The Charity Law & Practice Review

OXBRIDGE FELLOWS AS CHARITY TRUSTEES[1]

David Palfreyman[2]

It was recently reported in the *Oxford Gazette* that it had been said at Congregation that a Fellow of one (poor?) college has been advised, *after* formally being 'elected', to transfer his major personal financial assets into the name of the spouse. We read the same story in the quality press, albeit with the insertion of the magic word 'allegedly'. We all hear the gossip; we all wonder; perhaps some of us worry.

Is a Fellow of an Oxford college also automatically and in effect a Trustee of the college qua charity? Under what circumstances might a Trustee be *personally* liable for the mismanagement of the Charity's assets if there is a financial loss, and just how easy in attempting to escape liability is it simply to blame the Bursar - or the Bursar *and* Head of House, or them *and* all those Fellows who were Members of the Endowment Committee, the Estates Committee, the Investments Committee, or whatever? Well, it might be 'easy' to try and shuffle off responsibility in this way, but is it likely to be successful as a strategy in Court? How would a college end up in Court? Do most Fellows even know they are Trustees? (Those few who understand the medieval Latin declaration which they read and affirm on being 'admitted' as a Fellow may appreciate that the Founder is inducting them into, literally, a position of trust in taking responsibility for fulfilling his wishes, in swearing loyalty to the Foundation.) There are about 1 million (sic) charity Trustees handling an annual income of some £20 billion (c5% of GDP) spread over some 200,000 charities in the UK, and the Charity Commissioners estimate that around a third of 'em don't even know they are Trustees! Do new Fellows get fully briefed as they take on the burden of Trusteeship? Do Fellows/Trustees have ready access to the 'Trust Deed' (the College Statutes and perhaps Charter)? Is the burden potentially 'onerous', and, if it is, would there be as many applicants for Fellowships if the extent of the burden were fully appreciated? Would

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Governing Bodies take different (better?) decisions if they were more conscious of acting as Trustees rather than (merely?) as Fellows?

At least in the distant past the Fellows, in sharing out the annual financial surplus (if there was one) as a sort of dividend, could be said to share in the economic success of the college — an economic success helped no doubt by the frugality which usually follows from spending, de facto, one's own money rather than just college's! The then return was perhaps worth the risk of lean years, but now the return, especially for University Lecturers in terms of the low college share of their total 'remuneration package' as compared with 'CUFs', and even more so for non-Tutorial Fellows receiving no salary from the college, is a modest salary, with a range of 'perks' varying from college to college (and nowhere exactly at British Gas executive level). Is the risk of (theoretically) *unlimited* personal liability, even if remote, when put against such humble returns a(nother) price worth paying for 'collegiality'?[3] And, if it is not, can the problem be effectively dealt with by transferring assets to the spouse — assuming the marriage is happy and secure!? Can a Fellow be liable for decisions taken before he or she was elected?

Oxbridge colleges are, as well we all know, legally and financially autonomous (in relation to the relevant University) educational charities. They are also 'exempt' charities. They are incorporated, their Fellows being, collectively, the corporate body, and the body can sue (and be sued), enter into contracts, and do all the legal things which an individual can. The Fellows are the Trustees of the charity and of its assets. But what is a charity? From what is an exempt one exempt? What are the duties of a Trustee? Who are the 'beneficiaries' of an Oxford college as a charity? Are the Fellows/Trustees also 'beneficiaries'? - yet more hats for Oxford Dons to wear!

Some Specific Questions:

(a) If a single Trustee or a minority of Trustees can challenge through the Courts the actions of the Trustees collectively, can one group of Fellows, as Trustees, mount a challenge against the decisions of another (majority) group as Trustees?

(b) Could the students (as the 'Junior Member' class of beneficiaries?) challenge the Fellows/Trustees for, allegedly, drinking perpetual endowment if SCR port consumption got out of hand, or, even less likely, for, allegedly, 'eating' endowment capital by too heavily subsidising the college domestic account and not charging high enough rents and catering charges?

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3 See 'Collegiality, Challenge and Change', David Palfreyman, *Oxford Magazine*, Issue 112, Michaelmas Term, 1994.

(c) Could the Old Members demand bigger, better and more frequent Gaudes?

(d) Could potential student applicants challenge any proposed reduction in places prompted by financial cut-backs?

(e) Can the Bursar, as a Fellow/Trustee (and 'beneficiary'?), challenge his/her Governing Body (rare as this may be!) if it does not do as it is told on financial matters?

