

HoHs

## ***So, just what is an Oxbridge 'Head of House'?***

**David Palfreyman, New College, Oxford**

**In both Oxford and in Cambridge over the last few years quite a few Heads of House have left rather abruptly, in the same way that Vice-Chancellors across UK HE seem now to come & go - to spend more time with their families, to pursue other interests, or whatever lame reason is given out as the public explanation. A Freedom of Information application was about whether an unexplained entry for a payment of over £800k within College X's annual accounts related to the pay-off to HofH Y – the Information Commissioner ruled that College X did not have to reveal all to FOIA enquirer Z. And even some Bursars have now started suddenly to disappear – things must indeed be bad when such harmless drudges perhaps also are ending up in the firing line of collegiate discord. So, just what is the legal position when College Officers overstay their collegiate welcome? Short of waving around a big fat cheque as compensation for loss of office (I'll settle for 2 years sabbatical after 25 in office) how easy is it to see off a HofH or a Bursar (or in fact any offending Fellow), to get off them the key to the SCR drinks-cupboard, to push them out through the College gates into the bleak world beyond?**

**There may not be in place a crystal-clear employment contract for the HofH or for the Bursar – I have a 1988 letter from the Warden telling me that the Governing Body has elected me as the Bursar and as a Fellow; I still await the minimum information that employment legislation says should be supplied to a new employee within a certain period of time (which is a lot less than 24 years). So, in the absence of a conclusive and comprehensive contract such as, say, executives in business function under or as recommended by HEFCE (and also the Committee of University Chairs of Council) for senior university bods one resorts to piecing together a contract's terms (as indeed one does for the student-university contract-to-educate in the case of most UK**

**HEIs): collecting bits of jigsaw both on the basis of what the job's further particulars said, what was said during the selection and appointment process (but quite who has exactly what authority to say just what that might be binding upon the charitable corporation may be uncertain), what a 'Staff Handbook' says (if indeed applicable in any way to the Senior Members), and what has become established but unwritten (and perhaps unspoken) as custom & practice in how the College treats its Senior Members; and also on the basis of implying into the contract terms from the College Statutes, from employment law, and from the law of corporations.**

**If there is a beautifully crafted contract, as deliberated upon and authorised by Governing Body and as perhaps also signed off by the now fashionable Remuneration Committees which most colleges possess, then – unless it conflicts with the College Statutes or employment protection legislation, or with the law of corporations and general charity law – its termination procedures apply. More likely the starting point has to be the Model Statute as shoe-horned into all university and college Statutes by the University Commissioners in the early-1990s as the Government's way of ending academic tenure and making redundancy easier/cheaper. The MS essentially followed then HR and ACAS best practice for compliance with employment protection law, importing contractual fairness and the concept of natural justice. Some universities and colleges have since tidied up the original MS - at some heavily managed universities so as to be able to treat academics as being as speedily dispensable with as for any other of their hapless employees. (On the application of employment law to HE see Chapters 10 & 11 of Farrington & Palfreyman, 'The Law of Higher Education', OUP 2012.)**

**Here at New College the original MS is intact as Statute XVII and backed up by By-laws XVII & XVIII – the MS's provisions take up most of the length of each document; and, happily, have never (yet) been used. Statute XVII (Academic Staff) applies to the Warden, to the Tutorial Fellows, and to full-time College Officers such as the Bursar or Home Bursar (and now such as the Development Director as also a Fellow). It allows for 'dismissal' for 'good cause' relating to 'conduct' or**

**‘capability’, where misconduct or incapacity is manifested as (inter alia): ‘immoral, scandalous or disgraceful’ behaviour (it used to be ‘gross moral turpitude’); ‘failure or persistent refusal or neglect or inability to perform’; ‘physical or mental incapacity’; ‘wilful disruption of the activities of the College’; ‘wilful disobedience of any of the Statutes or By-laws of the College’. There is also scope for dismissal ‘by reason of redundancy’. Detailed, even elaborate or convoluted, procedures are set out – as expanded further in the By-laws with a stress on ‘due regard’ for ‘the interests of justice and fairness’ – for investigations, disciplinary panels, oral warnings, written warnings, appeals, grievances, etc, as the stuff of ever-expanding HR departments everywhere.**

