The Office of Visitor of an Eleemosynary Corporation: Some Ancient and Modern Principles

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A visitorial power attaches as a necessary incident to all eleemosynary corporations.[1] An eleemosynary corporation is a corporation founded for the purpose of distributing the founder's bounty.[2] In the context of educational establishments, eleemosynary corporations are those founded *ad studendum*, for the promotion and support of learning and literary ends.[3] All Australian universities[4] are eleemosynary corporations as are charities.[5] The origins of the office of visitor lie in ancient property law. At the time Geoffrey de Merton founded Merton College Oxford[6] a person could not 'disinherit' his heirs but the common law appeared to have accepted the argument that the heirs were compensated by the preference to be given to founder's kin in election to scholarships etc at the foundation.[7] The office is the creature of the common law.[8] Further, the common law gave automatically to the founder the office of visitor[9] which he and his heirs[10] could exercise, or he could nominate another[11] to that office.[12] Where there was no heir then the office of visitor as property passed to the Crown *bona vacantia*.[13]

Benefits to the founder

What then were the benefits of the office to the founder? First, having set up a foundation one would be interested to see that it was running well, hence a visitor has the right to visit the foundation.[14] For instance, there were a number of visits during the reign of

1 *Appelford's Case* (1672) 1 Mod Rep 82, 85; 86 ER 750, 751; *Philips* v *Bury* (1694) Skin 447, 484; 87 ER 289, 298 per Holt CJ; *Ex parte McFadyen* (1945) 45 SR (NSW) 200, 201; *Halsbury's Laws of England* (4th ed, London: Butterworths, 1974), vol 5, 509.

2 *Thomas* v *University of Bradford (No 1)* [1987] AC 795, 827 per Lord Ackner.

3 Shelford, *The Law of Mortmain* (1836) 23.

4 See R J Sadler, 'The University Visitor: Visitorial Precedent and Procedure in Australia' (1981) 7 *University of Tasmania Law Review* 2, 3, where he cites *Ryde Municipal Council* v *Macquarie University* (1978) 139 CLR 633 per Gibbs ACJ, and 660-663 per Aickin J. Some grammar schools are also eleemosynary corporations, see *In Trusts of Brisbane Grammar School* [1942] 1 QWN 21; *Protector* v *Crayford* (1656) Style 457; 82 ER 859.

5 A charity does not pay tax on its income. It should be noted that in Australia there is no equivalent to the Charity Commissioners in the United Kingdom.

6 Founded, it is believed, in 1384.

7 The rights of founder's kin were largely abolished during the ninteenth century.

8 *In the Matter of a Petition to Her Excellency The Honourable Dame Roma Mitchell* (1992) 57 SASR 573, 573 per Debelle J.

9 In *Philips* v *Bury* (1694) Holt KB 715, 723; 90 ER 1294, 1299, Holt CJ said 'and if there be no Visitor appointed by the Founder, I am of the opinion that the Law doth appoint the Founder and his Heirs to be Visitors'. See also *Page* v *Hull University Visitor* [1993] 1 All ER 97, 102 per Lord Browne-Wilkinson.

10 Viscount D'Lisle as representing the Sidney line is the visitor of Sidney Sussex College: *Oakes* v *Sidney Sussex College, Cambridge* [1988] 1 WLR 431.

11 As Oxford was then in the See of Lincoln, the Bishop of Lincoln is the visitor to many Oxford colleges and foundations within colleges. This applies also to Cambridge where the Bishop of Ely is often the visitor.

12 Cf an advowson, the right of presentation to a living: it was an incorporeal hereditament.

13 *Green* v *Rutherforth* (1750) 1 Ves Sen 462, 471-472; 27 ER 1144, 1149.