Can common sense ever again prevail?! Will the EC dimension make for a gradual impact (beneficial or adverse?) in terms of the charity law framework within which we operate and a shift towards the Continental 'Law of Associations' model (just as Australia and New Zealand have recently shifted away from the English Common Law approach - but note that some Eastern European countries, commencing with a clean sheet of paper, are leaning more towards the UK model!)? Certainly, one major text (Cracknell) on charity law and taxation comments: 'the greatest threat to a system which has evolved over the centuries and is deeply woven into the fabric of our society [comes from the fact that] the gradual erosion of UK charities' fiscal and other privileges must be a distinct possibility' under the EC quest for 'harmonisation'. (Before getting too lyrical about English law, however, we should remember that *Jarndyce v Jarndyce* in 'Bleak House', the longest running legal action in fiction, was a trust law case!).

Will the English Courts anyway soon be as full of litigators as those in the USA as our solicitors take on cases on a 'no win, no fee' basis? As we move to 'no win, no fee' and, if students start (once again) to pay their own academic fees at undergraduate level, we will surely end up, in this increasingly litigious age, with dissatisfied students (customers) challenging their educational institutions (suppliers of the product) on the basis of allegedly failing to provide goods 'suitable for the purpose' — stale lectures, incomplete reading lists, tutorials contaminated with unwanted sexual harassment, causing mental trauma by setting difficult examinations, indirect sexual discrimination by relying entirely on one set of exams to determine the degree result... In certain (remote, but perhaps still just possible) circumstances, the blind eye very occasionally turned by a college Governing Body to weaknesses in the 'quality control' of its tutorial system, leading to the loss of such a case, and to the payment of damages/legal costs by the college/charity, might leave the Fellows/Trustees personally liable to the college/charity for such losses arising from their alleged neglect of academic management...

It is convenient to turn to *Halsbury's Laws of England* for edification, also to Pettit's *Equity and the Law of Trusts*; to C P Hill's classic (if now dated, 1966) text: *A Guide for Charity Trustees* (Hill being then 'Lately Chief Charity Commissioner for England and Wales'); to a whole range of 'Janet and John'

guides produced by the Charity Commissioners to assist Trustees.[4] We should note that indicative of the growth of the charity sector (e.g. NHS Trust Hospitals, Housing Associations, opted-out State Schools) is the fact that both of *the* major texts on charity law (Picarda's *The Law and Practice Relating to Charities* and *Tudor on Charities*) have recently emerged in much revised and long-awaited new editions (see also Cracknell's *Charities: The Law and Practice*).

What is a Charity? A Charity is an institution, corporate (like a college) or not, which is established for charitable purposes and is subject to the jurisdiction of the Chancery Division of the High Court, and registered with the Charity Commissioners (unless exempted from this requirement) — all under the 1993 Charities Act (consolidating the 1992 and 1960 Charities Acts). What is 'charitable' is not defined in the Act and hence one relies on case law. Certain tests need to be satisfied; it must be 'for the public benefit' (or at least enough of 'em, perhaps narrowly but certainly clearly defined — e.g. Eton and Harrow are not exactly as undiscriminating in the allocation of their charitable resources as, say, Shelter, but all three are charities, whereas a fund to provide for the school fees of employees only in company X would not be for 'the public'), and must fit within the list of purposes enumerated in the preamble to the ancient statute of Elizabeth I (aka the Statute of Charitable Uses, or the 1601 Charitable Uses Act). Hence a charity (unlike, say, a family trust) does not strictly have 'beneficiaries', at least in terms of named individuals, given that it is 'public', even if the 'public' might be a relatively restricted sub-section of the masses selected by academic (and possibly geographical) criteria. Those charity purposes are essentially the 'four principal divisions' of charity (the MacNaghten classification, arising from the 1891 *Pemsel* case): relief of poverty, education (including, for example, medical research), support of religion, 'other' (e.g. sport, rifle clubs, lifeboats, disaster relief, even reduction of the National Debt — sic). The establishment and support of colleges falls firmly within the net — as was a trust to buy books for the Library of Trinity College, Oxford, on the basis that 'a large, well-assorted library tends to the promotion of education' (an 1866 case), or to endow a fellowship (Jesus College, 1615), or to provide academic prizes (St Catherine's, Cambridge, 1873).

A recent Australian case (1978) even managed to hold that a trust for the establishment of a rose garden in the grounds of a university was charitable in advancing the purposes of education, on the basis that such a garden 'must of its very nature be conducive to the inspiration in all but the most blasé of students of a state of mind better attuned to the academic tasks ahead'. Other college cases establish that surplus income can be retained — not much of a problem for most

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[4] I should also pay tribute to local Oxford solicitors, David Isaac and Peter Webber - to both of whom I am very grateful for their valuable comments on reading through this article, in draft form, but neither of whom bears any responsibility for the wild excesses of the end result.

Oxbridge colleges in the 1990s, but clearly of worry to some in the past: Trinity, Cambridge (1856 — and probably still a 'problem'!), Brasenose (1834), Sidney Sussex (1869). Finally, as Hill clearly states: 'Charity property is property held by private people, not public property held by a public authority....Charity property is private property.'

