The Charity Law & Practice Review

IS PORTERHOUSE REALLY 'A CHARITY'?

David Palfreyman[1]

Introduction

I have argued elsewhere[2] that Oxbridge colleges and chartered universities are perpetual institutions with a permanent endowment *corpus*, operating within general charity law, the law of corporations, their Statutes as approved by the Privy Council (including the provision of a Visitor implementing an internal set of rules or laws, a *forum domesticum*), and within particular legislation.[3]

I have also argued elsewhere,[4] that those controlling the corporation (Fellows of Oxbridge colleges, Members of Council in chartered universities) are possibly *de jure* charity trustees, or probably *de facto* quasi-trustees, or at least that their fiduciary duties are so great as for a Court to view them to be analogous to trustees, with the attendant risk of personal liability if they mismanage the institution and its assets. Such mismanagement would represent breach of trust, breach of fiduciary duty, an act *ultra vires* the Statutes, in other words an act contrary to 'the regulatory regime'. They should, therefore, behave as if charity trustees, rather than, say, company directors or merely meeting the basic fiduciary duty of simply being honest and acting in good faith.

---

1 David Palfreyman, Bursar & Fellow, New College, Oxford, OX1 3BN.
Tel: (01865) 279550 Fax: (01865) 279590.

2 See D Palfreyman, "Oxford Colleges: Permanent Endowment, Charity Trusteeship, and Personal Liability" (1995/96) 4 CL&PR 85-120.

3 Such as the 1925 Universities and College Estates Act (amended 1964) applying to Oxbridge colleges and also to the universities of Oxford, Cambridge and Durham, and the more recent legislation setting up the Higher Education Council for England (HEFCE) in relation to Higher Education Institutions (HEIs) generally being accountable via HEFCE for their use of public money - Education Reform Act 1988 and the Further & Higher Education Act 1992. See also D Palfreyman & D Warner, eds, 'Higher Education and the Law', 1998, chapters 2, 3 and 4, also the bibliographical essay on the Visitor, pp 340-360.

4 See D Palfreyman, "Oxford Fellows as Charity Trustees" (1995/96) 3 CL&PR 187-202.

Here, however, I wish to explore in more detail the role of the Charity Commissioners and of the High Court in supervising such colleges and universities as chartered charitable corporations. This article has been prompted by Oliver Hyams who asks 'Is There Such a Thing as 'Charity'?'[5] I want to explore whether, say, Porterhouse (Tom Sharpe's mythical, Cambridge college) as a typical Oxbridge college or, say, the University of Barchester (in Anthony Trollope's fictional cathedral city) as a typical chartered university, are each "a charity" under the Charities Act 1993. If they are each a charity the question arises as to what degree they are exempt from the provisions of that legislation but are still subject to the jurisdiction of the High Court in generally overseeing the management of charities.

"A Charity" and "Exempt Charity"

The Charities Act 1993 defines "a charity", for the purposes of the Act, as "any institution, corporate or not, which is established for charitable purposes and *is subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities*...".[6] Clearly, Porterhouse and the University of Barchester are "corporate", being incorporated bodies or corporations, and perform "charitable purposes", namely higher education in the form of teaching and research. The phrase "charitable purposes" is further defined as "purposes which are exclusively charitable according to the law of England and Wales".[7] The next clause defines "charity trustees" as being 'the persons having the general control and management of the administration of a charity'[8] (our Fellows of Porterhouse or the Members of the Council of the University of Barchester), assuming that it is indeed correct to describe each institution as a 'charity'.

An "exempt charity", is a charity exempted from most of the regulatory regime of the Charity Commissioners, and is "a charity comprised in Schedule 2" of the Charities Act 1993.[9] Schedule 2 (Exempt Charities) in clause (b) includes the Oxbridge colleges, while clause (c) takes in "any university ... which Her Majesty declares by Order in Council to be an exempt charity for the purposes of this Act" (as has been done for all English Higher Education Institutions ("HEIs"), whether

---

5 See O Hyams, "Is There Such a Thing as Charity"(1993/94) 2 CL&PR 149-154. See also O Hyams, *Law of Education* (1998) paragraphs 2-177 and 2-178, also 18-020-18-024.

