4. (a) A defendant may be given a sentence concession even if one of his motives is self-interest, but a plea over-tainted with self-interest will gain no special consideration.
   (b) In particular, a guilty plea from mere recognition of the inevitable will not bring a discount.
5. If the defendant pleads guilty as part of a bargain with the prosecution involving the withdrawal of other charges, there will be no mitigation.
6. It remains a paramount principle that there may be no accretion to a defendant's sentence for contesting a charge.

DESMOND LANE*

THE UNIVERSITY VISITOR IN AUSTRALIA: MURDOCH UNIVERSITY v. BLOOM[1]

In the last decade much has been written about legal relationships between universities and students and the role of the courts in reviewing university decisions.[2] But relatively little attention has been given to the office of the university visitor: to the extent of his jurisdiction and to the question of how far the existence of that jurisdiction affects the availability of judicial remedies to members of a university who have grievances in respect of the conduct of university affairs.[3]

The visitorial office is of ancient origin. Its jurisdictional parameters remain entrenched in concepts suitable only to its alma mater: the ancient Oxbridge colleges.[4] In Australia all but six[5] of the University Acts provide for the visitorial office as follows:

> "The Governor shall be the Visitor of the University and shall have authority to do all things which appertain to Visitors as often as to him seems meet."[6]

* B.A., LL.B. (Monash), Legal Officer, Commonwealth Attorney-General's Department. The views expressed are the author's own.

1 Unreported, 16 April 1980, No. 2294 of 1979, W.A.S.C. F.C.

2 See especially G. H. L. Fridman, "Judicial Intervention Into University Affairs" (1973) 21 *Chitty's L.J.* 181; A. Samuels, "The Student and the Law" (1972-1973) 12 *J.S.P.T.L.* 252.

3 See generally J. W. Bridge, "Keeping Peace in the Universities: The Role of the Visitor" (1970) 86 *L.Q.R.* 531; W. Ricquier, "The University Visitor" (1977-1978) 4 *Dalh. L.J.* 647; P. Willis, Case Note, (1979) 12 *M.U.L.R.* 291.

4 Visitorial history is discussed by Bridge, ibid.; Ricquier, ibid.; W. H. McConnell, "The Errant Professoriate: An Enquiry into Academic Due Process" (1972) 37 *Sask. L.R.* 250; R. Pound, "Visitatorial Jurisdiction Over Corporations in Equity" (1936) 49 *Harv. L.R.* 369. See also *Ex Parte McFadyen* (1945) 45 S.R. (N.S.W.) 200; *Patel* v. *University of Bradford Senate* [1978] 1 W.L.R. 1488 (Ch.D.), aff'd [1979] 2 All E.R. 582 (C.A.).

5 I.e. University of Queensland, James Cook University of North Queensland, Griffith University, University of New England, University of New South Wales and the Australian National University. Visitorial jurisdiction in these universities probably remains in the relevant Parliaments to be delegated when occasion arises. For a contrary argument see T. G. Matthews, in an article forthcoming in *U.Qld.L.J.*

6 There are slight variations in the relevant provisions of the various University Acts. See Willis, op. cit. 294 fn. 21.

The Governor *qua* visitor has all those powers vested in the founder, the *fundatio perficiens*, of the University. The most familiar of these roles is the hearing and determining of complaints and appeals. This jurisdiction has been exercised on at least five occasions in Australia: in 1871,[7] 1884[8] and 1979[9] at Melbourne University, at the University of Tasmania in 1962,[10] and at Murdoch University in 1980.[11] Petitions and subsequent refusals to accept jurisdiction are more common and have occurred, for instance, at Melbourne University in 1879,[12] the University of Western Australia in 1923,[13] Sydney University in 1944[14] and Monash University in 1974.[15]

Not all complaints to which the university or one of its members *qua* member is a party are within the exclusive province[16] of the visitor. The line of demarcation between those complaints which come under the jurisdiction of the visitor on the one hand, and that class of cases which come under the jurisdiction of the courts on the other was stated by

[7] *Visitation at the University of Melbourne* (1871) 2 A.J.R. 87.

