[2015] JMSC Civ 223

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO 2015HCV05012

BETWEEN	**SUZETTE CURTELLO**	**APPLICANT**
AND	**UNIVERSITY OF THE WEST INDIES**	**RESPONDENT**
	(Board of Graduate Studies and Research)	

IN CHAMBERS

Caroline Haye for the claimant

Christopher Kelman instructed by Myers Fletcher Gordon for the respondent

November 9 and 11, 2015

JUDICIAL REVIEW – ROYAL CHARTER ESTABLISHING UNIVERSITY – WHETHER COURT HAS JURISDICTION OVER MATTERS WITHIN PROVINCE OF THE UNIVERSITY VISITOR

SYKES J

[1] On October 27, 2015 I granted Miss Suzette Curtello leave to apply for judicial review and made an order that the University of the West Indies ('UWI') disclose

the name and identities of the Miss Curtello's internal and external examiner. Miss Curtello believes that she has been hard done by in relation to Ph D dissertation. The problem arose because two examiners reviewed her dissertation and were divided. One felt that it met the standard to be awarded the degree and other did not. How the matter was resolved is not entirely clear from the documents presented to the court. Miss Curtello believes a third person with whom she has had a difficult relationship was the third person asked to examine her dissertation and that person influenced or decided that her dissertation was not sufficient for her to be awarded the degree. She does not know who the examiners are and wishes to know who they are in order to determine whether the decision was activated by improper consideration or worse, malice, rather than an objective dispassionate examination of her dissertation. The university's response is that the Supreme Court has no jurisdiction to hear and decide the matter.

[2] In light of the cases cited by Mr Christopher Kelman and Mrs Caroline Haye the court has decided to set aside the grant of leave for judicial review as well as the order for disclosure has been set side. From the learning derived from the cases, the court has decided that Miss Curtello ought to utilise the visitor system of UWI. However, as will be made clear in these reasons the court can intervene to bar the visitor from embarking on the inquiry or can be compelled to conduct an inquiry. It will be equally clear that this court does not accept the reasoning of the majority in **Page v Hull University Visitor** [1993] All ER 97 because it has not advanced a cogent reason for not subjecting the visitor to the full rigours of judicial review. The reason advanced was simply that the history the matter is that the visitor was not subject to much judicial control and therefore it should continue. The basis of this conclusion is that the visitor is not applying the general law of the land but the law of the university or the charity and in that regard the visitor is immune from challenge regardless of how wrong or irrational the decision. Respectfully, this is not a sufficient reason. What would need to be shown is that subjecting the visitor to the full rigours of judicial review would somehow undermine his or her effectiveness or harm the visitatorial system in

such a manner and to such an extent that it cease to be what it is – namely a relatively inexpensive informal method of dispute resolution. Nothing like this was shown in the reasoning of the majority. This will be addressed in more detail at the end of these reasons for judgment.

[3] From what was told to the court, the UWI has no easily available and accessible documentation that clearly and accurately states the circumstances and procedure for persons to gain access to the visitor's jurisdiction. It may be helpful to be a bit detailed in this decision in order to show that there are means of redress available to Miss Curtello within the university's visitatorial system.

Who is a university visitor?

[4] The university visitor is an office that is at least three hundred years old. In England and Wales complaints by university students are now dealt with under the Higher Education Act 2004 which established an Office of the Independent Adjudicator for Higher Education.

[5] According to Halsbury's Laws of England (volume 24 (2010)/3) para. 399:

> *The visitatorial jurisdiction stems from the power recognised by the common law in the founder of an eleemosynary corporation to provide the internal laws under which the object of his charity was to be governed and to be sole judge of the interpretation and application of those laws either by himself or by such person as he should appoint as a visitor.*

[6] 'Eleemosynary' means relating to alms, charity or charitable donations. The key words there are 'eleemosynary corporation.' The word 'corporation' is vital because it is this characteristic that attracts the office of a visitor. If it is not a corporation then there is no visitatorial authority.

[7] It has been pointed out that if 'a charity is erected, and the property is vested in some persons as trustees for the benefit of others as cestuis que trust, the ruling

authority is not a visitor, but the Court of Chancery' (*The Law Magazine' or Quarterly Review of Jurisprudence for February 1838; and May 1838* Vol XIX (1838) (London) (Saunders and Benning, Law Book Sellers) pp 1 – 2). However, 'where those who are to enjoy the benefit are incorporated, then, to prevent all perverting of the gift or charity, the law establishes a visitatorial power' (citing Dr Ayliffe in *The Law Magazine* p 2). Consequently, 'is it the combination of the legal interest with the actual enjoyment of the corporate property, which constitutes a proper case for the visitor's jurisdiction' (*The Law Magazine* p 2). Therefore in 'all these charitable corporations, someone must be visitor. If the donor appoints no one, he is himself visitor during his lifetime. After his death, his heir is visitor, or, in case no heir can be found, the king. The king is visitor of all royal foundations: also of any foundations made partly by himself and partly by a subject' (*The Law Magazine* p 2). 'Where the king is visitor, he visits by his chancellor or by special commissioners' (*The Law Magazine* p 2).

[8] As far as the law was concerned there never a gap in visitatorial authority. The law provides a mechanism whereby a visitor can be identified even if the institution does not have a standing visitor. By standing visitor is meant a person who is appointed to that office even if there is no immediate need for his jurisdiction. If the benefactor did not explicitly establish the mechanism of the appointment of a visitor, the law concluded that benefactor and his heirs were the visitor. If no heirs can be identified then the law concluded that the sovereign was the visitor.

[9] The same root idea of the visitor in relation to charitable organisations was also applied to universities since the manner of their establishment indicated that they were seen as eleemosynary institutions. If the university was established by a private citizen then the governing documents prescribed the scope and extent of the visitor's powers. Where the university was established by royal charter the precise powers of the visitor are determined by the terms of the royal charter and any other document regulating the governance of the university.

[10] 'The visitor, then, is an officer appointed by the founder and has an authority emanating from the founder's original rights' (*The Law Magazine* p 5).

