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OFFICERS AND MANAGERS

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A. Management

6.01 Management is the description of the process by which one person controls the actions of another person or a team. The controlling aspect of management has been reinforced in decisions of the courts in the field of Health and Safety. In 1992 the Court of Appeal (Criminal Division) in *R v Boal*¹ quashed the conviction of an assistant general manager of a bookshop, for alleged offences under the Fire Precautions Act 1971. Section 23 uses the phraseology of a number of similar pieces of social legislation: '(1) where an offence under this Act committed by a body corporate is proved . . . to be attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate . . . he as well as the body corporate shall be guilty of that offence . . .' As Simon Brown J pointed out² the recognized textbooks did not assist in the interpretation of this section. The court accepted the definition given by Lord Denning MR in 1969 in *Registrar of Restrictive Trading Agreements v WH Smith and Son Ltd*,³ interpreting s 15(3) Restrictive Trade Practices Act 1956 and adopting dicta in earlier cases on provisions of the Companies Acts which impute liability to 'managers':⁴ 'The word "manager" means a person who is managing the affairs of the company as a whole. The word "officer" has a similar connotation . . . the only relevant "officer" here is an "officer" who is a "manager." In this context it means a person who is "managing in a governing role" the affairs of the company itself.' The conviction was quashed because the assistant general manager was responsible only for the day-to-day running of the bookshop rather than enjoying any

¹ [1992] 3 All ER 177.

² [1992] 3 All ER 177, 180. His Lordship referred to *Stone's Justices Manual* (1992 edn) para 7–15050, 18 *Halsbury's Statutes* (94th edn) para 450 and Redgrave Fife and Machin (1990) *Health and Safety* 231 as being largely silent on the point at issue, omitting mention to the authorities cited in the instant case. See discussion on Health and Safety in Chapter 21.

³ [1969] 3 All ER 1065, 1069.

⁴ *Gibson v Barton* (1875) LR 10 QB 329, 336 per Blackburn J and *Re B Johnson & Co (Builders) Ltd* [1955] 2 All ER 755, 790 per Jenkins LJ.

‘governing role’ in respect of the affairs of the company itself. According to Simon Brown J in *Boal* the section ‘is not meant to strike at underlings’.⁵ The Health and Safety Executive provides a guide to who can be included in the definition.⁶

A corporate body can itself be liable under s 2(1) Health and Safety at Work Act 1974 (HASAWA) where there is a failure to ensure the health, safety, and welfare at work of any employee and now, in cases resulting in death, under the Corporate Homicide and Corporate Manslaughter Act 2007 (CHCMA).⁷ As explained in *R v Gateway Foodmarkets Ltd*,⁸ the breach of HASAWA duty by the corporation and its liability does not depend upon any failure of the corporation itself, meaning head office personnel or senior management who ‘embody’ the company: and in *R v Associated Octel Co Ltd*⁹ it was made clear that this applies in respect of its duty to non-employees under s 3(1) as well. There is a duty on ‘managers’ who do fit the definition in the legislation under HASAWA, and the Management of Health and Safety At Work Regulations 1992–94¹⁰ define the duty of care under ss 2 and 3 HASAWA more explicitly as a duty of line management. Under s 1 CHCMA, an organization is guilty of an offence only if the way in which its activities are managed or organized by its senior management is a substantial element in a gross breach of duty of care. The Act defines ‘senior management’, in relation to an organization, as meaning ‘the persons who play significant roles in (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organized, or (ii) the actual managing or organizing of the whole or a substantial part of those activities.’

6.02

In the pre-1992 universities, administrative staff have no ‘governing role’ (in those universities with ‘members’ they are often excluded from membership) and until fairly recently many of them would not consider themselves as ‘line management’ or ‘senior management’ unless this is specifically part of their job description. Managing a budget is rather different to assuming liability for the safe working of an office, or indeed the whole organization, but the use of the terms ‘management’ and ‘manager’ is becoming more common. Legally, in Simon Brown J’s definition in *Boal* they are ‘underlings’ unless they voluntarily accept a higher degree of responsibility. Clearly it is important for them personally if they are found wanting in any area to which individual legal liability may attach. Only the Council or its equivalent has a governing role; unless the domestic legislation or contracts of employment validly say otherwise (so including, for example, a Secretary, Registrar, Director of Finance, or Director of Estates), the only individual office-holder who has specific responsibility for ‘management’ is the Vice-Chancellor or Principal and this is examined further later. As we shall see, in the higher education corporations and other HEIs the powers of the chief executive officer may be more explicit and ‘management’ is a more common expression. Setting aside the criminal or civil liability of ‘managers’ the problem now is to delineate the functions of managers and administrators and to help to answer the question whether there is a difference between management and administration in the legal sense.

