MR RONALD ALLEN

v

ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS

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MR JAFFER MANEK

v

ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS

DETERMINATION OF THE LORD CHANCELLOR

I have before me a Petition dated 20th December 1996, from Mr Ronald Allen, and another, dated 18th May 1997, from Mr Jaffer Manek. Both Petitions are addressed to the Lord Chancellor, seeking the determination of a dispute which has arisen between the Petitioner and the Association of Chartered Certified Accountants. Both have been presented on the assumption that the Association is subject to a visitatorial jurisdiction, which is exercisable by the Lord Chancellor on behalf of the Crown. Her Majesty has directed me to exercise the jurisdiction on Her behalf if She has such a jurisdiction. However, the Association has asserted that there is no basis upon which visitatorial jurisdiction can be founded. I therefore invited the Petitioners and the Association to address me on the preliminary point of whether the Association is subject to visitatorial jurisdiction. Since the jurisdiction, if it exists, would be the jurisdiction of the Crown, I have also sought the assistance of the Law Officers. This Determination is, therefore, confined to the preliminary issue of jurisdiction, and I have not considered the merits of the individual complaints made by Mr Allen and Mr Manek in their respective Petitions.

I should begin with a short explanation of what is meant by visitatorial jurisdiction or visitation. It is a form of supervision over the domestic affairs of certain institutions. I shall return to the question of which institutions these may be. Where the institution has a Visitor, he has exclusive jurisdiction to interpret its domestic laws and the proper application of those laws, including the resolution of internal disputes. This means that the court does not have concurrent jurisdiction with the Visitor, and also that the Visitor's decision on questions of fact and law are final and conclusive. If a qualifying institution has been founded by a Royal Charter, which is silent on the subject of visitation, or which reserves to the Crown a power to appoint a Visitor and that power has not been exercised, jurisdiction is exercisable by the Crown. Her Majesty may, and often does direct that the Lord Chancellor should exercise it on Her behalf, as She has done in relation to the two Petitions now before me. On some occasions She has directed some other person to act on Her behalf. However, Her direction is necessarily limited to exercising such jurisdiction as She may have. If there is any question as to whether She has visitatorial jurisdiction in a particular case, the Lord Chancellor (or other person) will not go into the merits of the Petition unless he is satisfied that the Crown does have jurisdiction. That was established in *re*

Garstang Church Town School (1829) 7 LJ (o.s.) Ch. 169, where it was not clear whether the jurisdiction was exercisable by the Crown or by some other office-holder.

Before going on to consider the main issue in this case, I should clarify one misunderstanding which may have arisen in part because this special, visitatorial jurisdiction is not widely known. It is apparent from Mr Manek's Petition that his expectation was that the Lord Chancellor would appoint another individual, to act as the Visitor, to consider his Petition. Where Her Majesty directs the Lord Chancellor to exercise visitatorial jurisdiction on Her behalf, it is for him to do so. The jurisdiction is not then delegated to some other person. I believe that a misconception may have arisen because, in a wholly different context, the Lord Chancellor does appoint "Visitors". Under section 102(1) of the Mental Health Act 1983, the Lord Chancellor appoints panels of Medical, Legal and General Visitors. The duty of those Visitors is to visit patients in accordance with the directions of the Court of Protection for the purpose of investigating matters relating to the capacity of any patient to manage and administer his property and affairs. The Lord Chancellor's Visitors Office, in the Court of Protection, is responsible for the administration of that scheme, but is in no way concerned with the other visitatorial jurisdiction which I have described.

The doubt as to whether the Association was subject to visitatorial jurisdiction was first raised by the Association in response to an invitation made to it on behalf of my predecessor, Lord Mackay of Clashfern, to answer Mr Allen's Petition. The Association relied on an Opinion it had obtained from Mr Michael Beloff QC dated 18th July 1997. Such an Opinion would attract legal professional privilege, so that the Association could not have been ordered to disclose it to other parties. However, the Association has chosen to rely on it, to demonstrate the reason why it now maintains that there is no visitatorial jurisdiction over its affairs. It has accordingly agreed, through its solicitors, Messrs Linklaters and Paines, that the Opinion should be disclosed.

Mr Allen and Mr Manek offered their own comments on jurisdiction in letters and papers submitted in September 1997. The analysis of the Law Officers, sent to me in November, was communicated to them, and to the Association, in response to which each of them has made further submissions. It is on the basis of all those submissions, and my own examination of the Association's Charter, that I have reached my present conclusion on the point of law whether jurisdiction exists.

