The Charity Law & Practice Review

THE JURISDICTION OF THE UNIVERSITY VISITOR: HOW EXCLUSIVE IS EXCLUSIVE?

Peter M Smith[1]

Interest in this ancient and unique jurisdiction appears to have in no way diminished over the last few years.

For many centuries visitors of eleemosynary corporations have been appointed by founders with the special function of acting on their behalf to ensure that each foundation is administered and conducts itself in accordance with the particular wishes of the founder as set out in its statutes, ordinances, rules, etc. In origin the authority of visitors stemmed from the property which a founder had possessed in lands given to support the foundation and the right of such a founder to make private rules for the government of his or her own donation.[2] It is the private nature of the internal rules of such foundations that has given rise to this extraordinary jurisdiction.

It has been consistently held since Lord Holt's judgment in the case of *Philips v Bury*[3] that the visitor has the exclusive right to determine and administer those internal rules. To this end, the visitor possesses a *forum domesticum,*[4] and no

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1 Peter M Smith, LLB, PhD, of Lincoln's Inn, Barrister, Faculty of Law, Exeter University.

2 Philips v Bury (1694) Holt KB 715, 724; *Green v Rutherforth* (1750) 1 Ves Sen 462, 472; *Thomas v University of Bradford* [1987] AC 795, 814-5, 827.

3 (1694) Holt KB 715; 1 Ld Raym 5; 2 TR 346; Skin 477; 4 Mod 106.

4 Dr Walker's Case (1736) Cas t Hard 212, 218; *Att-Gen v Talbot* (1747) 3 Atk 662, 674; *Green v Rutherforth*, supra.

other court, including a court of common law, is permitted to hear any matter properly within the visitatorial jurisdiction.[5]

In the colleges of Oxford and Cambridge, the master and fellows as corporators enjoyed the collegiate life in accordance with the college statutes, and since there was no contractual relationship, these statutes were instrumental in regulating their relations with the foundation and with each other. As originally conceived, therefore, the visitor may be seen to have been a most important figure in ensuring that the communal life of the college was maintained in peace and harmony.

It was this form of administration involving visitatorial supervision that was adopted by the framers of the statutes for the modern chartered universities which began to come into existence during the nineteenth century. Inevitably, this was to lead to problems involving conflicts of jurisdiction, for these institutions now employed academic staff on a contractual basis, but nevertheless invariably stipulated in their statutes that such employees should also be corporators subject to the statutes, ordinances, etc. of the foundation. As corporators, therefore, they could be removed from membership of the foundation only in accordance with the statutes, ordinances etc. of the university, with the result that appointees to many such academic posts were given tenure in the sense that they could be removed only for "good cause" as defined by the statutes of their institution.

Problems in the recent past have frequently arisen because of the co-existence of this relationship derived from membership of the foundation with the relationship based on employment. Questions concerning a member of the academic staff as a corporator, since they are regulated by the internal rules of the foundation as set out in the statutes, ordinances, regulations and the customs of the foundation, have hitherto been cognizable only by the visitor, whereas the relationship of employment between the individual member of staff and the university is determined by contract and the appropriate employment protection legislation so as to be within the jurisdiction of the common law courts or industrial tribunal. The fine line between the two has sometimes been difficult to define, particularly where the issue has involved a nice interplay between the contractual relationship and that of corporator.

The effect of s.206(1) of the Education Reform Act 1988 will be to remove the jurisdiction of the visitor with respect to all matters concerning the appointment and employment of academic staff as new appeals procedures are introduced into each institution under the Act. In so doing, many of these problems will be obviated. Nevertheless, other eleemosynary foundations such as schools or

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5 R v Dean & Chapter of Chester (1850) 15 QB 513; *Whiston v Dean & Chapter of Rochester* (1849) 7 Hare 532; *R v The Dean & Chapter of Rochester* (1851) 17 QB 1; *Thomson v The University of London* (1864) 33 LJCh. 625; *R v Dunsheath, ex parte Meredith* [1951] 1 KB 127; *Thorne v University of London* [1966] 2 QB 237; *Patel v University of Bradford Senate* [1978] 1 WLR 1488; *Thomas v University of Bradford* [1987] AC 795, 811. See by the author: "The Exclusive Jurisdiction of the University Visitor" (1981) 97 LQR 610; "Visitation of the Universities: A Ghost from the Past" *136 New Law Journal*,6 (1986), 484, 519, 567, 665.

colleges are not affected by the legislation, nor is the position of the visitor changed with respect to corporators other than members of the academic staff, e.g. students, administrators, etc. In all other respects, therefore, the visitatorial jurisdiction remains intact, and accordingly it is still appropriate to review the latest developments in the caselaw concerning the office of visitor.