Elizabeth 1, Cromwell, and James II. More recently, Sir Mark Oliphant[15] visited Flinders University during student disturbances. Secondly, the founder would be concerned that the money was not being ill-spent[16] and enough was put aside to fund the scholarships etc for his kin. Further, if he were to act in faith to his kin that he had deprived by his bounty and by the creation of the foundation, he would want to ensure that they were being preferred in accordance with the terms of the foundation deed. He would want to know that they could take their dispute to a person who had power to resolve and to enforce. It is this third aspect of determining disputes by reference to the terms of the foundation deed that was at first the most significant contribution to the jurisprudence of the eleemosynary visitor. However, if he were to be limited merely to an award of damages then the founder's aims would be thwarted. Hence there developed[17] a jurisdiction that enabled the terms of the foundation deed to be implemented by giving an appropriate remedy other than damages. The first order no doubt was that the petitioner was in fact the kin of the founder and ought to have been chosen or elected.[18] In course of time we find visitors also ordering re-instatement,[19] the removal from office,[20] the examination of a candidate's thesis,[21] and that a committee consider a supervisor's report on a candidate.[22] All this to ensure that the wishes of the founder were given effect to.

Exclusive Jurisdiction

Further, the visitor has exclusive jurisdiction over questions arising from the interpretation,[23] application, and observance[24] of the laws of the foundation.[25] This can give rise to dispute. For instance, in *Murdoch University* v *Bloom*[26] the members of the Full Court of Western Australia were divided as to whether a provision for study leave in a contract of appointment of a lecturer was within or without the jurisdiction; however, all members agreed that a challenge to the Vice-Chancellor's refusal to grant study leave in full was within the jurisdiction of the visitor. The importance of this is that the jurisdiction is exclusive and no claim can be brought in the general law courts.[27] This can be seen in the recent decision of the House of Lords in *Thomas* v *University of Bradford*[28] where the plaintiff lost because she brought her action before the courts even though on paper there

14 It is expressly provided by the *Murdoch University Act* 1973, s 9(3).
15 He was visitor at the time, namely 1974.
16 *Attorney-General* v *Dulwich College* (1841) 4 Beav 255; 49 ER 337, and *Attorney-General* v *Talbot* (1748) 1 Ves Sen 78; 27 ER 903.
17 There are few decisions of visitors reported, hence this is a matter of inference from a number of matters that found their way wrongly into the courts.
18 For example, *R* v *Hertford College, Oxford* (1878) 3 QBD 693, 702-703 per Lord Coleridge CJ; *R* v *Bishop of Ely* (1788) 2 TR 290; 100 ER 156.
19 See *Magdalen College Case* (1687) 12 St Tr 1.
20 *Phillips* v *Bury* (1694) 4 Mod 106; 87 ER 289.
21 *Bayley-Jones* v *University of Newcastle* (1990) 22 NSWLR 424.
22 *Ibid*
23 *Visitation at the University of Melbourne* (1871) 2 AJR 87; *Clark* v *University of Melbourne (No 2)* [1979] VR 66.
24 *Thomas* v *University of Bradford (No 1)* [1987] AC 795, 827 per Lord Ackner; *Thomson* v *University of London* (1864) 33 LJ Ch 625, 634 per Kindersley V-C; *Thorne* v *University of London* [1966] 2 QB 237; *Ex parte McFadyen* (1945) 45 SR (NSW) 200, 203 per Davidson J; *Ex parte King; Re The University of Sydney* (1943) 44 SR (NSW) 19, 31 per Davidson J.
25 If a matter is taken to the courts and the defendant does not raise the exclusive jurisdiction of the visitor, the court will not do so: *Orr* v *University of Tasmania* 22 May 1957, High Court Transcript, 139 per Dixon CJ (this point is not made in the report of the case at (1957) 100 CLR 526). See also, *Thomas* v *University of Bradford (No 1)* [1987] AC 795, 809 per Lord Griffiths.
26 [1980] WAR 193.
27 But see *supra* note 24.
28 [1987] AC 795.

appeared to be no visitor. Clause 29 of the Charter reserved to the Crown the right to appoint a visitor by Order in Council on the petition of the Court of the University. The Court had not so petitioned and Lord Griffiths said: 'However it is common ground that in the absence of such an appointment the Crown as founder of the university is visitor'.[29] In *Vijayatunga*,[30] Kerr LJ noted counsel's comment that 'where the statutes or other provisions governing foundations did not designate any visitor, the visitorial powers were vested in the Crown'.[31] In short, there cannot be any hiatus in the office of visitor. These general principles apply whether the foundation is set up by deed, royal charter, or by Act of Parliament.[32]