[8] See "The University Visitation" *The Argus* 11 January 1884, p. 6, cols. 5-6; *The Age* 11 January 1884, p. 6 col. 3; "The Governor's Decision" *The Argus* 24 January 1884, p. 9; col. 1; *The Age* 24 January 1884, p. 5, col. 7.

[9] *In the Matter of the University of Melbourne and a Petition to the Visitor—Judgment of the Visitor* (Unreported, 1979). A copy of the judgment is held by Melbourne University S.R.C. See also G. Maslen, "Students seek Winneke's aid" *The Age* 10 August 1979, 5; G. Maslen, "Students' plea to Governor could set a precedent" *The Age* 11 August 1979, 10.

[10] *In the Matter of a Petition Presented to the Visitor of the University of Tasmania* (Unreported, 1962) University of Tasmania Archives, Registrar's Office File, UT 88/1(4).

[11] *In the Matter of the Murdoch University Act, 1973-1978; Bloom v. Vice Chancellor of Murdoch University—Judgment of the Visitor* (Unreported, 1980) Secretary's Office, Murdoch University, and Government House, Perth. See also "Study leave dispute before Court" the *Australian* (Higher Education Supplement) 26 March 1980, 11.

[12] Unreported. See *Visitations 1879 and 1884* held by University of Melbourne Archives. See also Sir Ernest Scott, *A History of the University of Melbourne* (M.U.P., 1936) 89-91.

[13] See generally, W. Somerville, Vol. II, *A Blacksmith Looks at a University* (Unpublished Manuscript, University of Western Australia Archives, 1946) 713-716; F. Alexander, *Campus at Crawley* (C.W. Cheshire for Univ. of W.A. Press, 1963) 278-279.

[14] Which gave rise to, and is briefly discussed in, *Ex Parte McFadyen* (1945) 45 S.R. (N.S.W.) 200.

[15] Interview with J. D. Butchart, Academic Registrar, Monash University, 7 March 1980. The petition arose out of facts investigated by the Ombudsman and reported in *First Report of the Ombudsman, 30 October 1973 to 30 June 1974*, Victoria, 154-157.

[16] It is often said that a matter within the jurisdiction of the visitor is necessarily outside the jurisdiction of the courts: *Thorne* v. *University of London* [1966] 2 Q.B. 237; *Patel* v. *University of Bradford Senate* [1978] 1 W.L.R. 1488 (Ch.D.), aff'd [1979] 2 All E.R. 582 (C.A.). However, it has never been held that the visitor's jurisdiction is exclusive where the complaint is one of ultra vires, nor have any of the cases which espouse exclusivity of visitorial jurisdiction been concerned with jurisdictional errors. In such a case, it is suggested, there may well be a concurrent jurisdiction in the courts: cf. *R.* v. *Dunsheath; ex parte Meredith* [1951] 1 K.B. 127, 131-132. Wallace J. in *Bloom's* case noted the possibility of a "dual jurisdiction". In Victoria, a concurrent curial/visitorial jurisdiction may well have been achieved by the *Administrative Law Act* 1978.

Kindersley V.-C. in *Thomson* v. *University of London*[17] in the following manner:

> "Whatever relates to the internal arrangements and dealings with regard to the government and management of the house, of the domus, of the institution, is properly within the jurisdiction of the Visitor, and this Court will not interfere in those matters; but when it comes to a question of right of property, or rights as between the University and a third person *dehors* the University, or with regard, it may be, to any breach of trust committed by the corporation, that is, the University, and so on, or any contracts by the corporation, not being matters relating to the mere management and arrangement and details of their domus, then, indeed, this Court will interfere."