The foundation and justification for the visitor's jurisdiction

[11] From the next three cases cited the juridical basis of the visitor's power is clearly laid down. The law distinguished between four types of charitable or eleemosynary organisations. First there was pure trust where the trust is established and vested in trustees who are to manage the trust for the benefit of cestui qui trust. In these circumstances the Courts of Chancery had direct responsibility because this type of circumstance did not attract visitatorial powers. Second, there were eleemosynary corporations that were for public purposes and where this was this case they were governed by the ordinary laws of the land. Third, there were eleemosynary corporations that were established privately. In this instance the law accepted that a concomitant right was to determine how the property was to be managed. For this right to accrue the property had to be vested in those persons who were to benefit and the vehicle for doing this a corporation. Fourth, there were those established by royal charter. Where this was the case the visitor was the sovereign who in practice exercised the power through the office of the Lord Chancellor.

[12] Before going to the cases it is important to state the justification for treating pure trusts differently. Lord Griffiths in **Thomas v University of Bradford** [1987] AC 795, 823 assists:

> *The reason why the courts have maintained their jurisdiction over trusts, whether or not they benefit members of the foundation, is that the terms of the trust are to be derived from the construction of the trust instrument and not by any application of the laws of the foundation. Thus the construction of a trust must be a matter for the courts and not the visitor, nor is there any reason why the supervision of*

the trust should not remain with the courts. The cases on trusts well illustrate the principle that only those matters governed by the laws of the foundation are within visitatorial jurisdiction: see Green v. Rutherforth (1750) 1 Ves.Sen. 462, and Ex parte Berkhamsted Free School (1813) 2 Ves. & Bea.134, and Attorney-General v. Magdalen College, Oxford, 10 Beav. 402. Other cases are to be found discussed by Dr. Smith in 97 L.Q.R. 610, 634-637.

[13] The court now goes to the three cases. The first case is **Philips v Bury** 100 ER 186. In that case Holt CJ delivered what has come to be recognised as a correct statement of the law and has been regarded as the best early exposition of the basis for visitor's jurisdiction. The learned Chief Justice said at pages 189 – 190:

Every man is master of his own charity, to appoint and qualify it as he pleaseth.

…

And that we may the better apprehend the nature of a visitor, we are to consider that there are in law two sorts of corporations aggregate; such as are for public government, and such as are for private charity. Those that are for the public government of a town, city, mystery, or the like, being for public advantage, are to be governed according to the laws of the land; if they make any particular private laws and constitutions, the validity and justice of them is examinable in the King's Courts; of these there are no particular private founders, and consequently no particular visitor: there are no patrons of these; therefore, if no provision be in the charter how the succession shall continue, the law supplieth the defect of that constitution, and saith it shall be by election; as mayor, aldermen, common council, and the like; and so it was in the case of The Town of Launceston , 1 Roll's Abr.

513. But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them; and, therefore, if there be no visitor appointed by the founder, the law appoints the founder and his heirs to be visitors, who are to proceed and act according to the particular laws and constitutions assigned them by the founder. So it appears by the cases in Yelv. 65, and 2 Cro. 60, Fairchild and Gaire; where it is now admitted on all hands that the founder is patron, and, as founder, is visitor, if no particular visitor be assigned. And so is 8 E. 3, Ass. Placit. 29, 31. So that patronage and visitation are necessary consequents one upon another; for this visitatorial power was not introduced by any canons or constitutions ecclesiastical (as was said by a learned gentleman, whom I have in my eye, in his argument of this case): it is an appointment of law; it ariseth from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law gives him and his heirs a visitatorial power, that is, an authority to inspect the actions and regulate the behaviour of the members that partake of the charity; for it is fit the members that are endowed, and that have the charity bestowed upon them, should not be left to themselves, (for divisions and contests will arise amongst them about the dividend of the charity,) but pursue the intent and design of him that bestowed it upon them. Now indeed, where the poor, or those that receive the charity, are not incorporated, but there are certain trustees who dispose of the charity, according to the case in 10 Co. there is no visitor; because the interest of the revenue is not vested in the poor that have the benefit of the charity, but they are

subject to the orders and direction of the trustees. But where they who are to enjoy the benefit of the charity are incorporated, there, to prevent all perverting of the charity, or to compose differences that may happen among them, there is by law a visitatorial power; and it being a creature of the founder's own, it is reason that he and his heirs should have that power, unless by the founder it is vested in some other. Now there is no manner of difference between a college and an hospital, except only in degree; an hospital is for those that are poor, and mean, and low, and sickly: a college is for another sort of indigent persons; but it hath another intent, to study in, and breed up persons in the world, that have not otherwise to live; but still it is as much within the reason of hospitals. And if in an hospital the master and poor are incorporated, it is a college having a common seal to act by, although it hath not the name of a college, (which always supposeth a corporation,) because it is of an inferior degree; and in the one case and in the other there must be a visitor, either the founder and his heirs, or one appointed by him; and both are eleemosynary. A visitor being then of necessity created by the law, (as 8 E. 3, 69, 70,) every hospital is visitable either by the patron if a lay hospital, or by the Ordinary if spiritual. What is the visitor to do? He is to judge according to the statutes and rules of the college. He may expel, and (as in 8 Ass. 29, 31,) he may deprive.

[14] To the same effect is **Green v Rutherford** 27 ER 1144. There Lord Chancellor Hardwicke said at page 1149 - 1150:

This leads to the second and main point, on the merits of the plea. I agree, that the presentation set forth by the plea, is

not a proper subject of visitatorial power. To argue this clearly, the original and nature of visitatorial power must be considered. The original of all such power is the property of donor, and the power everyone has to dispose, direct, and regulate his own property; like the case of patronage; cujus est dare, &c. , therefore if either the crown or the subject creates an eleemosynary foundation, and vests the charity in the persons who are to receive the benefit of it, since a contest might arise about the government of it, the law allows the founder or his heirs, or the person especially appointed by him to be visitor, to determine concerning his own creature. If the charity is not vested in the persons, who are to partake, but in trustees for their benefit, no visitor can arise by implication, but the trustees have that power; from which account it appears, the nature of this power is forum domesticum, the private jurisdiction of the founder, and cannot extend farther, unless some other person grafts upon it, and by express words or necessary implication subjects the estate or emolument, given by him, to the same visitatorial power, and to be governed by the same rules; and then the former visitor is a visitor created by that subsequent founder or donor: the grounds of which appear from Holt in Philips v. Bury , 1 Ld. Ra . 5, more at large in Skin. Sho. Parl. Cases , 35. The topics of Bishop Stilling fleet are drawn from foreign laws; to be governed by the Ecclesiastical law, which the law of England totally disclaims and rejects.

