The Charity Law & Practice Review

OXFORD COLLEGES: PERMANENT ENDOWMENT, CHARITY TRUSTEESHIP, AND PERSONAL LIABILITY[1]

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Introduction

In the recent political furore over the threatened abolition or reduction of Oxbridge college academic fees as charged to students (but mainly paid by Government) the Oxford colleges collectively sought the opinion of a distinguished Chancery silk on three crucial questions.

The first question was whether the colleges hold their core, original, foundation assets (in other words, their assets other than those acquired since foundation or held on a specific trust) as permanent endowment. Secondly, they asked whether they could use such assets to fund recurrent deficits. Thirdly, they asked whether, should the college become insolvent, there were any circumstances in which the Fellows of a college could be faced with personal liability.

This article explores two of those questions, namely (1) whether an Oxford college is permanently endowed; and (2), if so, whether the Fellows of a college are charity trustees (or quasi-trustees) so that in the case of any apparent breach of

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1 The author thanks both Oliver Hyams, Barrister, and the author of 'Education Law' (forthcoming, 1998, Sweet & Maxwell), and Hubert Picarda QC, Editor, *The Charity Law and Practice Review* and author of *The Law and Practice Relating to Charities* (1995); for their valuable comments on this article when in draft. Jean Warburton, Reader in Law, University of Liverpool (and Editor of *Tudor on Charities* (1995), an authority much cited in this article), noted that the issue being addressed in this article is 'an interesting and intractable one', and that 'the only safe advice' for the Fellows of Oxford Colleges is that they should adopt a standard of fiduciary duty closer to charity trusteeship rather than, say, company directorship. None, of course, carries responsibility for any errors, omissions and misinterpretations still remaining.

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trust they can be held personally liable by the Court. Such liability would be either on the footing that they are in breach of their trust or, as corporators or directors, acting contrary to or *ultra vires* its Statutes. The concept of 'capital money' in the Universities and College Estates Act 1925, amended in 1964, is also discussed.

The line of argument which is explored here in relation to Oxford colleges may be of relevance to chartered English universities more generally, since they too are in the main lay eleemosynary charitable corporations aggregate. The only exceptions are Oxford and Cambridge which are not eleemosynary (hence no Visitor) but are civil corporations created by Statute.[3]

The Spectrum of Views

The commonly-held view within the 'culture' or 'folk-memory' of Oxford colleges, and certainly within the Estates Bursars' Committee, is that the colleges are permanently endowed charitable organisations, with no power to spend such permanent endowment, and that the Fellows, being charity trustees (or, at least, quasi-trustees), are, as such, subject to personal liability in certain circumstances. Indeed, if this were not the case it is hard to think why colleges would not have been bankrupted by the high-living Parson Woodfordes of eighteenth century Oxford.

Hence in recent years many colleges have sought and obtained Privy Council approval to amend their Statutes so as to permit them to delegate routine decisions over the management of their portfolios to investment managers. That mirrors the result achieved by registered charities which have individually been able to apply to the Charity Commissioners to incorporate into their constitutional document the 'model order' suggested by the Commissioners[4]. This line of argument is set out in an earlier article by the writer[5] and also in two related articles, one by the writer and one by the Managing Editor of this *Review*, on the statutory regime under which colleges are permitted to disperse income (and only income) in the form of 'college contributions', a kind of university and inter-college taxation

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3 See 'A Bibliographical Essay on the Visitor' in Palfreyman & Warner, eds '*Higher Education and the Law*', 1998, pp 340-360.

4 See item 6, 'Delegation of Investment Decisions by Charity Trustees and Appointment of Nominees (1993)', in 2 *Decisions of the Charity Commissioners* (1994).

5 See David Palfreyman 'Oxbridge Fellows as Charity Trustees' 3 CL&PR 187-202.

scheme[6]. The opinion is very largely at variance with what might be termed this traditional view. Somewhere in between, on the issue of personal liability for the governors of higher education institutions generally, are the (quasi-) trustee arguments of *Chamberlain*, *Hall* and *Hyams*.[7]

Oliver Hyams in two articles in *Education and the Law* comments: 'As a matter of policy, however, it seems sensible to say that a court should in relevant circumstances ignore the existence of the governing body's corporate status, and treat the governors as if they, rather than the corporate governing body, are charity trustees. Alternatively, the court could note that the governors are properly to be regarded as the managers of the corporation, and ... could then decide that the jurisdiction of the High Court with respect to charities extends to such managers, and hence the governors, at least as far as the management of property held for the general purposes of the governing body is concerned. (This would be subject to the question whether the jurisdiction of the High Court has been ousted by the statutory regime[8] relating to the governing body.) If that occurred, and, in any event, there would be very good reason to say in addition that the governors as well as the incorporated governing body should be regarded as within the definition of charity trustees in s.97(1) of the Charities Act 1993 where the governing body holds property on charitable trust rather than for its general purposes, the governors themselves could then be regarded as within the jurisdiction of the High Court with respect to charities in relation to the administration of that trust, as well as in relation to property held for the general purposes of the governing body. (It certainly seems, as a matter of policy, odd that there should be a distinction between the two situations in this regard. It is noted that, if the jurisdiction of the court extended only to the corporation, then an action for breach of charitable trust by the corporation could only result, if successful, in the use of charitable funds for a different charitable purpose from that for which they were originally intended. On the other hand, if the corporation misapplied property held for its general purposes, then there would be no power in the court to order the replacement of the property.)'

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6 David Palfreyman 'The Oxford Colleges and their College Contribution Scheme'(1996/97) 4 CL&PR 51-65; cf Hubert Picarda 'Oxford's College Contribution Scheme' (1996/97) 4 CL&PR 111-118.

7 See Palfreyman & Warner, eds, *Higher Education and the Law* (1998) 51-62 (Emma Chamberlain); and see John Hall and Oliver Hyams 'Governance in an Era of Accountability and Potential Personal Liability' ibid at 25-50; and see also O Hyams 'The potential liabilities of governors of education institutions '(1994) 6 *Education and the Law* 191-205, and O Hyams 'Higher and further education dismissals and redundancies - problem areas and their consequences for corporations and governors' (1996) 8 *Education and the Law* 137-152.

8 Or even the authority of the Visitor for eleemosynary charitable corporations?

Similarly, Hambley,[9] whilst conceding that the term 'quasi-trustee' has 'no recognised legal basis', sees the concept as a useful one in reminding the members of the corporation that their fiduciary obligation to the corporation is closer to that of charity trusteeship than to, say, the lower fiduciary standard expected of the company director.

US Law

In contrast, however, the USA experience cited in Kaplin & Lee *The Law of Higher Education* (1995) 82-85 is to be noted:

> '*Stern v Lucy Webb Hayes National Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003 (DDC 1974) (the *Sibley Hospital* case), is the first reported opinion to review comprehensively the obligation of the trustees [governors] of private charitable corporations and to set out guidelines for trustee involvement in financial dealings... The court's decision to analyse the trustee's standard of duty in terms of corporate law, rather than trust law, apparently reflects the evolving trend in the law... the trustees owed a duty to the institution comparable to, and in some cases greater than, that owed by the directors of a business corporation...'

Kaplin & Lee quote from the actual judgment:

> 'The court holds that a director or so-called trustee... is in default of his fiduciary duty... [if he] failed to perform his duties honestly, in good faith, and with a reasonable amount of diligence and care.'

They also cite *Corporation of Mercer University v Smith*, 371 SE 2d 858 (Ga 1988), as echoing the *Sibley Hospital* case:

> 'The plaintiffs wanted the court to apply the stricter fiduciary duty requirements of trust law: the college argued that trustees were bound only by the dictates of corporate laws. Siding with the college, the court applied corporate law, rather than trust law...'

The leading US textbook on trusts, *Scott on Trusts* (5th edn 1989), is also *not* supportive either of the first line of argument in this article (Oxford colleges hold all their corporate property on trust), or of the view that the fiduciary duties of corporators are so analogous to those of charity trustees as to make little difference in practice (the second line of argument in this article) and especially in relation to their approach to investment.

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9 In addition there is, E Hambley 'Personal Liability in Public Service Organisations: A legal Research Study for the Committee on Standards in Public Life'(1998) HMSO.

Scott notes[10]:

> '...it may be asked whether a gift to a charitable corporation creates a charitable trust... It is not infrequently stated in the cases that a charitable corporation does not hold on a charitable trust property conveyed or bequeathed to it. In fully as many cases, however, it is stated that a charitable corporation holds its property in trust [citing *The Abbey, Malvern v Minister of Town and Country Planning* [1951] 2 All ER 154]... A charitable corporation certainly does not hold its property beneficially in the same sense in which an individual or non-charitable corporation holds it beneficially, since in the case of a charitable corporation the Attorney-General can maintain a suit to prevent a diversion of the property from the purposes for which it was given... The truth is that it cannot be stated dogmatically that a charitable corporation either is or is not a trustee... It is probably more misleading to say that a charitable corporation is not a trustee than to say that it is, but the statement that it is a trustee must be taken with some qualifications.'

Thus, *Scott* talks of a quasi-trust, not being a true trust, not a technical trust:

> 'no trust arises in a technical sense because the trustee and beneficiary are one'.

In section 389 of Vol. VIA *Scott* comments:

> 'There is a question whether the rules governing investment by trustees are applicable to charitable corporations... [In the absence of specific legislation] it would seem that in making investments they are bound only to comply with the general rule of prudent management...'

In other words, charitable corporations must act in good faith (honestly) in a fiduciary capacity to ensure the corporation invests so as to balance preservation of endowment with the obtaining of maximum income from it. The investment policy should be carefully assessed as to risk and the corporators should be mindful of the strategy of similar organisations, but the standard of duty expected will be less than the strict common law standard applying to trustees proper. Thus, personal liability would arise only for poor judgment so reckless as to amount to bad faith (fraud, corruption, dishonesty) or to gross or wilful negligence. This of course suggests that it would have to be incompetence of a major kind. (NB In contrast, in *Harries v Church Commissioners for England* [1992] 1 WLR 124, at first instance in English Law, the court regarded the government director of a charitable corporation as being subject to the principles of charity trusteeship in regard to investment.

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10 *Scott on Trusts* (5th edn 1989) Vol VIA p 22.

There is also considerable academic discussion in the various US law journals, which it is only possible here to summarise in passing. First, it should be mentioned that the *Sibley Hospital* case is discussed in articles by Porth[11] and Fishman.[12]

Berry and Buchwald writing in the *University of San Francisco Law Review* of 1974 explored the question of who, besides the State Attorney-General, can sue to enforce the fiduciary duties of college trustees[13], while Christie in 1980 and Daugherty in 1990 consider the management of the investments of charitable corporations.[14] Marsh, writing in the *Dickinson Law Review* of 1981, compares the different standards of care applied by the Court to the common law trustee and the corporate director, arguing that the latter better serves the complexities of modern management duties in running what is really a business:

> 'Given the complexity of managing a modern non-profit institution, and the sometimes carping nature of the media, our courts, legislatures and law enforcement officials ought to think long and hard before imposing rigid trust standards on those hardy few who have the will and the means to shepherd these institutions in times of financial uncertainty and reduced governmental support.'[15]

Professor Harvey Dale and Michael Gwinnell writing in this *Review* two years ago also discuss US law.[16] They comment:

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11 WC Porth 'Personal Liability of Trustees of Educational Institutions' in (1973) 1 *J Coll & University Law* 84 and in (1974/75) 2 *J Coll & University Law* 143.

12 JL Fishman 'Standards of Conduct for Directors of Non-profit Corporations' (1987) 7 *Pace L Rev* 389.

13 CR Berry and GJ Buchwald 'Enforcement of College Trustees' Fiduciary Duties: Students and the Problem of Standing' (1974) 9 *University of San Francisco L Rev* 1.

14 GC Christie 'Legal Aspects of Changing University Investment Strategies' (1980) 58 *North Carolina L Rev* 189; MS Daugherty 'Uniform Management of Institutional Funds Act : The Implications for Private College Boards of Regents'(1990) 57 *West's Education Law Reporter* 319.

15 GH Marsh 'Governance of Non-Profit Organisations : An Appropriate Standard of Conduct for Trustees and Directors of Museums and Other Cultural Institutions' (1981) 85 *Dickinson L Rev* 607 at 627.

16 Professor Harvey P Dale and Michael Gwinnell 'Time for Change: Charity Investment and Modern Portfolio Theory' 3 CL&PR 65-96.