In *Murdoch University* v. *Bloom* the question arose whether visitorial jurisdiction encompassed disputes arising out of a contractual relationship between the university and persons falling within the visitor's jurisdiction *ratione personae*. In line with the Tertiary Education Commission's recommendations the Vice-Chancellor of Murdoch University had approved only half of the normal twelve months study-leave sought by Dr Bloom. Dr Bloom petitioned the Visitor claiming, inter alia, a declaration that he was entitled, by virtue of the terms and conditions of his contract of service, to a period of twelve months' study-leave. The University sought a declaration as to whether the Visitor had jurisdiction to hear and determine the matter. The West Australian Full Supreme Court concluded that the answer depended on whether the dispute could properly be characterized as "domestic", that is, whether, in the words of Kindersley V.-C. in *Thomson's* case, it was a dispute "relating to the mere management and arrangement and details of their domus".

A majority of the Full Court[18] declared that the Visitor did not have jurisdiction to determine the matter. In the leading judgment Burt C.J. stated that it could not be said that the dispute was necessarily outside visitorial jurisdiction simply because the matter arose out of a contract between the University and one of its members. The ultimate question was whether the construction of the study-leave clause in Dr Bloom's contract of service could be characterized as a "domestic" matter. The learned Chief Justice held that it could not:

> "The contract which is said to create [the right to twelve months study-leave] is a contract entered into between [Dr Bloom] and the body corporate—the University. The rights created by it are created by the application of the law of the land to the agreement entered into. The rights are *personal* to the parties to that agreement. They are rights with which the other corporators have no concern or interest. A dispute or difference of opinion between the parties as to the proper construction of that contract is not, in my opinion, an 'internal' or 'domestic' matter. *It is not a matter which relates to the management of the house and it is not a matter in difference which can be resolved by the application of*

[17] (1864) 33 L.J. Ch. 625, 634.
[18] Burt C.J.; Smith J.; Wallace J. dissenting.

the law of the house. Accordingly, in my opinion, it is not a matter within the jurisdiction of the Visitor."[19]

This should be contrasted with the dissenting opinion of Wallace J. who held that the dispute was within visitorial jurisdiction since the contract was plainly an internal matter; it had no importance outside the University. Wallace J. referred to an alternative report of *Thomson's* case[20] which records the words of Kindersley V.-C. in a slightly wider fashion, that is, as excluding visitorial jurisdiction from only those contracts made "outside the *domus*". As the contract in question was not made "outside the *domus*" it followed that entitlement to study-leave was essentially an internal affair. His Honour added that as the matter in dispute involved the construction to be placed upon a condition of employment common to most, if not all, lecturers at the University then, in effect, the case was really no different from that which would arise if the clause had been enshrined in a statute governing the employment of staff. Had the clause appeared in a statute governing employment of staff, the Visitor would clearly have had jurisdiction to determine a dispute turning on the construction of that clause.[21]

The dissent of Wallace J. in *Bloom's* case was the result of a fundamental difference of opinion about the scope of visitorial jurisdiction. Wallace J. seemed prepared to accept that the jurisdiction encompasses everything (apart, one may assume, from disputed public rights or duties[22]) which occurs within the walls of the University. Conversely, the majority imposed an "upper limit" on the jurisdiction to the extent that the visitorial province does not include matters which, although occurring within the walls of the University, are purely personal in nature in that their ramifications do not extend to the management of the concern. The opinion of the majority is in accord with New Zealand[23] and Canadian[24] views which also accept that visitorial jurisdiction does not include the resolution of all disputes arising out of contracts made between a university and its members. To this extent, to say that the visitor has jurisdiction over "domestic matters" means something more than that the matter in question is merely intra-mural. Where then, is the line of demarcation to be drawn? The logical conclusion to be drawn from *Bloom's* case is that if a contractual dispute is predominantly concerned with the *domus* (the 'house') and the organization therein

19 Reasons for Judgment per Burt C.J., 8 (italics mine). Smith J. delivered a short concurring judgment.

20 I.e. (1864) 10 Jur. (N.S.) 669, 671.

21 Historically, the principal duty of the visitor, as the founder's delegate, was construction of the foundation instrument and statutes made pursuant thereto: *Philips* v. *Bury* (1694) Show. P.C. 35; 1 E.R. 24; *Attorney-General* v. *Magdalen College, Oxford* (1847) 10 Beav. 402; 50 E.R. 637; *Ex Parte McFadyen* (1945) 45 S.R. (N.S.W.) 200, 202.