Both Petitioners have relied heavily on a Court of Appeal decision, in litigation to which the Association was a party, to the effect that it was subject to the Crown's visitatorial jurisdiction. *Bankole v The Chartered Association of Certified Accountants*, as the Association was then known, came before the Court on 15th November 1995. The appeal is unreported, but all the parties have seen copies of the judgments. It is not surprising that the Petitioners, neither of whom is legally represented, should have believed that that decision had established beyond question that there was jurisdiction. The Court considered the issues in great depth, and reached a fully reasoned conclusion. I unreservedly and gratefully adopt their careful exposition of the derivation of visitatorial jurisdiction over particular bodies established by Royal Charter. I would have great hesitation in differing from their conclusion, and would not do so, but for the fact that they reached it on the basis of one assumption, which was not the subject of any argument. That was the assumption

that the Association, being established by Royal Charter as it undoubtedly was, was also a charity, and in particular an eleemosynary corporation. Beldam LJ referred to the plaintiff having conceded that the Association was a charity. Ward LJ also said that the Association was an eleemosynary corporation, before going on to consider the applicable law.

The Association did not appear and was not represented on the appeal, but it had been represented by Counsel in the court below. In his Opinion, Mr Beloff says that Counsel for the Association had asserted that the Association was a charity and "had positively suggested that the Lord Chancellor was entitled to exercise the Crown's visitorial rights". Plainly, therefore, the idea that the Association was a charity (whether eleemosynary or not) had originated from its own representative, had not been challenged by the Plaintiff, and was assumed to be correct in the further deliberations of the Court.

Both Petitioners have suggested that the decision of the Court of Appeal is binding on me, that it is definitive, and is not to be "cast aside". As they point out, it was the carefully considered decision of two senior judges. Moreover, it was a decision in the Association's favour, and if it was made in error, it was an error for which the Association had at least some responsibility, and which may have operated to its advantage. In effect, they are saying that the Court reached the right decision, but even if it did not, then the Association is now estopped from denying visitatorial jurisdiction. Mr Allen has particular reason for taking that view, because he himself has been involved in county court litigation with the Association. I shall refer again to that litigation, which has some connection with the matters raised in his Petition. As I understand it, Mr Allen was unable to rely on those matters, by way of defence or counterclaim to the Association's money claim against him, because it was found (in reliance on the *Bankole* judgment) that those were matters within the exclusive jurisdiction of the Visitor.

However, the question whether or not the Association is subject to visitatorial jurisdiction is a question of law. It is an objective matter, affecting all the members of the Association. If the decision of the Court of Appeal was reached on the basis of an assumption about the status of the Association, and that assumption is subsequently shown to have been wrong, the decision would not bind another court. As the Vice-Chancellor, Sir Nicolas Brown-Wilkinson said in *Re Hetherington, decd* [1990] 1 Ch. 10:

> "the authorities ... clearly establish that even where a decision of a point of law in a particular sense was essential to an earlier decision of a superior court, but that superior court merely assumed the correctness of the law on a particular issue, a judge in a later case is not bound to hold that the law is decided in that sense."

Accordingly, if I am satisfied that the assumption that the Association was an eleemosynary corporation was wrong, I would not be bound by a decision which rested on that assumption, whether or not I would otherwise be bound by a decision of the Court of Appeal when I was acting as Visitor.

As to estoppel or waiver, I have no doubt that, since the Crown was not a party to the *Bankole* action, no estoppel or res judicata binds it. So far as I am aware, neither the Crown nor the Law Officers was informed of the proceedings. Nor do I consider that the Association is now precluded from maintaining that there is no visitatorial jurisdiction in relation to its affairs. Where a tribunal's jurisdiction is founded upon

statute, it may not be expanded by waiver by the parties of any point based on a want of jurisdiction: see eg *Rogers v Bodfari (Transport) Ltd* [1973] ICR 325; *Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53. In my view, the same holds true in relation to the limited jurisdiction of a Visitor implied by law into the statute of a corporation. The Crown (acting by the Lord Chancellor) has to decide whether, objectively, it has jurisdiction or not.

It therefore falls to me to decide whether the Association, a body which was undoubtedly established by Royal Charter, is also a corporation which attracts the Crown's visitatorial supervision. Both Petitioners have made valiant efforts to persuade me that it does, either because it does have charitable and eleemosynary status, or, even if it does not, because there is some vestigial supervisory right in the Crown attributable to its having been established by Royal Charter. They have drawn my attention to particular Articles in the Charter, to provisions in the Companies Act 1989 and to the fact that a registered charity known as "The Certified Accountants Educational Trust" operates from the same address as the Association.