> 'It is generally accepted[17] that a charitable corporation is the beneficial owner of its assets for the charitable purposes contained in its constitution and does not act as a trustee of its assets, except insofar as they may be subject to special trusts (i.e. restrictions on the purposes for which they may be expended).'

They note, however, that in relation to investment strategy:

> 'Although United States law generally imposes different (and higher) duties of care and loyalty upon trustees of charitable trusts than upon directors of charitable corporations, it appears that this difference has not generally mattered in cases applying the prudent investor rules. Thus, the Restatement Third takes the view that, even though the rule is phrased as applicable to trustees, "funds held for investment by a charitable corporation... are to be invested in accordance with the prudent investor rule of § 227". The Prefatory Note to the Uniform Prudent Investor Act agrees:
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> "Although the Uniform Prudent Investor Act by its terms applies to trusts and not to charitable corporations, the standards of the Act can be expected to inform the investment responsibilities of directors and officers of charitable corporations."'

The Opinion

First, Counsel considered that most Colleges did not have a 'permanent endowment' within the meaning of section 96(3) of the Charities Act 1993 because their charters and statutes did not draw a distinction between the expenditure of capital and income. Secondly, Counsel argued that capital assets (if not held on specific trusts) could be realised to meet debts.' It was also noted in relation to this second issue that Counsel saw no reason why Oxford Colleges could not use 'permanent endowment' to fund deficits. Thirdly, it was acknowledged that: 'There is almost a complete lack of authority on the area of the insolvency of a chartered body. Counsel's view, however, was that the Attorney General would not seek a monetary remedy and that individual members of a Governing Body were unlikely to be called to account if they had acted prudently, having had regard to the money available and their fiduciary duties.'

Clearly, Counsel saw the Fellows in terms of their being the corporators, directors, governors, or officers of a college as a charitable corporation, holding its assets (other than those held on specific trusts) beneficially and not as permanent endowment. From this it followed that they are not charity trustees

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17 *Sed quaere*. See *Scott op cit.*

(other than possibly in relation to the specific trusts where the college is holding such assets on a charitable trust and the Fellows 'having the general control and management of the administration of a charity' are arguably then charity trustees under s.97 of the Charities Act 1993).

The Challenge to the Opinion

Here it will be respectfully argued (if a non-lawyer humble Bursar may dare to argue with an eminent Chancery QC) that Oxford colleges are the holders of substantial permanent endowment; that they are not able readily to use capital to fund deficits on the recurrent annual income-expenditure account; and that the Fellows are possibly *de jure* and probably *de facto* charity trustees for that permanent endowment and hence for most of the general property of the college (and not solely in relation to specific trusts) insofar as that general property can be said to arise from the original foundation.

It is of course otherwise if the property in question really can be shown not to arise from the original endowment. One possible example is capital raised in the late 1980s or early 1990s from the creation of a BES arrangement. Another is almost certainly where there are identifiable (recent or otherwise) donations which had 'no strings attached' and left the Fellows to spend income and capital 'at their discretion' on anything. Another probable example is surplus income returned temporarily to capital as a 'Revenue Reserve' or similar over the years.

But presumably capital gains on the investment of the permanent endowment over the centuries (or more recently, over the decades, once converted from land to equities) would be permanent endowments, being an addition to the corporators as capital arising from the original endowment.

To view the assets in this way is in line with the reference to 'capital money' in the Universities and College Estates Act 1925 (amended 1964), which, interestingly, Counsel saw as not being relevant to corporations which, it was asserted, had all the powers of a natural person'.[18] The controls within the Act concerning the use of capital money other than for investment purposes are analogous to the requirement for trustees of a registered charity to seek the sanction of the Charity Commissioners to spend capital only on the repair,

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18 See Appendix A, and especially note that s.1 of the Act states that: 'The universities and colleges to which this Act applies are the Universities of Oxford, Cambridge... and the colleges or halls in those universities...' On the other hand, s.41 gives a wide definition of what college land is covered by the Act. In Appendix A see also paragraphs (n), (o) and (p) concerning the analysis of prior legislation to the 1925 Act in CL Shadwell *The Universities and College Estates Acts, 1858 to 1880, Their History and Results* (1898) Oxford: John Henry Parker & Co, and C Neate *Observations on College Leases* (1853) Oxford: Parker.

improvement, modernisation, or rebuilding of functional property owned by a charity and for any such capital expended to be replaced from future income within a specified period by the creation of a sinking fund.[19]

It is convenient to start with the views set out in *Tudor on Charities*[20] calling in support, where appropriate, the *Halsbury* title on Charities and *Picarda on Charities*,[21] and referring back, where necessary, to *Grant on Corporations* (1850) and *Shelford's Law of Mortmain* (1836). Certain key cases are also examined and other texts referred to.

The *Tudor* line

The Oxford colleges are lay eleemosynary chartered charitable corporations aggregate . They are also charities which 'are exempt from any of the provisions of the Charities Acts. But '[t]he general law of charity declared in the Acts applies to them[22] and hence they are subject to the jurisdiction of the court at the relation of the Attorney General, but they are exempt from all the supervisory or regulatory powers of the Commissioners.'[23] The Second Schedule to the Charities Act 1993 states: 'The following institutions, so far as they are charities, are exempt charities within the meaning of this Act... (b) the universities of Oxford, Cambridge... the colleges and halls in the universities of Oxford, Cambridge...'

Tudor draws a distinction between eleemosynary and other (non-eleemosynary) corporations and notes that: 'Eleemosynary corporations are those corporations constituted for the perpetual distribution of free alms and bounty of the Founder to such persons as he has directed and are generally hospitals or colleges. Such corporations hold their corporate property upon charitable trust. Although other corporations have from time to time been regarded as trustees in relation to their

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19 See Picarda *The Law and Practice Relating to Charities* (1995) 504-505.

20 (8th edn 1995).

21 Hubert Picarda *Law and Practice Relating to Charities* (2nd edn 1995).

22 i.e. exempt charities.

23 *Tudor*, *op cit* 15; and see also Judith Hill & Elizabeth Hackett, 'Exempt Charities' (1992/93) 1 CL&PR 209-215 especially at 213: '.. the duties and responsibilities of trustees of exempt charities are just as high as for any other charity and the liabilities are just as real if anything goes wrong.'

general funds, the better view is that non-eleemosynary corporations hold their general property beneficially and not on trust.'[24]

Later, *Tudor* comments,[25] : 'Corporations are divided into ecclesiastical and lay, and lay corporations are divided into eleemosynary and civil... The corporate property of ecclesiastical and civil corporations is not by its nature subject to any trust, and the court has, therefore, no more jurisdiction over it than it has over the goods of private individuals... Unlike ecclesiastical and civil corporations, eleemosynary corporations hold their corporate property upon charitable trusts, and they are therefore subject to the jurisdiction of the court like any other trustee, corporate or incorporate, lay or ecclesiastical...'[26]

There is some discussion of the conflicting, 'not wholly consistent' case-law concerning non-eleemosynary charitable corporations. This concludes with the statement that:

> 'The better view, however, would seem to be that such property is not subject to a trust in the strict sense but that it is held by the company subject to a binding legal obligation to apply it for charitable purposes only; the position of a charitable company in relation to its assets is, therefore, 'analogous' to that of a trustee.'[27]

The *Liverpool and District Hospital*[28] case is cited in the opinion as confirming that colleges, being chartered corporations, have all the powers of a private individual and free to sell land and invest the proceeds provided that the land is not held on any specific trust. This, the opinion asserts, applies equally to the college

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24 *Tudor op cit* at 162-163.

25 *Ibid* at 371.

26 The range of cases cited in *Tudor* is extensive: *Thetford School Case* (1610) 8 Co. Rep. 130b, 131a; *Lydiatt v Foach* (1700) 2 Vern. 410; *A-G v Whorwood* (1750) 1 Ves. 537; *Mayor of Colchester v Lowten* (1813) 1 V & B 226; *Ex p. Berkhampstead Free School* (1813) 2 V & B 134; *A-G v Wyggeston's Hospital* (1852) 12 Beav. 113; *A-G v St Cross Hospital* (1853) 17 Beav. 435; *Re Manchester Royal Infirmary* (1889) 43 ChD 420; and *Hume v Lopes* [1892] AC 112.

27 *Ibid* at 159. The relevant cases in the order discussed in *Tudor* at 159-161 (see also Picarda (1995), 382-386) are: *Re Vernon's Will Trusts* [1972] Ch 300; *Re Manchester Royal Infirmary* [1889] 43 ChD 420; *Soldiers', Sailors' and Airmen's Family Association v A-G* [1968] 1 WLR 313; *Construction Industry Training Board v AG* [1973] Ch 173; *Von Ernst et Cie S A v IRC* [1980] 1 WLR 468; and *Liverpool and District Hospital for Diseases of the Heart v A-G* [1981] Ch 193. All these cases concern *non-eleemosynary* charitable corporations.

28 *Liverpool and District Hospital for Diseases of the Heart v A-G* [1981] Ch 193.

site and to land held for investment.' Leaving aside for discussion below whether the Statutes of New College would permit the sale of its 1380s Great Quadrangle, and also whether the Universities and College Estates Act 1925 constrains a college's use of capital, the *Liverpool and District Hospital* case may not support such *complete* freedom for the corporation, unless it is one created under the Companies Act, for Slade J is quoted in *Tudor*[29] as commenting: 'In a broad sense, a corporate body may no doubt aptly be said to hold its assets as a 'trustee' for charitable purposes in any case where the terms of its constitution place a legally binding restriction on it which obliges it to apply its assets for exclusively charitable purposes. In a broad sense it may even be said, in such a case, that the company is not the 'beneficial owner' of its assets.' Indeed, even for a charitable company it may be anyway 'in a position *analogous to that of a trustee* in relation to its corporate assets, such as ordinarily to give rise to the jurisdiction of the Court to intervene in its affairs ...'

Nor is the jurisdiction of the Court ousted by the existence of a Visitor:

> 'The courts maintain their jurisdiction over trusts and any question of construction of the terms of the trust is a matter for the courts and not the Visitor whose jurisdiction extends only to those matters governed by the laws of the foundation.'[30]

Later, *Tudor* continues:[31]

> 'The court has, whether there is a Visitor or not, jurisdiction to enforce the performance of the trust of the charity property and to redress breaches of trust. Accordingly, governors who are entrusted with the management of an application of the charity property are accountable to the court in respect of their dealings with the estates and revenues whether they are invested with any visitational authority or not.'

The 1847 case of *A-G v Magdalen College, Oxford* [32] clearly supports this view that the jurisdiction of the Court in relation to the enforcement of the performance of trusts is not ousted by the existence of the Visitor's special position of authority in relation to the enforcement of the corporation's Statutes.[33]

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29 *Ibid* at 161.

30 *Tudor op cit* at 374.

31 *Ibid* at 387.

32 (1847) 10 Beav 402.

33 See also *Green v Rutherforth* (1750) 1 Ves. Sen. 462; *A-G v St John's Hospital, Bedford* (1864) 2 De G.J. & S. 621; and *Baldry v Feintuck* [1972] 1 WLR 552.

The 1906 edition of *Tudor* is the earliest edition in which these definitive statements about the corporate property of lay eleemosynary chartered charitable corporations aggregate being held on trust can be found. And, if anything, the language in the chapter entitled 'Eleemosynary Corporations' in the 1906 edition is stronger than in the 1995 edition (the supporting cases cited are similar):

> 'Eleemosynary or charitable corporations are corporations established for the perpetual distribution of the free alms or bounty of the founder. Their corporate property is thus charitable... An eleemosynary corporation, being created solely to fulfil a charitable purpose, holds its property in every case as a trustee for the accomplishment of that purpose... it makes no difference whether the corporation is a college or hospital in which the persons benefiting become corporators... Institutions of this kind are accordingly subject to the jurisdiction of the Court in the same manner as other trustees of charitable funds, whether corporate or incorporate... The corporate property of ecclesiastical and civil corporations, on the other hand, is not subject to any trust...' (1906 edition, 63-65)

The concept of permanent endowment presumably should, therefore, follow on from the fact that there is perpetuity linked to eleemosynary corporations, and perhaps it is arguable that the Founder's original endowment is passed over on a charitable trust immediately after the Royal Charter (or similar) has created the corporation:

> 'First, there is the abstract act of founding the institution, the *fundatio incipiens*, or incorporation... Secondly, there is the tangible property which the founder provides, the *fundatio percipiens*, or endowment. In this second sense the first gift of revenues is the foundation, and he who gives them is the Founder. It is in this sense that a man is generally called Founder of a college or hospital.' (*Tudor*, 375)

Thus, applying the text to an Oxford college, the college is created by its Royal Charter as a corporation, and then its endowment is provided by its Founder who duly transfers property to be held on a charitable trust to fulfil perpetually his directions. The corporation becomes the trustee of the Founder's charitable trust, and, by extension, the Fellows as corporators are also charity trustees, (or at least quasi-trustees), for the purpose of the Court being able to enforce the Founder's trust (and, of course, any other later and specific trusts).