Subject, therefore, to the changes brought about by s.206, it has already been observed that once it is established that the visitor has jurisdiction over a matter, the jurisdiction of the common law courts is excluded. Not only does this mean that a common law court cannot interpose directly to adjudicate on or interpret the internal statutes, ordinances, etc. of an eleemosynary foundation where there is a visitor, but it is wholly constrained from entering the visitatorial jurisdiction to the extent that even an express reference in a contract of employment to rights and duties derived from the internal rules of the society will not have the effect of drawing the determination of any question concerning the interpretation or application of those rules into the common law courts.[6] Likewise, there is no possibility of an appeal from a visitor to a common law court.[7] Unless the founder has made express provision for an appeal, therefore, the decision of a visitor is final and without appeal from it.[8] As Wright J remarked in *R v Bishop of Chester*: "Visitors have an absolute power; the only absolute one I know of in England."[9]

Nevertheless, though there might be no appeal from a visitor, the question remained as to whether the decision of a visitor could be examined by means of judicial review.

The High Court now exercises its powers of judicial review in accordance with those procedures prescribed by the Supreme Court Act 1981, s.31, RSC Ord 53, which permits the Queen's Bench on receipt of an application for judicial review to issue any of the prerogative orders of prohibition, mandamus or certiorari. There is no doubt that visitors have always been amenable to prohibition and mandamus. Visitors must act within their jurisdiction, and if, they act ultra vires, then prohibition will lie as it would against any inferior jurisdiction exceeding its powers.[10] Any attempt to determine matters which are not regulated by the internal and domestic rules of the society might therefore be met with a

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6 *Thomas v University of Bradford*, supra.

7 *Philips v Bury*, (1694) Holt KB 715, 723, 725.

8 *St John's College v Todington* (1757) 1 Burr 158, 200.

9 (1747) 1 Wm Bl 22, 26.

10 *Bishop of Chichester v Harward and Webber* (1787) 1 TR 650; Dean of York's Case (1841) 2 QB 1. See: *Dr Bentley v Bishop of Ely* (1729) 1 Barn.KB 192; *R v Bishop of Chester* (1747) 1 Wm Bl 22, 23, 25; *Green v Rutherforth*, supra, 471; *R v Bishop of Ely* (1788) 2 TR 290, 336.

prohibition. The courts will also intervene to remedy an abuse of jurisdiction where the rules of natural justice, e.g., the *nemo judex in re sua* and *audi alterem partem* rules, are not observed by the visitor.[11] Similarly, it is well established that mandamus will lie against a visitor to compel the visitor to act,[12] for otherwise great injustice would result if a complainant was rendered remediless due to the inaction of a visitor, since no other tribunal could entertain the complaint.

But what of certiorari? Although prior to the Supreme Court Act 1981 there were no known examples of the writ or order of certiorari having lain against a visitor, it might be supposed that with the consolidation of the procedures in the one application for judicial review, the visitatorial jurisdiction which is unquestionably amenable to prohibition and mandamus must likewise be subject to certiorari.

Certiorari may be generally seen as complementary with prohibition in the sense that certiorari will lie to quash a decision where the proceedings in which the excess of jurisdiction has taken place have been concluded so that there is nothing further to prohibit.[13] Until comparatively recent times certiorari was regarded as having been available to quash the decision of an inferior court or tribunal which had acted ultra vires, or exceptionally, if intra vires, where vitiated by an error of law which appeared on the face of the record.[14] But after *Anisminic*[15] it appears to have been accepted that almost any error of law made by a tribunal or lower court may be regarded as going to jurisdiction so as to permit the quashing of the erroneous decision by judicial review.[16] Thus, not only errors of law on the face of the record, but all errors of law are brought within the ambit of judicial review.

It is therefore apparent that if this reasoning was applicable to visitors so that the High Court through the mechanism of judicial review could examine the decision

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11 *Dr Bentley v Bishop of Ely,* supra; *R v Bishop of Ely* (1788) 2 TR 290, 336. See generally *Anisminic Ltd v Foreign Compensation Commission* [1968] 2 QB 862, at p 890 (Diplock L), [1969] 2 AC 147, at pp. 171 (Lord Reid), 195 (Lord Pearce), 207 (Lord Wilberforce).