6 CA 1993, s.96(1), emphasis added.

7 CA 1993, s.97(1).

8 *Ibid* s.97(1).

9 *Ibid* s.97(2).

chartered or statutory), and as clarified for the statutory universities of the Teaching and Higher Education Act 1998.[10] Hill and Hackett explore what this exemption means. It does not mean exemption from all aspects of the supervisory role of the Charity Commissioners, and nor does it mean the burden of trusteeship is lessened or the risk and extent of personal liability reduced: "... 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."[11] They are, however, freed of the need to register with the Charity Commissioners or to submit an annual report and accounts to them, and they may commence "charity proceedings" without the authority of the Charity Commissioners. The latter may not institute an enquiry into them, search their records, or remove a trustee, but they can provide advice if requested and can authorise *ex gratia* payments. There is no exemption from the requirement to keep proper accounts, to supply a copy of the accounts to anybody asking for one, to include a statement concerning being an exempt charity in documents relating to the sale of land, and the rules concerning the disqualification from acting as charity trustees if an individual becomes bankrupt or is convicted of an offence involving dishonesty or deception. Also, "exempt charities remain, however, fully subject to the jurisdiction of the Court in relation to charities. The common law relating to charities is thus equally applicable to exempt charities."[12]

But are they "fully subject to the jurisdiction of the courts"? The Charities Act 1993[13] lists, in effect, Porterhouse and Barchester as exempt charities, free of most of the powers of the Charity Commissioners. Clearly, Parliament regards each of them as "a charity". Yet "a charity", as noted earlier, is "any institution ... subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities ...".[14] Can there be doubt whether the High Court has such jurisdiction over Porterhouse and Barchester, and, if so, might the assertion that exempt charities are "fully subject to the jurisdiction of the Court" if not of the Charity Commissioners be wrong?[15]

---

10 CA 1993 s.41.

11 See J Hill and E Hackett, 'Exempt Charities'1999 CL & PR 209-215, at 213. See also *Tudor on Charities* (1995) 15. See also Hyams *Law of Education* (1998) paragraph 2.177.

12 Hill and Hackett *op cit* at 213.

13 CA 1993, Schedule 2.

14 CA 1993 s.96 (1).

15 Hill and Hackett *op cit* at 213.

Jurisdiction of High Court ousted?

The difficulty lies in whether the jurisdiction of the High Court is partly or fully ousted by the fact that other controls (the Privy Council approval of Statutes, the role of the Visitor, specific legislation) apply to the governance of these chartered, charitable, eleemosynary, perpetual, lay corporations; there being nothing then left for the High Court to need to control, supervise, regulate. This is complicated legal territory, with no clear, easy answers.[16]

Farrington picks up the uncertainty: "The court ... can only intervene to regulate or control the activities of a chartered corporation where the governing body has management of the revenues where they are considered to be in the position of trustees and have abused that trust ... the courts have otherwise no power to intervene by ordinary process except *possibly* where the action taken by the corporation involves mismanagement of charitable funds" 'and' in all cases where charitable status is enjoyed, the liabilities of charitable trustees are generally unlimited and there is a *potential* area of doubt."[17]

There is a little more clarity at least in relation to how such corporators should behave when handling the investments of the corporation. The required standard is closer to 'the prudent investor' charity trustee, and is in *Harries v Church Commissioners for England*[18] where the Court regarded the "trustees" of a charitable corporation as being subject to the principles of charity law concerning investment.[19]

The position in relation to a *specific* trust is straightforward. For example, money bequeathed to Porterhouse by an Old Member only for purposes carefully defined in the will and linked to the educational activity of the college will be a separate charitable trust managed by the college which will be itself the trustee of the bequest. The trust will be within the jurisdiction of the High Court which is charged with the

---

16 See D Palfreyman *Oxford Colleges Permanent Endowment Charity Trusteeship, and Personal Liability* (1998) 5 CL&PR 85-120). See also O Hyams, 'The potential liabilities of governors of education institutions' *Education and the Law* 6 (4) 191-205; E Hambley, *Personal Liability in Public Service Organisations: A Legal Research Study for the Committee on Standards in Public Life* (1998); and D Palfreyman, 'Unlimited Personal Liability for Members of Councils/Boards of Governors?' *Education and the Law* (1998) 10 (4) 245-252.

