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# PRACTICE AND PROCEDURE ON VISITATORIAL APPEALS

Hubert Picarda QC

## Introduction

Almost all the colleges at Oxford and Cambridge have a visitor[1] and so do all the other universities.[2] Many of the independent schools which adhere to the Headmasters' Conference are similarly constituted as chartered corporations with a visitor although there have been no reported cases of the visitatorial jurisdiction being exercised in connection with any public schools in recent years. While the visitor's jurisdiction is to be displaced in connection with cases involving academic tenure and the appointment and dismissal of academic staff at universities,[3] there still remain many other cases where the visitatorial jurisdiction will continue to run.

Over the last decade the usefulness of the visitor as a solvent in university disputes, a usefulness identified by Megarry J in *Patel v University of Bradford Senate* [1978] 1 WLR 1488, has been exemplified in several cases, and it is therefore sensible to review in a modern context the practice and procedure of visitors.

## Delegation by a Visitor

The visitor is, in effect, the delegate of the founder. The founder has power to hear and determine grievances and can delegate his own visitatorial power. But once the founder has delegated his visitatorial power to what extent can the appointed visitor sub-delegate his power? Or must the delegated visitor act personally? The answer to this is that there is delegation and delegation. In other words, the maxim *delegatus non potest delegare* is subject to exceptions.

On the other hand many visitors such as (to take two examples) ecclesiastical functionaries[5] and hereditary visitors[6] often appoint assessors who advise them on matters of law. Thus the Archbishop of Canterbury who is visitor of All Souls' College Oxford habitually sat with assessors whose advice he took and would adopt

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1 Green College Cambridge is an exception.

2 See J W Bridge (1970) 86 LQR 531-551.

3 Education Reform Act 1988, s.206

5 Squibb *Founders' Kin* (1972) 54-55 and 206.

6 E.g., Viscount De L'Isle at Sidney Sussex College Cambridge.

as his own.[7] Other visitors have sent commissaries.[8] Moreover, the sovereign instead of acting by her Lord Chancellor may appoint Commissioners to visit on her behalf,[9] a practice which is becoming more frequent no doubt because the sovereign is visitor of so many universities that it would be an unnecessary burden to require the Lord Chancellor to deal with every visitatorial appeal.[10] There are of course many examples of visitors who are not lawyers sitting without assessors or commissaries: see *R v Bishop of Lincoln* (1785) 2 Term Rep 338 n; *R v Bishop of Ely* (1794) 5 Term Rep 474. One function that may be delegated is that of hearing evidence. That was what happened in *Page v University of Hull* where the complainant alleged that various promises had been made to him when he was appointed lecturer. Mr Jonathan Parker QC sat as examiner and the Visitor held on the advice of Lord Jauncey that no such promises had been made. There is, it must be admitted, a danger in delegating the hearing of evidence which is hotly in dispute, because the visitor is then deprived of the opportunity of assessing the credibility of witnesses in the box.

## Form of the Appeal

A visitor can intervene on his own initiative. This process, known as general visitation, is still open to a visitor but only one modern instance, and that in Australia, is chronicled.[11] Otherwise the visitatorial function is brought into play by an appeal to the visitor. The time-honoured way of launching such an appeal is by petition and that initiating procedure, invariably used in appeals to the Queen as visitor,[12] has currency where the visitor is an archbishop, bishop, or indeed any other dignitary.[13] The petition is forwarded to the relevant office of the visitor and there will then be an answer from the respondent.

## Petitioner

Usually the petitioner is a dissatisfied corporator: an academic who has been deprived of his chair as professor, or his fellowship, or some other academic post. But one

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7 *Watson and Fremantle v Warden etc of All Souls College in Oxford* (1864) 11 LT 166.

8 *Philips v Bury* (1694) 2 Term Rep 346 (power to appoint commissaries was expressly conferred by statutes of Exeter College).

9 This possibility was highlighted in *Thomas v University of Bradford* [1987] AC1 795 at 801.

10 See *Pearce v University of Aston* [1991] 2 All ER 469 (Sir Nicolas Browne-Wilkinson VC sitting as visitor).

11 See R J Sadler (1981) Univ Tas L R 2.

12 For a precedent see 8 Encyclopedia of Forms and Precedents (4th ed) 549.

13 *Re Christ Church* (1866) 1 Ch App 526; *Spencer v All Souls College* (1762) Wilm 163.

does not have to be a corporator to have the necessary *locus standi*.[14] While scholars of most Oxbridge colleges are corporators, exhibitioners and ordinary undergraduates are not corporators but still have the requisite standing because they are affected by the internal laws of the corporation in question.[15] *Locus standi* is derived from the petitioner's interest in having a matter determined by reference to the internal laws of the foundation in question and not, as was once mistakenly assumed, by reference to the status of corporator. Sometimes the conventional roles are reversed and the petitioner is not the complainant but the university body itself.[16]

### Respondent

Usually the respondent will be the university college or other relevant corporation. But sometimes, as noted above, there is a role reversal, so that the appeal is initiated by the university body with the complainant as respondent.