**Part VII deals with ‘Removal of the Warden from Office’ when ‘any nine members’ of the GB (currently c65 souls here at New College) ‘make complaint to the Sub-Warden seeking the removal of the Warden for good cause’: the complaint is referred to the full GB, sans Warden and the nine grumpy Members; the GB may dismiss the complaint as ‘trivial or invalid or unjustified’ or set up ‘a Tribunal’ which will ‘hear and determine the matter’; this Tribunal is to have ‘an independent Chairman’ (who?), an Honorary or Emeritus Fellow, and an (as it were) working Fellow as a Member of GB; the process then follows the route for a Fellow threatened with discipline/dismissal; if the charges are upheld and ‘the Tribunal finds good cause and recommends dismissal’, the Sub-Warden ‘shall consult the Governing Body and may then dismiss the Warden’ (who could meanwhile have been suspended by the S-W if he/she ‘considers that the College might otherwise suffer significant harm’ by the Warden remaining in office during the hearing – but the Warden presumably is able to remain in the Lodgings, dine at High Table?); there appears to be no right of appeal for the Warden against dismissal (but dismissed Tutorial Fellows and Bursars can do so under their bit of the MS, as can the humblest employee under the procedures set out in the Staff Handbook: clearly, whichever Union represents the Oxbridge HofH did not do a good job protecting this creature’s interests when the MS was drawn up...).**

**The role of the Visitor in relation to such employment matters and also with reference to ‘the student contract’ has been removed by legislation in 1988 and 2004 respectively; the Visitor still has a residual but exclusive jurisdiction over the interpretation of the college statutes and any other aspect of the forum domesticum as the internal law of the college as a chartered lay eleemosynary corporation. This would apply to Statute II on ‘The Warden’ and his/her election & admission, his/her remuneration & retirement, and his/her duties & power under the Charter & Statutes. The last allows for the Warden to have ‘pre-eminence and authority over all the members of the College’, to ‘superintend the discipline and education of the College’, to ‘cause all the members of the College... to perform the duties of their respective positions’ – and all such shall ‘obey the orders of the Warden, being lawful and consistent with the Statutes and By-laws of the College’. Sort of sounds like a CEO job in the real world? The By-laws note that the Warden ‘is charged by the Statutes with the responsibility for the well-being of the College as a place of education and scholarship, for its discipline, and for the safety and well-being of all its members’. Thus, the power & authority of an Oxbridge Head of House as Implementer & Enforcer is seemingly wide, challengeable only where its use conflicts with the Statute and By-laws as interpreted by the Visitor – although both can be changed by a majority decision of the GB, albeit the former only with the subsequent approval of the Privy Council.**

**Thus the HofH, if not exactly a CEO, is akin to the Master of a London livery company as another species of the chartered corporation who is elected by the Members of its Court – although the Fellows of an Oxbridge college are probably less servile than the members of such a company, who anyway have to put up with a bossy and/or incompetent Master for only one year before the Ordinances force another election and hence a change (Palfreyman, ‘London’s Livery Companies’, 2010). Similarly, the notoriously shy and docile hoi polloi barrister members of a London inn of court (as an unincorporated association) are seemingly jolly deferential to the same one-year benign rule (or less benign tyranny) of a Treasurer as elected by its inner sanctum of Benchers**

**(Palfreyman, 'London's Inns of Court', 2011). The Bursar equivalents, by the way, are the Clerk of the Worshipful Company of Bellows-Menders or the Under-Treasurer of the Honourable Soho Inn. Certainly, the case law in Williams, 'The Law of the Universities' (1910), is mainly about stropky Fellows challenging Heads of House and GB decisions via the Visitor – as opposed to that in Farrington & Palfreyman being largely about stropky students claiming rights of various kinds under their consumer-contract relationship with the university, now usually via the OIA (or judicial review where it is a statutory rather than a chartered institution). There are eighteenth and nineteenth century cases of stropky liverymen or barristers baulking at the authority of their 'worshipful' company or 'honourable' inn, but dons seem(ed) proportionately far more quarrelsome.**

**So, the power & authority of the HofH is derived from the Statutes & By-laws and, where they are silent, from: the general rules under the law of meetings and of agency in terms of delegated authority (Chapter 8 of Farrington & Palfreyman); the law of charities and fiduciary duties upon members of a Governing Body as charity trustees (Chapter 7); and the broad law of corporations (Chapters 5 & 6 on governance structures and the power of officers). And, of course, whatever the strict legal position much depends on the personalities and style of those involved within the collegial organisational culture of HE generally and the collegiality & commensality of Oxford colleges in particular - Tapper & Palfreyman, 'The Collegial Tradition in the Age of Mass Higher Education' (Springer, 2010) and 'Oxford, the Collegiate University' (Springer, 2011). The law of meetings gives surprisingly little power to the chair of a committee – he/she is very clearly the creature of the committee unless appointed with explicitly greater powers under the institution's Statutes/Ordinances (Megarry J in *John v Rees* stressed: the chair's 'duty is to act not as a dictator, but as servant of the members of the body'). The law of agency means that, generally, powers are not to be readily shifted to individual chairs/officers by lazy committees, even by way of the (often much abused) use of 'chairman's action' between meetings. The law of charities requires all Fellow-qua-trustees**