17 See D J Farrington *The Law of Higher Education* (1998) at 1.45 and 1.47 and 2-110, respectively, emphasis added.

18 [1992] 1 WLR 1241.

19 See H P Dale and M Gwinnell, 'Time for Change: Charity Investments and Modern Portfolio Theory' (1993) CL & PR 65-96.

function of enforcing trusts for charitable purposes. The problem area is in relation to the *general* property of the corporation, the assets used to support the broad charitable educational activities of the institution. Statutory Higher Education Corporations (HECs), for example, would normally hold such assets beneficially, not on trust, and hence the jurisdiction of the High Court in relation to charity will not apply, there being no trust to enforce. The governance of the corporation will be constrained and monitored by other mechanisms of the kind referred to earlier.

In the case of *eleemosynary* chartered corporations (such as Porterhouse and Barchester), however, the leading text books[20] as recognised by Hambley)[21] argue that they *do*, as *eleemosynary* chartered corporations, hold their general corporate property, and not just specific assets donated "with strings attached", on trust. Hence the jurisdiction of the High Court does indeed apply with respect to protecting those assets and ensuring that they are applied only for charitable purposes in accordance with the constitutional documents of the corporation or foundation and with any relevant legislation. The Privy Council and the Visitor may still be involved, but that does not necessarily mean the jurisdiction of the High Court has been ousted with regard to the charity assets.[22] In turn, the view in the modern authorities stretches back to and is supported by *Grant on Corporations*,[23] Shelford's *Law of Mortmain,*[24] and (to a lesser degree) *Kyd on Corporations*:[25] all, as discussed in Palfreyman.[26] This information found in *Tudor* and *Halsbury* can be termed 'the trust approach' as a convenient short-hand expression within the text of this article.

A contrary view is, as mentioned before, that a corporation holds its general corporate assets beneficially, subject to their being used only in support of charitable purposes. Claricoat and Phillips, for example, reject the distinction made between eleemosynary and non-eleemosynary (civil or ecclesiastical) corporations, stating:

---

20 *Tudor on Charities*(8th ed,1995) at 162-3 and 371 and *Halsbury* Vol 5(2) Re-Issue on Charities, para 222.

21 Hambley; *Personal Liability in Public Service Organisations: A Legal Research Study for the Committee on Standards in Public Life* (1998) at para. 347, A38, f 84/166/215.

22 *Tudor op cit* at 371, 374, 381 and 387.

23 *Grant on Corporations* (1850) at 136 and 531/3.

24 *Shelford's Law of Mortmain* (1836) at 334 and 408/9.

25 *Kyd on Corporations* (1793) at Vol 2 195.

26 See D Palfreyman, *Oxford Colleges: Permanent Endowments, Charity Trusteeship, and Personal Liability* (1998) 5 CL &PR 85-120.

"No very good reason can be seen for this distinction, except perhaps that the Court of Chancery was seeking to found a jurisdiction which would give it control over these undoubtedly charitable institutions ..."[27] Certainly some of the case-law is archaic. For example, *Lydiatt v Foach*, coins the concept of corporators as 'but trustees for charity', yet dates back to 1700.[28] Indeed, one extensive albeit elderly case report (*Green v Rutherforth*, 1750)[29] is worth considering in detail - see Appendix. Even so, some authorities,[30] would argue that the Attorney-General, as the *parens patriae* protecting charity, could anyway still seek to protect and enforce the use of such assets in an appropriate charitable way by challenging the corporation in the High Court. For the purposes of this article let us refer to 'the A-G approach'.

Halsbury comments that the court "exercises jurisdiction with respect to the dealings and conduct of governors who receive and apply the revenues of charity property or manage charity estates", even if an eleemosynary corporation and 'whether or not the corporation is subject to the control of a Visitor.'[31] And thus, the jurisdiction of the Court is never completely ousted, and anyway "the jurisdiction of a Visitor is limited by the statutes regulating the charity...".[32] And "If the power given to the Visitor is unlimited and universal he has, in respect of the foundation and property moving from the Founder, no rule but his sound discretion. If there are particular statutes they are the rule by which he is bound, and if he acts contrary to or exceeds them he acts without jurisdiction, and consequently his act is a nullity."[33] Thus, *Halsbury* sums up the role of the Court:

> "Perhaps the true meaning of the so-called rule that the court's jurisdiction to intervene in the affairs of a charity depends on the existence of a trust is that 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 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

---

27 See J Claricoat and H Phillips, 'Corporations as Trustees' (1996/97) 4 CL&PR 83-93, at 84.

28 2 Vern. 410.