In Support of *Tudor*

Picarda acknowledges that:

> 'The legal nature of a corporate charity is not entirely clear. A particular problem is whether such a charity holds its corporate property on trust...

> Because of the rule basing the charitable jurisdiction of the court on the existence of a trust, it was generally said that a charitable corporation was necessarily a trustee of its property[34] ... As regards the chartered companies the view is probably quite tenable... In the end the matter may be partly one of terminology or semantics... The company owes fiduciary duties to charity, which can be enforced by the court *in personam*... the governors and directors of a charitable corporation though not strictly trustees themselves do occupy a position so analogous...' (*Picarda* 382-386)

In *Halsbury* (Volume 5(2), on Charities) there are two passages: one which deals generally with the position and one which is more specific. The general comment is in para. 222:

> 'As charitable corporations exist solely for the accomplishment of charitable purposes, they are sometimes said to be but trustees for charity... the governors or directors of the corporation, though not strictly trustees themselves, are in a fiduciary position...'

In para. 228 it is specifically observed that: '*Eleemosynary corporations are trustees of their corporate property* ... They may also undertake the execution of special trusts connected with the objects of their foundation.' (emphasis added).[35]

Volume 9 of *Halsbury*, on Corporations, notes in para. 1358 that:

> At common law, corporations of whatever nature, have a general right to alienate their lands held in fee; and this inherent power of alienation (except in the case of land forming part of a permanent endowment or functional land of a charity) is independent of anything in the nature of a trust imposed upon the corporation in favour of either its incorporated members or the purpose for which it was constituted.'

The bracketed words would seem to challenge the argument in the opinion that, as already quoted above, 'the college site' could be sold off to balance the books, for, whether or not it is part of any permanent endowment, it is certainly the 'functional land' of a charity.

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34 Citing *Lydiatt v Foach* (1700) 2 Vern 410.

35 *Lydiatt v Foach* (1700) 2 Vern 410 at 412 is cited, as also in *Tudor* and *Picarda* above.

Hambley[36] declares that:

> "Unlike statutory corporations...eleemosynary corporations hold their general property on charitable trust. This makes the corporate body (with its separate legal personality) a true trustee. However, it does not make the individual appointees (Members/Fellows) true trustees, although they will owe a duty to the PSO (Public Service Organisations being deemed by Hambley to include a private, chartered university or college) to see that the terms of the trust are obeyed."

Later she notes that, following the *Liverpool v District Hospital* case "it is now generally agreed that charitable companies (and by implication, statutory corporations also) do not hold their general property or trust..." (a footnote emphasises that, in contrast, eleemosynary chartered corporations do 'strictly speaking' hold their property or trust, while subsequent footnotes argue that the court, rather than the Visitor, is "the proper forum if the dispute involves allegations of a breach of the terms of the trust" relating to the general property of the corporation.

Turning to *Grant on Corporations* (1850), we note:

> 'the idea of perpetual duration is implied in the word corporation'.[37]

In support of *Tudor*'s assertion that the Visitor does not oust the jurisdiction of the Court in relation to the enforcement of trust obligations imposed upon the corporation, *Grant* comments (pp 531-533):

> 'When a Visitor is duly appointed, his power, on the one hand, is confined to enforcing obedience to the Statutes of the corporation and the general maintenance of order; but he may do every act necessary for the full accomplishment of the object, only he cannot take cognisance of offences which are such by virtue of an Act of Parliament or the provisions of the common law, independently of the college Statutes... To control the execution of the Trusts with respect to estates devised to the corporation in trust, is not within the scope of the Visitorial power, *either generally or when the devise has been made subsequent to the foundation of the college*... generally, where the governors or visitors of a charitable foundation are trustees for the charity, and are found to be making

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36 E Hambley 'Personal Liability in Public Service Organisations: A Legal Research Study for the Committee of Standards in Public Life'(1998) HMSO paras 3.47 and A 38, and *ibid* 84, 166, 215.

37 At 15. Does the implication extend in the case of eleemosynary charitable corporations so as also to make the endowment a *permanent* endowment.

> fraudulent use of their powers, the Court of Chancery interferes on information...'(emphasis added).

The emphasised words seem to imply that land might have been transferred 'generally' but still *in trust*: to the corporation at the time of foundation (*fundatio percipiens*) and can also be handed over to the college subsequently on specific trusts. Similarly, the following statement from *Grant* seems to imply that the foundation itself is a kind of trust:

> '... it is clear that corporations are vigorously held to the performance of the charitable uses to the benefit of which they hold land; and there appears to be a strict analogy between such cases and those of lands *which were originally in trust, as it were to be applied in furtherance of the purposes for which the corporation was erected* ...'[38] (emphasis added).

Shelford on Mortmain (1836) also provides the following illumination:[39]

> 'We have already seen that the Court of Chancery has no jurisdiction over charities established by charter if the visitors or governors appointed to regulate it are not entrusted with the management of the revenues; but that the Court has jurisdiction over governors, so far as they are the trustees of the revenues. The cases in which the governors or visitors are said not to be amenable to the Court of Chancery, must be confined to such governors as have the power of government only, and not extended to those who have the legal estate, and are entrusted with the receipt of the rents and profits: for it would be of the most pernicious consequence imaginable that any person, instructed with the receipts of rents and profits of a charity, should be unaccountable for their receipts and for a gross misapplication.'

We are referred back to p 334:

> '... if the governors have also the management of the revenues, the court does assume a jurisdiction of necessity, so far as they are to be considered trustees of the revenue.'

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38 *Grant on Corporations* (1850), 136.

39 At 408-409.

Kyd on Corporations (1793) also supports this line:[40]

> '... when the management and application of the revenues is immediately intrusted to them [governors of a charity], then, as to these, they are subject to the control of that court.' (Vol. 2, 195)

D J Farrington, whose *Law of Higher Education* appeared in 1994, refers[41] to a case under the law of Scotland:

> '... on general principles, the existing members of all corporations, in so far as they have any right of control over the funds of the corporation, are to be held as public administrators or quasi trustees...'[42]

This takes us back to the idea of the Fellows as corporators and thus akin to company directors in running the corporation, but emphasises their role as trustees in relation to the corporation's revenues and capital insofar as they arise under specific trusts and arguably includes within the notion of the trusteeship the Founder's general endowment.

HM Adler in his *Summary of the Law Relating to Corporations* (1903) makes a similar point:[43]

> '... all eleemosynary corporations are trust corporations, and therefore come under the equitable jurisdiction of the Courts.'

CT Carr in his *General Principles of the Law of Corporations* (1905)[44] comments that:

> 'Whether a corporation at Common Law has any power to alienate its property is a vexed question, to which neither cases nor text-books give any certain or unanimous answer.' (see at 48).

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40 *Kyd on Corporations* (1793) London (Butterworth Reprint 1978) Vol 2 at 195.

41 *Law of Higher Education* (1994), 68.

42 Citing the Lord Ordinary in *Howden and Others v Incorporation of Goldsmiths* (1840) 2 D 996.

43 *A Summary of the Law Relating to Corporations* (1903) London: Clowes, see at 24.

44 Cambridge CUP.

He notes that *Kyd* (1793) argues that a corporation does have power at common law to alienate its property, while *Grant* (1850) 'entirely disagrees'.[45] *Kyd* does assert that corporations:

> 'always have had an unlimited control over their respective properties... [and can deal with it] as fully as any individual may do with respect to his own property.' (Vol. 2, 108)

But he is here referring to civil not eleemosynary corporations: indeed, he puts 'civil' in italics seemingly to emphasise this. And yet *Kyd* (Vol 2 at 108) goes on to specify that:

> 'At common law, the master, fellows, and scholars of a college... *had* the same unlimited control over [their] property.'

Elsewhere *Kyd* notes that the Disabling Act of 13 Eliz. c.10[46] removed this unlimited control.[47]

Thus, *Kyd*, on balance, does not support the *Tudor* thesis that colleges as eleemosynary corporations hold their corporate property on trust as permanent endowment, and sees no distinction at common law amongst corporations in terms of their duty towards their corporate assets.

Incidentally, on the perpetuity of a corporation, *Carr* muses:[48]

> 'A fantastic instance, which it is hoped may never be realised, puts the situation before us. The Master, Fellows, and Scholars, who form the corporation of Trinity College at Cambridge, assemble annually in their Hall at a feast for the Commemoration of Benefactors. Suppose that all the corporators, thus assembled in full number, are suddenly poisoned by the negligence or caprice of their cook. Is the corporation at an end? Or does it exist 'passively' in spite of the momentary loss of members?... the corporation is not dead, but temporarily in abeyance.'[49]

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45 *Kyd op cit* at 50.

46 See Appendix A, para (o) and the section on 'The Opinion of Mr William Stebbing' below.

47 See *Kyd op cit* Vol.1, 122-123. CL Shadwell *The Universities and College Estates Acts 1858 to 1880, Their History and Results* (1898) Oxford: James Parker, is to the same effect: see the discussion in Appendix A para (n) below.

48 At 126.

49 Otherwise redistributing the substantial wealth of Trinity on a *cy-près* interesting!

Yet *Kyd* (1793) asserts quite plainly:[50]

> 'that a corporation aggregate is dissolved by the death of all its members... and cannot be revived without a new creation.'[51]

Brice in his treatise *The Law of Corporations and Companies: A Treatise on the Doctrine of Ultra Vires* (1893) at 775 sides with *Kyd*.

Professor Philip Pettit in his *Equity and the Law of Trusts* (1993) p.277 comments, in the context of the Court's charitable jurisdiction:

> 'Where a corporate body holds property on charitable trusts there is clearly jurisdiction, but in many cases a corporation with exclusively charitable purposes simply holds property as part of its corporate funds. If jurisdiction depends on the existence of a trust a problem arises. It may be possible in the case of a charity incorporated by charter to evade the difficulty by holding that the corporate charity holds its property on trust for its charitable purposes[52] ... it has been held[53] that the court has jurisdiction not only where there is a trust in the strict sense, but also, in the case of a corporate body, where under the terms of its constitution it is legally obliged to apply the assets in question for exclusively charitable purposes... Further, the statutory definition of charity[54] includes a corporate 'institution' established for charitable purposes, and 'institution' is defined[55] to include a trust, and 'trust' is defined, in relation to a charity, as meaning the provisions establishing it as a charity and regulating its purpose and administration[56], *whether those provisions take effect by way of trust or not*.' (emphasis added).

Clearly this would be a somewhat complex route for getting to the same result (the college holds its general endowment as if on trust), if the more direct route of arguing that an eleemosynary charitable corporation simply holds all its corporate property on trust were to fail. This idea of the quasi-trusteeship is as discussed

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50 *Kyd op cit* Vol 2 at 447.

51 And election of successors from the grave is not without its difficulties!

52 Citing *A-G v St Cross Hospital* (1853) 17 Beav. 435.

63 *Ibid* at 157.

64 *Ibid* at 118.

65 Note the use of the phrase 'a regular corporate act' in *Grant* as cited above.

above and in the textbooks[57] and, of course, lies behind the argument advanced by Oliver Hyams in his article in 1994 on 'The potential liabilities of governors of educational institutions'.[58]

Brice in his treatise on the doctrine of ultra vires, published in 1893, sees eleemosynary corporations as subject 'to the general jurisdiction and general principles established for the general control of charities' (186), and the existence of a Visitor does not oust the jurisdiction of the Court of Chancery which 'assumes jurisdiction, and causes the trust to be duly observed and carried out' (187). Moreover, any such charity will, 'to a greater or even lesser degree', partake of the nature of a trust... as *cestuis que trustent* ... [hence] the broad ground upon which the Courts proceed is the due observance, and carrying into effect of the Founder's objects and regulations ... the questions, whether considered to be questions of *ultra vires* or trust, whether of the powers vested in or the duties imposed on the corporation, will depend on the construction placed upon the instruments under which the charity was primarily founded, or by which its constitution has been subsequently modified.' (187-188).