12 *R v Bishop of Lincoln* (1785) 2 TR 338n; *R v The Bishop of Ely* (1794) 5 TR 475. See also Lord Goddard CJ in *R v Dunsheath, ex parte Meredith,* supra at p. 134.

13 See Atkin LJ in *R v Electricity Commissioners, ex parte London Electricity Joint Committee Co. (1920) Ltd.* [1924] 1 KB 171 at 206.

14 *R v Northumberland Compensation Appeal Tribunal* [1952] 1 KB 338.

15 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

16 *O'Reilly v Mackman* [1983] 2 AC 237, per Lord Diplock at p.278; *R v Greater Manchester Coroner, ex parte Tal* [1985]1 QB 67, 82. See also Lord Browne-Wilkinson in *R v President of the Privy Council, ex parte Page* [1992] 3 WLR 1112, at p. 1123.

of a visitor with a view to determining whether it was correctly made having regard to the requirements of the internal rules of the foundation, then the decisions of a visitor might indeed be subjected by this means to judicial scrutiny notwithstanding the long line of authorities which establish that no appeal is possible. Where then exclusivity?

It is against this background that *R v President of the Privy Council, ex parte Page* [1992] 3 WLR 1112 came before the House of Lords. Edgar Page, a lecturer at Hull University, had been dismissed from his post in conformity with the three months' notice requirement of his contract of employment. He argued that he could be dismissed only for "good cause" as specified by the statutes of the University of Hull, and that the purported dismissal was ultra vires and of no effect. An action started in the Queen's Bench Division for wrongful dismissal was struck out on the grounds that the matter fell within the exclusive jurisdiction of the visitor of the University, Her Majesty the Queen. His petition to the visitor was considered by the Lord President of the Council on behalf of the Queen, who sought the advice of Lord Jauncey of Tullichettle which was to the effect that the dismissal had not been in breach of the statutes as the power of removal contained in the statutes was expressly made "subject to the terms of his appointment", and accordingly the petition was dismissed by the visitor. Page then sought to challenge the decision of the visitor by applying for judicial review. He was successful in the Divisional Court in obtaining an order quashing the decision of the visitor on the ground that it had been wrong in law and that the University had no power to dismiss him only by reason of redundancy. On appeal, the Court of Appeal upheld the decision of the Divisional Court as to jurisdiction, but took the view that the decision of the visitor concerning the interpretation of the statutes was correct. Page appealed to the House of Lords.

The majority in the House of Lords held that although the decisions of visitors were amenable to judicial review, including certiorari, certiorari was not available to challenge the decision of a visitor on the ground of an error of law where there had been no want of jurisdiction. In coming to this decision, those members of the Court took the view that the long line of authority which established the exclusive character of the visitatorial jurisdiction also had the effect of precluding a judicial review of the decision of a visitor made within his or her jurisdiction. Lord Griffiths was evidently concerned that to permit judicial review would in practice have the effect of admitting an appeal by another name.[17] Nor was there anything inherently wrong with powers vested in an inferior court from which there could be no appeal.[18]

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17 At 1115-6.

18 Lord Browne-Wilkinson at 1124-5.

The case, therefore, while confirming that certiorari does indeed lie against a visitor, also shows that such a review of the visitor's decision is possible only where there has been an excess of jurisdiction, and not on the grounds of an error of law.

A visitor will have exceeded his or her jurisdiction where the matter determined falls outside the scope of the statutes, ordinances, regulations, etc. of the particular foundation of which he or she is visitor. There will also have been an excess of jurisdiction where there has been some abuse in its exercise,[19] for example where there has been a breach of the rules of natural justice, or if it could be shown that the visitor had acted out of malice or in bad faith. But the post-*Anisminic* expansion of the doctrine of ultra vires will not apply to visitors. A visitor must have genuinely exceeded the visitatorial jurisdiction in the sense described before certiorari will issue, and an error in determining the internal laws of the body will not give grounds for the decision of the visitor to be quashed.

It is not devoid of logic that there should be such a constraint on the extent to which certiorari may issue to review the decisions of visitors. In recent years the expansion of judicial review to embrace the correction of all errors of law, not just those on the face of the record, may be seen as a movement towards making the courts the ultimate arbiters on all questions of law. It is now open to the High Court through judicial review to ensure that the rules of law are properly interpreted and applied in whatever kind or quality of inferior court or tribunal they might arise, and a failure of such a court or tribunal to act in accordance with law will cause its decision to be quashed. The assumption, however, is that the error in the inferior tribunal is one involving ordinary principles of law, so that the High Court in its general supervisory capacity has an immediate interest in correcting any such errors. This is not, however, the case with respect to the jurisdiction of visitors.