6.03

⁵ *R v Boal* loc cit n 1 per Simon Brown J.

⁶ <<http://www.hse.gov.uk/enforce/enforcementguidesc/identifying/directors.htm>>, accessed 18 August 2010.

⁷ The Act sets out a new offence for prosecuting certain types of organization for gross failings in the management of their activities which have resulted in a person’s death. The offence applies to corporations, including HEIs, as well as to a number of bodies which are not corporations, including police forces and certain partnerships. The first successful prosecution was brought in 2011 over the death of a geologist taking oil samples in a trench which collapsed: *R v Cotswold Geotechnical (Holdings) Ltd* [2011] All ER (D) 100.

⁸ The Times, 2 January 1997.

⁹ [1996] 1 WLR 1543.

¹⁰ SI 1992/2051; SI 1994/2865.

B. Officers with mainly ceremonial functions

The Chancellor

- 6.04** In the medieval English universities the Chancellor who, together with the Masters, formed the body corporate, was both the titular head of the University and also its chief executive. It was originally an office to which the incumbent was appointed by the bishop, since the corporation was originally an ecclesiastical one. The first Chancellor of the University of Oxford was Robert Grosseteste (1224).¹¹ The first elected Chancellor of the University of Cambridge was Hugh de Hottun (1426);¹² in time most of the functions other than chairing the congregation and inception of masters (i.e. the award of degrees) were handed over to another officer, the title 'Vice-Chancellor' being coined at Cambridge later. In Scotland the office of Chancellor, formerly called Lord Chancellor, was originally held by a cleric (for example, at Glasgow by the Archbishop of Glasgow). The Chancellor is now normally described as the 'Head of the University' with responsibility for presiding at congregations and conferring degrees, both ceremonial functions. The Chancellor of an English chartered university is also normally the ex-officio presiding officer at meetings of the Court, if it still exists. As presiding officer or chairman of the Court the Chancellor has the legal responsibilities and powers of a meeting chairman. Under the Universities (Scotland) Act 1858 the Chancellor is President of the General Council of the University of St Andrews, which must give its sanction to all 'improvements in the internal arrangements of the University' that may be proposed by the Court (the governing body). In that capacity the Chancellor's powers and duties will be similar to those of the Chancellor presiding over a Court meeting in England. In a few HEIs the Chancellor is a member of the governing body. And although by convention he or she does not attend, the Chancellor will otherwise presumably have the same duties and responsibilities as other members. A Chancellor holds office either for life until retirement age, or for a fixed term, depending on the statutes of the HEI. He or she may resign by writing addressed to the appropriate authority and can only be removed from office by procedures laid down in the Statutes or Instrument and Articles of Government.

The Lord Rector or Rector (Scotland)

- 6.05** The distinctively Scottish office of Lord Rector was derived from the institutions on which the ancient universities were originally modelled. It was an elective office, the electoral constituency being the students who at Glasgow were divided into groups or 'Nations' depending on their geographical origin.¹³ The Lord Rector, along with the Dean of Faculties, was named in the Charter *nova erectio* (1577) as a Visitor. The modern form of elected Rector was instituted in 1859 in the then four universities by the Universities (Scotland) Act 1858 and still exists, having been retained by the University of Dundee when it separated from St Andrews in the 1960s, albeit in a different form. The Rector in the ancient HEIs is the convenor or president of the Court,¹⁴ with both a deliberative and a casting vote,¹⁵ or a member of the Court at Dundee.¹⁶ The Rector is elected annually either by the students alone or by the students and

¹¹ <http://www.ox.ac.uk/about_the_university/oxford_people/key_university_officers/past_chancellors.html>, accessed 7 February 2011.