What is an Oxford College in charity law terms? Clearly it is an 'institution', in this case 'incorporated' (the corporate body being 'the Governing Body'), which has the charitable objective of the advancement of education for the public benefit (even if, originally, the 'public' might have included a somewhat limited priority group of 'Founder's Kin'). The Oxford college is generally a corporation established for the perpetual distribution of charity by the Founder, and hence is an 'eleemosynary' corporation - thus the University of Oxford (no Founder) itself is, like a Livery Company, a civil, not an eleemosynary corporation. The 'beneficiaries' of the charity are, in fact, generally and directly the Head of House and Fellows, *and* Scholars; indirectly the 'public benefit' arises from the college providing university education, promoting academic research, and, in some cases, being a choral college and maintaining a public place of religious worship. The same Head of House and Fellows (but *not* Scholars) are, as the corporation, also the Trustees of the charity property. Indeed, Oxbridge colleges are probably unique, are entirely *sui generis* in charity law terms, in that not only are the Head of House and Fellows both de facto Trustees and at the same time a class of beneficiary, but they are also paid salaries, are remunerated, from charity/college funds — does one argue that the financial rewards are not for managing the college since charity law strictly precludes the payment of Trustees (other than, e.g. solicitors acting as 'professional' Trustees), but are receivable as beneficiaries of the eleemosynary charity dishing out the Founder's perpetual bounty as he directed? In fact, one might (less convincingly?) argue that the Founder did indeed intend that Fellows were to be remunerated while they not only teach (and research?), but also (adequately) perform that function of managing the college (just as some, albeit very few, Trust Instruments *do* allow for an element of compensation to non-professional Trustees for their time and trouble in acting as Trustees — e.g. the Trustees of the Wellcome Foundation).

What is an exempt Charity exempted from? An Oxbridge college is an exempt charity within the 1993 Charities Act. The list covers universities, the Church Commissioners, various national institutions and museums, grant-maintained schools and related institutions. The rationale behind exemption is that Parliament is content that a particular charity will be effectively managed and its property properly safeguarded by a variety of existing arrangements for supervision and regulation, without the need for the charity to be put within the jurisdiction of the Charity Commissioners. In the case of a College these arrangements for supervision and regulation would include the Statutes both of the College itself (probably based on the 1923 Universities of Oxford and Cambridge Act, and amended by authority of the Privy Council over the years) and of the University of Oxford; the role of the College Visitor; the 1925 Universities and College

Estates Act (amended 1964) - and hence, occasionally, we seek the approval of, of all things, 'MAFF' (Ministry of Agriculture, Fisheries & Food); the function of the College Auditors; the College's utilisation of various professional advisors for investment management, legal matters, estate management, building conservation, etc.; the Trustee Act 1925; and the numerous Court of Law precedents governing the conduct of Charity Trustees — *and*, arguably, the fact that democratic collegiality involves many checks and balances on executive power, and any abuse thereof (unlike the situation prevailing in certain modishly managerial higher education and other public sector organisations which sometimes behave as if they were unaccountable private sector corporations — British Gas again!). The exempt charity is exempted from the need to register (hence no 'Charity Number', although there will be a 'file number' with the Inland Revenue) with the Charity Commissioners (but so are some 'excepted' charities), whose supervisory role would be superfluous given the other arrangements in place (Parliament hopes) for efficient management, but it remains fully subject (apparently at the behest of the Attorney-General, on behalf of the Sovereign in his/her *parens patriae* role, and representing 'Joe Public' as the (potential) beneficiaries of the Charity — as Hill notes, the Crown, via the Attorney-General, protects 'lunatics, minors, and charities') to the High Court in relation to the common law applicable to a charity: Oxford college cases, mainly C18 and C19, include ones concerning All Souls, Balliol, Brasenose, Christ Church, Exeter, Jesus, Hertford, Magdalen, Trinity, University. Thus, the duties and responsibilities of the Trustees are just as great as for any non-exempt charity — and the liabilities just as threatening if anything goes wrong! As set out below, however, some aspects of the 1993 Charities Act do apply.

Who is a Trustee? It is a person 'having the general control and management of the administration of a charity' (section 97 Charities Act 1993) — which, for an Oxford college, means 'the Governing Body', the corporate body of *all* Fellows (not just the domineering Head of House and/or Bursar!), whether *or not* the Fellow bothers to attend meetings and to participate in decision-making ('The law knows no such person as a passive trustee', *Lewin on Trusts*). Pettit notes: 'Qualities to be looked for include integrity....a knowledge of financial matters, business acumen and common sense', while in a leading case it was commented that 'there are some who are temperamentally unsuited to being Trustees' (*Cowan v [Arthur] Scargill* (1984), re pension fund Trustees' investment policy).