[15] The third case has Sir William Grant MR in **Attorney General v Earl of Clarendon** 34ER 190, 193 saying:

This Information has three objects: first, the removal of such

of the Governors of Harrow School as have not been duly elected: secondly, the better administration of the revenues of the Charity: thirdly, an alteration in the present constitution of the School. The first of these objects is prayed upon the ground of those governors not having been inhabitants of the parish at the time of their election. By the Letters Patent of Queen Elizabeth the governors are constituted a body corporate. This Court, I apprehend, has no jurisdiction with regard either to the election or the amotion of corporators of any description. Eleemosynary Corporations are the subject of visitatorial jurisdiction; and where, for want of an heir of the founder, the Crown becomes the visitor, it is by petition to the Great Seal, and not by Bill or Information, that the removal of a governor, from the corporate character, which he de facto holds, is to be sought. This was the course pursued in the cases of Grantham School and Richmond School; and even in The Attorney-General v. Dixie (13 Ves. 519), where the election of governors might be said to be a fraud upon the Court, the Lord Chancellor declined proceeding to their removal, until a petition was presented to him in his visitatorial capacity. Corporations, constituted trustees, have indeed sometimes been by Decrees of the Court devested of their trust for an abuse of it; as any other trustees would have been. (The Attorney-General v. The Governors of the Foundling Hospital , 2 Ves. jun. 42; see p. 47, and the note.) Such was the case of the Corporation of Coventry, in the time of Lord Harcourt: but that is very different from devesting a person of his corporate character and capacity. Whether any Court, or visitor, would be disposed to inquire into the original eligibility of corporators after such a length of time as the Defendants have held their

offices of governors, is a point, on which it is not necessary for me to give any opinion. The Information, so far as it seeks their removal, must be dismissed.

[16] These cases speak to two main points. First, it speaks to the philosophical basis of the visitor's jurisdiction and second, the extent of the visitor's authority. The philosophical basis for the visitor's jurisdiction is that since the founder of the corporation has the right of disposition of property he has the right to set the terms upon which persons should enjoy the property. Second, flowing from this is the right to determine how the corporation administering the property shall be managed and governed. Regarding the visitor's authority, the founder can determine the things over which the visitor has authority. Therefore the terms of the statutes regulating the visitor's power are crucial.

Judicial attitude to eleemonsynary corporations

[17] The court, early in the day, took a position that it would not interfere with the visitor's jurisdiction and therefore gave the visitor a wide margin within which to operate. The judgment of Sir John Romilly MR **Attorney General v The Governors of the Free Grammar School of Queen Elizabeth of Dedham** 53 ER 138 illustrates the point. His Lordship noted the difference between the attitude of the courts to private charitable corporations and those charitable corporations that were established by the Crown. In relation to private charitable corporations the Master of the Rolls stated at page140:

The view I take of these cases is this:—What this Court looks at, in all charities, is the original intention of the founder, and, apart from any question of illegality and various other questions, this Court carries into effect the wishes and intentions of the founder of the charity; and where it sees that those intentions have not been carried into

effect, it rectifies the existing administration of the charity for that purpose. If it cannot carry them into effect specifically, it carries them into effect as nearly as may be, and with as close a resemblance to them as it can.

With respect to the internal regulation and management of a charity, apart from any question of breach of trust, if the original founder of the charity has appointed a visitor for the purpose of seeing that certain parts of the internal regulation are carried into effect, this Court does not interfere with the visitatorial power, unless it finds a breach of trust; that is, something totally at variance with the views of the founder.

[18] This second paragraph has not found its way in modern cases on the subject. The modern cases tend to give the impression that under no circumstances will the courts intervene other than by way of judicial review of the visitor's decision. However, this passage shows otherwise.

[19] On the situation where the Crown established the charity Sir John Romilly stated at page 140:

Wherever the Crown founds 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. This jurisdiction is quite distinct from the ordinary jurisdiction exercised by the Court. But where the Crown itself grants a charter of incorporation, or a charter appointing governors, and, at the same time that it incorporates them, gives them the power to make rules, and all this with respect to a charity

> *founded by somebody else; in that case the Court infers that the Crown does what the Court of Chancery would do by decree in any such case, viz., that it grants that charter with the view and intention of carrying into effect the views and wishes of the original founder; and accordingly when, as in this case, the Court finds thereafter that those rules and those regulations do not carry into effect the views and wishes of the original founder, this Court interposes to make such a scheme for the purpose of furthering the intentions of the founder, as may have been rendered necessary by the altered state of circumstances and the increased civilization of the country. That, I apprehend, is the foundation of the jurisdiction which this Court exercises in those cases, and, accordingly, I have, in a great number of instances, interfered, where there has been a charter of incorporation and a direction to the governors or persons to make rules, and I have directed a scheme where the altered circumstances of the charity have made it necessary, for the purpose of carrying into effect the wishes and views of the original founder.*

[20] Sir John is saying from these passages that charities were so far as possible were to be left to govern themselves. The courts did not readily intervene in the operation or management of the charity unless there was something to show that the intention of the founder was not being met. Even in those instances of intervention the purpose of the intervention was to see that founder's intentions were being carried out. This was the stated position in 1857.

[21] This position has been reaffirmed by the House of Lords in **Thomas** at pages 814 – 815 (Lord Griffiths):

The jurisdiction stems from the power recognised by the common law in the founder of an eleemosynary corporation to provide the laws under which the object of his charity was to be governed and to be sole judge of the interpretation and application of those laws either by himself or by such person as he should appoint as a visitor.

[22] As can be seen the position has been consistent over the centuries.

The breadth of visitatorial authority

[23] In the case of **Attorney General v The Governors of the Foundling Hospital** 30 ER 760, the following note is found. There is no statement of facts or who the judge was. This is the note.

3. A Court of Equity, will be disposed to go considerable lengths in its jurisdiction over a charity, for the purpose of securing the most advantageous management thereof; the exercise, however, of clear rights will never be destroyed, under the colour of regulating a charity. Questions, therefore, which properly fall under the cognizance of the visitor of a charitable foundation, cannot be decided by a Court of Equity, nor the decision of the visitor, however erroneous, be altered, upon bill or information. And, a fortiori, such questions cannot be determined upon petition, under the statute of the 52 Geo. 3.