29 1 Ves. Sen. 463-475.

30 See H Picarda, *The Law and Practice Relating to Charities* (3rd ed 1999) at 551.

31 *Halsbury op cit* para 431.

32 *Ibid* para 414.

33 *Ibid* para 406.

> assets in question for exclusively charitable purposes; for the jurisdiction of the court necessarily depends on the existence of a person or body who is subject to such obligation and against whom the court can act in personam so far as necessary for the purposes of enforcement."[34]

The Appendix illustrates this line of argument by citing the constraints placed upon the New College Visitor by the original Founder's Statutes, and especially by Rubric 48 on the disposal of property. Arguably these restraints have one of two consequences. Either they impose in effect a trust between the Founder and the Visitor thereby invoking the jurisdiction of the Court. Or they so constrain the Visitor that such "particular statutes" leave scope for the jurisdiction of the Court to be applied by way of judicial review of the Visitor were he to exceed his jurisdiction powers.

Others would attempt to get to the same answer by a different route. For example, Pettit[35] comments, in the context of the Court's 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 ['the trust approach' referred to above] ... it has been held 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 [the A-G approach] ... Further, the statutory definition of charity includes a corporate "institution"[36] which is defined[37] 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 *whether those provisions take effect by way of trust or not.*" (This argument we might call 'the statute approach'.)

---

34 *Ibid* para 222.

35 See P H Pettit, *Equity and the Law of Trusts* (1993), at 277, emphasis added.

36 CA 1993, s.96(1).

37 CA 1993, s.97(1).

Claricoat and Phillips[38] also recognise this mechanism for 'lifting the veil of incorporation' and ensuring that "charity trustees" means *real* people, as opposed to just the legal persona of the corporate body itself, who can be sent to prison for the mismanagement of a charity. Farrington similarly follows the 'statute approach', at least in relation to the Governors of the statutory ' HEIs:

> "In practice, it is perhaps more appropriate to consider members of governing bodies as charitable trustees ... Section 97(1) Charities Act 1993 defines 'charity trustees' in terms which include directors of charitable corporations as well as trusts. It is argued with support from the decision in *Harries v Commissioners for Church of England*[39] that governors of a higher education corporation clearly fall within this definition and in that capacity are subject to the jurisdiction of the courts."[40]

Yet, if anything, the statutory regime surrounding the new HEIs as HECs (Higher Education Corporations created under the Further and Higher Education Act 1992) is stronger than for the chartered universities and Oxbridge colleges (although the former do not in addition have the concept of the Visitor), and might be more likely to oust the jurisdiction of the Court.

Key Cases

Much of the debate concerning these three approaches identified above, centres around two key cases, which Hyams[41] discusses (and especially what he terms the 'problematic dicta' within them): *Liverpool and District Hospital for Diseases of the Heart v Attorney-General*,[42] and *Construction Industry Training Board v Attorney-General.*[43] (CTB) In essence, if 'the trust approach' is not accepted as invoking the jurisdiction of the High Court, nor the 'A-G approach', now the 'statute approach'. Hyams argues that the Court will anyway seek to bring the charitable corporation and its general property within its jurisdiction on the basis that "it is in a position so analogous to that of a trustee in relation to its corporate assets, such as

---

38 J Claricoat and H Phillips *Corporations on Trustees* (1996/97) 4 CL& PR 83-93.

39 [1992] 1WLR 1241.

40 D J Farrington *The Law of Higher Education* at 2.112 and 2.114.

41 Hyams *op cit* (2 CL & PR 149-154).

42 [1981] Ch 193.

43 [1981] Ch 173.

ordinarily to give rise to the jurisdiction of the court to intervene in its affairs"...[44] This would be in keeping with the *Harris v Church of England Commissioners* case referred to earlier. Moreover, in the *Construction Industry Training Board* case Russell LJ (dissenting) comments: "... I find it difficult to hold that the Minister in the instant case can be said to have less control than a Visitor may have; and, indeed, I think some institutions specifically exempted by the Act have Visitors, which if the definition was devised to exclude such, should think their exemption superfluous..."[45]

An Alternative Regime?