What are the duties, obligations, responsibilities, and liabilities of a Fellow/Trustee? Arguably a good guide is the following (long) list extracted from the Charity Commissioners, series of 'Janet and John' guides, such guides being 'best practice' which even an exempt charity might wisely follow subject to its own Trust Deed (or College Statutes) (albeit not strictly required to in some instances). A Fellow/Trustee MUST....

(a) Resign as a Trustee if convicted of an offence involving deception or dishonesty, unless the conviction is spent, or if he/she becomes an

undischarged bankrupt (section 72 Charities Act 1993, and applying even to exempt charities).

(b) Familiarise himself/herself with 'the governing document or documents of the Charity' and 'ask about its activities, its funding and the nature and condition of its property'.

(c) Ensure that the income and property of the Charity are 'applied for the purposes set out in the governing document and for no other purpose'.

(d) 'Act reasonably and prudently in all matters relating to the Charity.'

(e) 'Always bear in mind the interests of the Charity.'

(f) 'Not let personal views or prejudices affect conduct as Trustees.'

(g) 'Exercise the same degree of care in dealing with the administration of the Charity as a prudent business man would exercise in managing his own affairs or those of someone else for whom he was responsible' (based on a string of cases reaching back as far as *Speight v Gaunt*, 1893).

(h) Absent himself/herself entirely from any discussion or vote on the matter by his/her co-Trustees where the Trustees are required to make a decision which affects the personal interest of the individual concerned (who would be left at Governing Body, other than the Head of House, to decide on the periodic increases in allowances of one kind or another for Fellows?!). An alternative would be to handle it like the 'remuneration committee' of a Board of Directors; you, St Judd's, increase our pay at St Smugg's and we'll increase yours when we sit on your Governing Body as non-executive directors to consider 'the remuneration package' for Fellows. Or perhaps the unpaid Professorial Fellows could have fun determining the pay of the Tutorial Fellows? Either way, Trustees are normally strictly banned from such personal financial gain at the expense of the Charity, given their fiduciary relationship (just as, for example, they — or others closely connected/related to them — are not, other than perhaps under very stringent safeguards (e.g. at a public auction; the individual Trustee concerned not having participated in relevant meetings at which, say, the process of sale had been discussed; the other Trustees having full and clear independent professional advice on the value of the property, such advice not being made available to the potential purchaser amongst their number), meant to purchase Trust property (the 'self-dealing' rule) lest they find a conflict of interest between a requirement to maximise the sale value for the Trust and a natural desire to acquire a bargain as a purchaser).

(i) 'Ensure that the way in which the Charity is administered is not open to abuse by unscrupulous associates or employees; and that systems of control are vigorous and constantly maintained.'

(j) See that money not needed for immediate expenditure is invested, or deposited in an interest-bearing account [not Barings or BCCI!] if expenditure is expected in the near future.

(k) Ensure that investments are reviewed periodically to check that they remain suitable for the Charity's needs.

(l) Wherever possible, place funds 'in a range of investments so as to avoid substantial losses caused by the failure of a single investment or institution' [Barings and BCCI again!].

(m) Ensure that bank accounts are controlled by at least two of the Trustees (one Trustee should not be allowed to operate a bank account alone and a second signatory should never presign-blank cheques for counter-signing by another).

(n) Ensure that Trustees know on a continuing basis what condition any land owned by the Charity is in, and, if its boundaries are being encroached upon, what can be done with it, and how it should be used, and that it has appropriate and adequate insurance cover — hence the 'Progresses' which some colleges have annually around their farms (not meant to be just an excuse for an outing and a cream tea).

(o) Ensure that property which is the permanent endowment of the Charity, 'is preserved and invested in such a way as to produce a good income, while at the same time safeguarding the real value of the capital'.

(p) Ensure that 'all income due to the Charity is received and that all tax and rating relief is claimed'.

(q) 'Decide what form of investment will be most suitable for the needs of the Charity and obtain skilled advice for this purpose, bearing in mind the long-term future of the Charity as well as the short-term, and try to counteract the effect of inflation on capital and income'. As Hill expresses it: 'the trustees are bound to consider the interests not only of the present generation but also of a century hence', and so must observe the 'essential distinction' between capital and income. Yet note the comments in one case (*Nestlé v National Westminster Bank*, 1988): 'Modern trustees acting within their investment powers are entitled to be judged by the standards of current portfolio theory...one must be careful not to endow the prudent trustee with prophetic vision or expect him to have ignored the received wisdom of his time.' And note the further

comment in a second version of the same case (1993) which suggests that demonstrating poor investment management is not easy: performance 'is to be judged not so much by success, as by absence of proven default'.