¹² <<http://www.admin.cam.ac.uk/offices/v-c/chancellor.html>>, accessed 7 February 2011.

¹³ For example, Natio Loudoniana sive Thevidaliae, encompassing the Lothians, Stirling and all the towns east of the waters of the Urr: JB Hay (1839) *Inaugural Addresses by Lords Rectors of the University of Glasgow*, Table annexed to p xviii.

¹⁴ Section 5(5) Universities (Scotland) Act 1889.

¹⁵ Section 4 Universities (Scotland) Act 1858.

¹⁶ In the other Scottish HEIs, the Chairman of the Court is elected from among the lay members, for example, University of Stirling, Statute 9(2), <<http://www.calendar.stir.ac.uk/documents/the-statutes.pdf>>, accessed

staff, depending on the historical development of the HEI. The other eight universities and the remaining HEIs have no exact equivalent.¹⁷

C. The Pro-Chancellors and Chairs of Governing Bodies

The office of Pro-Chancellor exists in England, Wales, Northern Ireland, and the Republic of Ireland. These officers are the surviving descendants of the Chancellor's commissary or delegate, whose functions were largely handed over to the Vice-Chancellor by the fifteenth century,¹⁸ so some older universities have no Pro-Chancellors. Otherwise the Pro-Chancellors, who can be up to six in number, in the absence of the Chancellor exercise all the powers of that office except that of conferring degrees. In addition, one Pro-Chancellor is often Chair of the university governing body. Like the Chancellor, a Pro-Chancellor may resign by writing addressed to the appropriate authority and can normally only be removed from office for the same reasons as the Chancellor. Some Pro-Chancellors, however, hold office for a limited term and their appointment can therefore lapse by virtue of not being re-elected by the appointing body. **6.06**

Whether a Pro-Chancellor or not, the position of Chair of the governing body has taken on increased importance in the light of concerns about the role of the governing bodies themselves. There are organizations established to provide a framework for meetings of Chairs: both organizations, the Committee of University Chairmen (CUC) and the Committee of Scottish and Irish Chairmen (CSIC), produce guidance for members of governing bodies, the latter in collaboration with SFHEFC. The Chairman, if not a Pro-Chancellor, has no defined powers other than that of chairing meetings of the governing body and specific committees, and any specific authority granted under standing orders (for example action between meetings or during vacations) and/or a scheme of delegated authority. **6.07**

D. The Treasurer

The honorary office of Treasurer, which is not known in Scotland, is a common feature of chartered institutions of different kinds: local government, livery companies, universities, etc. Not all chartered universities have provision for a Treasurer in the Charter or Statutes and a number have abolished the office over time. Others have retained it, for example the University of Bath, where the unpaid Treasurer works for about two days per month and 'exercises an overview of the University's finances'.¹⁹ At Cranfield University the Treasurer is Chair of the Finance Committee of the Council.²⁰ At the University of Liverpool there is both a Treasurer with technical authority and a Deputy-Treasurer.²¹ The description Treasurer is also sometimes **6.08**

8 February 2011; The Napier University (Scotland) Order of Council 1993 sch 1 para B(6), SI 1993/557; Order amended by The Napier University (Scotland) Order of Council 1993 Amendment Order of Council 2007, SSI 2007/160 and by The Edinburgh Napier University Order of Council 2008, SSI 2008/388.

¹⁷ The position of Honorary President of the Students' Association, subject to periodic election like the Rector, was abolished at Stirling in 1997 in favour of a second full student member of the University Court, after numerous failed attempts at securing a candidate acceptable to the student electorate, the argument for its existence not being assisted by an incumbent who came to meetings dressed as a Court Jester.

¹⁸ The Pro-Chancellor of Trinity College Dublin was called the Vice-Chancellor from 1645 to 1964, when the office of Vice-Chancellor was abolished. A Pro-Chancellor deputizes for the Chancellor in awarding degrees.

¹⁹ <<http://www.bath.ac.uk/news/2011/01/14/new-university-treasurer/>>, accessed 7 February 2011.

²⁰ <<http://www.cranfield.ac.uk/about/people/page25256.html>>, accessed 7 February 2011. Statute 9(v): <<http://www.cranfield.ac.uk/academicservices/files/charter.pdf>>, accessed 7 February 2011.