Here the rules which are under consideration are not the general laws of the realm, but the private rules of the founder, and the High Court is neither competent in such laws, nor is it directly concerned whether or not such laws are observed or enforced. The supervision of these internal rules has been placed by the founder exclusively in the hands of the visitor, whose decisions do not concern any other laws and therefore quite properly fall outside this general supervision now exercised by the High Court.[20] As Lord Kenyon CJ had said in *R v Bishop of Ely*:[21]

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19 See Lord Griffiths at 1115 where he explains his use of the phrase "abuse of his powers" in *Thomas v University of Bradford* (825).

20 See Lord Browne-Wilkinson, *R v President of the Privy Council, ex parte Page,* supra at 1121-2, 1123-4.

21 (1794) 5 TR 475 at 477.

> "[A]ny interference by us to control the judgment of the visitor, would be attended with the most mischievous consequences, since we must decide on the statutes of the college, of which we are ignorant, and the construction of which has been confided to another forum".[22]

In this respect the position of the visitor is consistent with that of an ecclesiastical court. It is evident that the High Court has always been reluctant to intervene to correct errors which may have occurred within a jurisdiction where the rules to be examined are not those of the general law. Thus certiorari has been held not to lie to an ecclesiastical court, on the ground that such courts administer the canon law with which the High Court is unfamiliar.[23] Even should it be decided by the Court of Appeal in the future that certiorari may issue to an ecclesiastical court, it is submitted that it will not be available for the same reasons to correct any errors of ecclesiastical law which might have occurred, and will lie only where the ecclesiastical court has purported to act in a matter which in the strict sense is outside its jurisdiction.[24]

The High Court, therefore, has no jurisdiction to review the correctness or otherwise of visitors' decisions concerning the rules of those foundations of which they are appointed visitors. Visitors are thus susceptible only to what might be described as a "limited judicial review jurisdiction".[25] The jurisdiction of a visitor acting within his or her authority who does not infringe any of the general principles by which such powers are to be exercised therefore remains exclusive and is incapable of being challenged in any other court, including the High Court, by means of judicial review.

Within this prescribed area of concern the visitor has a distinct role to play which is still of considerable utility.[26] `Perhaps it is worth remarking, however, that many of the advantages of the visitor's jurisdiction are lost if substantial delays are allowed to occur before an appeal is actually brought before the visitor, or the procedures preliminary to an appeal are unduly complex. The jurisdiction is (or

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22 Quoted by Lord Browne-Wilkinson in *Page* supra at 1120.

23 *R v Chancellor of St Edmundsbury and Ipswich Diocese, exparte White* [1948] 1 KB 195, 220, 221.

24 See Mann LJ in *R v Chancellor of the Chichester Consistory Court, ex parte News Group Newspapers Ltd & Others* (1991) *The Times*, 15th July 1991.

25 Per Sir Donald Nicholls V-C in *R v Visitors to Lincoln's Inn, ex parte Persaud R v Same, ex parte Calder, Calder v General Council of the Bar* (1993) *The Times*, 26th January, 1993.

26 See Sir Robert Megarry, *Patel v Bradford University Senate* [1978] 1 WLR 1488 at 1499; Lord Griffiths, *R v Lord President of the Privy Council, ex parte Page* supra at 1116, 1125.

ought to be) characterised by its speed, privacy, relative informality, and cheapness.[27]

The visitatorial jurisdiction is therefore by no means rendered otiose by s.206 of the Education Reform Act 1988, particularly where students are concerned. Indeed, there is here a potential for growth, since students, irrespective of whether or not they are corporators, are also subject to the exclusive jurisdiction of the visitor to determine any dispute which involves the interpretation or application of the internal rules of the foundation.[28] Moreover, the *Page* case shows that the jurisdiction of the university visitor is still capable of raising some most interesting issues, which, it would appear, can add to our more general understanding of English law.

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27 Per Sir Robert Megarry, supra. See also: Lord Griffiths in *Thomas v University of Bradford*, supra at 825 and in *R v Lord President of the Privy Council, ex parte Page*, supra 116; Lord Browne-Wilkinson ibid, at 1125.

28 *Oakes v Sidney Sussex College, Cambridge* [1988] 1 WLR 431.