(r) 'Keep proper books of account, and prepare consecutive statements of account showing income and expenditure or receipts and payments for periods of not more than 15 months, together with a balance sheet relating to the end of the period, which should be preserved for at least seven years and supply a copy of such accounts to anybody requesting them' (and paying 'a reasonable fee' to have them, as applied to exempt charities by the 1993 Act). [NB The Franks Accounts are, of course, already in the public domain and have been since the late 1960s — hence they reveal little of college capital in Statement VII, the excuse for a balance sheet!]

(s) Have such accounts professionally and independently audited and certified.

(t) With special reference to land and property, briefly, Trustees should instruct a qualified surveyor who will act for them alone and report to them in writing, and they must follow such advice on the marketing of the property or concerning the purchase of property. Trustees should not sell land or property for less than 'the best price reasonably obtainable', and the surveyor should confirm that any offer which they propose to accept meets this requirement. Property conveyed in breach of trust can be recovered by the Court setting aside the sale (e.g. *Attorney-General v Magdalen College*, 1854).

(u) The above requirement gets interesting in relation to 'gazumping', and I quote at length from the relevant leaflet produced by the Charity Commissioners:

'The legal requirement is that Trustees must satisfy themselves that they have secured the best terms reasonably obtainable in the circumstances. This means that they must accept the highest offer they receive if they are satisfied that the offerer is acting in good faith. Only in rare cases will acceptance of a slightly lower price be justified. In such cases Trustees will have to show that other, quantifiable, elements of the offer more than make up for the lower price. It is not sufficient for Trustees to proceed with an offer merely because it appears reasonable. It is their duty to obtain the *best* terms possible in the circumstances, and until they have signed a legally enforceable contract with a purchaser they are obliged to consider any other offers they receive, even if it means "gazumping" someone whose offer they feel honour-bound to accept. Trustees cannot sell at less than the best price simply in order to avoid selling to a purchaser whom they find objectionable. The interests of a Charity must come before the Trustees' personal preferences. Where they accept a lower price, they must be satisfied that this is to the overall advantage of

the Charity. The surveyor or other advisor should be instructed to assess the value of any non-monetary elements in an offer.' (The case-law is *Buttle v Saunders*, 1950.)

(There, I said it was a long list).

Turning to the provisions of the 1993 Charities Act in relation to land and property, a detailed procedure is set out in the booklets produced by the Charity Commissioners, and needs to be followed so that the Charity can comply with the Act (section 36). This part of the Act does *not* apply to exempt charities, but, again, it is a useful guideline for us and one which we might (and probably already do) generally follow.

- Trustees must obtain and consider a written report on the proposed disposal from a qualified surveyor instructed by the Trustees and acting exclusively for the Charity.

- Trustees must advertise the property in accordance with the surveyor's advice. If the surveyor advises that advertising or marketing a property would not be in the best interests of the Charity, then the property need not be advertised.

- Having considered the surveyor's report, the Trustees must satisfy themselves that the terms of the disposal they intend to make are the best that can reasonably be obtained.

- The surveyor must be a Fellow or professional associate of either the Royal Institution of Chartered Surveyors (RICS) or the Incorporated Society of Valuers and Auctioneers (ISVA). A surveyor qualified in this way will be entitled to use the letters FRICS, ARICS, FSVA or ASVA after his/her name. In addition, the surveyor must have ability in, and experience of, valuing land of the type the Trustees are selling, e.g., farmland, freehold residential property, light industrial units, or whatever, in the area where the Trustees' land is situated. Trustees should satisfy themselves, before they formally instruct a surveyor to act for them, that he/she possesses these qualifications, ability and experience.

- The surveyor's report must be in writing and must deal with the matters laid down in regulations made by the Home Secretary, which came into effect on 1st January 1993. These are the Charities (Qualified Surveyor's Reports) Regulations 1992. When instructing a surveyor to act for them, Trustees should be sure that the surveyor is aware of these Regulations. Everything in the Regulations must be covered by the surveyor in his/her Report(s). Trustees should urge the surveyor to report to them on any other matters he/she feels are relevant in the circumstances, or on which the Trustees wish to receive advice.

- Such items to be covered in the surveyor's report include: a description of the property; details of any planning permission needed by the Trustees; a valuation of the property; advice on the price the Trustees should expect or should pay, or at auction the maximum bid they should make or minimum figure they should seek; a description of repairs or alterations the Trustees would need to make, and the estimated cost in relation to a purchase; a positive recommendation that it is in the Charity's interest to sell or purchase the property; anything else the surveyor thinks relevant.

- Where Trustees are disposing of land which is let to produce an income for the Charity, they must satisfy themselves that the sale of the land is more beneficial to the Charity than the retention of the land. Trustees will need to seek professional advice on the long-term potential of the land, especially if it may be suitable for development. They will also need to compare the income which the land would yield if they retained it, with the income they could obtain by selling it and investing the sale proceeds.