²¹ <<http://www.liv.ac.uk/commsec/calendar/statutes.pdf>>, accessed 7 February 2011. Statute 8 provides: 'The receipt of the Treasurer for any moneys or property payable or deliverable to the University shall be a

applied to a paid official as at the University of Durham where the officer is 'responsible to the Council for the conduct of the financial business of the University and for such other business as the Council may prescribe'.²² In such cases there is no Honorary Treasurer. At the majority of HEIs the professional duties would be assigned to the Registrar or Secretary (who would have a qualified accountant to assist him or her); at a few they are assigned directly to a Bursar, Finance Officer, Quaestor, or (latterly) 'Director of Corporate Services' or Director of Finance (who is almost certainly a chartered accountant).

E. The Vice-Chancellor and equivalent posts

The significance and history of the role of Vice-Chancellor

- 6.09** The most important of the office-holders is the Vice-Chancellor; all recent cases of concern in institutional governance have involved the post. A number of Vice-Chancellors have resigned, retired early, or been dismissed as a consequence of institutional or personal failings. The title Vice-Chancellor was invented by the University of Cambridge and was assigned the Chancellor's jurisdiction *ad universitatem causarum* (in all causes) as his chosen substitute or vicar. It followed a period during which the Chancellor was able to delegate some, but not all, of his powers to a commissary; the office became permanent in the fifteenth century, and in 1504, the Statute requiring the Chancellor to be resident was repealed.²³ In the chartered HEIs in the absence of the Chancellor the Vice-Chancellor presides at congregations of the university and confers degrees.²⁴ At the University of Cambridge, the Vice-Chancellor retains power to adjudicate in certain disputes about the application of domestic legislation and may appoint a Commissary to advise him or her. An appeal against a decision of the Vice-Chancellor can be made by any 50 members of the Regent House to the Chancellor, within one week of the decision. Though doubtless this provision is intended to avoid circumstances arising in which the Vice-Chancellor's rulings are left in suspense, as Sedley J stated in *R v University of Cambridge, ex p Evans*²⁵ it is arguable that where the matter relates to an individual, as an alternative to a High Court action this is not a true alternative form of recourse at all. In discussing the role of the Vice-Chancellor, this nomenclature will be used to describe the post which is in effect the chief executive officer of the HEI, known by a variety of titles. Almost all the universities outside Scotland use the title Vice-Chancellor. A number of HEIs use the title Principal, including the Scottish universities where the Principal is also the Vice-Chancellor.²⁶ Other titles (sometimes in addition to Vice-Chancellor) are President, Rector, Director, Provost, Master, Warden, Vice-Patron; chief executive is used as an additional title in a number of HEIs, the title reflecting the duties. The Vice-Chancellor is almost invariably ex-officio Chair of the Senate or equivalent body and major committees including a Policy (or Planning) and Resources Committee, Executive, etc.

sufficient discharge for the same, provided that the Council may appoint other persons holding office in the University to give receipts for any such moneys or property and in such case a receipt given by any one such person shall be sufficient discharge for the same.'

²² University of Durham Statute 9.

²³ <<http://www.admin.cam.ac.uk/offices/v-c/role/previous-vcs.html>>, accessed 7 February 2011, gives the list of holders of the post from 1412.

²⁴ Usually this authority is granted in the Charter and Statutes or similar domestic legislation: in the case of the ancient Scottish universities it is specified in s 2 Universities (Scotland) Act 1858: '... the Chancellor in each University shall have power to appoint a Vice-Chancellor, who may in the absence of the Chancellor discharge his office insofar as regards conferring degrees, but in no other respect.'

²⁵ CO/1031/97, QBD, 1997.

²⁶ With power to confer degrees in the absence of the Chancellor.