Whilst the jurisdiction of the visitor is exclusive, it can only be invoked by a corporator of the foundation. It has been held to include an undergraduate,[33] a postgraduate student,[34] a member of the lecturing staff,[35] a supervisor of a postgraduate student,[36] and a university itself.[37] It has also included the appointment of an usher.[38] It extends to cases where the foundation document imposes a duty on an office holder. Even though the office holder is not a corporator, the visitor may inquire whether the duties are being performed and may correct any abuses discovered.[39] The office holder may petition the visitor concerning his or her office.[40] Others are not able to take their problems to the visitor unless they are able to establish status by reference to the foundation document or can be said to be 'of the foundation'.[41]

The form of appeal is by way of petition[42] with no time limit.[43] It does not enable a third party to invoke the jurisdiction[44] and grounds of the complaint must be capable of being decided by reference to the interpretation or application of the laws of the foundation or both.[45] It means that if one corporator assaults another corporator that is not within the exclusive jurisdiction of the visitor but of the courts.[46] Once properly seised of a matter, then the visitor's decision is final unless there are grounds for a judicial review. But how does the visitor reach his or her decision — is the jurisdiction appellate or supervisory?

29 *Id* 811. See also *Patel* v *University of Bradford* [1978] 1 WLR 1488.
30 *Reg* v *Committee of the Lords of the Judicial Committee of the Privy Council Acting for the Visitor of the University of London, Ex parte Vijayatunga* [1988] 1 QB 322 (DC).
31 *Id* 332.
32 *R* v *Dunsheath; Ex parte Meredith* [1951] 1 KB 127, 133 per Lord Goddard.
33 *Re La Trobe University , Ex parte Hazan (No 1)* [1993] 1 VR 7; *Oakes* v *Sidney Sussex College, Cambridge* [1988] 1 WLR 431.
34 *Bayley-Jones* v *University of Newcastle* (1990) 22 NSWLR 424.
35 *Murdoch University* v *Bloom* [1980] WAR 193.
36 *Ibid*
37 *Thomas* v *University of Bradford (No 1)* [1987] AC 795, 809 per Lord Griffiths; *Thomas* v *University of Bradford (No 2)* [1992] 1 All ER 964.
38 *Attorney-General* v *Magdalen College, Oxford* (1847) 10 Beav 402; 50 ER 637.
39 *Ibid*
40 *R* v *Dean and Chapter of Chester* (1850) 15 QB 513; 117 ER 553.
41 *Hines* v *Birbeck College* [1985] 3 All ER 162, 162-163 per Hoffman J.
42 If the visitor declines to hear the petition then the petitioner may apply for mandamus: *Hickman* v *Brasenose College* (1760) Lincolnshire Record office V/V/6. See also *Attorney-General* v *Archbishop of York* (1831) 2 Russ & M 461, 468; 39 ER 469, 472.
43 Unless someone has already been appointed to the office.
44 *Thomson* v *University of London* (1864) LJ Ch 625, 634 per Kindersley VC.
45 It does not include interpretation of a constitution of a third party: *Re University of Melbourne; Ex parte De Simone* [1981] VR 378, 386-387.
46 Unless the rules of the foundation give to the party assaulting the power to chastise.