Could, however, the High Court's jurisdiction still be partially ousted by the argument that, for Porterhouse and Barchester at least as corporate charities, there is already in place an alternative regime for controlling the administration of the corporate property. These constraints include the power to change the constitution of the corporation and in certain circumstances to appoint or remove its corporators as the *de facto* quasi trustees. Perhaps this provides the justification to oust *completely* the jurisdiction of the Court? Consider the alternative controls applying to Porterhouse and Barchester...

There are the Charter and Statutes as approved by the Privy Council; there is the Visitor; there is some legislation. Yet the Privy Council "office" does not seem to have the resources of the Attorney-General or the Charity Commissioners to "police" such exempt charities, and hence the Attorney-General: High Court route is arguably the only viable one. Moreover, unless the Crown has clearly reserved powers when granting the Charter, not even the Privy Council has power to alter the Charter, to add or remove corporators, or control the administration of the corporation,[46] short of the Privy Council revoking (*scire facias*) a Charter as is theoretically possible. The Visitor similarly has few resources and, these days, is largely a passive, appeal-based entity, not a Visitor in the active sense of coming to inspect. Moreover, while the Visitor may have exclusive jurisdiction on the interpretation and application of the Statutes, he/she does not necessarily have jurisdiction over the charities general property if it is indeed held on trust, or because the Founder did not intend to provide the Visitor with discretion concerning the disposal of capital as opposed to revenue arising on that capital (see the Appendix). Even if he/she did so, the Visitor does not have the powers, for example, to trace assets and recover charity property,

---

44 Quoting from Slade J in the *Liverpool Hospital* case, at 209G, Slade J's emphasis.

45 At 185A.

46 *Tudor on Charities* (1995) at 371.

or punish corporator quasi - trustees (other than by depriving them of office and, *possibly*,[47] awarding damages in favour of the corporation against them). The Statutes themselves typically are not minutely detailed. They assume the application of broad swathes of the common law and at least attention to the "good practice" contemplated in relevant legislation.[48] Finally, specific legislation such as the Further and Higher Education Act 1992 relates only to the case of public funds flowing into and within Barchester, not to its corporate property. Similarly, the Universities and College Estates Act 1925 (as amended 1964) constrain Porterhouse only in relation to the disposal of its permanent endowment capital corpus, not in its use of income.

Any alternative regime of control, therefore, while it might be enough to justify exemption from most of the requirements of the Charites Act 1993, hardly seems to replace fully the jurisdiction of the High Court either in theory or in practice. The theory is confirmed in the interpretation given by leading textbooks 'the trust approach'. The practice is acknowledged in the cases where the court has considered the governance and the administration. Hyams even speculates that "the blatant misuse of public[49] funds even by the trustees of a charitable trust" might be subject to public law and not[50] just charity and trust law. Hence the decision of an HEI in respect of its management of its corporate property might be liable to judicial review, as well as being within the purview of the Charity Commissioners and the High Court.

Conclusion

First, since 'the control of the High Court in the exercise of the court's jurisdiction with respect to charities'[51] is not ousted, either completely or even substantially, by there being a practical and effective alternative regulatory regime in place, Porterhouse is indeed really "a charity" in the terms of the Charities Act 1993.

---

47 *Thomas v University of Bradford* [1987] AC 795 at 823D-824B.

48 For example, the concepts of "fair-dealing" and "self-dealing" in relation to the fiduciary duties of the corporators to the corporation and its property, the concept of the prudent man of business investing assets on behalf of another or balancing income today against capital growth for tomorrow, the Trustee Act 1961, and the CA 1993 itself.

49 I.e charity.

50 Including a chartered university or college.

51 CA 1993 s.96 (1).

Second, its Fellows are "charity trustees".[52] Third, there is exemption from many of the terms of the Charites Act 1993, but that exemption is not total. Fourthly, Porterhouse is within the jurisdiction of the High Court with reference to its general corporate property, as well as any specific trust property, at the relation of the Attorney-General or even the relation of its Visitor or any of its Fellows as charity trustees wishing to commence "charity proceedings", or more likely as a result of the laying of an 'information' before the Attorney-General.