Changes in the role and functions of Vice-Chancellor

The role of the Vice-Chancellor in most HEIs has changed considerably over the past half-century: the post is now recognized as the equivalent of a chief executive officer, the Universities UK Articles of Association going so far as to accord to the post the status of ‘person who has primary responsibility for the academic and executive affairs’ of the HEI,²⁷ although this may not be accurate in strict legal terms. The Jarratt Report (1985) observed a wide range of management styles characterizing the Vice-Chancellors of six universities. Some stemmed from the structure, history, and culture of the HEIs; others arose from the personalities of individuals. Nevertheless, a shift was emerging in the role of the Vice-Chancellor to the style of chief executive, bearing a responsibility for leadership and effective management of the HEI.²⁸ As noted in Chapter 4, the Financial Memoranda with the Funding Councils require the designation of a principal office, the ‘accountable officer’, responsibilities of which include satisfying the governing body that the HEI is complying with the conditions of funding. The holder of this post is normally the Vice-Chancellor or equivalent. The Financial Memorandum provides that if the Vice-Chancellor is instructed by the Council to take action which in his or her view is not a proper expenditure of public funds, he or she should report the matter to the Funding Council. In this respect the Vice-Chancellor is placed in an analogous position to the salaried treasurer of a local authority: if instructed to make an illegal payment such officers should disobey the order²⁹ even if acting under threat of dismissal.³⁰ This is on the basis that the treasurer acts in a fiduciary relationship towards the members of the corporation at large (the burgesses in an English borough).³¹ Paragraph 3 of the Model HEFCE Financial Memorandum (2010) states ‘Institutions are bound by the requirements of their Charter and statutes (or equivalent) and by rules relating to their charitable status. This document does not supersede those requirements but is intended to complement and reinforce them.’ This gives cause for doubt that in fact the Vice-Chancellor could act outside his or her primary responsibility to the HEI and the governing body; such uncertainty could give rise to difficulties. The Vice-Chancellor is also excluded from membership of the Audit Committee required to be established by the Financial Memorandum.

6.10

The power and influence exerted by the post varies: to a certain extent this variation is bound up with the difference in formal duties and powers laid down in the Charters and Statutes or their equivalent. The Vice-Chancellor is commonly described as the principal academic and administrative officer of the university. In most older Charters the formal role of the Vice-Chancellor is described in terms of keeping good order and discipline and formal powers usually relate to the admission and suspension of students. This is a direct descendant of the powers of the medieval Vice-Chancellors and of those of the Principals and Vice-Chancellors of the civic HEIs of the nineteenth and early twentieth centuries who were much more directly involved with individual students than the present-day chief executives.³² Some modern Charters granted more direct management authority to the Vice-Chancellor from the start; for example, the original Statutes of Brunel University³³ placed powers of appointment of most

6.11

²⁷ Articles of Association of CVCP, Art 1, July 1990.

²⁸ In formal terms at least, the Director of a polytechnic enjoyed considerably more power than did a Vice-Chancellor of a pre-1992 university: *Government and Academic Organisation of Polytechnics: Notes for Guidance* (1967) Appendix A to DES Administrative Memorandum 8/67.

²⁹ *R v Saunders* (1854) 3 E & B 763.

³⁰ *Re Hurlle-Hobbs, ex p Riley* (QBD, 1944).

³¹ *Attorney-General v De Winton* [1906] 2 Ch 106.

³² For example, the Principal of the Yorkshire College (which became the University of Leeds) was required to keep certain office hours to give advice and information to intending students (and no doubt have absolute discretion whom to admit): FT Mattison (1975) ‘Government and Staff’ in *Studies in the History of a University 1874–1974* 189.

³³ Statute 10.

staff in the hands of the Vice-Chancellor and Principal, something which is common in the post-1992 HEIs and also in the latest versions of Statutes, such as those of the University of Manchester (2004), which make precise provision for the powers and duties of the President and Vice-Chancellor (as the Vice-Chancellor is called) and the delegation of responsibility.