The amount of prudence required from a Trustee is the same degree as the Fellow would apply in looking after his/her own property/assets (with an even higher standard for investment matters). The Court is 'severe with trustees who wilfully, corruptly or negligently misapply the trust property'. (Indeed, the Debtor's Act 1869 abolished arrest and imprisonment for debt with a few exceptions, one of which was 'default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity', as duly applied in an 1883 case (*Re Knowles*) in which the learned judge remarked: 'I think this is a case in which the punishment ought to be inflicted for the purpose of teaching this man that a dishonest act of this kind will not be passed over with impunity, even though he is unable to pay, and for the purpose of teaching other trustees the same lesson.' Similarly, the Limitation Act 1939, whilst generally applying a six year period for the bringing of actions, allowed for an indefinite period where a beneficiary wished to bring a breach of trust action against a Trustee on the basis of the latter's fraud — as opposed to an innocent breach of trust, to which the six year rule would apply.) But the Court 'acts leniently where the administration of the funds has been honest but mistaken' (*Halsbury*, citing *Attorney-General v Dean and Canons of Christ Church*, 1829), especially in the case of a corporation (Balliol College, 1744, and Gonville and Caius College, 1948, cited). So, the Trustee acting 'honestly and reasonably' may well be relieved of personal liability for any breach of trust (section 61 Trustee Act 1925), providing he/she has noted the 'Janet and John' guidelines referred to earlier and has not delegated his/her duties (e.g. neglected to attend Governing Body!), and is not guilty of 'wilful default' in his/her duties ('wilful default' being defined as 'want of ordinary prudence', which might take the form of 'a passive breach of trust, an omission to do something, which, as a prudent Trustee, he ought to have done'. It implies a consciousness of negligence, a breach of duty, a recklessness in the performance of duty). A new Fellow/Trustee is not liable for any errors in the management of the charity/college prior to his/her appearance on the scene, but may become liable for

continuing inefficiencies if he/she should reasonably have discovered them and spoken out. A Fellow/Trustee recording his *prior* clear opposition to the taking of a decision which turns out to be a breach of trust, may well also escape personal liability. The Trust Deed for some trusts/charities *might* try to limit the liability of Trustees, but the validity of such a clause is uncertain (especially in the context of fraud or gross negligence on the part of a Trustee). It is possible to buy Trustee Indemnity Insurance, but, obviously, only against honest error on the part of Trustees which leads to a loss to the Charity and personal liability for the Trustee(s). In essence, the fiduciary duties of charity trustees are similar to those for company directors (hence, the personal liability insurance packages offered by insurers are similarly worded), and, arguably, the tests applied by the Courts as to the reasonableness, or otherwise, of the behaviour of trustees might overlap. The following is an extract from an article in *The Financial Times* (12/12/95) and might be relevant, for example, to a charity which, say, unwisely commits itself to a major building contract by signing contracts but whose Benefactor then fails to give generously as expected, leaving it unable to finance the work:

'In a test laid down by courts in 1925, judges stated:

> "A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience".

According to the judges then, directors did not need to attend more board meetings than they reasonably could, nor to understand the accounts which were laid before them. It was a sort of "Buffer's Charter".

Over the past two years the courts have been applying a much tougher standard, which they have taken from the 1986 Insolvency Act on wrongful trading in insolvency. The Act states:

> "The facts which a director ought to know or ascertain, the conclusions he ought to reach and the steps which he ought to take are those which would have been known or ascertained, or reached or taken, by a reasonably diligent person having both (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and (b) the general knowledge, skill and experience that that director has."'

In the case of investment policy the test of prudence has been defined as to 'take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide' (*Re Whitely*, 1886): for example, to seek professional advice, to accept such advice and not to disregard it because of irrelevant (even if sincerely and honestly held) personal political beliefs concerning certain kinds of investment in,