Thus, Brice moves us in the direction of *Tudor* (college corporators as trustees) or at least *Picarda* (college corporators as quasi-trustees). Harold H Street (later Professor Street) in his book *The Doctrine of Ultra Vires* (1930), updating Brice, argues that the doctrine of *ultra vires* is not applicable to colleges (and other eleemosynary corporations). He bases that view on the fact that such corporations are effectively controlled by the combined jurisdiction of their Visitor in enforcing the Statutes and of the Court of Chancery in so far as they are charities with trusts to perform. In fact, Street sees the two doctrines of *ultra vires* and of breach of trust in respect to charitable corporations as being very closely related:

> 'Counsel may argue that an act is *ultra vires*, and the Court may call it a breach of trust. The effect of the two doctrines is similar...'[59]

Finally, the *Encyclopaedia of the Laws of England* (1907), written 'by the most eminent legal authorities', in its entry for 'Corporation' tells us that 'this is a refined conception not belonging to a rude age... this convenient abstraction... Examples of a corporation aggregate are the head and fellows of a college, the dean and chapter of a cathedral, a trading company, a municipal corporation... Lay corporations are either civil like a borough, or eleemosynary like a college or hospital... In common parlance a corporation never dies: it is endowed in English

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57 See *Tudor*, 261; *Picarda*, 384-385; *Halsbury*, Vol 5 (2), on Charities, 717, relying on *Re French Protestant Hospital* [1951] Ch 567.

58 See (1994) 6 *Education and the Law*, 191-205.

59 See Street *op cit* at 15.

law with immortality...' Under 'Ultra Vires' we note with interest the use of the word 'trust' in the sentence: 'Chartered Corporation - A chartered corporation risks forfeiture of its charter, according to Lord Holt (*R v Mayor of London,* 1679, 1 Show 274, 280; 89ER 573), for abuse of its franchises "if the trust be broke and the end of the institution be perverted"...'

The entry for 'Charities' refers to 'Exemptions from the [Mortmain] Acts of 1736 and 1888,:

> 'It will be seen that the Universities of Oxford and Cambridge, and the colleges and houses of learning in them, and the scholars of Eton, Winchester, and Westminster, were exempted...'

The emphasis all the time is on a perpetual obligation (if not trust) placed upon the college by its Founder, and enforced partly by the Statutes and also by the Founder's appointment of a Visitor.

No trust of foundation endowment

In possible support of the view that an Oxford college does not hold its foundation endowment on trust, one may note the comments of the Master of the Rolls in an 1847 case, *A-G v Magdalen College, Oxford*:[60]

> '... and, subject to the specific payments, for specific purposes, including fixed stipends to the master and usher [of Magdalen College School], the revenues of the college[61] belong to the college, for its own use, subject indeed to the performance of all duties incumbent on the college to perform, but not subject to any trust to be executed in this Court.'

There is ambiguity as to quite what 'duties incumbent' means. Arguably, it recognises that Magdalen is entrusted with fulfilling Waynflete's objective of a perpetual college, but that running a school was not a prime objective, and that the duties are imposed at least by the Statutes, if not by way of a trust between Waynflete and the College.

But even if the line here argued, to the effect that colleges do hold the Founder's original endowment on charitable trust as permanent endowment, is valid, are the Fellows charity trustees or 'merely' the Officers of the corporation, college itself

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60 (1847) 10 Beav 402 at 410.

61 Arising, presumably, largely from the original Waynflete endowment at the foundation of the college in 1458.

being the only trustee? Certainly *Halsbury* volume 5(2) on Charities notes (para 332) that:

> 'When a corporation is trustee, the Court tends to leniency, more than in the case of individual trustees.'

The *Halsbury* Volume 9 on Corporations comments (para 1209):

> 'If a man trusts a corporation, he trusts that legal person, and must look to its assets for payment; he can only call upon individual members to contribute if the Act or charter creating the corporation has so provided.'

Grant on Corporations (1850) supports the idea of the corporation having the liability, not its directors or officers:[62]

> 'Corporators in general are not liable, either civilly or criminally, for any share they may have taken in a regular corporate act within the competence of the corporation to perform.'

Moreover:

> '... generally every corporator is privileged and exempted from all question for acts within the competency of the corporation to perform, regularly going under the Common Seal, in which he has taken a part. A case, in which a corporator is individually responsible, in an action, for his share in a corporate act, is when it can be shown that he has made the corporate character his shield under which to effect malicious purposes of his own...'[63]

Yet he later comments:[64]

> '...no one injured by the breach of trust of a charitable corporation has a right to be indemnified out of the funds of the charity... nor out of the separate property of the corporation who administers such a fund; he must proceed at common law against the individuals, who procured the wrongful acts.'

If the corporation as the trustee protects the Fellows as mere corporators (and not themselves trustees) from personal liability, presumably this is only if their actions

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62 *Grant op cit* at 15.

63 *Ibid* at 157.

64 *Ibid* at 118.

are not contrary to and are *intra vires* the Statutes of the corporation or college[65]. In fact, *Grant* (at 547) seems to support the concept of personal liability for corporators who act *ultra vires*:

> '... a principle of corporation law which has been frequently insisted on in this treatise, that where a majority takes upon it to do acts which it is beyond the competence of the corporation consistently with its constitution to adopt, the persons forming such a majority are individually and in their private characters responsible for such acts, and cannot shield themselves behind the corporate powers and corporate responsibility which they have exceeded and violated...'

This path is followed by Farrington too:[66]

> 'The position of members of the governing body of a chartered corporation is clear. It is the body itself which is responsible and the members carry no individual liability or responsibility... The members of a governing body of a company limited by guarantee are assimilated to the position of company director, so that their liability is also limited. The members of the governing body of an institution created by Declaration of Trust, who are also the trustees, are liable to the extent of charitable trustees... It has however been held that where the officers or directors of a corporation or company actively participate in an act which is beyond the power of the corporation to perform [*ultra vires*], they are each, to the extent of participation, personally liable for the consequences.'[67]

On the other hand, Oliver Hyams, in his article on the liability of governors of educational institutions referred to earlier, minimises the risk of personal liability even for an *ultra vires* action:[68]

> 'Finally, it is noted here that it has been suggested that a governor of a relevant statutory education corporation could be liable in respect of an act which was *ultra vires* the corporation merely because the governor had caused the corporation to act *ultra vires*. It is suggested that that overstates the position dramatically. Before liability to the corporation could arise, there would have to be a breach of some duty owed to the corporation. Unless there could be liability as a fiduciary or by analogy

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65 Note the use of the phrase 'a regular corporate act' in *Grant* as cited above.

66 Farrington *Law of Higher Education* (1994) 207-208.

67 See *Young v Naval Military & Civil Service Co-operative Society of South Africa* [1905] 1 KB 687.

68 (1994) 6 *Education and the Law* 191 at 202.

> with company directors, or governors are properly to be regarded as if they were trustees, or unless there is some other way in which a court might determine that governors could be liable to the corporation, causing the corporation to act *ultra vires* could not properly be said without more to give rise to potential liability to the corporation.'

But before Fellows take too much comfort from all of this, one must recall the opinion which, as already noted earlier, comments that there:

> 'is almost a *complete lack of authority* on the area of the insolvency of a chartered body, but it being Counsels view that the Attorney General would not seek a monetary remedy and that individual members of a Governing Body were *unlikely* to be called to account if they had acted prudently, having had regard to the money available and their fiduciary duties'

Note should also be taken of what Sir William Holdsworth had to say in his *History of English Law*:[69]

> '... the law on the subject of the effect of dissolution on a corporation's proprietary position was, and still is, comparatively meagre.'

Which brave collective of Fellows would wish to test the legal water at the risk of drowning in unlimited personal liability by behaving in any way other than adopting the highest possible standard of fiduciary care? The standard required is satisfied by acting as prudent (quasi-)trustees, whether formally required to or not. In this context it is worth noting that s.61 of the Trustee Act 1925 and s.727 of the Companies Act 1985 (which deals with 'wrongful trading') make provision for a trustee or company director, respectively, to be excused by the court if, in the case of the Trustee Act, he or she had acted 'honestly and reasonably' and 'ought fairly to be excused' the breach of trust. There is no similar escape clause for a corporator who is not also a trustee: unless the Court were, helpfully, to recognise the concepts of the quasi-trustee. Hambley[70] makes the same point: 'At present, however, it cannot be said with any certainty that a 'quasi-trustee' will enjoy this type of protection.'

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69 Holdsworth *History of English Law* (1926) Vol. IX at 69.

70 E Hambley 'Personal Liability in Public Service Organisations: A Legal Research Study for the Committee of Standards in Public Life' (1998) HMSO paras A 41-43, A 51 and 6.25-6.28

It should nevertheless be noted that the standard expected of a company director is becoming more burdensome. As is pointed out in *Gower's Modern Company Law*.[71]

> 'It is often stated that directors are trustees and that the nature of their duties can be explained on that basis... In truth, directors are agents of the company rather than trustees of it or its property. But as agents they stand in a fiduciary relationship to their principal, the company. The duties of good faith, the risk[72] which this fiduciary relationship imposes are virtually identical with those imposed on trustees, and to this extent the description 'trustee' still has validity...'

Thus, the corporator Fellow: trustee: company director: fiduciary analogy holds good for duties of loyalty and good faith, but breaks down in connection with the standards of care and skill expected of a company director, for these are rather different from the higher ones required of trustees. Yet, *Gower* goes on:[73]

> 'that laxness of the law in relation to skill and diligence is a thing of the past'.

In essence the common law test is moving closer to the statutory test for wrongful trading (contained in s.214(4) of the Insolvency Act 1986), viz: what should the director have known or done on the basis of what would have been done 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'.

The Opinion of 'Mr William Stebbing of the Chancery Bar'

This interesting opinion is quoted at some length by Mark Pattison in his *Suggestions on Academical Organisation with especial reference to Oxford* (1868).[74] The opinion reinforces much of what has been said in the preceding section *against* the essential assertions of this article: that Oxford colleges as eleemosynary charitable corporations hold their corporate property on trust and as permanent endowment, but, failing that, the Fellows must keep the corporation's

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71 6th Ed (1997) Sweet & Maxwell at p 598.

72 *Sed quaere* as to the risk of personal liability.

73 See Gower *op cit* at 640.

74 M Pattison *Suggestions on Academical Organisation with especial reference to Oxford* (1858) Edinburgh: Edmonston and Douglas, at 7-18.

actions properly within the College Statutes (and bearing in mind relevant legislation) - otherwise the Court (or possibly the Visitor) can intervene and impose personal liability on them for breach of trust, or the Visitor (or possibly the Court) might intervene and impose personal liability on them for the financial consequences of an *ultra vires* act.

Stebbing's comments of 1860 do not square with those of many of the writers cited above. For example, they are at variance with the views of Shadwell (*op cit* 1898) (see Appendix A, paragraphs (m), (n), and (o)), *Kyd* (*op cit* 1793) as cited above, and also those of Highmore (*History of Mortmain* 1809) and Street (*op cit* 1930), for Stebbing makes no mention of the Disabling Act of 13 Eliz. c.10. That Act, according to Shadwell, 'put a stop to the alienation by the Colleges of any part of their real estate' until they were given powers of sale under the Universities and College Estates Act 1858, subject to treating the cash proceeds as permanent endowment ('capital money').

Shadwell, *Highmore*, *Kyd*, and *Street*, do, however, seem to support Stebbing (and hence the 1997 opinion) in asserting that, at least originally, the colleges had complete control of their corporate property, in terms of being free to alienate it and probably there being no concept of 'permanent endowment'.

Stebbing comments:

> 'The colleges being eleemosynary institutions... the estates given for their corporate enjoyment are presumed by law to have been dedicated by the donors to charity... But the corporate estates are, though eleemosynary, not trust property. They are not trust-property, because no trust can be implied unless where the two interests - the beneficiary, or right to the enjoyment, and the legal, or right to the custody and management of the substance - exist, or are capable of being contemplated as existing, separate from each other; and here both interests are united in the corporation itself... The conscience of the corporation thus being burdened with no trust for other than itself, complete ownership of its estates being enjoyed by it... the public cannot claim the aid of the courts to protect this its contingent [charitable] interest until failure of the original limitation... [Hence] The exemption of the corporate property of colleges from the ordinary charitable jurisdiction [of the Court of Chancery]...'