Specific powers vested in Vice-Chancellors

- 6.12** The specific powers accorded to Vice-Chancellors in relation to students vary: in some cases the power to refuse to admit as a student is unconditional, and does not have to be reported. In modern statutes it is clear that the power of admission and refusal can be delegated to appropriate officials.³⁴ In cases of refusal of admission the only domestic remedy is by way of petition to the Visitor, if there is one—since the Office of the Independent Adjudicator for Higher Education (OIAHE) does not deal with admissions cases—but it is considered that only in exceptional cases would the Visitor intervene, by virtue of the general principle that the Visitor does not interfere in the general management of the corporation to which he or she is Visitor. In other cases there is an obligation in a Statute or Ordinance to report the refusal to the university authority which has the power to regulate admission to courses: normally the Senate. The consequence of the obligation to report is not well defined. Vice-Chancellors also frequently have the power to suspend or exclude students from any part of the university or its precincts. As the precinct is normally expressly mentioned as a second area it is assumed that it means the environs, rather than the space defined by the boundaries of the property, i.e. the immediate neighbourhood of the university. In exercising these powers a Vice-Chancellor should normally apply the rules of natural justice, i.e. the nature of the charge which is the basis of the potential exclusion should be known to the student and the student should be given an opportunity to answer the charge, as held in the leading case now celebrating its 40th anniversary, *Glynn v Keele University*.³⁵ In addition the Vice-Chancellor would not exercise such powers if he or she were personally involved in the charge (for example an assault upon him or her in his or her room).
- 6.13** In a recent case *Freeman-Maloy v Marsden*³⁶ the Ontario Court of Appeals held that the President of York University was a ‘public officer’ against whom student F-M could bring a civil action for ‘misfeasance in public office’ after he was suspended for activities related to protests about Israeli actions in Palestine. The court noted: (i) the tort of misfeasance in a public office is founded on the fundamental rule of law principle that those who hold public office and exercise public functions are subject to the law and must not abuse their powers to the detriment of the ordinary citizen; (ii) although the President of the University is not subject to governmental control, she is in other respects subject to the regime of public law; and (iii) universities are at arm’s length for purposes of academic freedom, but they ‘operate under a statutory framework, perform functions that are regarded as public in nature, and derive the major part of their funding from government. . .’ However, in *Three Rivers DC v Bank of England (No 3)*³⁷ the House of Lords held that to succeed in this type of claim it had to be demonstrated that the public officer or authority was acting maliciously (which would be rare) or that they knew they had no power to perform an act, and they knew it would probably injure the claimant, and it did so injure the claimant. The tort involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful. The public officer must know of, or be subjectively reckless with regard to, the illegality of his or her proposed cause of action and he or she must know of, or be subjectively reckless with regard to, the probability that the

³⁴ University of Manchester (2004) Statute VIII(9).

³⁵ [1971] 1 WLR 487.

³⁶ [2006] OJ No 1228 (CA) (leave to appeal having been refused by the Supreme Court).

³⁷ [2003] 2 AC 1.

cause of action will cause loss to the claimant. In such cases the employer's vicarious liability is subject to the 'close connection' test in *Lister and Others v Hesley Hall Ltd*³⁸ The only reported case in the UK of a Vice-Chancellor being accused of misdemeanour in his office is *R v Dr Purnell, Vice-Chancellor of Oxford*³⁹ which was inconclusive, as the Crown was unable to access U's statutes and archives, and P was protected by the right against self-incrimination.

The Vice-Chancellor may also have powers related to staff; indeed it would be odd if as a 'chief executive officer' she or he was unable to act in disciplinary or other HR issues. Under the original 'May' Statute imposed on the pre-1992 universities by virtue of ss 202–205 ERA, the Vice-Chancellor had the power to dismiss academic staff and others covered by the Statute on the findings of a disciplinary tribunal.⁴⁰ Under the revised model Statute, and in regulations designed to reflect modern employment practice, this function is given to the administration, presumably in effect to the personnel/human resources department. The Vice-Chancellor takes no part in the disciplinary procedure where a matter is referred to the tribunal but decides whether to do so in the first place, and may take preliminary steps not constituting part of the formal disciplinary process, guided by the principles set out by Lord Slynn of Hadley in *Rees v Crane*.⁴¹ The Vice-Chancellor also has a formal role in the grievance procedure for staff covered by the Statute, where this still exists, or in replacement domestic legislation. Issues arising from the application of the Statute are covered in detail in Chapter 10.