4. But though Courts of Equity will not interfere in the internal regulations and management of a charity, where there is a visitor by operation of law, or where a special visitor has been appointed; or where particular powers with respect to such internal regulations have been given by; for such

> *special powers are generally exercised in a reasonable manner, and being less expensive than a suit at Law or Equity, afford the most convenient jurisdiction in all cases in which the powers given by charter, or by the founder to a visitor appointed by him, are sufficient to enable complete justice to be done; yet as to the revenues, it is quite clear, that notwithstanding a visitor may have been appointed to regulate the interior conduct and management of a charity, or even where such charity is established by royal charter, still, if in the original instrument of foundation, a trust be expressed as to the application of the revenue, the Court of Chancery has jurisdiction to compel a due application. However, when a charity is one of royal foundation, and no special visitor has been appointed by the charter, it seems, that any complaint, even as to the misapplication of the revenues, must be addressed, not to the Court of Chancery, as such, but to the great officer there presiding, as exercising the visitatorial power of the Crown.*

[24] This was stated in 1816. It is to be noted that in respect of private charities the Court of Equity was prepared to abandon its reluctance to interfere if there was complaint about how the revenues of the private charity were being handled. From this case, it was the law that where the charity was founded by royal charter the freedom accorded to it by the courts was even greater.

[25] The passage also gives some indication of why the courts were reluctant to intervene in private charities where there was a visitor. Generally, 'such special powers are generally exercised in a reasonable manner, and being less expensive than a suit at Law or Equity, afford the most convenient jurisdiction.' It was usually less expensive to resolve the matters through the visitor than through the courts. There was no bill of equity, no interrogatories, no reply and the associated expensive accoutrement of litigation.

[26] In another Foundling Hospital case, namely, **Attorney General v The Governors of the Foundling Hospital** 30 ER 514 a question arose as to whether the court should intervene in the management of the charity which was established by Letters Patent and confirmed by a 1792 Act of Parliament. The passages cited indicate the breadth of the visitor's jurisdiction. Lord Commissioner Ashurst stated at page 517:

> *There is no doubt, as a general position, that this Court has a controlling power over all charitable institutions. As little doubt is there, that this Court will grant an injunction, wherever it is properly laid before them either by positive or probable evidence, that the trustees are acting in a manner inconsistent with the trust; and are either doing, or about to do, what will be detrimental to the charity; and which, when done, cannot be undone. The only question is, whether this is one of those cases; for the Court has no right to take the trust out of the hands of those, who are the real administrators of the charity, unless it appears, they have acted improperly. Those, who come for the injunction, must make out that case clearly.*

[27] In the same case Lord Commissioner Wilson held at page 518:

> *I am of the same opinion. The Defendants are a corporation instituted by charter and act of Parliament for the purpose of governing this charity; and I take it, that, unless there is some reasonable ground to say, there is an actual abuse of trust, we have no jurisdiction to take it out of their hands, and to stop them, till we can inquire, whether they are abusing their trust or not. If they violate their trust, and that can be made out, it is proper to punish them, and to stop them, till we can inquire: but it is necessary to make that out in all*

cases.

[28] The breadth of the visitor's jurisdiction has been affirmed in modern times. In **Thomas** the claimant was appointed a lecturer at the University of Bradford. The university dismissed her and she brought a claim against the university on the basis that its decisions breached its charter, statutes, ordinances and regulations which were incorporated in her contract. She sought damages for breach of contract. The university sought a stay of execution. The judge refused and the Court of Appeal dismissed the appeal against that decision. The university appealed to the House of Lords. The Court of Appeal was reversed. The basis of the decision was that since the claimant was relying exclusively on the failure by the university to comply with its own rules and was not relying on any contractual obligation other than the university's failure to comply with its own internal law then it was a matter that fell within the exclusive jurisdiction of the visitor.

[29] It is important to appreciate the significance of the decision by examining the dicta of the trial court and the Court of Appeal. At first instance the trial court judge took the view that it was a matter of simple contract and the courts had power to adjudicate upon it. In the Court of Appeal Fox LJ thought that the visitor's jurisdiction depended upon what matters the courts would allow the visitor to deal with. For Fox LJ matters such as academic standards, admission and removal from office (called amotion in the older cases) and matters of similar nature were unsuitable for the courts. Sir George Waller held that matters of status were for the visitor and matters of torts and contracts for the courts. Lloyd LJ held that the courts and the visitor had concurrent jurisdiction.

[30] Lord Griffiths, in the House of Lords, outlined and affirmed the jurisdiction of the visitor. His Lordship approved cases were an unsuccessful candidate for a fellowship sought to challenge that decision in the court and it was held that that was a matter of the visitor (**Attorney-General v. Talbot** (1747) 3 Atk. 662; 1 Ves. Sen. 78); another unsuccessful candidate for some post appealed to the visitor and the college went to court seeking prohibition against the visitor. The court

declined to grant the order on the ground that it was a matter for the visitor (**St. John's College, Cambridge v. Todington** (1757) 1 Burr. 158); a chorister who had been removed from office sought mandamus to restore him. The application was refused (**R. v. Dean and Chapter of Chester**, 15 Q.B. 513); a candidate alleged that he was wrongly not examined for a fellowship and sought mandamus against the college. The application was refused (**Reg. v. Hertford College, Oxford** (1878) 3 Q.B.D. 693).

[31] During the inter partes hearing Mrs Haye sought to say that where the right being relied on was one at common law then the courts have jurisdiction. This argument was already raised and rejected by Brightman J in **Herring v. Templeman** [1973] 2 All E.R. 581. This decision was approved by Lord Griffiths. In addition, Lord Griffith expressly approved the dictum of Hoffman J in **Hines v. Birkbeck College** [1986] Ch. 524, 539 ('It is conceded that the jurisdiction of the visitor and the courts are mutually exclusive').

[32] Lord Griffith pointed out that the scope the visitor's jurisdiction extended to the appointment of a master and usher at Magdalen College, Oxford (**Attorney-General v. Magdalen College, Oxford** (1847) 10 Beav. 402); dismissal of the headmaster of a grammar school (**Whiston v. Dean and Chapter of Rochester**, 7 Hare 532).