say, tobacco products, South Africa, armaments, or whatever (*Cowan v Scargill re the Miners' Pension Fund*, 1985, and *Lord Bishop of Oxford v Church Commissioners*, 1991). Only in *very* rare cases might a contrary policy be appropriate — for example, a cancer research charity might reasonably not invest in tobacco companies, or a temperance charity in alcohol products. It seems possible that a college could find it difficult *not* investing in certain products, countries, etc, unless it was clear that to do so would not be harmful ('a risk of significant financial detriment') to the duty of the Fellows/Trustees to maximise endowment, and/or that there was an equally valid alternative investment — no making of 'moral statements at the expense of the charity'! (Quotations from *Bishop of Oxford* case.) The maximising of endowment needs to take into account the balancing of income today with the need for capital growth for tomorrow (hence the rough rule of thumb not to extract much more than about 4% from 'perpetual endowment'), *and* the need for diversification, *and* the requirement to balance risk against return (OK to set the investment manager a target of, say, 1 or possibly 2 points above the benchmark index/indices, but to expect an out-performance by, say, 4 points or more may be inviting him to take undue risk for a perpetual charity — even if 'Joe the Millionaire Old Member' does it all the time with his personal money). All this points strongly towards the need for Trustees to obtain appropriate professional advice, 'and on receiving that advice to act with some degree of prudence' (*Cowan v Scargill*). A prudent investment policy may well involve an older charity whose assets are, for historical reasons, heavily concentrated in, say, London commercial property, having to 'sell the family silver' to some degree in order to redeploy the proceeds into other asset classes (e.g. equities), so as to achieve some diversification within the portfolio. This process can be painful for some more conservative-minded Trustees, who may not have appreciated that, in strict legal terms, they have perhaps been (uncharacteristically) reckless in continuing to keep their eggs all in one basket (especially if the commercial property basket has tended to generate tempting and welcome high(ish) yields of 6-7%, which rental income has all been spent without regard to the possibility of the property being 'a wasting asset' and the need for some to be ploughed back for eventual rebuilding/redevelopment).

A comment about the Visitor, which eleemosynary exempt corporate charities have, but civil corporations don't, and who might be the Crown or a Bishop, according to Statutes. The Visitor will probably have powers of inspection (visitation) but in practice may rarely visit. His (less likely her!) role is very clear and significant as 'forum domesticum', the private jurisdiction of the Founder. The power of the Visitor in any dispute arising under the domestic law of the institution (the Statutes) is absolute and exclusive (all as reiterated in the 1988 *Sidney Sussex* case), generally reviewable by the Courts only if he fails to discharge his duties or to follow the rules of natural justice. He can even award damages! The Visitor in action is a judicial act, with power to investigate and correct wrongs, to redress grievances, as a review court or as an appellate tribunal. The Courts cannot gainsay him on the interpretation of the domestic law of the institution; he is the sole arbiter and the Courts have no cognisance of it; they can

usually intervene (Judicial Review) only if he carries out his work improperly or is abusing his powers. The 1988 Education Reform Act has eroded the jurisdiction of the Visitor in relation to matters of academic employment contracts, ending the concept of tenure being unchallengeable on grounds of financial exigency. The Visitor, however, remains an economical (relative to the Courts) and potentially effective (e.g. the published Visitor's Report on troubles at Swansea — Sir Michael Davies, *The Davies Report*, 1994) route for the resolution of student complaints, and is likely to be kept increasingly busy in an era of 'charterism' and of the student as a consumer rather than simply a Junior Member of the *studium generale*. Indeed, a 1988 case explored the jurisdiction of the Visitor in relation to the alleged misuse of the powers of Governing Body in sending down an undergraduate at an Oxbridge college on the grounds of failure in examinations (*Oakes v Sidney Sussex College, Cambridge*, [1988] 1 All ER 1004). Incidentally, Picarda notes that the contrast between Oxford and Cambridge, with no Visitor, and all other Chartered ('old', pre-1992) UK universities 'is to be ascribed to history rather than to logic' — there are other aspects of the distinction between what he terms 'the two ancient universities' and 'the modern universities' which similarly relate to the baggage of history rather than to coolly rational managerial decision-making!

Finally, back to the five specific questions posed at the beginning... Assuming there is no remit to the Visitor, the answers would seem to be: (a) yes in theory (how unseemly, and who pays whose legal costs along the way or eventually?!); (b) yes, but only via the Attorney-General and only for the Scholars as 'beneficiaries' (*not* ordinary students, commoners) like the Fellows/Trustees; (c) no, *not* a class of 'beneficiaries'; (d) no, also *not* a class of 'beneficiaries'; (e) yes, but who would pay the legal costs along the way even if he won in the end — no Bursar is rich enough to go to law, none quite so poor as to get legal aid (although he/she might persuade the Attorney-General to act on behalf of the Crown in the public interest, as might just possibly the non-'beneficiary' student or applicant in examples (b), (c) and (d) as a 'relator' (a kind of 'informer') or, even more likely, as a 'person interested in the charity' taken under the wing of the Attorney-General. In fact, legal costs for all parties in 'charity proceedings' are normally charged to the Charity, unless one party has acted in an unreasonable way. Of course, the Court action under Charity Law contemplated in the above scenarios might be substituted for by reference to the Visitor (at less cost in legal fees?), and his jurisdiction under the Statutes probably should provide recognition of the mass of Junior Members under (b) (not just the Scholars), although the domestic Law probably does not establish any rights for 'Old Members' or 'potential applicants' in (c) and (d).