**to be on top of their fiduciary duties at the risk of personal financial liability to the charitable corporation if their recklessness in decision-making causes loss to the college – no defence that the HofH was scarily domineering and the Bursar wickedly manipulative as well as unusually secretive, incompetent and dozy.**

**And so to the law of corporations (which, incidentally, is not the same as company law, but registered companies like municipal entities under local government law being species of corporations: and some HEIs are set up as registered charitable companies and indeed now as registered for-profit companies under the Companies Act 2006)... The law of corporations giving us guidance as to the role of the HofH or of any other Officer in relation to the corporate entity itself or its members individually is to be found in ‘Halsbury’s Laws of England’ (Vol. 9(2), 1998), in ‘Grant on Corporations’ (1850), and in Kyd (1793/94) ‘A Treatise on the Law of Corporations’ (and even earlier but to a lesser extent, in Blackstone’s ‘Commentaries on the Laws of England’, 1765/69, Vol. I, Ch. XVIII). Again, as with the law of meetings the general law of corporations does not bestow vast legal powers upon the head of the corporation, whatever authority he/she may command by way of influence through charisma, persuasion, bullying, and whatever else in the range of inter-personal skills he/she possesses. Thus, where a GB falls out with its HofH or any College Officer it is probably a mess not to be readily resolved by reference to a demonstrable breach of legal powers or duties as neatly set out in some dusty legal treatise nor even as detailed in the Statutes & By-laws – or rather the offending HofH or Officer would have to be very dim indeed to end up with the situation being that stark because he/she had so blatantly exceeded his/her power & authority or had so egregiously neglected prescribed duties. Much more likely it will be a matter of style and personality, where the use of the MS dismissal process would be uncertain, time-consuming, and costly - and hence a negotiated departure is usually the end/best result.**

**But ‘negotiated’ almost always means a compensation payment to go quietly and hence the issue arises of how such**

**expenditure is justified as being in the best interests of the college in using charitable income (or a university in using public, taxpayer monies: HEFCE, the NAO, and the PAC all have views on the size of payoffs to exiting VCs or HEI Finance Directors; the Charity Commission may similarly query an over-generous award to a departing HofH or Bursar and any over-payment could be clawed back from the Fellows-quatrusters jointly & severally as a misuse of charitable assets; and anyway the college would need CC permission under the Charities Act 2011 to make an ex gratia payment – certainly one of £800k...). Difficult territory indeed! And there is extra difficulty in that, arguably, getting rid of a HofH or of a Bursar, or of any Member of a GB as a corporator of the college as a chartered lay eleemosynary corporation aggregate is also a matter of depriving the individual not simply of a job as covered by employment law and the MS but also of a freehold tenure in the corporation (until the Victorian Royal Commissions' reforms of Oxford and its colleges Fellows used to be paid by way of an annual dividend as a share of the surplus income based on their personal 'ownership' stake in their property of the corporation – a great incentive to being economical in managing college affairs!). This issue of being a member of as well as an employee of the College has not yet really been sorted out in Law – the potential for a challenge to our shiny new EJRA (employer justified retirement age, of 67) may flush out the issues, and expensively prolong the process of any such challenge!**

**So, what guidance do we get from the texts on the law of corporations? In Halsbury we are told that a corporator can be expelled from membership by a process of 'disfranchisement' as 'the total deprivation of all privileges, rights, interests, profits and advantages' (the loss of a property interest and more than just the loss of a job); but this can be done only by the full GB having followed the principles of natural justice and fairness, and for actions 'against the duty of a corporator' and ones 'to the prejudice of the good of the corporation' and also 'against his oath which he took when he was admitted to membership' (the new Fellows of New College still swear such an oath in Latin as they did more than 600 years back).**

**Moreover, ‘words of contempt’ even if ‘spoken against the chief officer of the corporation’, while ‘ground for punishment’ (perhaps a fine, or deprivation of port at High Table, or no access to the ‘Guardian’ in the SCR, or denial of a parking space, or whatever) are in themselves not cause for disfranchisement.**