### Subject Matter of Appeal

The matters which may fall to be determined on a visitatorial appeal are many and variegated. The appointment and renewal of a university professor, a fellow or lecturer are a frequent source of complaint and appeal by university teachers. But students too have their gripes over examination results (*Patel*) or the refusal of a doctoral degree. The administrative staff may also seek advices from the visitor in some cases such as when their position involves construction of university statutes or regulations expressly affecting them. The writer has also known of one case, happily resolved before any visitatorial hearing, where the question in issue was whether, under the university's statutes, it was possible to vary the sequence in which college heads became vice chancellors. While tenure disputes may in the future be settled elsewhere, it is clear that the visitatorial jurisdiction still has an important role to play in relation to other academic disputes and disputes over administration.

### Pleadings, Discovery, Interrogatories

In the normal course of events the only formal documentation is the petition and the answer in response. Very occasionally a reply will follow the answer.[17] The procedural history of the visitatorial appeal in *Thomas v University of Bradford (No2)*[18] yields further variations. Miss Brenda Thomas started fresh proceedings in the Chancery Division after the enactment of the Education Reform Act 1988 but those were eventually struck out when the University in that case applied to the

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14 *Thomas v University of Bradford* [1987] AC 795 at 816.

15 *Oakes v Sidney Sussex College Cambridge* [1988] 1 All ER 1004.

16 *Thomas v University of Bradford (No 2)* [1992] 1 All ER 964.

17 As in *Page v University of Hull*

18 [1992] 1 All ER 964

Visitor. The Statement of Claim in the action was converted into points of claim, the petitioner university filed points of defence and a reply was put in. There were requests for further and better particulars and discovery was ordered by Sir Nicolas Browne-Wilkinson V-C (as he then was), sitting on behalf of the Visitor. He also ordered each set of legal representatives to define the issues and then ordered them to file their submissions on evidence and law. He nevertheless indicated (and rightly so) distaste for the elaboration of litigious steps and formalities within a domestic forum commended in the *Patel* case for its informality, cheapness and speed. In the end the visitor is the person who controls the course of all such steps and if the advantages of the jurisdiction are to be preserved it is important that, save in exceptional cases or where natural justice might otherwise be at risk, formalities should be kept to a minimum.

## Hearing

In his control of proceedings before him the visitor will constantly have in mind the need for the hearing before him to conform with the principles of natural justice. This involves observance of the principle *audi alteram partem*: the need for a fair hearing so that the interested parties should have an opportunity to make a defence. The second principle tied in with this is that the visitor cannot make a decision as judge in his own cause.

### (1) Fair Hearing: Natural Justice

In hearing an appeal a visitor is engaged in a judicial act and so like a judge he cannot determine the appeal without hearing the parties involved or at least giving them an opportunity to be heard: *R v Bishop of Ely* (1788) 2 Term Rep 290 at 336. Putting it another way, the maxim *audi alteram partem* is a principle of natural justice which binds a visitor as much as a judge. There is, however, one very material difference: in the visitatorial forum the word "hearing" is to be more liberally interpreted. In some cases, for example where a simple question of construction is involved, it may be that the visitor does not have to hear the parties personally or to receive oral evidence. The case may be one where it is appropriate for him to determine the matter simply on the basis of the grounds of appeal in the petition and of the answer to it in writing: *R v Bishop of Ely* (1794) 5 Term Rep 475 at 477.

On the other hand where, as is often the case, there is a difficult question of law or a substantial issue of fact or a necessary review of the exercise of such power or discretion, the visitor will feel constrained to hear argument on the points in the appeal document.

### (2) Bias

In *R v Bishop of Ely (No 1)* (1788) 2 Term Rep 290 the Bishop of Ely, as visitor of Peterhouse College Cambridge, attempted to validate a previous decision he had made in his capacity as warden of the college. Buller J at 338-339 opined thus:

> "A visitor cannot be judge in his own cause unless that power is expressly given to him. A founder indeed may make him so, but such an authority is not to be implied; he cannot visit himself."

These words have been treated as authority for the more general proposition (which

appears unexceptionable) that a visitor would be disqualified from adjudicating because of any form of bias recognised by the law.

## Evidence

The extent to which it is necessary or appropriate for visitors to hear evidence depends on the nature of the hearing by the visitor. If the visitor is fulfilling a purely supervisory role there is usually no reason for hearing evidence at all. That will be the position where the complaint is in essence about faulty procedure before some inferior body charged with reaching a conclusion on a procedural error. In the *Page* case, as already noted, because reliance was placed on what had allegedly been said at an interview before appointment, evidence was relevant.

Where all that is in issue is what construction ought to be placed on a university statute evidence will often be irrelevant unless, of course, it can be said to be part of the factual matrix against which the statute or regulation in question ought to be construed.

In the last resort it is for the visitor to determine the form in which his exclusive jurisdiction over the domestic affairs of the university should be exercised and the manner which he chooses to exercise his jurisdiction will be conditioned by the nature of the complaint and must not be categorised or narrowed to a supervisory or to an appellate jurisdiction: *R v Judicial Committee Ex parte Vijayatunga* [1988] QB 322.

The evidence adduced before the visitor may be written or oral: *R v Bishop of Ely* (1794) 5 Term Rep 475; and it may be given on oath or otherwise as the visitor may direct: see Shelford, *Law of Mortmain* (1836) 379.

## Costs

Just as the visitor has power to award damages (see *Thomas v University of Bradford* [1987] AC1 795) so he has power to order any of the parties who appear before him to pay costs. The award of costs in such circumstances can be enforced, no doubt, by reference to contract principles in the ordinary courts. A recent example of an award of costs is to be found in *Thomas v University of Bradford (No 2)* [1992] 1 All ER 964.