6.14

F. The Deputy and Pro-Vice-Chancellors

In general terms a corporation cannot appoint deputies to act for it unless clear authority to do so exists in the Charter or Statutes.⁴² The early Vice-Chancellors had powers to appoint substitutes and deputies of their own in order to assist them with carrying out the functions, some of which they had themselves been delegated by the Chancellor. A Deputy or Pro-Vice-Chancellor is an example of such a deputy; he or she can substitute for the Vice-Chancellor.⁴³ Where there is power by Charter for an authority to appoint a deputy, the latter has all the powers of the principal unless appointed as a special deputy.⁴⁴ The Scottish HEIs do not have Pro-Vice-Chancellors but a range of Deputy, Vice-, and Assistant Principals. In the newer HEIs throughout the UK, and increasingly in the older ones, it is common to find at least the latter drawn from the ranks of administrative as well as academic staff, so that, for example, in a large HEI there may be a Registrar and deputy chief executive, or a Secretary and deputy Principal, but practice varies. Apart from the reserve duty of filling the post of Vice-Chancellor if it becomes vacant or if the Vice-Chancellor is otherwise unable to discharge the functions of the post, academic Deputy and Pro-Vice-Chancellors are normally assigned specific areas of work within the HEI and take the Chair at major committees. These posts are normally held for a limited term.

6.15

³⁸ [2001] UKHL 22.

³⁹ [1748] 1 W BI 37. Interestingly, in this case the court appears to have taken the view that the University of Oxford was liable to visitation, despite being a civil corporation.

⁴⁰ An Appendix to the Statute sets out the arrangements for discipline, dismissal, etc. of the Vice-Chancellor.

⁴¹ [1994] 2 AC 173, 189F–196F, especially 191G–192A and 192F–G; see also *Brooks v DPP* [1994] 1 AC 568, 580F–H.

⁴² *R v Gravesend Corporation* (1824) 4 Dow & Ry KB 117.

⁴³ A modern power of delegation is 'The Vice-Chancellor's duties and powers [except those relating to the appointment of Deputy and Pro-Vice-Chancellors] may be delegated by the Vice-Chancellor to the Deputy Vice-Chancellor, the Pro-Vice-Chancellors and, subject to the concurrence of the Council, to others.' (University of London (1994) Statute 12.)

⁴⁴ *Jones v Williams* (1825) 3 B & C 762, 771 per Holroyd J.

G. The Secretary and Registrar/Registry/Clerk and other administrative officials

Nature of the post of Secretary, etc.

- 6.16** Below the ‘chief executive’ level of the HEI, it is in the ‘administration’ that the issues raised in the introduction to this Chapter are of most importance, although we also have to consider academic officers such as Deans, who may have a limited and often temporary managerial role. If simply carrying out policies approved by the governing body or otherwise according to domestic legislation, then most of these employees can be considered as ‘underlings’ in the *Boal* terminology. An exception may be the chief administrative officer under the Vice-Chancellor, where titles vary; Secretary and Registrar (or both) are common, and formal duties of the post also vary. Unlike those occupying the nearest equivalent position in most other European countries (for example, Secretary-General or Chancellor), and given the relative importance of the position, it is surprising that few of them have legal qualifications. Some HEIs have eliminated the old ‘secretary’ or ‘registrar’ position in favour of those with specific financial, corporate governance, or facilities duties; and some have no chief administrative officer as such, but the importance of having someone who can ensure that the governing body acts within its powers and follows proper procedures has been stressed by the Nolan Committee⁴⁵ and in the various guides issued to governing bodies.⁴⁶ Most of the chief administrative officers are technically clerk to the governing body: this aspect of their work also attracts legal interest but many of them also have line management responsibilities for a wide range of administrative services. This explains the relative lack of legally qualified clerks, because they have tended to be appointed from the ranks of administrative ‘managers’—although many of them do not have formal management qualifications either. A brief survey in 2011 shows that some of them hold only first degrees in academic subjects or the equivalent professional qualification. In many instances it is not at all clear from information published on websites what their precise function is. However, an attempt by the University of Newcastle upon Tyne in 2010 to argue that information held by a Registrar in his capacity as certificate holder under the Animals (Scientific Procedures) Act 1986⁴⁷ was not ‘held’ by its governing body (and therefore not open to disclosure under FOIA), was described by the First Tier Tribunal General Regulatory Chamber (Information Rights), as ‘artificial and unrealistic’. The Registrar was an officer of the governing body, which held the information through him as certificate holder.⁴⁸ The decision was upheld in 2011 on appeal to the Upper Tribunal.⁴⁹

Potential conflict of interest

- 6.17** There appears to be a real risk of conflict between the holder of the chief administrative office and the chief executive (Vice-Chancellor or Principal) to whom he or she usually reports for management purposes, since it is possible that the former would be offering critical comment on the behaviour of the latter to the governing body. The risk can only be removed by separating out the role of clerk to the governing body, appointing someone with legal or company secretarial qualifications and making this post directly responsible to the governing body itself. Unfortunately, in most HEIs that would not be a full-time activity so there would be a risk of

⁴⁵ Committee on Standards in Public Life, Second Report (1996) para 104.