**The ‘chief officer’ is clearly the HofH in our context; other ‘officers of a corporation’ (full-time and more part-time) are elected (usually annually and unopposed, rather than say ‘for life’) by the GB according to Statutes & By-laws; and the GB will probably have ‘a very wide discretionary power to remove a person so appointed’ (subject to a process of ‘amotion’ being ‘for just cause’ and being compliant with natural justice – with the right of appeal to the Visitor). Such officers have ‘the right and duty’ properly ‘to inform and guide the corporators in matters affecting corporate interests’ – addressing GB directly, not filtered via a CEO as in some organisations. The HofH within a chartered corporation aggregate (as are almost all Oxbridge colleges – the Master of Pembroke, however, is, like a Bishop, a corporation sole) ‘cannot act without the concurrence of the body as he is only a part of the entire corporation’ (albeit that ‘usage and precedent may be taken into consideration’: whatever that may mean...), but conversely the GB is unable to do any corporate act (‘other than the election of a new head’) ‘without the presence of the head’ (or of a deputy as duly authorised within the Statutes, as perhaps the Sub-Warden becomes Acting-Warden). This ‘presence of the head is necessary’ for any corporate decision that has to be taken by the GB where the GB has no power under the Statutes to delegate the decision-taking to a committee or to officers (see Chapter 8 of Farrington & Palfreyman on unlawful delegation and hence the risk of decisions being invalid as ultra vires the powers of the decision-takers). Otherwise, ‘the presiding officer’ at GB is, as noted above, the creature of the GB and has no inherent power to, say, ‘stop the meeting at his own will and pleasure’: if he walks out in a huff, the GB reverts to the Sub-Warden as chair and next to the senior College Officer or to the Senior Fellow, or whatever as in the Statutes or By-laws; and then, if they in turn all walk out, it – by now a bunch of dangerous radicals -**



may 'appoint a chairman to conduct the business' (which will be valid if it is business 'begun when the head was present').

Thus, corporate sovereignty definitively lies in the GB of an Oxbridge college as (usually) a combination of the HofH (or an authorised deputy) and a quorum of its membership (half-plus-one if the Statutes are silent) since the chartered corporation aggregate as a perpetual artificial person of legal immortality acts through the majority decisions of its corporators (GB Fellows) taken under its constitution and within the general law of corporations, being able to do what any natural person can do within the Law. As Grant puts it: 'acting within the scope of and in obedience to the provisions of the constitution of the corporation, the will of the majority, duly expressed at a legally constituted assembly, must govern...'. Incidentally, unless the Statutes so provide, the HofH as chair does not have a casting-vote. Here one might also note Bracton ('Note-Books', c1250/56, as perhaps the earliest English legal text-book) comparing Fellows with sheep: 'for in colleges and chapters [cathedrals] the same body [the corporation] endures for ever, although all [the corporators] may die one after the other, and others may be placed in their stead [perhaps by the Visitor if all Fellows are poisoned in one go at High Table!]; just as with flocks of sheep, the flock remains the same though the sheep may die...'. Extending the analogy: the HofH as shepherd; Fellows to be shorn; Fellows sent off for dipping, branding, and slaughter?

A few comments from Kyd on the HofH function as head of the chartered corporation: the powers of 'the head officer of a corporation' depend on 'the provisions of the charters [and in our case the Privy Council approved Statutes], or the prescriptive usage of the corporation [so, custom & practice by way of an unduly docile GB might perhaps mean the HofH at St Jude's is indeed invited and free to be CEO-like?]'. Kyd notes that 'the head is but a member of the acting part [a GB say], in the same manner as any other individual; and therefore, without a particular usage, or the express provision of a charter, he has no casting vote'. And: 'Every corporate act must be done in a corporate assembly, properly constituted and duly assembled [the giving of notice, clear agendas, etc]'.

**Kyd discusses constitutionally complex chartered corporations such as the livery companies with their Courts and in an Oxbridge context it was not uncommon in Oxford colleges up to the Victorian reform of Statutes and it is common now in Cambridge colleges (which tend to be larger than the Oxford ones) to have an inner Council that routinely runs the place, made up mainly of the college officers elected from the plenary of all Fellows as the GB – just as the University Council of 20 or so (the Members of which are the charity trustees) relates to Congregation of 3500 or more in Oxford. It remains to be seen if and when an Oxford college will go down the Cambridge route, perhaps when its GB gets too large (75+?) or too many of its Members want to avoid the burden and risks of charity trusteeship and hence set up a smaller group as the formal trustees of the charitable corporation (but does that merry band then become the employer of the rest, and does its members get paid extra to take on the task of charity trusteeship?).**

