

IN THE MATTER OF:

THE ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS

("ACCA")

ADVICE

1. I am asked to advise ACCA in respect of a letter dated 27th June from the Lord Chancellor's Department ("LCD") asserting a visitatorial jurisdiction on behalf of the Crown in relation to a complaint made by a Mr Allen against ACCA arising out of disciplinary proceedings against him. The basis for the LCD's assertion is not spelt out in the letter, but it appears overwhelmingly likely that it is based on the decision of the Court of Appeal in Bankole v. ACCA (CA: 14th November 1995) (unreported). In that case, (where the Plaintiff complained of negligent marking of his examination papers, the passing of which was a sine qua non of ultimately becoming a member of ACCA) the Court of Appeal found, *obiter*, that since ACCA was a charity incorporated by Royal Charter, it was subject to visitatorial jurisdiction.
2. It should be noted that the premise for the Court of Appeal's decision was that the ACCA was a charity or eleemosynary corporation, whose founder via medium of charter was the Crown. However, Counsel's acting on behalf of ACCA had in that case, asserted - and the Plaintiff accepted [Judgment Beldam LJ p.4] - that ACCA was a charity and had positively suggested to the Court that the Lord Chancellor was entitled to exercise the Crown's visitatorial rights.

3. If the premise were correct, I agree that the conclusion followed.

- AG v. Dedham School 23 Bear 365

"Where the Crown founds a charity, the Court treats the Crown as the permanent authority and visitor of the charity, unless where the Crown has thought fit to appoint a special visitor ..."

- Patel v. University of Bradford 1978 WLR 1488 at p.1482.

- "The special status of a visitor springs from the common law recognising the right of the founder to lay down such a special law subject to adjudication only by a special judge, the visitor." R. v. Hull University Visitor ex p. Page 1993 AC 682 at p.700.

4. If the premise, however, (subject, as it was, to no analysis) were wrong the conclusion would necessarily be flawed. Whatever the source of Counsel's statement (qv para.2 above), it cannot affect the true position. Consent elementarily cannot confer jurisdiction: a fortiori error cannot.

5. The issue then is whether ACCA is an eleemosynary corporation. Not all chartered bodies are eleemosynary corporations or have visitors. For example, the Jockey Club was incorporated by charter. In Re Aga Khan 1993 1 WLR a question was raised as to whether its decisions were amenable to judicial review and it was held that, at any rate at the suit of a member, private law remedies alone were available: no-one considered that the rules of the Jockey Club were a special of domestic law, over which the Crown qua visitor exercised a unique jurisdiction. Equally the Law Society is a

chartered body: but does not have a visitor (Cordery: Solicitors: 9th ed., para.[208].

Its decisions are amenable to control by the ordinary Courts of the land [e.g. Giles v. Law Society 1996 Administrative Law Report 109].

6. In Re Armitage 1972 1 Ch.438, Goulding J. said at p.445 "The term 'eleemosynary charity' covers all charities directed to the relief of individual distress, whether due to poverty, age, sickness or other similar individual afflictions, whether the term extends further it is not necessary for me to decide ...". What is in law a charity is to be assessed by whether its purpose falls within the spirit and intendment of the preamble to the Charitable User Act 1601, inter alia, "trusts for the advancement of education and trusts for other purposes beneficial to the interests of the community", see also: Commissioners for Special Purposes v. Pemsel 1891 AC 531 at 583.

7. "Whether or not a trust is charitable is a question of law to be decided by the Judge in the light of the circumstances in which the institution ... came into existence and the sphere in which it operates" (Pettit. Equity and the Law of Trusts: 7th ed., p.228). Trust funds must be "exclusively devoted to charitable purposes" (ditto p.217) (Pettit p.235).