The Association's argument, in summary, is that its main purpose is the advancement of the profession, as is apparent both from construction of its objects as a whole, which are set out in its Charter, and from the nature of its operations in practice. Since that is not a charitable purpose, the Association cannot be a charity, and therefore cannot be subject to visitatorial jurisdiction. The argument of the Law Officers is more specific. They too suggest that, on construction of the Charter, in the light of the authorities to which they have referred me, the Association does not have charitable status. But they also draw attention to the distinction between charitable status generally, and eleemosynary status in particular. Their first line of argument is that only eleemosynary corporations are subject to visitatorial jurisdiction and, since the Association is not eleemosynary, there can be no jurisdiction. Charitable status alone does not attract visitatorial jurisdiction. If that is right, and I am satisfied that the Association is not an eleemosynary corporation, that disposes of the preliminary issue, and it is not necessary to go on to consider whether or not the Association is a charity. It may be charitable without being eleemosynary, although if it is eleemosynary it is necessarily a charity.

Blackstone explained the classification of corporations, as ecclesiastical, civil, or eleemosynary, and how the law had provided "proper persons to visit, inquire into and correct all irregularities that arise in such corporations": see Blackstone's Commentaries on the Laws of England, (15th edn.,1809) Chapter 18. He explained that civil corporations were subject to visitation only in the sense that they were subject to the jurisdiction of the court. Eleemosynary corporations, which were those charitable institutions constituted for the perpetual distribution of the founder's free alms or bounty, (including, in particular, a number of universities and other educational establishments) were subject to the separate, exclusive visitatorial jurisdiction on which the common law had first been settled by the case of *Phillips v Bury* (1694) Holt K.B. 715. It was true then that "all subsequent determinations [had] been conformable" with that leading case, and is, I think, still true. There are later authorities, from which general statements taken out of context could suggest that the test was whether the body under consideration was charitable. But closer examination indicates that the word "charity" has been used as a synonym for eleemosynary corporation, and that it is nowhere suggested that charitable status on its own is

sufficient to give rise to a visitatorial jurisdiction. For example, in the *Bankole* case, Ward LJ said that it was well settled that

> "Wherever the Crown funds a charity, this 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: and in these cases, it is necessary to apply to the Lord Chancellor, by petition, in his visitatorial character, to exercise jurisdiction on behalf of the Crown as Visitor."(p.16)

adopting the words of the Master of the Rolls in *Attorney General v The Dedham School* (1857) 23 Beav. 355. However, he had already said that the Association was an eleemosynary corporation and had just referred to another general statement, made by the Master of the Rolls in *Attorney General v The Earl of Clarendon* (1810) 17 Ves.491, that:

> "Eleemosynary Corporations are the subject of visitatorial jurisdiction".

Incidentally, in both the older cases, the decision was that the application was properly before the court, for reasons unrelated to the question whether the institution had a Visitor.

The same passage from *Attorney General v Dedham School* was cited with approval by Megarry V.-C. in *Patel v University of Bradford Senate* [1978] Ch.1488, 1492. Again, however, the reference immediately followed his explanation that the Universities of Oxford and Cambridge had no visitors because they were not eleemosynary corporations, while their colleges, and the more modern universities founded by Royal Charter, did have visitors because they were eleemosynary. The issue of visitatorial jurisdiction was most recently before the House of Lords in *R v Hull University Visitor ex p. Page* [1993] A.C. 682, where Lord Browne-Wilkinson reviewed the caselaw, describing *Philips v Bury* as the locus classicus of the law of visitors, and concluding, at p.700c:

> "In my judgment this review of the authorities demonstrates that for over 300 years the law has been clearly established that the visitor of an eleemosynary charity has an exclusive jurisdiction to determine what are the internal laws of the charity and the proper application of those laws to those within his jurisdiction."

That in my judgment is a definitive statement of the law, and there is nothing in the authorities to support a contention that the word "eleemosynary" is redundant, so that the statement would be equally correct without it. Nor has any authority been produced to suggest or establish that there could be a source of visitatorial, or equivalent supervisory jurisdiction, arising from the founding Royal Charter of a corporation other than one which was not only charitable, but was also eleemosynary. In the absence of any such authority, there is no foundation for an assertion that the Crown has visitatorial jurisdiction over corporations established for other purposes.

I have no doubt from my examination of the Association's Charter, and other information provided in its annual Rulebook, that the Association could not be classified as an eleemosynary corporation. As the Law Officers say, its objects are plainly temporal. It is a professional association intended to advance the particular interests of professionals. Therefore my conclusion is that it is not subject to visitation, and I have no jurisdiction to entertain the Petitions of Mr Allen and Mr Manek.

If my conclusion is right, it is not necessary for me to go on to consider whether the Association is a charity, albeit not an eleemosynary one. But I would have reached the same final conclusion, that the Association was not subject to any visitatorial

jurisdiction, even if I had been persuaded that the proper test for jurisdiction was whether the Association had charitable status. Having considered the Charter as a whole, and the authorities which have been cited to me, I have concluded that the Association is not a charity. In reaching this conclusion, I have been greatly assisted by the analysis provided by the Law Officers, with which I agree. However, the conclusion is mine.