**Whatever a HofH is in legal terms, he/she is not a CEO and anyway a college is not a business even if it tries to operate in a business-like way; the HofH task is a much more subtle and sophisticated (and delicate and difficult?) function, needing careful induction for those appointed from the world beyond Oxbridge, especially the commercial world but even from bodies on the face of it similar to our peculiar little medieval guild colleges (say, other elite but non-Oxbridge universities, law firms, the media) – happily, both Farrington & Palfreyman (2012) and also Tapper & Palfreyman (2011) are available for the incoming HofH's Kindle and reading at the Tuscan villa! And nor is the relationship between the HofH and the Bursar akin to that between a CEO and his/her FD (Finance Director); similarly, a Senior Tutor is not the HofH's COO (Chief Operating Office, as even some UK universities now have along with a Director of Marketing!). The Bursars and Senior Tutor (assuming all are voting, full GB Fellows) are officers of the corporation, answerable directly to GB (as are the part-time Deans and Fellow Librarians or the full-time Development Directors) - the HofH is closer to the chair of a board in a registered company in co-ordinating senior company officers and managing board agendas than to a CEO hiring & firing**

**executives on his/her team; all these college officer folk serve the perpetual entity that is the College through the GB (in fact, I find it helpful to think of my ultimate Boss as William of Wykeham while my HofH tells the Freshers that I am WofW's representative on earth!).**

**Finally, what of the hoi polloi humble Fellow's duty as a charity trustee? He or she who is not a grand HofH, not a college officer. Any GB Fellow reading this who is not fairly familiar with that boring Annual Report & Accounts of his/her college as submitted in his/her name by the GB to the University and also to the Charity Commission is in breach of the simple and basic fiduciary duty to know vital general information about the charity which he/she governs; and, specifically, any Fellow not aware of the detail within that document concerning the size and management of the college endowment and its division between permanent capital and expendable assets as well as between corporate assets and specific trust funds (and why so divided) is in breach of the duty to attend to a key area of the charity's business. Similarly, the Fellow should know the spend-rate from the endowment (a maximum of 4% of endowment capital taken as income generated or via a total return investment strategy?), as compared to the norm across Oxbridge colleges (Bursars, as nerdy souls, collect data and benchmark all & sundry these days on nicely coloured graphs & tables), and hence be alert to whether the college is spending itself out of existence by eating too much today at the expense of tomorrow (which would be lawful if the bulk of endowment is indeed expendable, but perhaps it should be widely realised and explicitly affirmed as to what's going on; and which would be a gross breach of trust if the endowment is permanent).**

**After that, it is prudent to confirm that, say, the college has a reasonably competent budget-setting and expenditure-control process as well as an updated and costed condition survey so that a sensible amount is transferred annually to fund maintenance; that the undeniably tedious issue of compliance with health & safety legislation is being addressed, where fines can be hefty (10% of turn-over) and officers can go to goal (one way of getting shot of the HofH or the Bursar?); that**

**the college has an appropriate range of and extent of insurance cover for public liability (£50m+?) and for directors' & officers' liability (£5m if now in DARS!) and for employer's liability (£25m+?); and that the college seems to have robust procedures for compliance with the Data Protection Act (fines of up to £500k – and here again DARS membership adds significantly to a college's risk). Happily, in the Oxford context as opposed to being a governor of LMU, whether the college is a going-concern in relation to the ability to recruit students/customers is not an issue, but the Fellow may by inclination show an interest in minor areas like diversity and widening-participation (I say 'minor' since such territory, unlike that to do with financial viability, is very much less likely to trigger personal liability to compensate the charity where trustee recklessness has caused loss).**

**And because the Attorney-General as parens patriae for charities can chase Fellows-qua-trustees jointly & severally those (few?) Fellows who are wealthy should be more diligent than most lest they get stung as easy-to-pick deep pockets and are left trying to recover shares from their poorer brethren! Incidentally, the recent shift to being registered charities rather than exempt charities has made no difference at all to these long-standing fiduciary duties of charity trusteeship and to the risk of incurring personal financial liability; it is just that the registration process and the application of the Charities SORP to the way the Annual Report & Accounts are prepared ram home the concept of the GB Fellow being a corporator and hence a director/governor of the foundation as well as thereby a charity trustee – and the latter's duty is now codified under the Trustee Act 2000 as simply to carry out the task 'with such care and skill as is reasonable in all the circumstances' (no problem there then if Fellows would just do as the wise Bursar tells 'em!).**