[33] The following passage from Lord Griffiths is important because it puts to rest anxieties about the visitor's jurisdiction. Some have said that it is anachronistic and represents a throw-back to long-gone era. One can readily understand these sentiments but it is here with us for now. Interestingly, this was canvassed in the Court of Appeal in Jamaica and rejected in **Vanessa Mason v University of the West Indies** SCCA No 7 of 2009 (unreported) (delivered on February 18, 2009). Of equal interest is the fact that the Jamaican Parliament has decided to retain the 'anachronistic' institution when it passed the University of Technology, Jamaica Act (see **Duke St John-Paul Foote v University of Technology and other** [2015] JMCA App 27). This is what Lord Griffiths had to say at pages 821 – 823:

All are jealous of their own territory and in the ordinary course of events nothing falls more naturally within the territory of the courts than disputes between master and servant. It being a well recognised function of the common law to resolve such disputes they must, it is said, fall outside the visitatorial jurisdiction. In support of this argument the appellant relied upon the decision of Lord Hailsham of St. Marylebone L.C., sitting as visitor in Casson v. University of Aston in Birmingham [1983] 1 All E.R. 88. The facts were that the two petitioners had been accepted by the university to read a course in "human communication." The university subsequently found that they were unable to provide the course and offered an alternative course in "human psychology" which was accepted by the petitioners and they were admitted to the university to read that course. They then sued the university in the county court for damages for breach of contract in respect of the course in "human communication." The registrar and the judge declined jurisdiction holding that the dispute fell within the jurisdiction of the visitor. They then petitioned the visitor, but the Lord Chancellor acting as the visitor, also declined jurisdiction. The Lord Chancellor relied upon the first of the articles by Dr. Smith. He said, at pp. 90-91:

> *"It is, perhaps, unfortunate that none of the parties to this dispute have referred to the exhaustive and up-to-date article by Dr. Peter M. Smith 'The Exclusive Jurisdiction of the University Visitor' (1981) 97 L.Q.R. 610. If they had, I believe much trouble would have been avoided."*

In giving his principal reason for declining jurisdiction, the Lord Chancellor said, at p. 91:

> *"I agree, however, with Dr. Smith that a visitor can have no jurisdiction in any matter governed by the common law, e.g. contract (see 97 L.Q.R. 610, 615). I regard each of the petitions as claims for damages for breach of a contract entered into before the petitioners became members of the university and for nothing else" (my italics).*

As the contract relied upon was one between the university and third parties who were not members of the university at the time it was entered into, I accept this case as correctly decided. However, the head-note puts the decision on a far wider basis and reads:

> "*Held* - The petitions would be dismissed for the following reasons - (1) A visitor of a foundation had no jurisdiction in any matter governed by the common law, and, once a relationship with the foundation had been established which was governed by the general laws of the realm over which the visitor could have no jurisdiction, the visitor was wholly excluded from considering any question concerning that relationship. Since the relationship of contract was governed by the general laws of the realm, the visitor had no jurisdiction over contracts entered into with the foundation, and the fact that the other contracting party was also a member of the foundation did not have the effect of excluding the jurisdiction of the courts and putting the matter exclusively within the visitor's authority."

> *If, which I doubt, the Lord Chancellor did intend to put the decision upon so broad a base as excluding any relationship which, apart from visitatorial jurisdiction, would otherwise be governed by the common law, I must respectfully disagree with him. I have already pointed out that almost any dispute between a member and the university can be framed in either contract or tort, which relationships are apart from the visitatorial jurisdiction governed by the common law. To adopt this approach would entirely emasculate the visitatorial jurisdiction leaving it with virtually no content.*

[34] Here, if nowhere else, is the most emphatic rejection of the proposition that matters of contract or tort simply because they exist at common law in and of themselves either ousts the jurisdiction of the visitor or permits concurrent jurisdiction of the visitor. Lord Griffith has indicated that there is no such principle. The Court of Appeal of Jamaica has affirmed the exclusive jurisdiction of the visitor over matters within his jurisdiction (**Duke St John-Paul Foote v University of Technology and other**). But this is not the same thing as saying that the courts will never intervene where necessary.

The powers of the visitor

[35] The extent of the visitor's powers depends on the terms of the founding documents. In some case they are limited and in others they are unlimited. The following passage from Lord Hardwicke makes the point in **Green v Rutherford** at page 1150:

> *The founder may give a general power; or may limit and bind by particular statutes and laws; may give the visitor power of altering or giving new statutes; or may restrain from doing it, or from acting according to any other; as is done in the present case. 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, he is bound by them; and if he acts contrary to or exceeds them, acts without jurisdiction; the question being still open whether he has acted within his jurisdiction or not, if not, his act is a nullity. Holt in Philips v. Bury, where the Bishop of Exeter was undoubtedly visitor generally.*

[36] The idea is that the visitor is the court of the founder and his jurisdiction rests on the founder's right to decide who the power will be exercised. The visitor has full 'visitor's power to investigate and right wrongs arising from the application of the statutes or other internal laws of the institution' (Halsbury's Laws of England (vol. 35 (2015) para 629).

[37] A legitimate question is, what are the powers of the visitor if he or she finds that some wrong has indeed been committed? The case of **Thomas** assists. The leading judgments of Lord Griffiths and Lord Ackner indicate that once a matter can be properly dealt with by the visitor then the visitor is empowered to grant remedies. In some instances, the visitor can even award damages.

[38] In **Patel v University of Bradford Senate** [1978] 3 All ER 841 Megarry VC stated that the university visitor can hear both complaints and appeal. To use the language of lawyers, the visitor as original and appellate powers. Though it has been said to be obsolete, the visitor, if the founding documents give that power, can conduct general visitations to see how the organisation is operating. In these circumstances the visitor may function as an inquisitor and not just to hear specific complaints or appeals.

[39] In **Thomas** Lord Griffiths took the view that the visitor had powers 'right a wrong done a member or office holder in the foundation by the misapplication of those laws' (page 823). Therefore in Miss Thomas' case the visitor had the power to award damages.

Judicial control over visitors

[40] It has been seen that the courts have given the visitor wide latitude in conducting his or her duties. The courts have said that there is power to intervene in some circumstances.

[41] Megarry VC in **Patel** indicated that the visitor is subject to both prohibition and mandamus. Prohibition to stop him or her from exceeding the powers granted and mandamus to compel him or her to exercise the authority given.