Finally, all this matters because, possibly at Porterhouse and probably at Barchester, the quasi trustee role of the Fellows or Members of Council may not be sufficiently emphasised in guidance given on "good practice" in decision-making. Nor is the admittedly remote risk of personal liability sufficiently appreciated. Equally the potential role of the Attorney-General and even of the Charity Commissioners is likely to be little understood. Indeed, Members of the Council of the University of Barchester are probably amongst the two-thirds of those in control of a charity who do not think of themselves as 'charity trustees'.[53] The Fellows of Porterhouse may have a more instinctive understanding of the consequence of becoming a corporator; underlined by their swearing a Latin oath of allegiance on being admitted to a Fellowship. Further light has been cast on this understanding by the legal research study produced by the Treasury Solicitor for the Neill Committee on Standards in Public Life.[54] Perhaps if this concept of charity trusteeship in higher and further education the recent scandals of mismanagement, and even alleged corruption, would have been fewer.

APPENDIX:

Green v Rutherforth[55]

This case clearly confirms that the Visitor has no jurisdiction when the eleemosynary corporation (St John's College, Cambridge) holds assets on a *specific* trust established subsequent to the Foundation; the Court alone has jurisdiction. Moreover, it does *not* support 'the trust approach' in asserting that the *general* corporate assets are held on trust and hence also fall within the jurisdiction of the Court; it leaves them within the exclusive jurisdiction of the Visitor, and the

---

52 CA 1993 s.97(1).

53 See J Dollimore Liabilities of Charity Trustees 2 CL&PR 69-81

54 See E Hambley *Personal Liability in Public Service Organisations: A Legal Research Study for the Committee on Standards in Public Life* (1998).

55 (1750) 1 Ves. Sen. 463.

jurisdiction of the Court is completely ousted by the existence of the Visitor. So declare the Master of the Rolls, Sir John Strange, and the Lord Chancellor, Lord Hardwicke:

> "...and though they are a collegiate body, whose Founder has given a Visitor to superintend his own foundation and bounty, yet as between one claiming under a separate benefactor and those trustees, for special purposes, the court will look on them as being given on special trust, the visitor has no jurisdiction" (MR); "... whether the plea is sufficient in law and equity to oust this court of all manner of jurisdiction of the cause... for in case of a private, particular, limited jurisdiction, and of courts proceeding by rules different from the general law of the land, no appearance, answering or pleading of the party, will give a jurisdiction to the court ... the original and nature of visitorial power must be considered. The original of all such power is the property of the donor, and the power every one has to dispose, direct, and regulate his own property ... the law allows the Founder or his heirs, or the person especially appointed by him to be Visitor, to determine concerning his own creature ... *The Founder may give a general power; or may limit and bind by particular statutes and laws... If the power to the Visitor is unlimited and universal, he has in respect of the foundation and property moving from the Founder no rule but his sound discretion. If there are particular statutes, they are his rule, and he is bound by them: and if he acts contrary to or exceeds them, acts without jurisdiction ... his act is a nullity* ... (LC, concurring with MR that a "special trust puts an end to the Visitor's power" over the trust property, emphasis added).

The Wykeham Statutes

Clearly, therefore, in the analysis by the LC much will depend on just what powers over his foundation property a Founder devolves to the Visitor - absolute freedom, or circumscribed by Statutes set by the Founder? The Porterhouse and Barchester Statutes are not to hand, but those for New College, Oxford, are, in the form of the original William of Wykeham Statutes given by him as the Founder in 1379. They stress that New College is an "everlasting college of poor and needy scholars clerks" for which the Founder hereby wishes "to make establish and also ordain certain things which now occur to us which we think necessary and useful for our said college at Oxford for the *scholars clerks and other persons and the possessions and goods of the same college and their healthful regulation* ..."[56] The Wykeham Statutes go on to enjoin the Warden, Scholars and Fellows (the corporators) 'to