As the North Commission/University/Conference of Colleges/Governing Bodies debate (yet again) the College Contributions (tax) system and (as every quarter century or so) the pooling of endowments, and as some colleges come ever closer to the financial brink, the whole issue of trusteeship will come more sharply into focus — Can a generous-hearted Governing Body cheerfully give more away via

college taxation?; Can it allow endowment to be pooled?; Can it take ever more annual income at the expense of future capital?; Can it run at an annual recurrent deficit (even if the bank manager will let it) while waiting, like Billy Bunter in Macawber mode, for the much heralded Postal Order to turn up? In fact, any Charity needs to be *very* careful in mixing capital and income under the terms of the 1961 Trustee Investments Act, but an Oxford college, whilst exempt from that Act, is constrained by the provisions in the 1925/64 Universities and College Estates Act in that it proscribes the disposal of a capital asset ('capital money' or permanent endowment) in the form of land, or commercial or residential property, equities and bonds, and even 'treasures', in order to balance off the deficit on the recurrent account caused by expenditure exceeding income: i.e., capital should *not* be used as a substitute for income (except where that income could be said (*and proved*) to be to the benefit of another type of capital asset, e.g. refurbishment/alteration of or additions to college buildings or improvement of college farms or even the rebuilding of chancels in far-away chuches with which the College is (or has been) linked by way of patronage). In any event, if capital is spent, it *must* be repaid, with interest, over an appropriate period of time (say, 30 years) via a 'sinking fund'. Thus, while the point may *not* quickly be reached in terms of trading while insolvent, as discussed earlier and as for a company director, arguably the Fellow/Trustee *may* find himself/herself seeing sizeable recurrent, annual deficits on the income/expenditure account (Statement I of the Franks Accounts) being 'posted' (or lost) to the 'back pages' (Statements VI & VII), and potentially find himself/herself being in breach of trust in terms of eating endowment capital (especially since, given the college is already striking a substantial annual deficit on its trading account, it would be hard for it to cover the repayments to capital required, even if utilising it to cover recurrent expenditure had been 'legal' anyway). The college could be in a mess well before the bank manager, the only non-college person (besides the Auditors!) likely to be 'in-the-know' as to the true state of affairs, gets worried about the level of secured assets covering the growing overdraft.

P.S. But what of *criminal liability* for the corporate body? The colleges as corporations, especially as employers and as the providers of accommodation and catering, bring themselves within the remit of Health & Safety and Environmental Health (& hygiene) legislation. A college has been fined for a food-poisoning incident. Another has been successfully prosecuted (£500 fine) by the Health & Safety Executive for nearly killing somebody by electrocution. A public school charity has recently been fined £21,000 (plus costs) for the death of a pupil. Yet the H & S Executive could try to prosecute *personally* key individuals within 'the corporation' — the Head of House, more likely the Bursar, perhaps the Domestic Bursar (especially if a Fellow), probably less likely an employee such as the Clerk of Works — if it felt that the dangers had been identified, but that, not only 'the College' but also *individuals* in positions of power (the Bursar?) and influence, had ignored them and their duty to do all 'reasonably practicable' to prevent accidents and harm at work under the relevant legislation. Or, if the College, and individuals, had been negligent in not *reasonably* identifying risks and dangers.

Such personal prosecutions don't often happen, and are even less frequently successful — remember the failed corporate manslaughter (recklessness) prosecutions over the sinking of the *Herald of Free Enterprise*; but note the recent prosecution of a Director (employer/owner — *not* of the Manager, employee) over the accident at a canoe training centre.

It would seem unlikely that an individual Fellow, unless holding a relevant key administrative office and having some direct involvement with the event, will be personally prosecuted. Yet what if the Bursar had warned Governing Body that it must do x or y to comply with relevant legislation (say, recent new legislation re potential legionella contamination in water supplies), and the Fellows had decided instead to spend money on more port, or portraits, or Porterhouse style feasts...could they all, and not this time (for once) the Bursar, end up in dock, and even prison? — imagine a college without Fellows! On the other hand, if a college were prosecuted successfully for, say, a death arising from its neglect of Health & Safety (and the average 'sanction' is only some £2,000 per death), or, more significantly, if the criminal prosecution led to a civil Court case for damages to the bereaved (likely, in the case of the killing off (corporate homicide) at a Gaude of a successful Old Member in prime earning capacity, to be rather more than £2K) *and* if the public liability insurance were voided because it seemed that the college had not revealed its H & S weaknesses under the insurance contract of 'ultimate good faith', could the (assenting) Fellows as individual Trustees be liable to compensate the Charity for its fines, damages pay-out, and legal costs, given that their collective mismanagement had cost it dear? Back to Fellows as Trustees!

Even with the new enhanced prospect of the (empty, 'no extra pay') title of Reader or Professor, is the £3K or so extra as an Oxbridge College Fellow over career academic posts at selected other UK research universities really worth taking on the extra undergraduate teaching and the college duties, *including* the permanent and inescapable burden of Trusteeship?