Nature of visitor's jurisdiction

In *Vijayatunga*, Janaki Vijayatunga was a PhD candidate whose thesis was written on zoology yet she was examined by two histochemists who failed her. She complained and was re-examined by a panel of five examiners. That panel also failed her. She appealed twice to the visitor before seeking an order for judicial review.[47] The application for judicial review came before the Divisional Court[48] and then Vijayatunga appealed to the Court of Appeal[49] which also dismissed her appeal. In the Court of Appeal the leading judgment was given by Bingham LJ who quoted at length from the judgment of Simon Brown J in the Divisional Court. For present purposes, the latter said:

> My final conclusion, therefore is that the visitor's role cannot properly be characterised either as supervisory or appellate. It has no exact analogy with that of the courts. It cannot usefully be defined beyond saying that the visitor has untrammelled power to investigate and right wrongs arising from the application of the domestic laws of a charitable foundation; untrammelled, that is, save only and always that the visitor must recognise the full width of his jurisdiction and yet approach its exercise in any given case reasonably (in the public law sense).[50]

Its application to the case in question shows that an academic decision will not be upset by the visitor or the courts 'unless the decisions in question are so plainly irrational or fraught with bias or some other obvious irregularity that they cannot clearly stand'.[51] In this connection special attention must be paid to the words 'domestic laws of the charitable foundation'. This means those laws must be read subject to the common law requirement that in making decisions by reference to those domestic laws the foundation and its officers must comply with procedural fairness.[52] If they do that a decision cannot be attacked merely because another may have come to a different conclusion.[53] However, it is the failure to comply with the Adam and Eve principle (namely being given an opportunity of explanation before condemnation)[54] that led to Carol Bayley-Jones' success.

Bayley-Jones v University of Newcastle

In *Bayley-Jones* v *University of Newcastle*[55] (hereafter '*Bayley-Jones*') the petitioner was a candidate for the degree of doctor of philosophy. She and her supervisor did not get on and the latter petitioned the visitor to obtain an order addressed to the members of the Doctors Degrees Committee to consider his 1984 report. The visitor so ordered.[56] In the meantime, the petitioner lodged her thesis for examination and then on 30 July 1987 the members of the Committee, without affording to the petitioner an opportunity to argue to the contrary, recommended that her candidature be terminated. Finally, in September 1987 the Vice-Chancellor did so (even though the University had received legal advice that it could not do so and that was the independent opinion of senior members of the administration).

The grounds for terminating her candidature were that by enrolling also at Loughbor-

47 She also sought redress for her complaint from the European Commission for Human Rights.

48 *Reg* v *Committee of the Lords of the Judicial Committee of the Privy Council Acting for the Visitor of the University of London, Ex parte Vijayatunga* [1988] 1 QB 322 (DC).

49 *Reg* v *Her Majesty The Queen In Council, Ex Parte Vijayatunga* [1990] 2 QB 444 (CA).

50 [1988] 1 QB 322, 344 (DC). Cf *Williams* v *Melbourne Corporation* (1933) 49 CLR 142, 154 per Dixon J.

51 [1988] 1 QB 322, 334 per Kerr LJ (DC).

52 *Annetts* v *McCann* (1990) 170 CLR 596 is authority for the proposition that the rules of natural justice must be complied with unless the legislation specifically provides that those rules are not to apply.

53 *Ex parte Forster; re University of Sydney*(1963) 63 SR (NSW) 723, 728.

54 *R* v *The Chancellor, Masters and Scholars of the University of Cambridge* (1723) 1 Str 557, 567; 93 ER 698, 704 per Fortescue J.

55 (1990) 22 NSWLR 424.

56 The author has been unable to obtain a copy of the judgment.

ough University the petitioner had committed a breach of the University's enrolment rules. Secondly, her enrolment at Loughborough University necessarily entailed breach of the rules requiring the carrying out of the specified work under supervision by her appointed supervisor and that in turn necessarily made it impossible for the members to satisfy themselves that her thesis was the product of her own work.