Thus, Stebbing disputes what we might describe as the pure trust approach argued in *Tudor*, and reminds us of Scott talking of a quasi-trust.

Stebbing, however, goes on to note, in considering the possibility of Parliament intervening in the affairs of the colleges, that it would probably follow the principles which govern the exercise of the ordinary charitable jurisdiction in equity' and would recognise the Founder's:

> 'primary intention... to devote his estates to the maintenance of the particular corporation, doubtless to its maintenance as an instrument for the perpetual carrying out of the special objects stated in the charter or his grant, but at all events to the perpetual maintenance of the corporation itself...'

Thus, Stebbing supports *Picarda*'s quasi-trustee interpretation, and so too would, as *Scott* (1989) implies and as Hyams (1994) suggests, the Court which would seek to infer a legal obligation, and impose, presumably a constructive or, in US legal terms, a remedial trust, and thereby invokes the concept of personal liability for the quasi-trustees.

Finally, with reference to Stebbing's point that a trust will not be created unless the legal and beneficial interests are split, it is to be noted that Professor Philip Pettit in his *Equity and the Law of Trusts* has this to say:

> 'No trust can exist where the entire estate, both legal and equitable, is vested in one person.'[75]

The same point is made in Underhill and Hayton *Law of Trusts and Trustees*[76] again citing *Re Cook*. Thus, Stebbing is in line with *Scott* in recognising that there is not, technically, a trust in place.

The New College Statutes

Taking New College as typical, the Statutes, as amended with the approval of the Privy Council over the decades, are ones drawn up in the wake of the Universities of Oxford & Cambridge Act 1923 (as also amended by the Education Reform Act 1988 as regards the Model Statute concerning the tenure of academic staff). Presumably all such statutes envisage that a college, whether an exempt charity or not, and whether the Fellows are charity trustees or not, must be run in accordance with them. Accordingly, exceeding the powers within those statues is an *ultra vires* act, which may or may not incur personal liability for Fellows as corporators/officers/governors/directors in a fiduciary position.

Here, however, there may be a problem. Counsel in the opinion noted that as chartered corporations, colleges have all the powers of a private individual all the powers of a natural person. As already discussed, these wide-ranging powers of a natural person may be constrained by the existence of a trust in relation to the corporate endowment. They were in any event curtailed in relation to the sale of

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75 Pettit *op cit* 40, citing *Re Cook* [1948] 1 All ER 231.

76 (15th edn 1995) 244.

land by the Disabling Acts before being restored (albeit with restrictions) by the successive Universities and College Estates Acts. Counsel further noted that s.42 of the Universities and College Estates Act 1925 expressly preserves any powers of sale which the university and college might have exercised had the Act not been passed, and hence identified as a key question: what are the powers of a college at common law?[77]

Counsel argues that, at common law, the colleges would be free, having 'all the powers of a natural person', to sell land, unless the Attorney-General challenges the decision as not being beneficial for the charitable corporation/college, for example because a 'proper price' has not been obtained. But, if the colleges lost such powers of sale under the Disabling Acts, then s.42 does not help: they are restored but with the restrictions concerning the need to maintain the *corpus*.[78]

Farrington[79] in considering the nature of a corporation, differentiates between the statutory corporation (e.g. a 'new' university) which can do such acts only 'as are authorised directly or indirectly by the statute creating it' and the chartered corporation which can 'speaking generally, do anything that an ordinary individual can do[80] Hence the *ultra vires* rule does not apply to the chartered corporation, argues Farrington.[81] Farrington[82] quotes from *Pearce v University of Aston in Birmingham (No 2)*:[83]

> '... as against the outside world the University, being a body incorporated by Royal Charter, has the capacity of a natural person: as a result even acts done in contravention of a provision of its Statutes are as against the outside world not *ultra vires* or void.'

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77 See Appendix A, para (i) for the text of s.42.

78 See Appendix A, para (n) for Shadwell's analysis.

79 D J Farrington *Law of Higher Education* (1994) at 33.

80 Quoting from *A-G v Leeds Corporation* [1929] 2 Ch 291, and also citing *A-G v Leicester Corporation* [1943] 1 Ch 86 and *A-G v Manchester Corporation* [1906] 1 Ch 643.

81 D J Farrington *op cit* at 34 and 58, citing *Sutton's Hospital Case* (1612) 10 Co Rep 1a. Street, as we have seen above, takes the same view.

82 Farrington *op cit* at 35.

83 [1991] 2 All ER 469.

The Visitor, however, says Farrington (again citing *Pearce*) has the power to intervene and restrain the institution and to correct any situation or action contrary to the Charter and Statutes.[84]

Thus, New College, it appears, as a chartered corporation can do everything an individual can, unless the Statutes expressly forbid it. Yet the Statutes are worded so as to permit rather than prohibit.

Moreover, if, as noted below, the Statutes do expressly refer to spending revenues or income, is there, therefore, an implied prohibition concerning the spending of capital or (permanent) endowment? The Statutes do not include any express power to spend endowment capital, nor to divert capital to any purposes beyond the purposes of college itself as detailed within the Statutes.

On the other hand, the Statute on the disposal of revenue does mirror Title XII in the University of Oxford Statutes (made under the 1923 Act). This enables the college to despatch money (income only, not capital) as required of it by the University 'to University purposes'[85]. Otherwise expenditure from revenue may include 'reasonable and customary expenditure... for College purposes... and any reasonable donations for educational or charitable objects or connected with the duties of the College as a holder of property'.[86] If there is still anything left over from revenue, the Visitor may direct it to be 'applied to purposes relative either to the College or to the University'.[87] Or, subject to the Visitor's right to step in, the Fellows may divert surplus revenue 'at their discretion to any purposes relative to the College and not inconsistent with these Statutes, or... to any purpose relative to the University and conducive to the advancement of learning science or education'.[88]

All in all, these clauses would seem to make it difficult for a college to donate significant sums from revenue or income (let alone from endowment capital) to any charitable, or even just educational purpose, other than the University itself(which may, however, include the constituent colleges of the University, as in the phrase 'to University purposes').

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84 Farrington *op cit* at 67.

85 See Palfreyman (1996/97) 4 CL&PR 51-65, and Picarda (1996/97) 4 CL&PR 111-118.

86 New College Statute XVII, clause 7.

87 *Ibid* clause 6.

88 *Ibid*, clause 11.

It is assumed, however, that the provisions of the Universities and College Estates Acts 1925 and 1964[89] which enable the expenditure of 'capital money' on certain limited building or refurbishment projects (subject to its repayment by way of a sinking fund), add to the scope of the Statutes. But the Statutes as such do not, it is thought, need to be revised to recognise the existence of this legislative framework concerning the restricted use of permanent endowment.

Thus, it might be arguable that a New College Fellow by his or her oath of allegiance takes on the role of a corporator or officer in the terms of the loose translation gives as Appendix B; then he or she becomes a charity trustee in relation to the Founder's endowment transferred on charitable trust, and of any other specific endowments, insofar as the Fellow can be said to be a charity trustee as defined by s.97(1) of the Charities Act 1993.[90]

If the Fellows, collectively as the Governing Body, are not controlling and managing New College as it fulfils its charitable objectives, who else (one is entitled to wonder) is? Thus, for the Fellow, corporator status in itself may not carry personal liability (other than probably, via the Visitor, for an *ultra vires* action or one contrary to the Statutes), but the trustee or quasi-trustee status does.

Invoking Personal Liability

If, as has been argued, Oxford colleges hold most of their assets as permanent endowment and the Fellows themselves are to be seen as charity trustees (even to the extent of carrying personal liability), then how could such personal liability in practice be invoked? Similarly, if Fellows are 'merely' corporators and not also charity trustees, but the corporation does have permanent endowment and the corporators (Fellows) still potentially face personal liability for any *ultra vires* decisions which they misguidedly take, are they liable only to third parties? Or can they also be liable to the corporation itself? And again, how in practice could such personal liability be invoked?

There are two likely scenarios giving rise to financial problems. The first is where a college is suddenly obliged to dip into endowment capital to part-fund a new building which it mistakenly had believed would be fully financed from other sources. For example, a donation or benefaction amounts to less than expected, the project has a cost overrun, there is the cost of substantial repairs to the new building and the college loses the related expensive legal battle to recover them from the builder or architect (or from both of them). The second case is where a

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89 See Appendix A.

90 That section defines 'charity trustees' as 'the persons having the general control and management of the administration of a charity'.

college gradually fails to match recurrent income and expenditure, strikes increasingly large annual deficits, shifts these deficits from the (as it were) 'profit and loss account' to reserves, steadily erodes any revenue reserves it started with, and so begins to eat into endowment capital.

Of course, endowment can also be eaten away, slowly and indirectly but relentlessly, by a college taking too high an annual income as the yield from capital (typically 6%-7% on gilts or property) rather than the acceptable 'spend rate' of 4%-5% for a perpetual charity properly balancing today's income needs against tomorrow's capital growth. It is assumed, however, for the purposes of this article, that the Bursar has kept the spendthrift tendency of the Fellows/corporators firmly under control and that this particular' breach of trust' is not taking place.

This is not the place for an elaborate discussion of what constitutes good practice in charity investment.[91] But it seems sensible to indicate in parentheses that there has been considerable criticism directed of late at the absence of some equivalent of the American prudent investor rule. Thus Professor Harvey Dale and Michael Gwinnell have compared the United States prudent investor rule with English trust law.[92] The latter, with its emphasis on the balance between income and capital, and governed as it is by an outdated Trustee Investments Act 1961, the caution of the Charity Commissioners with their 'inadequate understanding of the discipline of managing investments', and constricting case law[93] is, they suggest, 'woefully anachronistic and in need of legislative resuscitation'. Since that article was written, however, there has been a decision of the Court of Appeal concerning diversification of investments in three cases heard together,[94] in which the Court of Appeal agreed that a normal spread of investments by the prudent investor would include some 75% equities.

It is also assumed that a college which intends to spend capital on a new building or on the extensive refurbishment, repair, or upgrading of existing building stock will plan to do so in accordance with the restrictions contained within its Statutes,

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91 See Harbottle *Investing Charity Funds* (1995), Harrison *Managing Charitable Investments* (1994), and Richens and Fletcher *Charity Land and Premises* (1996) for discussion of 'Good Practice' in charity investment, and note Longstreth, *Modern Investment Management and the Prudent Man Role* (1986).

92 See nore 16 above.

93 See, for example: *Re Whiteley* [1886] 33 ChD 347; *Nestle v National Westminster Bank plc* [1994] 1 All ER 118, *Cowan v Scargill* [1984] 2 All ER 750; and *Harries v Church Commissioners for England* [1992] 1 WR 1241.

94 See *Wells v Wells*, *Thomas v Brighton Health Authority*, and *Page v Sheerness Steel Co plc* (1996) *The Times*, 24th October 1996.

as qualified or expanded by the Universities and College Estates Act (see Appendix A), and will make provision to repay the capital in the way required by the Act. Capital may not, however, be used to finance routine revenue deficits even if there are well-intentioned plans to pay endowment back from surpluses optimistically anticipated for future years.

Similarly, it is assumed that Fellows are not collectively so incompetent as the Governing Body that they fail to abide by the terms of a specific trust and mistakenly spend its permanent endowment when they have no power under the relevant trust deed to use capital, or they misguidedly apply the income from the specific trust to the wrong purposes (and so are liable to compensate the trust for the amount misdirected).

Assuming that the Fellows are in fact charity trustees, and have suceeded in getting the college into a financial mess, and ought *not* to be excused by the Court under s.61 of the Trustee Act 1925 because the learned judge rules that s.61 applies only to true trustees or that the Fellows should really have made a better job of controlling the charity's assets. Then the most likely way in which the Fellows will be faced with personal liability to make good the college's losses will be in a legal action brought against them by the Attorney-General.[95]

Liability of corporators to the corporation itself

If, however, the Fellows are not charity trustees but may still be liable for any *ultra vires* acts, then the first question is whether any third party alleging a contractual or tort loss arising from the *ultra vires* action would bother also to sue individual Fellows as well as the college. Theoretically there may in certain circumstances well be a liability. But it would be rare Don who would be the powder and shot.

In most cases, the college will be first in the firing line to suffer any financial loss arising from being obliged to compensate a third party. The loss if following from a tort may well be covered by public liability insurance carried by the college. Or it may be covered by directors or trustees liability insurance provided by the college to protect its corporators or governors as is now recommended for the members of Boards of Governors or Councils of Universities by the Higher Education Funding Councils.