56 Preamble, emphasis added.

preserve, protect and manfully defend the goods and chattels, lands, revenues and other possessions spiritual and temporal' so that the College may 'peacefully and strongly persist and *for ever* endure in the beauty of peace'.[57] Rubrics 47-51 (see detail below on Rubric 48) and 53-58 concern the management of property, and the original Statutes end with what Leach calls "a somewhat pathetic attempt to secure permanence, by the most stringent oaths and penalties on any one altering them".[58]

Thus, William of Wykeham, then Bishop of Winchester, appoints as the Visitor to his "everlasting college" all his successors as Bishop of Winchester, but he binds them with *very* "particular statutes" (to use the phrase of Hardwicke LC, as quoted above. Indeed, the Wykeham Statues are more detailed statutes than usually found in an Oxbridge college. Moreover, within those Statutes he implies the permanence of the property of the College (a permanent endowment *corpus*), and expressly states that the corporation may spend revenues while not mentioning capital. If the Fellows were free to spend capital, how could the College be secure as 'everlasting' in its objective of distributing the revenue's arising from the permanent endowment *corpus* as the everlasting bounty of the Founder? Hence, there is no express power given to the Visitor to approve proposals to spend capital. This links to the regime for the disposal of land or "capital monies" in the 1925/64 Universities and College Estates Act. So, not only does the Visitor appear not to have such open jurisdiction as to permit the spending of capital, but it seems not unreasonable to say that it is as if William of Wykeham was putting his capital assets with the Visitor for the benefit of the College, entrusting them to future Bishops of Winchester. Perhaps, therefore, one can see why 'the trust approach' refers to the general property of an eleemosynary chartered corporation being held on trust. Hence, the Court might retain jurisdiction not only because of this arguable point about the existence of a trust, but also because it would need to intervene if the Visitor acted beyond his jurisdiction, as it were *ultra vires* the Founder's Statutes, in relation to the disposal of capital as permanent endowment. It may be thought that in this way William of Wykeham, as also a one-time Lord Chancellor himself, would ensure that, in order to best protect and preserve his "everlasting college", these matters would be as firmly settled as it was possible to get them six hundred years ago. He might be alarmed to hear talk in 1990s Oxford of the possibility of colleges being free to spend capital or use capital to fund recurrent deficits.[59]

---

57 Rubric I, emphasis added.

58 See A F Leach *Educational Charters and Documents* 598-1909 (1911) at 373.

Incidentally, the Charites Act 1993 defines "permanent endowment" as:

> "A charity shall be deemed for the purposes of this Act to have a permanent endowment when all property held for the purposes of the charity may be expended for those purposes without distinction between capital and income, and in this Act 'permanent endowment' means, in relation to any charity, property held subject to a restriction on its being expended for the purposes of the charity...".[60]

Given that the Statutes for the Oxford colleges typically refer only to the spending of the revenues, as the annual income stream arising on the investment of the capital, on the particular and exclusively charitable purposes envisaged within the Statutes, there *is* a distinction between the expenditure of the capital and income, and hence there is permanent endowment held by these corporations. Since they are eleemosynary, and eleemosynary means the perpetual distribution of the Founder's bounty, this is not surprising. The endowment corpus has to be preserved over the centuries so as to generate the revenues needed to fulfil the charitable objectives on a perpetual basis.

The 1870 revision of the New College Statutes, as also for the 1923 revision, continue the express mention of *revenues* being available for use and, by their silence on the issue, the implication that *capital* is not to be expended, thereby echoing the relevant Rubrics from the Founder's original Statutes. Indeed, in the event of there being insufficient College income "to provide for the charges created by these Statutes and to defray the rest of its expenditure", the Visitor may approve what we would now inelegantly call a 'downsizing' "scheme to be submitted to him by the Warden and Fellows": no mention of dipping into capital to finance recurrent deficits on the annual operating account.[61] The same clause is to be found in all sets of college statutes.[62] Similarly, the 1870 Statutes for New College refer to the maintenance of the Chapel, the Hall, "and the several other buildings of the College as the first charge on the revenues of the College". The 1923 Statutes allow the

---

59 See D Palfreyman, "Oxford Colleges: Permanent Endowment, Charity Trusteeship, and Personal Liability" (1995/96) 4 CL&PR 85-120. As an aside, it is instructive to note in Rubric 48 the commercial common-sense of William of Wykeham's stricture that new commitments in terms of corporate expenditure must be covered by additional "permanent possessions" yielding twice the cost to recurrent annual revenue of the proposed additional activity: he well recognised that, then as now, organisations underestimate expenditure and overestimate income.