The procedure

[42] Another point that was raised during this inter partes hearing was that there was an absence of detailed proper procedure for the inquiries by the visitor. The court was concerned about that as well but the research has shown that part of the reason for this was that the office arose in very ancient time and even coming into the modern era there was no insistence that the inquiry take a particular form. The reason for this is to maintain flexibility and to give the visitor full authority to determine how the inquiry should be conducted. Naturally, one would expect the visitor to conform to elementary standards of fairness such has hearing from affected persons particularly from those against whom a complaint has been made. This does not preclude the founder from stating how investigations are to be conducted.

[43] The question of how the visitor should go about the inquiry was canvassed in **Regina v Committee of the Lord of the Judicial Committee of the Privy Council acting for the Visitor of the University of London, Ex parte Vijayatunga** [1988] QB 322. Mr Sedley QC, on behalf of the student, submitted that the visitor is not just a reviewer of decisions made by other university organs but should conduct his inquiry much like a court conducting a trial. Simon Brown J preferred the submission of Mr Sedley which was that ‘visitor's role as intimate

and interventionist, extending to the resolution of questions of fact as well as to ensuring that the relevant domestic rules have been both substantively and procedurally followed' (page 342). Mr Laws, for the visitor, contended that the visitor's role is like that of judicial review court. It does not get into the merits of decisions and was only there to see that the regime established by the founder was lawfully operated. Merits, Mr Laws submitted, were for other university organs.

[44] Simon Brown J held at pages 343 – 344:

> ***Nor am I persuaded of the exactness of the suggested analogy between the visitor's role and that of this court when exercising its review jurisdiction.*** *Rather it appears to me fallacious. Judicial review is the exercise of the court's inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law. There is, of course, no question of this court entertaining an appeal from a decision entrusted by Parliament or the prerogative to another public body: rights of appeal, indeed, are by definition always statutory.* ***But the visitor's jurisdiction is in my judgment sui generis. It is unconstrained by those considerations which operate to confine this court's powers. The statutes of the university provide only for the visitor's identity. Nothing whatever is laid down as to the precise role which he should play in the resolution of whatever domestic disputes may be referred to him.*** *In my judgment the decision in Thomas v. University of Bradford, determining as it does the exclusivity of visitatorial jurisdiction where it arises, underlines also the need for such jurisdiction to assume whatever breadth and character will best enable the visitor to discharge his ultimate function. That function was described by Lord Griffiths, at p. 823, as*

being the

> *"judge of the laws of the foundation [who] should... have the power to right a wrong done to a member or office holder in the foundation by the misapplication of those laws."*

Lord Ackner, at p. 828, put it that the visitor

> *"must be entitled, in order to ensure that the domestic law is properly applied, to redress any grievance that has resulted from the misapplication of that domestic law."*

I conclude therefore that the visitor enjoys untrammelled jurisdiction to investigate and correct wrongs done in the administration of the internal law of the foundation to which he is appointed: a general power to right wrongs and redress grievances. And if that on occasion requires the visitor to act akin rather to an appeal court than to a review court, so be it. Indeed there may well be occasions when he could not properly act other than as an essentially appellate tribunal.

The difference between visitatorial and this court's supervisory jurisdiction may be illustrated thus. It will often be inappropriate for this court in the exercise of its review jurisdiction to investigate the facts underlying the legal dispute before it. Equally, this court must from time to time leave undisturbed a decision on the merits which it believes to be wrong because it recognises that there is properly room for two views upon the point. But in my judgment there are no such limitations upon the visitor's jurisdiction: he may,

indeed should, investigate the basic facts to whatever depth he feels appropriate and he may interfere with any decision which he concludes to be wrong, even though he feels unable to categorise it as Wednesbury unreasonable.

Generally speaking, therefore, I prefer the approach urged upon us by Mr. Sedley. But it nevertheless remains important to recognise that many decisions giving rise to dispute will be subject to considerations which quite properly inhibit the visitor from embarking upon any independent fact-finding role. I agree with Kerr L.J. that this is as plainly true of the appointment of examiners as of the decision of such examiners upon the standard attained by a candidate. But in both cases this seems to me less because the university statutes expressly entrust those decisions to the discretion of particular members of the university than that these members are peculiarly fitted by their eminence, experience and expertise to arrive at proper decisions. This, indeed, was the essential burden of Mr. Newman's submissions on behalf of the university. And it must be remembered that even courts exercising an unlimited appellate jurisdiction on occasions recognise that the tribunal appealed from may have an expertise which particularly qualifies it to decide a given question and will accordingly decline to intervene, save only if satisfied that such tribunal was clearly wrong: see for instance the Court of Appeal decision in Commission for Racial Equality v. Associated Newspapers Group Ltd. [1978] 1 W.L.R. 905.

My final conclusion, therefore, is that the visitor's role

> ***cannot properly be characterised either as supervisory or appellate. It has no exact analogy with that of the ordinary courts. It cannot usefully be defined beyond saying that the visitor has untrammelled power to investigate and right wrongs arising from the application of the domestic laws of a charitable foundation; untrammelled, that is, save only and always that the visitor must recognise the full width of his jurisdiction and yet approach its exercise in any given case reasonably (in the public law sense). I wholly share Kerr L.J.'s conclusions upon the instant application*** .. (emphasis added).

[45] Kerr LJ on the other hand did not receive Mr Sedley's submissions with any great enthusiasm but nonetheless accepted that even if the visitor declined to interfere with an examiner's' 'decisions on matters which depend upon academic or scientific or other technical judgment,' that lack of interference did not amount to an error of law committed by the visitor justifying interference by the courts unless the visitor failed to appreciated that 'the decisions in question are so plainly irrational or fraught with bias or some other obvious irregularity that they clearly cannot stand' (page 334). The Lord Justice took the view that if the decision of the visitor is plainly unjustified or infected by bias or a failure of natural justice the courts will interfere. This is a significant departure from the position of the courts in earlier centuries.

[46] Kerr LJ rightly emphasised that visitor's jurisdiction 'fall to be exercised in an almost infinite variety of situations, and the mode of their exercise must necessarily be left to the discretion of the visitor, provided of course that he acts judicially' (page 333). This meant that there 'cannot for one moment accept any such mandatory prescription governing the mode of the exercise of visitatorial powers' (page 333). These reasons advanced by Kerr LJ show why it may not be desirable to be too prescriptive about how the visitor goes about the inquiry.

