King*, just as Diplock L.J. had been successful counsel in *R. v. Dunsheath, Ex parte Meredith* [1951] 1 K.B. 127 (D.C.).
[45] [1969] 2 A.C. 147, 171, 209 (H.L. (E.)).
[46] [1978] 1 W.L.R. 1488, 1493, 1500 (emphasis added).
* B.A. (Hons.).
[1] (1978) 53 A.L.J.R. 59.
[2] Barwick C.J., Gibbs, Stephen, Jacobs and Aickin JJ.