60 S.97 (General interpretation) to be construed in accordance with s.96(3), CA 1993.

61 Statute XVIII, The Visitor, clause 4.

62 *Statutes* (1927), Oxford: Clarendon Press.

Governing Body to "set apart out of the general revenues of the College" a sum each year 'to form a fund for the improvement or completion of the fabric of the College': again no suggestion here of freedom to be readily raiding endowment capital to build a new building or to fund major repairs.

Rubric 48

In the original Wykeham Statutes Rubric 48, "That the manors, possessions, advowsons and ecclesiastical patronage must not be disposed of" (as set out below)[63] seems as close to a trust (Wykeham to the Warden & Fellows as the corporators) as a Court may need to find in order to impose its ultimate jurisdiction over the corporate property of New College, and hence is surely supportive of 'the trust approach'. Moreover, it also seems to support the argument that the Founder, in this area at least, had curtailed the jurisdiction of the Visitor. The Bishop of Winchester supervises the Warden and Fellows in spending revenues arising from this corporate property, yet has no power to dispose of such property as *capital* (the permanent endowment *corpus*). As explored in Palfreyman,[64] it was because future generations in some such corporations abused this 'trust' that the Elizabethan "disabling" legislation was passed which severely circumscribed the ability of colleges and other eleemosynary corporations to dispose of such property; legislation which was *to some degree* eventually freed up by the mid-Victorian 1858 'enabling' forerunner of the Universities and College Estates Act 1925.

RUBRIC 48 ... "That the manors, possessions, advowsons and ecclesiastical patronage must not be disposed of"

Item we decree, ordain and wish that the manors, advowsons and ecclesiastical patronage, lands, tenements, rents, services, serfs or free tenants, ground and soil, woods and land where trees grow, meadows, grazing lands, commons and pasture and other immoveable goods of the college, whether they derive from spiritual or from secular sources and any rights whatever or wherever they may be, must never

---

63 As kindly translated by the New College Archivist, Mrs Caroline Dalton, from the medieval Latin of the original Wykeham Statutes.

64 See D Palfreyman, "Oxford Colleges: Permanent Endowment, Charity Trusteeship, and Personal Liability" (1995/96) 4 CL&PR 85-120. As an aside, it is instructive to note in Rubric 48 the commercial common-sense of William of Wykeham's stricture that new commitments in terms of corporate expenditure must be covered by additional "permanent possessions" yielding twice the cost to recurrent annual revenue of the proposed additional activity: he well recognised that, then as now, organisations underestimate expenditure and overestimate income.

be granted or sold as a fief or for the term of a life. Nor must advowsons or ecclesiastical patronage, vicarages, chaplaincies, or chantries be granted to anyone as a fief or for the term of a life or of years, or for any other period of time: manors may only be put to farm for a term of twenty years and appropriated churches for a term of ten years, and not for any other term. Nevertheless we permit that the lands, tenements, messuages and tenures in all places with their appurtenances, which were customarily let out to tenants, both in town and in villages, on manors and in appropriated churches in all places without exception belonging and appertaining to the college, which fall into the hands of the said Warden and Fellows through escheat or through failure of heirs or by any other method may be granted and put to farm for a term of years in the court rolls according to the customs anciently practised in those places: or else they may be let by indentures between the Warden and Scholars on the one hand and the recipient or recipients on the other hand, the college documents being sealed with the communal seal. All this is on the understanding that no transaction of this kind exceeds the term of fifty or sixty years and that the tenants of the said lands, tenements, messuages, and holdings or of any part of them do not give away, or grant any interest in them to other people or pass them on in any way without the special permission and agreement of the said Warden and Scholars. Furthermore we decree that the Warden, Fellows and Scholars of our said college must on no account grant annual pensions or perpetual chantries or corrodies, nor must they commit the college to any other spiritual or temporal obligations in perpetuity or for a term of more than forty years, unless they have received *as permanent possessions* in kind or in rents for the convenience and sustenance of the college twice as much as the cost of sustaining the obligation.[65]

65 Emphasis added.