The second question is whether the corporation, having suffered a financial loss, can itself invoke the personal liability of its incompetent, or even corrupt,

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95 The Attorney General proceeds on behalf of the Sovereign as *parens patriae*. He probably will be acting on a complaint raised by a group of Fellows, or concerned students, 'disgruntled' Old Members, or the Charity Commissioners.

corporators? Unless one (majority) section of the Fellowship tried to sue the rest in the name of the college, as is theoretically possible, the most likely route is by appeal to the Visitor.[96] The late-twentieth century Visitor may be a dormant concept in some Oxford colleges, but he is still alive and well and recently there was an appeal to the Visitor in St John's College. Moreover his (latent) power is clearly set out in college Statutes, and in times past the Bishop of Winchester would in the case of New College, for example, probably have been a very real force in the life of the College as the Founder's permanent check on the society. It is now clear that the Visitor himself might, where his powers are untrammelled by restricting provisions, have the power to award compensation or damages in favour of the college against the miscreant Fellows.[97]

It is, perhaps, more likely that the matter would be the subject of court proceedings. Yet it is uncertain whether the Court would regard the miscreant corporator Fellows as immune from liability towards the college, or would find some way to impose personal liability on such Fellows on the basis of their general fiduciary duties as corporators or by an analogy with the greater fiduciary duties either of charity trusteeship or even of company directorship.

Whatever the theoretical legal position, the cautious common-sense approach for the Fellows of Oxford colleges must surely be, as already suggested, to proceed on the assumption that they are charity trustees. Hence they should apply to themselves the highest level of fiduciary duty towards the charitable corporation they control, and for which, whatever may be their accountability at law, they are accountable both to History and to Society, and to generations past, present and future.

Selling the Great Quadrangle

As mentioned above, the recent opinion argues that New College, for example, is free to sell off its medieval site, and the Listed Grade I buildings and Scheduled Ancient Monument City Walls standing upon it. It has already been queried within this article whether such 'functional land' can be alienated at the discretion of the Governing Body: see the reference to *Halsbury* above. It is also here argued that, even if the site could be sold, the receipts would still be permanent endowment ('capital money') and not available to finance revenue deficits.

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96 For a discussion of the unique role and authority of the Visitor, see pp 369-388 of *Tudor* (1995), chapter 41 of *Picarda* (1995), and the bibliographical essay by Palfreyman in Palfreyman & Warner (1998).

97 See *Thomas v University of Bradford* [1987] AC 759, as cited by *Tudor* and *Picarda*; cf the powers of the District Auditor surcharging errant councillors.

The New College 1923 Statutes (XX, Investment Powers) grant wide freedom for the Warden and Fellows to manage the 'endowments' 'as if they were the beneficial owners thereof' (but no doubt subject to the Universities and College Estates Act 1925). They do not refer to the College's 'functional land' as such (other than in the context of allowing revenues to be used 'to form a fund for the improvement or completion of the fabric of the College').[98]

On the other hand, the 1870 Statutes not only state that 'Any property of the College may be alienated to the extent and in the manner allowed by the law',[99] but also require that the repair of the buildings 'shall be the first charge on the revenues of the College'.[100] The Universities and College Estates Act 1925 defines 'land' in s.41 sufficiently widely as seemingly to include the 'functional land' of the College site.[101]

Again, to take an outlandish example, what if the present generation of New College Fellows, as 'the corporation', were to decide to end some 600 years of association with the New College Lane site and its collection of buildings, and to sell the site to Disney as its 'Oxford Theme Park'? Such a decision and course of conduct is one which conceivably might tempt a Court to find a way to interpret the action of the Fellows as being at least *ultra vires*, probably in breach of their general fiduciary duty towards the corporation, and even in breach of trust.

In this connection *Oldham MBC v A-G*[102] is of interest, but probably not of help, in that it stresses that a charity can alienate land (property) not essential to the fulfilment of its charitable objectives. In contrast, the judge in that case suggested that a charity to preserve an historic building would be unable to sell the building in order to buy another building to preserve instead. In the case of Oxford colleges, however, their educational objectives could, presumably, still be adequately performed from cheaper-to-run premises within a reasonable distance of the University's libraries and laboratories.

Conclusions

Oxford colleges hold permanent endowment as lay eleemosynary charitable chartered corporations aggregate which are also exempt charities. The major part

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98 This perhaps implies that 'the College' is a *permanent* physical entity.

99 Statute 19.

100 Statute 21. This appears to provide that it is a question of buildings first, jobs second.

101 See Appendix A paragraph (g) for the wording.

102 [1993] 2 All ER 432.

of their assets will be 'capital money' (i.e. permanent endowment) held on trust, and in accordance both with their Statutes and also with the Universities and College Estates Acts 1925 and 1964, unless the college can show it is not capital money or that it is specific trust money where the terms of the trust are such as to allow the expenditure of capital. Otherwise, as perpetual institutions, the *corpus* must be kept intact.

Thus, the college will be hard-pressed, without breach of trust, to use capital, either within the general law relating to trusts or within the University and College Estates Acts of 1925 and 1964, for funding a recurrent deficit. The college as an eleemosynary charitable corporation is the trustee of that permanent endowment, and the Fellows of the college, as corporators or officers of the corporation, are also, in effect, the charity trustees of such capital money or permanent endowment and risk personal liability as such for any breach of their duties.

This accords with 'the traditional view' as expressed in the writer's previous article[103] and is as asserted in *Tudor* and *Halsbury* and the cases cited by them[104] which *inter alia* are summarised in Appendix C.

If, however, the cases cited above are now just too arcane and archaic to support *Tudor* and hence the corporation is not strictly *de jure* a trustee, it could well be treated *de facto* as such. The Court might regard the duties and obligations of trusteeship to be the appropriate standard for the management of the corporate assets.[105] Certainly there is no question of the Court's charity jurisdiction being ousted either by there being a Visitor or by a degree of control by Statute: *A-G v St Cross Hospital* [1853] 17 Beav. 435; *Re Whitworth Art Gallery Trusts* [1958] Ch 461; and *Construction Industry Training Board v A-G* [1973] Ch 173. (See Appendix C for details of these cases.)

Interestingly, Counsel in his Opinion, comments on the fiduciary duties of corporators, noting that, although the corporators are not trustees in the sense that the property of the college is vested in them, they are in a similar position to

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103 Palfreyman (1995/96) 3 CL&PR 187-202.

104 *Lydiatt v Foach* (1700) 2 Vern 410, *A-G v Governors of the Foundling Hospital* (1793) 2 Vers. Jun. 42; *A-G v Wyggeston's Hospital* (1852) 12 Beav. 113; *A-G v St Cross Hospital* (1853) 17 Beav. 435; *A-G v Governors of Sherbourne Grammar School* (1854) 18 Beav. 256; and *Baldry v Feintuck* [1972] 1 WLR 552 (see Appendix C for details of these cases).

105 As has been the US approach, see Dale and Gwinnell (1995/96) 3 CL&PR 65-96; and see *Re Manchester Royal Infirmary* (1889) 43 ChD 420; *Re French Protestant Hospital* [1951] Ch 567; *Soldiers', Sailors' and Airmen's Family Association v A-G* [1968] 1 WLR 313; and *Harries v Church Commissioners for England* [1993] 1 All ER 300.

trustees, and indeed are 'charity trustees' within the meaning of that expression in the Charities Act 1993.[106]

If this line of argument is incorrect in that colleges do not hold their general corporate property on any kind of trust whether pure, quasi or constructive (as argued in the opinion, relying on *Liverpool and District Hospital for Diseases of the Heart v A-G* [1981] Ch 193, and in accordance with Stebbing, Shadwell and *Re Cook* as discussed above), then their Fellows may anyway still risk personal liability as corporators in relation to any act contrary to or *ultra vires* the Charter and Statutes, and are not able to be relieved of such liability as corporators in contrast to the possibility of the Court being lenient towards any trustee (breach of trust) or company director ('wrongful trading') under relevant legislation. If the New College Statutes are typical for Oxford colleges, they do not provide for the expenditure of capital and refer only to the disposal of revenues: the expenditure of capital (other than in accordance with the provisions of the Universities and College Estates Acts 1925 and 1964) would seem to be, therefore, an *ultra vires* act.

The enforcement of such personal liability upon miscreant or incompetent corporators to compensate the corporation for any financial losses arising from their *ultra vires* actions could probably be at the hands of the Visitor. Indeed, given the line deployed by Messrs Farrington and Street and apparent in the case of *Pearce*, only the Visitor may be able to act, since at common law there will have been no 'offence' for the Court to deal with. The Courts, however, may step in and, moreover, could see fit to do so on analogy with charity trusteeship and with certain aspects of company directorship. *Ultra vires* or not, there is also the issue of the controls imposed by the Universities and College Estates Acts 1925 and 1964.

Indeed, while Counsel comments on the unlikelihood of the Attorney-General intervening if the Fellows acted in good faith with a sole view to the good of the college, he does acknowledge that it is here that the constraints on their freedom of action of the college and its Fellows are to be found. Hence Counsel accepts that there is a possibility of Fellows being held to account by the Attorney-General if they should act without due attention to their fiduciary duties.

This clearly takes us back to the concept of the corporators as quasi-trustees. The use of the word 'sole' is interesting in that it implies that the duty of the Fellows of a fictional St Smugg's is to be more concerned about its long-term survival than, say, the short-term financial viability of the collegiate system as a whole.

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106 S.97(1), the charity being the college. Counsel cites and quotes from *Re French Protestant Hospital.*

Whatever the strict legal position, the simple issue for Fellows is whether there is sufficient risk of personal liability (or at least uncertainty within the law) that the common-sense, practical approach is to guard against it by adopting a standard of fiduciary duty which is modelled on charity trusteeship and hence is least likely to trigger liability. That said, one has to note that the 'fiduciary relationship' is a slippery legal concept, described by P M Flinn *Fiduciary Obligations* (1977) 'as one of the most ill-defined if not altogether misleading terms in our law.'[107]

Above all, whatever the law may or may not say with any clarity, there is the moral and ethical question of whether today's generation of Fellows should ever contemplate eating endowment at the expense of tomorrow's, generation especially if yesterday's generation has been disciplined over the centuries so as to honour the concept of the Oxford college as a perpetual eleemosynary charitable corporation.

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107 See also R T Austin (1996) 'Moulding the Content of Fiduciary Duties' in A J Oakley *Trends in Contemporary Trust Law* (1996) for a valuable decision of 'fiduciary duty' and 'good faith', where the latter concept is described as a 'fifth column waiting for its moment' or as 'an answer waiting for a question', and where the evoking concept of 'a fiduciary duty of case' is also described in relation to trustees and company directors.

APPENDIX A: THE KEY PROVISIONS OF THE UNIVERSITIES AND COLLEGE ESTATES ACT 1925 (amended 1964)

(a) Section 1: '1. The universities and colleges to which this Act applies are the Universities of Oxford, Cambridge and Durham, and the colleges or halls in those universities, and the Colleges of Saint Mary of Winchester, near Winchester, and of King Henry the Sixth at Eton, and for the purposes of this Act the Cathedral or House of Christ Church in Oxford shall be considered to be a college in the University of Oxford.'

(Hence, for example, the Land Registry will typically contain this sort of entry in relation to Oxford college transactions: 'Except under an order of the Registrar no disposition by the proprietor of the land is to be registered unless: either (a) it is made in accordance with the Universities and College Estates Acts 1925 and 1964; or (b) a Certificate signed by the proprietor's solicitors has been furnished that the disposition has not contravened any of the provisions of the proprietor's charter or private statutes, or the terms of any trust subject to which the land may have been held ..'

(b) Sections 5, 7(4), 13(7), 14(4), 15(2), 16(4), 20, 23(5), and 24(5) state that any money received in accordance with the powers of sale, exchange, leasing, surrenders, regrants, varying leases, granting options, etc., being given under the Act 'shall be capital money': i.e. land being permanent endowment when converted to cash still remains permanent endowment, as capital money, and may be used only as in (c) below.

(c) Section 26 sets out how capital money may be applied: investment in securities, the improvement of farms, purchase of other land in fee simple or leasehold (60 years minimum), purchase of mineral rights, development of existing land, restoring chancels whose maintenance liability falls upon the college, improving existing buildings (the extent of such refurbishment or up-grading being as set out in the two parts to Schedule 1), etc....subject to the capital spent being replaced within or over a specified period (up to 50 years).

(d) Section 30 concerns borrowing money to build new or enlarge or improve existing buildings.