The candidate then petitioned the visitor who ruled against the University and held that there was no basis for the Vice-Chancellor terminating her candidature. He further ruled that there was a breach of the Adam and Eve principle. But how does one make good the wrong done? First there was to be examination of the thesis.[57] But does that completely remedy the wrong? Obviously not, but to promote harmony within the foundation (called 'the harmony principle') the visitor awarded the candidate a mere six thousand dollars.[58]

Damages

The petitioner appealed to the courts and her appeal was heard by Allen J of the Administrative Division of the Supreme Court of New South Wales. He held that at the very least there was an error on the face of the record that required correction. Further, the concept of exclusive jurisdiction and statements on damages enunciated by members of the House of Lords in *Thomas* v *University of Bradford*[59] required that damages in accordance with the general principles of law be awarded to the petitioner. The effect of this is that a petitioner is not to be worse off by having[60] to appeal to the visitor. The latter is not to deny the petitioner general law damages merely because of the harmony principle.[61] Allen J concluded: 'If he does not right the wrong it will remain unaddressed'.[62]

Judicial control of the visitor

Without a doubt there were a number of wrongs[63] in *Bayley-Jones* and this does not appear to have been argued otherwise by the University[64] but the principles to be adopted by the courts when asked to review a decision of a visitor were discussed in *Vijayatunga*. There Bingham LJ said: '[T]here is no doubt about the role of this court, which is to confine itself to correction of demonstrated errors of law. We could not properly interfere with any exercise of discretion or judgment by the committee [sic the visitor] unless of opinion that it was wrong in law'.[65] An applicant would find establishing this difficult 'unless the decisions in question are so plainly irrational or fraught with bias or some other obvious irregularity that they clearly cannot stand'.[66] However, the foregoing must be read down in the light of the recent decision of the House of Lords in *Page* v *Hull Uni-*

57 The order made is beyond the jurisdiction either of a court of common law or of equity.
58 Allen J characterised this as a mere solatium.
59 [1987] AC 795.
60 Because of the visitor's exclusive jurisdiction.
61 It was expressed by Lord Rowallan as follows: 'We can I believe all agree that the well being of the University, present and future, is the all important consideration': *In the matter of a petition to the Visitor of the University of Tasmania* (1962) (unreported, University of Tasmania Archives, 6). The general expectation that the principles of procedural fairness will be applied by all administrative decision makers leaves no room for a consideration that a student who is wrongly refused a degree must nevertheless not be awarded damages because to do so would put restraints on the university's future activities.
62 (1990) 22 NSWLR 424, 433.
63 Allen J considered that there was breach of contract, negligence, and misfeasance of office.
64 But they argued strenuously that they ought not to have to pay any damages at all.
65 *Reg* v *Her Majesty The Queen In Council, Ex Parte Vijayatunga* [1990] 2 QB 444, 458 (CA).
66 *Reg* v *Committee of the Lords of the Judicial Committee of the Privy Council Acting for the Visitor of the University of London, Ex parte Vijayatunga* [1988] 1 QB 322, 334 per Kerr LJ (DC).

versity Visitor.[67] In that case the majority held that there was no power to review an error of law.

Conclusion

The office of visitor is ancient and is 'property in nature'. There may yet be further surprises to come. The office has received a number of blessings recently in England[68] as being a jurisdiction that is speedy, private and cheap, and ought to be retained. It has the advantage that delay[69] is not a factor unless of course someone else has been appointed in the meantime. The role of the visitor is still that of a judge.[70] His or her powers are much wider than those enjoyed by the courts and these powers may well be needed if there are to be inroads into tenure and there is to be accountability of funds and time (particularly in relation to obtaining tenure or increments). Academically, *Vijayatunga* indicates that scholarly decisions where made bona fide are still free from attack whether in the courts or in the forum of the visitor.

67 [1993] 1 All ER 97.

68 Megarry VC in *Patel* v *University of Bradford* [1978] 1 WLR 1488; members of the House of Lords in *Thomas* v *University of Bradford (No 1)* [1987] AC 795; and Lord Browne-Wilkinson acting as visitor in *University of Bradford* v *Thomas (No 2)* [1992] 1 All ER 964.

69 For instance many years may pass before a plagiarism or other misconduct (see eg *Re La Trobe University; Ex parte Hazan (No 1)* [1993] 1 VR 7) comes to light. May not a university wish to go to the visitor to obtain an order for the cancellation of the award of a degree obtained entirely by plagiarism or impersonation and other ancillary orders? As there is no time limit a university may do it at any time even if the corporator is dead.

70 It is a forum domesticum but none the less a forum.