8. There is in the law a well-established distinction between advancement of skill and knowledge on the one hand (charitable because educational) and the advancement of the professional position of members (non-charitable). Royal College of Surgeons v. National Provincial Bank 1952 AC 631 at p.661. Incorporated Council of Law Reporting 1972 Ch.73 at p.93. Educational purposes are not charitable when ancillary to the main purpose i.e. to benefit the profession. Chartered Insurance Institute v. London Corporation 1957 1 WLR 867 at p.874 [per Devlin J] at p.876 "Education in a

particular aptitude is primarily designed for the acquisition of some professional advantage." See also London Hospital Medical College, IRC 1976 2 All ER 113 at p.121. Royal College of Nursing v. St. Marylebone Corporation 1959 3 All ER 623 (advancement of nursing or advancement of nursing profession).

9. Two passages from Tudor on Charities 8th ed identify the distinction: p.58

"If the main objects of an institution or association are charitable the mere fact that the members are benefitted in the course of promoting the charitable purpose does not prevent the institution or association being established for charitable purposes only".

p.60

"An institution whose main object is the prohibition and advantage of those practising particular profession is not a charity even though the carrying out of the main object results in benefits to the community".

10. Therefore the question becomes whether ACCA's main object is the advancement of the science of accountancy or the promotion of the interests of the profession.
11. ACCA was created in 1939 through the amalgamation of three long established professional bodies, namely the London Association of Accountants, which had been founded in 1904, the Glasgow based Corporation of Accountants, founded in 1891 and the Institute of Certified Public Accountants, founded in 1903. It is not registered as a charity although such registration would be compulsory if it were such [Charities Act 1993 s.3]: nor has it sought to take advantage as a body of the fiscal and related advantages deriving from such status.

12. ACCA is a Supervisory and Qualifying Body under Section 25 of the Companies Act 1989 and a Recognised Professional Body under both the Financial Services Act 1986 and the Insolvency Act 1986. As a result, ACCA's disciplinary process is overseen by the DTI Companies Division, the Insolvency Service and the Securities and Investments Board. Decisions (including disciplinary decisions of such a body) are amenable in principle to judicial review: cf. R. v. Bar Council ex p. Percival 1991 QB 219 at p.228-229.

13. ACCA's charter provides, so far as material, as follows:

"3. The principal objects and purposes for which the Association is hereby constituted are to advance the science of accountancy, financial management and cognate subjects as applied to all or any of the professional services provided by accountants whether engaged in public practice (in partnership or through the medium of a body corporate or otherwise), industry and commerce or the public sector; to promote the highest standards of competence, practice and conduct among members of the Association so engaged; to protect and preserve their professional independence and to exercise professional supervision over them; and to do all such things as may advance and protect the character of the profession of accountancy whether in relation to public practice (carried on in partnership or through the medium of a body corporate or otherwise) or as applied to service in industry and commerce or the public service.

4. In furtherance of the objects and purposes set out in Article 3 hereof the Association shall have the following ancillary objects and powers:

...

(e) to establish and administer or to participate in the establishment and administration of any organisation, whether incorporated or not and whether subsidiary to the Association or not, having as its principal object or one of its principal objects the advancement of the science of accountancy or any part thereof where in the opinion of the Council the interests of the accountancy profession may be most advantageously served through the medium of such an organisation;

...

(g) to provide means by the holding of examination and other tests in the science of accountancy, financial management and cognate subjects for assessing the skill and knowledge of persons seeking admission to membership of the Association and others and to issue certificates and diplomas to such persons on passing such examination ...

(h) to encourage the study of such subjects by providing scholarships, bursaries, prizes and donations on such terms and conditions as may be thought fit, by making grants to universities and other educational institutions, by providing courses, classes, lectures and other tuition for members and others by making grants for the provision of the same or for research or by such other means as may be thought appropriate;