⁴⁶ For example, *Guide for Members of Governing Bodies* (1996) para 2.7 and Good Practice Suggestion 6, and its successors to the latest version in 2009.

⁴⁷ Pursuant to Directive 86/609/EEC.

⁴⁸ *British Union for Abolition of Vivisection v Information Commissioner, additional party Newcastle University* [2010] UKFTT 525 (GRC).

⁴⁹ *University of Newcastle upon Tyne v Information Commissioner and British Union for Abolition of Vivisection* [2011] UKUT 185 (AAC).

that individual not being sufficiently informed. Another issue is that ‘the dual accountabilities’ in the role of the clerk arguably privilege the governing body and the executive over academic decision-makers. The traditional form of tripartite governance in higher education has been eroded over time, but, given the responsibilities of the governing body in post-1992 HEIs for ‘determining the educational character’ of the HEI, ‘it may be worth considering whether it receives sufficient independent advice on academic and educational matters to carry out this function’.⁵⁰ Once again, it is to local authorities that we turn for analogy, particularly since the House of Lords’ judgment in *Attorney-General ex rel Co-operative Retail Services v Taff-Ely Borough Council*.⁵¹ In this case the clerk of the council—who would of course be legally qualified—had erroneously issued planning consent. The document issued referred to a non-existent resolution which in any event would have been *ultra vires*. The council could not subsequently confirm what was an error. From this it would appear that if, for example, a Secretary or Registrar informs a student that he or she has been granted a degree, when that has not in fact happened, the student will have no redress, except to complain to the OIAHE.

Other officers

A variety of other officers are employed by HEIs, in the majority of cases in a subordinate role to the Secretary or equivalent, forming the ‘civil service’ of the HEI. There is an increasing tendency to bring together the formerly separate functions of Finance Officer or Bursar and Secretary as financial planning, assisted by modern technology, becomes more a general management function: there is naturally still a need for accountants (in a modern book-keeping role) and supporting staff of differing professional expertise. It is rare to find any significant function formally delegated below the level of Secretary or equivalent, although professional officers in estates, finance, human resources, and other functions carry out a range of day-to-day administrative and management tasks. Occasionally other staff are designated in legislation, a modern example being the Human Tissue (Specification of Posts) (Scotland) Order 2006⁵² which specifies the post of ‘head of forensic pathology’ of a university for certain purposes connected with the Human Tissue (Scotland) Act 2006 (asp).

6.18

Indemnification

Officers of whatever rank will assume that they are indemnified for acts done in the course of their duties. However, in *Burgoyne and Another v Waltham Forest London Borough Council and Another*,⁵³ a contractual indemnity granted to officers for defaults committed by them ‘in or about the pursuit of their duties on behalf of their employer while acting within the scope of their authority’ may not, as a matter of construction, cover defaults committed by the officers in the course of activities authorized by the employer when that authorization is *ultra vires*. This is of particular relevance to the non-chartered HEIs where some acts may indeed be *ultra vires*. In *R v Lambeth London Borough Council, ex p Wilson*⁵⁴ the Court of Appeal overturned a finding that officers were personally liable for wasted costs arising from a decision not to contest a challenge by judicial review at the eleventh hour where the authority was not party to the proceedings. An order making a council official personally liable for the costs of an action would usually be inappropriate, but not always. It is important that officers take account of this risk, particularly since, unlike local authorities, the powers of which have been extended by the Localism Act 2011 to equate with those of individual persons, HEIs have panels limited by their governing instruments.

6.19

⁵⁰ *A Final Report to the CUC: Good Practice in Six Areas of the Governance of HEIs* (2004) pt 5.

⁵¹ (1982) 42 P&CR 1.

⁵² SSI 2006/309.

⁵³ [1997] BCC 347.

⁵⁴ (1998) 30 HLR 64 (CA).