(e) Section 32 states over what period such borrowings must be repaid (up to 50 years, but only 25 years for certain types of refurbishment); such repayment can be by way 'of a sinking or redemption fund'.

(f) Section 38 allows for 'the Minister' (MAFF) to give consent as required under certain sections (e.g. s.23(3) requires that an option specifies the price at which the land will eventually be sold, but, typically, the Minister now gives approval for the price to be determined at the future time of sale providing a clear, precise formula for then agreeing it is put in the option agreement at the outset).

(g) Section 41 specifies what land is covered by the Act:

(1) The powers and provisions of this Act relating to land belonging to a university or college shall extend and be applicable not only to land vested in the university or college, or in any body constituted for holding land belonging to the university or college, and held as the property or for the general purposes of the university or college, but also to land so vested which may be held upon any trusts, or for any special endowment or other purposes, connected with the university or college.

(2) The power conferred by this Act on a university or college may as respects each particular university or college be exercised by such body and in such manner as may be provided by the statutes regulating that university or college.

(h) Section 43 defines, *inter alia*, 'building purposes' and 'land':

(i) "Building purposes" include the erecting and the improving of, and the adding to, and the repairing of buildings; and a "building lease" is a lease for any building purposes or purposes connected therewith...

(iv) "Land" includes land of any tenure, and mines and minerals whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or otherwise) and all other corporeal hereditaments; also manor, an advowson, and a rent and all other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land, but not an undivided share in land;

(i) Section 42, 'Saving of existing powers' is interesting:

> 'Nothing in this Act contained shall restrain a university or college, or other body constituted for holding land belonging to a university or college, from exercising any powers of sale, exchange, purchase, or borrowing, or from granting any leases or making any grants, whether by way of renewal or otherwise, which the university or college might have exercised or granted under the provisions of any Act of Parliament, whether public general or local or private, or under any other authority, or in any other manner whatsoever, in case this Act had not been passed: Provided that, upon any exchange being effected under the provisions of the Inclosure Acts 1845 to 1882, it shall be lawful for the [Secretary of State] to authorise any money by way of equality of exchange to be received by the university or college, and any money so received shall be capital money [the money (if any) to be paid by way of equality of exchange has been paid to the university or college] no order of exchange shall be finally confirmed by the [Secretary of State], and a recital of such payment in the order of exchange shall be conclusive evidence thereof.'

Counsel in his opinion regards this section as meaning that colleges can still do whatever they might have been able to do at common law - i.e. sell lands as 'a natural person'.

Here there is conflict with Shadwell (1898) as discussed in (n) below, and his reference to the Disabling Act 13 Eliz. c.10 (as confirmed in *Kyd*, 1793). The essential question is not whether colleges can sell land (the University and College Estates Acts 1925 and 1964 Act allows them to if it indeed applies, and their Statutes do not forbid it). And there may well be a question mark over the sale of functional land (the Great Quadrangle issue). The key question, however, is whether, once sold, the capital raised may be used to cover recurrent revenue deficits, or should be treated as permanent endowment (capital money).

Counsel acknowledges that the Attorney-General can intervene (corporate property or trust property) if he considers that the sale is contrary to the interests of charity, but is unlikely to do so providing the college has been acting in good faith with a sole view to the benefit of the college *and* a proper price has been obtained by way of effective marketing of the sale property.

(j) The preamble to the Act reads:

> 'An Act to consolidate the Universities and College Estates Acts 1858 to 1898, and enactments amending those Acts.'

(k) It is noted within the Preamble that the Act has been 'extended with modification by Universities and Colleges (Trusts) Act 1943 (c9), s.2(3)'. This 1943 Act is 'to make provision as to trust property held by or on

behalf of certain universities and colleges', including Oxford colleges (s.1(1)). The Act permits a college to make a scheme whereby specific trusts can be combined into one pooled Fund for convenience of investment management and accounting, each trust having shares in the overall Fund and income being allocated on the basis of the shareholdings. Power is also given to create reserves 'for the purpose of eliminating or reducing fluctuations of income'. The 1925 Act applies to the property held within any such Fund (s.2(3)) - see (g) above and reference to s.41.

(l) The First Schedule lists the type of 'Improvements for which a University or college may borrow or apply Capital Money' (including, usefully, 'heating and lighting, structural alterations and extensions reasonably required', 'buildings for farm purposes'; and even more outlandishly 'sea walls', 'dams', 'tramways', 'canals', 'places of amusement and entertainment', 'steam rollers'..).

(m) The *Encyclopedia of the Laws of England* (1907) under 'College' notes that: 'In managing their property, colleges were formerly restricted by the provisions of the 13 Eliz. c.10, and 14 Eliz. c.11, but the Universities and College Estates Acts of 1858 and 1880 have given large powers of leasing, etc'. This statement supports the argument that the 1925 Act is of general application in relation to Oxford colleges managing their endowment as land or land as transformed into 'capital money' and then otherwise invested.

(n) Shadwell (1898) and Skene, *Handbook of certain Acts affecting the Universities of Oxford and Cambridge and the Colleges therein in the sale, acquisition and administration of property* (1898) discuss the earlier versions of the 1925 and 1964 legislation.[108] The latter notes:

'Except to the extent to which they are affected by special legislation, the Universities and the colleges therein are in the position of any other corporation, so far as their power of dealing with their real property is concerned. Their powers in this respect are now, to a great extent, regulated by the... Universities and Colleges Estates Acts...'

Shadwell's pamphlet earned him his Oxford DCL and in it he comments: (emphasis added together with square bracketed comments by the present writer)

'No restriction existed at Common Law upon the sale of land by corporations aggregate, whether lay or ecclesiastical... the concurrence of the several members of a corporation aggregate was looked upon as a sufficient security against wasteful alienation...

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108 Skene *ob cit* at 15.

> This uncontrolled power of the Colleges to part with their property came to an end with the passing of the [Disabling] Act 13 Eliz. c. 10... This Act effectually put a stop to the alienation by the Colleges of any part of their real estate... [unless, rarely, permission could be obtained by a specific Statute, in which case] provision was made for the due application of the consideration money, *so as to leave the corpus of the endowment undiminished...*
>
> [Then came the Universities and College Estates Act 1858 which enabled] the Colleges, with the consent of the Copyhold Commissioners (afterwards styled the Land Commissioners, and now the Board of Agriculture [MAFF by the 1964 amendments], to sell, enfranchise and exchange... all or any part of their landed property [including functional land?]... [the sale proceeds can be used only] for the purchase of other land [under the 1858 Act, and, by the 1880 Amendment Act also to allow Colleges to] borrow from themselves... [in which case it must be paid back so that] *The corpus of College property is preserved intact...* [So, these Acts] have been of great service... Some of the conditions of the borrowing may perhaps be modified, *though the principle of preserving the corporate property intact should be carefully maintained...*'. (NB 'The introduction of this Act [the 1880 amendments] was due to one of the ablest and most eminent of College Bursars, the late Mr Alfred Robinson, Bursar of New College.')

The Disabling Act of 1570/71 to which Shadwell refers is entitled 'An Act against Fraudes, defeating Remedies for Dilapidations, etc.', and states that 'from henceforth al Leases Gyftes Grauntes Feoffmentes Conveyances or Estates, to be made had done or suffered by any Master and Fellows of anye Colledg... to any Pson or Psons Bodyes Politike or Corporate [other than 21 year, three lives leases] shalbe utterly voide and of none Effect to al Intentes Constructions and Purposes; Any Law Custome or Usage to the contrary any wayes notwithstanding ...' If, however, the College Statutes already contain a power only to grant a lease for less than 21 years, then the lower figure in the Statutes shall prevail as the legal maximum. The Act is largely concerned with 'Frauds by Ecclesiastics' but 'Colledges' and 'Hospitallytie' (the lay eleemosynary corporations) are swept up in it since they too, like 'Spyrituall Lyvynges', are deemed to suffer from 'the Dilapidations and the Decaye' which gives rise to 'the utter impoverishing of all Successors Incumbentes in the same', and hence the restriction covers not only 'any spiritual or ecclesiastical living, [but also] any houses, lands, tithes, tenements or other heridataments, being any parcel of the possessions of any such college...'

The 1570/71 Act was strengthened by the 1576/77 Act of 18 Eliz. c.11, which complains that the earlier Act had not stamped out the abuses by, *inter alia*, 'collegiate persons' in relation to, in their case, 'collegiate lands, tenements or heridataments'. This later Act also provides exemption for St John's, Oxford, in so far as its Founder had arranged for his brother to have a life interest for 99 years in a certain part (the Manor of Fifield) of the original endowed lands: St

John's was allowed to honour this, despite the 21 year, three lives rule. *Kyd* (1793), as referred to in the main text, confirms Shadwell's interpretation, as does Street (1930): the latter recognises the common law freedom for 'corporations of every kind' to deal with property as they wish 'apart from statutory prohibitions or the principles of *ultra vires* or trusts', and notes the restrictions of 'the Disabling or Restraining Acts' applying to colleges in the form of 13 Eliz. c 10, 14 Eliz. c.11, and 39 Eliz. c.5 (140). Highmore in his *History of Mortmain* (1809) gives a history of these and relevant later Acts (432-436): 'The acts recited, certainly restrain any corporation from wholly alienating any of their lands or tenements...' (439). The second edition of *Tudor* (1862) does likewise (311-313), noting that s.38 of the Charitable Trusts Amendment Act, 1855, gave the Board (the early Charity Commissioners) power to override the Elizabethan Disabling Acts in relation, presumably, to specific trust land; the 1858 (first) Universities and College Estates Act grants the same power to the Minister in relation to all collegiate land.

(p) C Neate, 'Fellow and late Treasurer of Oriel College', discusses in his *Observations on College Leases* (1853) Oxford: Parker, the powers of colleges in relation to leases granted with the levying of 'fines' and the disbursements to the Fellows personally of the 'fines' rather than this income being part of the general revenues of the college ('the College itself, as a whole, has been sacrificed to the interests of the managing body', p.5). Not surprisingly, Neate argues for the freedom of estate management which subsequently came with the first of the Universities and College Estates Acts in 1858.

(q) J W Pycroft in his *Legislative Incorporation in relation to the University and Colleges of Oxford* (1851)[109] notes that certain colleges have 'protection afforded by legislative incorporation', the relevant legislation being 'several private and public statutes, which have been enacted for the protection of some of the collegiate privileges': Merton, 1st Mary c.24; Queen's 27th Eliz. c.2; Corpus, 3rd Jac. I c.3; Oriel, 3rd Jac. I c.9 and 13th Anne c.6 & 8; Pembroke, 13th Anne c.6 & 8; and (but he gives no references) All Souls, Balliol, Brasenose, Magdalen, New College and Worcester.

Essentially Pycroft is arguing that for that reason the 1850s Royal Commission on Oxford was an 'illegal mode of obtaining information', an improper 'Inquisition' leaving 'some of the noblest institutions of this country' potentially 'at the mercy of the ministry of the day' and its 'political designs... [and] dictates'.[110]

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109 Oxford: John Henry Parker.

110 A criticism which will strike a chord with the colleges who in 1997 sought the opinion which has generated this article.

APPENDIX B: THE FELLOWS' OATH OF ALLEGIANCE AT NEW COLLEGE, OXFORD

I, NN, now admitted as a Fellow of the College of Saint Mary of Winchester, founded by the reverend father Lord William of Wykeham in Oxford, pledge that I shall faithfully uphold all statutes and ordinances of said College, as well as those of the College of the Blessed Mary at Winchester, as far as they apply to me, and that I shall, as far as I am able, see to it that they are upheld and observed by others.

Further, that I shall be faithful as well as diligent in whatever duty it should fall to me to be assigned and to fulfil, and, when it is assigned me, I shall take it up and, as far as I can, faithfully carry it out. And that I shall be faithful to said Colleges and shall, as far as I am able, in no way cause or suffer to occur in any way any damage, scandals or prejudices against said Colleges, but in any ways I can, by my own efforts or those of others, I shall prevent their occurrence and if I myself cannot prevent them, I shall report them fully to the Warden, Sub-Warden, Dean, and Bursars of said Oxford College.

The Warden, Sub-Warden and other Official Fellows, in legitimate and honourable matters, and especially in the business of said Oxford College, I shall obey, assist, and obediently give to them due reverence. And I shall preserve, as far as I can, the tranquillity, peace, benefit, welfare, and honour of said Colleges and the unity of their Fellows, and take pains that they be preserved by others.