- (i) to promote and facilitate the dissemination and exchange of information on matters of professional interest among members and others by the holding of conferences, meetings and seminars for the reading of papers and reports, by the publication of periodicals, books, monographs or papers and by the promotion, compilation and publication of research studies;
- (j) to establish and maintain a library or libraries for the use of members and others;
- (k) to provide such services including technical and advisory services as may promote and further the interest and efficiency of members and others and of the accountancy profession generally;
- (l) to organise, finance and maintain schemes for the granting of diplomas, certificates and other awards (with or without prior examination) to members of the Association and of other professional bodies in any activities with which the accountancy profession is concerned ...
- (s) to organise, finance and maintain alone or in conjunction with one or more other professional accountancy bodies (together with this paragraph called "the participants") a scheme for investigating and making findings as to the professional or business conduct, efficiency and competence of any member of any of the participants or of any firm which is or at any time has been composed in whole or in part of members of any of the participants who are in public practice in the United Kingdom, where (in any such case) in the opinion of the participants (or as laid down in the scheme) the circumstances to be investigated give rise to or include questions of public concern; ...
- (t) to take all such steps as it thinks fit to enable it to become and operate as a recognised professional body for the purposes of the Financial Services Act 1986 and do anything whatsoever incidental to or in connection therewith and ...
- (u) (i) to take all steps as it thinks fit to enable it to obtain and maintain recognition as a supervisory body for the purposes of the 1989 Act, any corresponding provision under the law of Northern Ireland and any other corresponding or similar provision of the law of any other jurisdiction anywhere in the world;
- (ii) to take all steps as it thinks fit to enable any qualifications offered by it to be declared a recognised professional qualification for the purposes of the 1989 Act so as to enable it to become a recognised qualifying body for the purposes of the 1989 Act, any corresponding provision under the law of Northern Ireland and any other corresponding or similar provision of the law of any other jurisdiction anywhere in the world; and
- (iii) to perform on behalf of other bodies, which are recognised supervisory bodies under the 1989 Act, the functions of monitoring of compliance with the rules of such other bodies and of investigating complaints on behalf of such other bodies against that body or any other person; and
- (iv) to do anything whatsoever incidental to or in connection with such powers (without prejudice to the generality of those powers) to:-
- (1) implement procedures (including arrangements for monitoring and enforcement in relation to members or otherwise) to ensure that the requirements for recognition of the Association as a supervisory body, set out in Part II of Schedule 11 to the 1989 Act, are and continued to be fulfilled;

(2) implement procedures for the certification of any individual (whether or not a member of the Association) or firm as eligible for appointment as company auditor for the purposes of the 1989 Act;

(3) accept undertakings and make agreements with individuals (whether or not members of the Association) or firms in relation to such procedures and certification;

(4) make provision (whether by agreement or otherwise) for the application of disciplinary procedures and sanctions to individuals and firms giving such undertakings or entering into such agreements; and

(5) lay down requirements and implement procedures (including professional experience, examinations and practical training) to ensure that the requirements for recognition of a professional qualification, set out in Part II of Schedule 12 to the 1989 Act, are and continue to be fulfilled;

and for the purposes of this paragraph "firm" means a partnership and a body corporate; and

(v) to do, alone or in conjunction with others, the foregoing and all such other lawful things in any manner whatsoever consistent with the provisions of this Our Charter and the bye-laws as may be incidental or conducive to furthering or protecting the interests and efficiency of the Association and its members and of the accountancy profession."

14. In my view, construing the objects of ACCA as a whole, ACCA is not a charity: its purposes are not exclusively charitable (i.e. predominant if not sole). Its main purpose is the advancement of the profession: the advancement of the science of accountancy, although mentioned first amongst its objects, is subsidiary. This conforms to what I am told about the operation of ACCA (see Chartered Insurance Institute v. London Corporation 1957 1 WLR 867 at p.876) per Devlin J's "I place rather less reliance on the terms of the charter and more on the finding of fact in this case". I am glad that my opinion on this issue coincides with that of D.C. Potter (now QC).
15. If the Lord Chancellor is not persuaded by these arguments then judicial review is an option available to ACCA.

16. In Page v. University of Hull cit.sup. it was held that judicial review lies to visitor who exceeds his powers: see also Picarda p.536 and cases there cited. A fortiori judicial review to someone who asserts that s/he is a visitor, but who is not: the Queen was a visitor of the University of Hull (acting through Lord Jauncey) 1991 4 All ER 747 at p.750. No-one suggested that in consequence judicial review did not go.

**The President's Lodgings
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