[47] In terms of the appreciation of Mr Sedley's submission this court prefers Simon Brown J's understanding and acceptance of them. This court takes the point made by Kerr LJ regarding the mode of the exercise of the visitor's jurisdiction but this court is of the firm view that the visitor must conduct a full and thorough enquiry if that is what is demanded by the circumstances and not hide behind the proposition that some judgments are best left to other organs of the university. For example if the allegation is one of racial bias, gender bias, discrimination based on religion or the lack of religion, sexual orientation the visitor must make full and vigorous inquiry of if the statutes permit such an inquiry to be conducted by some other body then the visitor must examine the record to see whether the body did a proper and thorough job. Exclusive jurisdiction is not a cloak for feigned attempts at investigating complaints.

[48] The visitor's processes are flexible enough for him to delegate the actual collection of evidence to another. What he cannot delegate his actual power to make the final decision. This comes out in **R (on the application of Varma) v HRH The Duke of Kent** [2004] All ER (D) 293. In that case the claimant was deregistered because he failed to maintain satisfactory academic progress. He had exhausted all internal appeal and took his case to the visitor. The visitor appointed a circuit judge as his commissary. The circuit judge 'received all written material and comments' and held a meeting with the claimant who was able to make further representations. The circuit judge submitted the report with the recommendation that the petition be dismissed. The visitor accepted the recommendations and dismissed the petition.

[49] The claimant made two challenges to the visitor. First he said that the visitor had delegated his powers to the judge without any express power enabling him to do so. Second, and in the alternative, 'if the judge produced a recommendation or was giving advice, fairness or the rules of natural justice required that that advice be disclosed to the claimant to enable him to identify any inaccuracies whether of fact or law before the defendant reached his decision.' Collins J took the view that the visitor could utilise the commissary

provided he did not delegate his ultimate decision making function. He also held that fairness and natural justice required that before reaching a decision the affected person was made aware of and provided with the opportunity to comment on the material the decision maker is using to make his decision.

[50] From the decided cases, where the institution is set up by royal charter the document initiating the jurisdiction of the visitor is a petition.

[51] The visitor on receipt of the petition would consider it and then respond to the petitioner. Unless constrained by the charter, the statutes and other documents, the visitor can decide how the petition will be managed. For example, the case of **The Duke of Kent** case shows that the visitor can delegate the fact finding to another as long as the visitor does not delegate the power to make the final decision on the petition. Indeed the general principles of law indicate that the decision maker must be the person who makes the decision. The same case shows that visitor may receive advice from others but the key thing is that the visitor must be the person who makes the final decision.

[52] So far as the mode of the hearing is concerned the case law indicates that the lack of prescription of methodology for the hearing was deliberate so that the visitor can fashion the inquiry to meet the circumstances of the case. This may not be as unsound as it appears bearing in mind the visitor's jurisdiction is usually very wide and covers a whole multitude of activities within the university.

[53] The crucial thing for the visitor is that any person who may be adversely affected by any decision must be given the opportunity to respond to the material on which the decision is to be based. A good rule of thumb would should be that the more severe the consequences the more the visitor should be inclined to have the person make oral representations. In **The Duke of Kent** case, the applicant made oral representations to the commissary who recorded those representations as well as other material and sent them on to the His Royal Highness. It appears that the commissary also included his recommendation to His Royal Highness who accepted them.

Application to present case

[54] The UWI was established by royal charter in the exercise of the royal prerogative by Her Majesty Queen Elizabeth the Second who acted upon the advice of the Secretary of State for the Colonies. It is a corporate body under the charter with perpetual succession, a common seal and it can sue and be sued in its own name. Under article 6 Her Majesty, her heirs and successors 'shall be and remain the Visitor and Visitors of the University and in the exercise of Visitatorial Authority from time to time and in such manner as We or They shall think fit may inspect the University, its buildings, laboratories and general work, equipment, and also the examination, teaching and other activities of the University by such person or persons as may be appointed in that behalf.'

[55] In a previous case it was argued that the power in article 6 was limited to inspection of building, laboratories and the like. This argument was rejected by Brooks J in **Dr Matt Myrie v University of the West Indies** Claim No. 2007HCV04736 (unreported) (delivered January 4, 2008).

[56] From the article the role of the visitor is not limited to inspection of buildings, laboratories, examination and teaching. The powers are not limited to examination of the physical plant but in this context 'inspect the University' means examining the operations of the university generally that it to say, whether it is being operated in accordance with the Charter and its statutes. This is an example of a very general visitatorial power granted to the visitor. As Holt CJ indicated, where the power is not limited but general, the only restriction is sound judgment.

[57] Miss Curtello can invoke the jurisdiction of the visitor. Even though this bit of information was not before the court on the application for leave but arose when her claim was filed pursuant to the grant of leave it is necessary to make the point that the allegation that the decision of the Vice Chancellor against her was made without hearing from her or letting her know the content of the adverse

report is can be raised with before visitor. The Vice Chancellor's decision unless permitted by the Charter and the statutes is not final. The visitor may hear a complaint (an appeal) against that decision.

[58] There is one final case which must be mentioned and it is the case of **Page**. As indicated earlier, this court does not accept the reasoning and conclusion of the majority and agrees with the dissenting judgment of Lord Slynn. The majority held that once the visitor lawfully embarked upon a matter within his jurisdiction and made an error of law in interpreting and applying the regulations granting the power to act then that was beyond the scope of judicial review. The reason advanced by Lord Browne Wilkinson was that the law had developed in a manner in relation to visitors that precluded judicial review for errors of that nature. Lord Browne Wilkinson held to this position despite his Lordship's concession that prohibition could be issued to restrain a visitor from exceeding his authority and certiorari to quash a decision that exceeded the visitor's jurisdiction. His Lordship even accepted that the courts have the ability to issue mandamus to compel the visitor to exercise his jurisdiction. This is his Lordship's reasoning at page 106:

> *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. The court's inability to determine those matters is not limited to the period pending the visitor's determination but extends so as to prohibit any subsequent review by the court of the correctness of a decision made by the visitor acting within his jurisdiction and in accordance with the rules of natural justice. This inability of the court to intervene is founded on the fact that the applicable law is*

not the common law of England but a peculiar or domestic law of which the visitor is the sole judge. This 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.