Further, regarding the election and admission of Fellows to said Oxford College, I shall give and extend loyal counsel, without favour, so that said College may take forethought regarding the good, chaste, modest, and honourable persons who are most skilful and suitable for study and advancement in scholarship, according to the ordinances and statutes of said College.

Further that I shall diligently assist in the improvement of said Colleges, their increase in goods, lands, possessions, and rents, and the preservation and defence of their rights, and the promotion and execution of any business of said Colleges, in whatever condition, rank, honour, and office I shall later hold, with sound counsels, deeds, favours, and assistance, as far as I am able and as far as concerns me, and I shall work faithfully for the same ends and persevere as far as I can to

the final and fortunate outcome of said business, as long as I live in this world.[111]

[111] Translated by Catherine Atherton, Fellow and Tutor in Classical Philosophy, New College.

APPENDIX C: DISCUSSION OF KEY CASES (in date order)

Lydiatt v Foach (1700) 1 Vern. 410: cited in support of the following statements:

> 'eleemosynary corporations hold their corporate property upon charitable trusts' (*Tudor*, 163 & 371); charitable corporations are 'but trustees for charity' and 'Eleemosynary corporations are trustees of their corporate property' (*Halsbury*, 5(2), 717 & 719); 'quite tenable' that a charitable corporation is 'necessarily a trustee of its property' (*Picarda*, 383 & 410). Lydiatt *et al* were acting on behalf of the Hospital of Felstead in Essex against Sir John Foach; the Report states as held by the 'Lord Keeper': 'The corporation are but trustees for the charity, and might improve for the benefit of the charity but could not do anything to the prejudice of the charity, in breach of the founder's rules.' Note that this was not a matter of the Hospital acquiring after foundation a specific trust, but concerns the Hospital as a charitable corporation following the directions and fulfilling the objectives set by its founder, the Lord Rich.

A-G v Governors of the Foundling Hospital (1793) 2 Ves. Jun. 42: see *CITB v A-G* (1973) below; here the Court of Chancery asserted its control over *all* charitable corporations which have the management of their revenues and mismanage them:

> 'There is no doubt, that a corporation, being trustee [here of its original foundation corporate property], is in this Court the same as an individual... There is nothing better established, than that this Court does not entertain a general jurisdiction to regulate and control charities established by charter. There the establishment is fixed and determined; and the Court has no power to vary it. If the Governors, established for the regulation of it, are not those, who have the management of the revenues, this Court has no jurisdiction; and, if it is ever so much abused, as far as respects the jurisdiction of this Court; it is without remedy: but if those, established as governors, have also the management of the revenues, this Court does assume a jurisdiction of necessity, so far as they are to be considered as trustees of the revenue...'

A-G v Wyggeston's Hospital (1852) 12 Beav 113: cited in support of the statement:

> 'eleemosynary corporations hold their corporate property upon charitable trusts' (*Tudor*, 163 & 371); the Master of the Rolls commented: 'Here is

> a foundation for charitable purposes... the whole property was devoted to *uses* pious or charitable...' (emphasis added).

A-G v St Cross Hospital (1853) 17 Beav 435: cited in support of the statement:

> 'eleemosynary corporations hold their corporate property upon charitable trusts' (*Tudor*, 163 & 371); the Master of the Rolls noted that the original foundation of this eleemosynary lay corporation 'is as clear and distinct a trust for the general support of charity as ever was created... and one which it is incumbent on this Court to carry into effect... the manifest trusts imposed by the original foundation... Where there is a clear and distinct trust, this Court administers and enforces it as much where there is a visitor as where there is none. This is clear, both on principle and authority. The visitor has a common law office and common law duties to perform, and does not superintend the performance of the trust which belong to the various officers, and which he may take care to see are properly kept up and appointed...'

A-G v The Governors of the Sherbourne Grammar School (1854) 18 Beav 256: here another visited (by the Lord Chancellor), lay, eleemosynary, charitable corporation was held to hold its original, foundation corporate property on trust:

> 'This Court has authority to redress a breach of trust, when the objects of the founder have been prevented or neglected...'

Re Manchester Royal Infirmary (1889) 43 ChD 420: corporate bodies held in some circumstances to be subject to the duties of trustees, here the application of the Trust Investment Act 1889 (*Tudor*, 160; *Picarda*, 384, makes a similar point); cited in support of the statement: 'eleemosynary corporations hold their corporate property upon charitable trusts' (*Tudor*, 163 & 371); here, however, there was clearly a trust in place *prior to* the incorporation of the officers of the Manchester Royal Infirmary and hence the corporation became the trustee and so was obliged to follow trustee duties.

The Abbey, Malvern v Ministry of Town & Country Planning [1951] 2 All ER 154: Danckwerts J noted that a company or corporation as 'an artificial person' and 'a legal person' 'can only operate by means of human beings': 'therefore, one has to see who operates the company... who, in fact, is in control...' Note, however, that here those 'human beings' were already trustees via a trust deed, that they operated as such through a company, and hence the company held its assets not beneficially but on the trust set out in the trust deed lying behind its memorandum and articles of association (the same would apply if it had been a charted corporation, as it were, inheriting a trust). The judgment cross-referred to *Re French Protestant Hospital* below.

Re French Protestant Hospital [1951] Ch 567: cited in support of these statements:

> 'the governors and directors of the hospital incorporated under Royal Charter are in the position of trustees and have to act in a fiduciary manner on behalf of the charitable trusts for which they act' (*Tudor*, 261); governors and directors of a charitable corporation 'though not strictly trustees themselves do occupy a position so analogous' that they should be unpaid as for all (non-professional) charity trustees (*Picarda*, 384 & 385); not strictly trustees but 'are in a fiduciary position' (*Halsbury*, 5(2), 717). Danckwerts J commented: '... it is the corporation which is trustee of the property of the charity in question, and ... the governor and directors are not trustees. Technically that may be so... [But] in a case of this kind the court is bound to look at the real situation which exists in fact... those persons [corporators] are as much in a fiduciary position as trustees in regard to any acts which are done respecting the corporation and its property... [they] in fact control the corporation and decide what should be done... they are, to all intents and purposes, bound by the rules which affect trustees...'

In Re Whitworth Art Gallery Trusts [1958] Ch 461: the Manchester Whitworth Institute was a chartered charitable corporation managing the Gallery; its financial position became weak and the Court was asked to agree to the transfer of premises and funds to Manchester University; Vaisey J comments: 'a charitable corporation founded by Royal Charter cannot be refounded or re-established by the court, but can be regulated and controlled by the court, especially on financial grounds...' (citing, *inter alia*, *A-G v Governors of the Foundling Hospital*, 1793, as above).

Soldiers', Sailors' and Airmen's Family Association v A-G [1968] 1 WLR 313: cited in support of their statements... the chartered corporation held to be subject to the Trustee Investments Act 1961 (*Tudor*, 160); the governor and directors of a charitable corporation 'though not strictly trustees themselves, do occupy a position so analogous' (*Picarda*, 384). Held that the Association was a charitable corporation and hence was in a position of a trustee with regard to its funds, and such funds can be invested only in accordance with the 1961 Act unless the Charter ('just like a trust deed setting up a trust', at 317H) gave wider powers of investment.

Baldry v Feintuck [1972] 1 WLR 552: eleemosynary corporations subject to the jurisdiction of the Court like any other trustee (*Tudor*, 371); this case concerned the Students' Union at Sussex University and a proposal to greatly widen its purposes, the Court holding that there was no power so to extend the objectives (*ultra vires*) and that the officers of the Union as an educational charity 'are, clearly, trustees of the funds for charitable educational purposes' (at 557 E); hence also, the concept of breach of trust in handling of the corporate property, 'trust money' (at 558 D).

Re Vernon's Will Trusts [1972] 1 Ch 300: a bequest to a corporate body is a beneficial addition to its general funds, a trust is not to be inferred (*Tudor*, 159 & 163); the corporate body here was a crippled children's guild incorporated under the Companies Act 1929: it was not an eleemosynary charity; Buckley J commented:

> 'A bequest to a corporate body... takes effect simply as a gift to that body beneficially, unless there are circumstances which show that the recipient is to take the gift as a trustee. There is no need in such a case to infer a trust for any particular purpose... the natural construction is that the bequest is made to the corporate body as part of its general funds, that is to say, beneficially and without the imposition of any trust...' (at 303 E-F).

Construction Industry Training Board v A-G [1973] Ch 173: the Board of the chartered corporation held its funds in trust for exclusively charitable purposes (*Tudor*, 160). The use of the word 'trust' in this context 'ought to be construed loosely', but certainly the CITB 'owes fiduciary duties to charity, which can be enforced by the court in personam' (*Picarda*, 384). The CITB wanted to be held charitable so as to avoid selective employment tax; to be so it needed to show it was a charity and 'subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities'. The Attorney-General argued that it was subject to control by relevant statute and not, therefore, to the control of the High Court which was ousted by the statute:

> 'Every charitable institution is in general subject to the control of the High Court in the sense that, even if regulated by statute or charter, the court will at the instance of an appropriate person - and in particular of the Attorney-General - intervene to prevent disobedience to the statute or charter...' (at 181G).

But this intervention in relation to an *ultra vires* act is different from controlling a charity as such. When here the relevant Minister under the statute also provided some of the detailed supervision and control, the Court was not entirely (or even substantially) ousted, and so the CITB is a charity.

Note too that Plowman J cited *Re Whitworth Art Gallery Trusts* (see above), which in turn referred to *A-G v Governors of the Foundling Hospital* (see above) from which he quoted with approval:

> 'The result is, this court must not hastily take upon itself to interfere with those, who have by charter, and in this case by Act of Parliament, the whole control over this charity. But where, having also the management of the revenues, they are abusing their trust, the court has jurisdiction' (at 189A).

Liverpool and District Hospital for Diseases of the Heart v A-G [1981] Ch 193: is cited in support of the following statements: a company formed under the Companies Act is not holding its assets on trust, but a corporate body might if its constitution obliges it to apply the assets for exclusively charitable purposes (*Tudor*, 161); again a company or corporation may owe 'fiduciary duties to charity, which can be enforced by the court in personam' (*Picarda*, 384). Here the Hospital was in a position analogous to that of a trustee but was not in a strict sense a trustee, being both the legal and beneficial owner of its assets (hence **not** holding its general corporate assets as a trustee for the benefit of charitable purposes). Slade J commented:

> 'In a broad sense a corporate body may no doubt aptly be said to hold its assets as a 'trustee' for charitable purposes; in any case where the terms of its constitution place a legally binding restriction upon it which obliges it to apply its assets for exclusively charitable purposes... [but] none of the authorities... establish that a company formed under the Companies Act 1948 for charitable purposes is a trustee in the strict sense of its corporate assets... They do, in my opinion, clearly establish that such a company is in a position analogous to that of a trustee in relation to its corporate assets, such as ordinarily do give rise to the jurisdiction of the court to intervene in its affairs...' (at 209 E-G).

Construction Industry Training Board v A-G (as above) was expressly considered, as was *Re French Protestant Hospital* (also above), and were seen as referring to 'trust' in a wide sense, rather than a strict sense, and hence the judgment went on:

> '... the court has no jurisdiction to intervene unless there has been placed on the holder of the assets in question a legally binding restriction, arising either by way of a trust in the strict traditional sense or, in the case of a corporate body, under the terms of its constitution, which obliges him or it to apply the assets in question for exclusively charitable purposes... [then] the court can act in personam so far as necessary for the purpose of enforcement...' (at 214 B/C);

yet the jurisdiction of the court may be partially ousted by the existence of a Visitor or specific statutory supervision/control (citing *A-G v Magdalen College*, Oxford, 10 Beav 402, and *CITB v A-G* as above).

Harries v Church Commissioners for England [1993] 2 All ER 300: the presence of a trust was assumed (*Tudor*, 160); 'due regard required of trustees re the balance of income against capital growth and the need to balance risk against return' (*Picarda*, 497). Here 'the assets in question are held by the Commissioners as a [non-eleemosynary] corporate body's property and applicable in accordance with its constitution. The assets are not, strictly, vested in trustees and held by them upon defined trusts [citing the *Liverpool and District Hospital* case, as above]... For present purposes, however, nothing turns upon this distinction.

Whatever significance this distinction may or may not have in other contexts, in the context of the issues arising in these proceedings the Commissioners' position is no different from what it would be if the Commissioners were unincorporated and they held the assets formally as trustees...'