The main objects clause of the Association is Article 3 of its Royal Charter granted on 25th November 1974, which provides:

> "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 service; 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 or the public service."

I have been referred to a number of authorities in which the courts have considered whether or not particular bodies were charities. It is not without significance that in these cases, the question has been relevant in deciding whether the bodies could rely on charitable status to gain some advantage (usually fiscal, or attracting the more benign approach of the courts in matters of construction and validation of gifts) rather than in the context of visitatorial jurisdiction. The same general principles would, however, apply if the question were relevant in this context.

It is clearly established that, if a trust has a main object which is not charitable, it is not capable of being a charity: see, for example, *Royal College of Surgeons v National Provincial Bank Ltd* [1952] AC 631; *Royal College of Nursing v St Marylebone Borough Council* [1959] 1 W.L.R. 1077; *General Nursing Council v St Marylebone Borough Council* [1959] A.C. 540. I agree with the Law Officers that the advancement and protection of the character of the profession is one of the Association's principal objects and that it is not charitable. It is therefore not possible for the Association to be regarded as a charitable institution for the purposes of English law. I should add that in *The Royal College of Surgeons of England v National Provincial Bank Ltd,* and *The Institution of Civil Engineers v Inland Revenue Commissioners* [1932] KB 149, in which the House of Lords, and Court of Appeal, respectively, found that the institution's promotion of the interests of its practising professionals was incidental to its main object of promoting a particular science, the court's task was complicated by having to consider a series of charters and, in the former case, the objects were not even expressed in the operative parts. But, in both cases, the language of the charters showed that the institution's main purpose was the advancement and promotion of a science.

Here, Article 3 expressly sets out the principal objects and purposes, while the ancillary objects and powers are set out in detail in Article 4. I agree with the Law

Officers that the decision in *Royal College of Nursing v St Marylebone Borough Council* is not capable of supporting an assertion that the Association is a charity. There, all the objects, including those merely incidental, were set out in the same Article, and both main objects were found to be charitable. In particular, the second main object "to promote the advance of nursing as a profession in all or any of its branches" meant the advancement of nursing (for the benefit of the sick) and not the advancement of the nursing profession.

Nor is there any suggestion in the authorities that the functions of an institution might be divisible in such a way that there might be a visitatorial jurisdiction over some but not all of them. I understand that the Association performs those of its objects which are charitable in nature through a registered charity, presumably that referred to by Mr Manek. If that is so, the Association may act as a trustee of the funds in question, obliged to spend them only for charitable purposes. Those purposes will be different from the Association's own objects as a corporation.

For the reasons I have given, I am not satisfied that the Association is subject to the visitatorial jurisdiction of the Crown or to any visitatorial jurisdiction.

In view of the conclusion which I have reached on the issue of jurisdiction, I may not entertain either of the Petitions which have been presented to me by Mr Allen and Mr Manek. It follows that, if any application were made for an order for costs, I would require the applicant to satisfy me that, having no visitatorial jurisdiction, I nevertheless had power to make such an order. I should add that, given the background to these Petitions, I would expect to be sympathetic to a submission that costs should not follow the event. I should be reluctant to make an order in favour of a respondent whose own submissions, before one tribunal, had been the direct cause of the Petitioners approaching another tribunal which had no jurisdiction. I am particularly concerned about the position in which Mr Allen now finds himself. I am aware, from the papers which he has submitted to me, that there have been other proceedings between the Association and himself. Although, of course, I have not seen all the papers relevant to that litigation, it appears that judgment has been entered against him, in the Chichester County Court, on a claim to recover a penalty imposed on him by the Association in disciplinary proceedings. It further appears that he may have been prevented from challenging the propriety of that imposition, on the basis that that was a matter within the exclusive jurisdiction of the Visitor, rather than the Court, on the authority of the *Bankole* decision. If that is so, it would appear that the Association has caused Mr Allen to lose the opportunity of addressing the court on that issue, by maintaining that it was within the exclusive jurisdiction of the Visitor, an assertion which it has now retracted. I do not know whether Mr Allen would wish to pursue an appeal against the County Court decision, in the light of this determination, or whether, at this stage, the Rules of Court would allow him to do so. However, I would expect that the Association, having necessarily acknowledged its own responsibility for the confusion which has arisen, would be zealous in supporting any application he may make, to bring the issue back before the court. It does not necessarily follow that the court would have been able to take what Mr Allen said into account, if it had not been persuaded that the subject he sought to raise came under the exclusive visitatorial jurisdiction. Nothing which I have said should be taken as an indication that there is any particular conclusion which I would expect the court to reach. Those would be questions for the court to decide.

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