[59] Lord Browne Wilkinson at page 108 stated:

Although the general rule is that decisions affected by errors of law made by tribunals or inferior courts can be quashed, in my judgment there are two reasons why that rule does not apply in the case of visitors. First, as I have sought to explain, the constitutional basis of the courts' power to quash is that the decision of the inferior tribunal is unlawful on the grounds that it is ultra vires. In the ordinary case, the law applicable to a decision made by such a body is the general law of the land. Therefore, a tribunal or inferior court acts ultra vires if it reaches its conclusion on a basis erroneous under the general law. But the position of decisions made by a visitor is different. As the authorities which I have cited demonstrate, the visitor is applying not the general law of the land but a peculiar, domestic law of which he is the sole arbiter and of which the courts have no cognisance. If the visitor has power under the regulating documents to enter into the adjudication of the dispute (ie is acting within his jurisdiction in the narrow sense) he cannot err in law in reaching this decision since the general law is not the applicable law. Therefore he cannot be acting ultra vires and unlawfully by applying his view of the domestic law in reaching his decision. The court has no jurisdiction either

to say that he erred in his application of the general law (since the general law is not applicable to the decision) or to reach a contrary view as to the effect of the domestic law (since the visitor is the sole judge of such domestic law).

[60] Lord Browne Wilkinson went so far as to say the following at page 109 - 110:

I accept that the position of the visitor is anomalous, indeed unique. I further accept that where the visitor is, or is advised by, a lawyer the distinction between the peculiar domestic law he applies and the general law is artificial. But I do not regard these factors as justifying sweeping away the law which for so long has regulated the conduct of charitable corporations. There are internal disputes which are resolved by a visitor who is not a lawyer himself and has not taken legal advice. It is not only modern universities which have visitors: there are a substantial number of other long-established educational, ecclesiastical and eleemosynary bodies which have visitors. The advantages of having an informal system which produces a speedy, cheap and final answer to internal disputes has been repeatedly emphasised in the authorities, most recently by this House in the Thomas v University of Bradford [1987] 1 All ER 834 at 850, [1987] AC 795 at 825 per Lord Griffiths; see also Patel v University of Bradford Senate [1978] 3 All ER 841 at 852, [1978] 1 WLR 1488 at 1499-1500. If it were to be held that judicial review for error of law lay against the visitor I fear that, as in the present case, finality would be lost not only in cases raising pure questions of law but also in cases where it would be urged in accordance with the Wednesbury principle that the visitor had failed to take into account relevant

matters or taken into account irrelevant matters or had reached an irrational conclusion. Although the visitor's position is anomalous, it provides a valuable machinery for resolving internal disputes which should not be lost.

I have therefore reached the conclusion that judicial review does not lie to impeach the decisions of a visitor taken within his jurisdiction (in the narrow sense) on questions of either fact or law. Judicial review does lie to the visitor in cases where he has acted outside his jurisdiction (in the narrow sense) or abused his powers or acted in breach of the rules of natural justice. Accordingly, in my judgment the Divisional Court had no jurisdiction to entertain the application for judicial review of the visitor's decision in this case.

[61] So there it is. Lord Slynn's reply to this at page 113 is set out in full:

With deference to the contrary view of the majority of your Lordships, in my opinion if certiorari can go to a particular tribunal it is available on all the grounds which have been judicially recognised. I can see no reasons in principle for limiting the availability of certiorari to a patent excess of power (as where a visitor has decided something which was not within his remit) and excluding review on other grounds recognised by the law. If it is accepted, as I believe it should be accepted, that certiorari goes not only for such an excess or abuse of power but also for a breach of the rules of natural justice there is even less reason in principle for excluding other established grounds. If therefore certiorari is generally available for error of law not involving abuse of power (as on the basis of Lord Diplock's speeches I consider that it is so available) then it should be available also in respect of a decision of a visitor.

I am not persuaded that the jurisdiction of the visitor involves such exceptional considerations that this principle should be departed from and that some grounds be accepted and others held not to be available for the purposes of judicial review.

The submissions made to your Lordships on the basis of the history of eleemosynary corporations do not seem to me to justify the drawing of such a distinction at the present time once it is accepted that certiorari can be available (as in Thomas's case) on some grounds. Nor do I accept that all the questions referred to a visitor involve such arcane learning that only those intimately aware of university affairs can begin to understand it, the judges of the land not being able to appreciate the issues. The fact that Lords of Appeal in Ordinary and other senior judges are invited to advise the visitor show that this cannot be assumed. Moreover, issues of law may be referred to the visitor which are wholly analogous to questions decided by the courts. The present is such a case in which, if there had been no referral to a visitor, the matter would have come before the tribunals and courts on a clearly recognisable employment law question.

Nor am I impressed by the floodgates argument--it is said that the Divisional Court would be overwhelmed by applications to review visitors' decisions. In the first place many references to the visitor in student or staff disputes with university authorities do not involve questions of law at all. It will quickly be recognised that on matters of fact and challenges to the exercise of discretion leave to apply for judicial review will be refused. Moreover where the issue really does raise a question of esoteric university 'lore' the

courts are unlikely to override the decision of the visitor, informed as he will be by the university authorities.

[62] As can be seen the majority did not advance a single cogent reason to refute the reasoning of Lord Steyn. Lord Steyn pointed out if the court could grant mandamus to compel a visitor to act, if the court could grant prohibition even after the visitor has assumed jurisdiction, if certiorari could be granted after the visitor has acted, what good reason can there be, in light of how administrative law principles have developed why not extend the benefit of that jurisprudence to the visitatorial system? Like Lord Steyn, this court cannot see any good reason for the reluctance to subject the visitor to the full rigours of judicial review. It cannot be that in the twenty first century the courts are saying that a visitor who has made a very significant error that is patent to all or at least discoverable on close examination.

Conclusion

[63] **Thomas**' case states that exclusive jurisdiction of the visitor is so well established that the remedy for commencing a claim when the visitatorial jurisdiction is still available is to strike out the claim. It is not merely a stay of the proceedings. The **Duke Foote** case from the Court of Appeal of Jamaica has accepted that position. It means that in this case the claim form filed in this case has to struck out and the leave to apply for judicial review set aside.

[64] The basis for this decision is that there visitatorial jurisdiction is still available to Miss Curtello. However, as this court has endeavoured to make clear, the visitor's decision is subject to judicial review and the conduct is subject to prohibition if it is shown that the visitor has committed or about to commit a serious breach of principle such as bias. Also this court has accepted the minority decision in **Page** as the better of the two positions taken in the case.