22 *Ex Parte King; re University of Sydney* (1944) 44 S.R. (N.S.W.) 19, 31; *King* v. *University of Saskatchewan* (1969) 1 D.L.R. (3d) 721 (Sask. C.A.), aff'd (1969) 6 D.L.R. (3d) 120 (Can. S.C.); *Re Webb and Simon Fraser University* (1978) 83 D.L.R. (3d) 244 (B.C.S.C.).

23 *Bell* v. *University of Auckland* [1969] N.Z.L.R. 1029.

24 E.g. *McWhirter* v. *Governors of the University of Alberta* (1976) 63 D.L.R. (3d) 684; *Riddle* v. *University of Victoria* (1978) 84 D.L.R. (3d) 164, aff'd [1979] 3 W.W.R. 289 (B.C.C.A.).

rather than the individual rights or duties of members of the university, then it is domestic and within visitorial jurisdiction.

It may also be said that the visitor's jurisdiction in cases arising under "internal" contracts is confined to disputes which concern the exercise of discretions, for example, the discretion of a departmental chairman to determine the teaching duties of one of his subordinates. This limitation is the result of the unanimous finding in *Bloom's* case that the question of whether or not the Vice-Chancellor had been "harsh and unjust" in refusing Dr Bloom's full study-leave was a question for the Visitor. The significance of this finding, however, is belittled by the oft applied principle that visitors will not interfere with the honest exercise of a discretion.[25] It is not material to argue that different persons exercising the discretion with equal honesty might have reached a different conclusion.[26] For instance, as a result of *Bloom's* case Sir Wallace Kyle, as visitor to Murdoch University, considered the question of whether or not he should overturn the Vice-Chancellor's decision. His Excellency stated that he was not prepared to "interfere with the exercise of a discretionary power, unless that power has been exercised 'from motives wrong, illegal or corrupt' ".[27] This should be contrasted with the view taken eight months earlier by Sir Henry Winneke as visitor to the University of Melbourne[28] when His Excellency stated that he would not:

> "encroach upon the functions of a body within the University to whose discretion [an] aspect of internal management has been entrusted by or under the foundation instrument if that body has exercised the discretion honestly[29] . . . and that involves forming the opinion genuinely and not dishonestly or irrationally."[30]

His Excellency defined "irrationally" as meaning, "something more than not being reasonable; there has to be an absence of reason to the point where there is no real opinion".[31] Thus, both Sir Wallace Kyle and Sir Henry Winneke agreed that they would intervene if the decision-maker had acted in bad faith, that is, not honestly or genuinely. Both also agreed that a mere error in the exercise of discretion would not be sufficient to justify visitorial intervention. Sir Henry Winneke, however, would go one step further. He would intervene if, in truth, the decision-maker had not really formed an opinion, had failed to exercise his discretion.[32] It is evident from

[25] Cf. *R.* v. *Hertford College, Oxford* (1878) 3 Q.B.D. 693, 701. Burt C.J. acknowledged that this is a matter which goes to the exercise of visitorial discretion, and not to the question of whether jurisdiction exists to entertain the petition: Reasons for Judgment per Burt C.J., 10.

[26] Cf. *Ex Parte Forster; re University of Sydney* (1963) 63 S.R. (N.S.W.) 723, 728.

[27] His Excellency stated that the expression "from motives wrong, illegal or corrupt" was not a code on the subject but well expressed the rule that ". . . before I could interfere with the Vice-Chancellor's discretion I would need to find something much more weighty than that I myself would have reached a different decision": Judgment of the Visitor, Murdoch University, 1980, see fn. 11 supra, 15.

[28] See fn. 9 supra.

[29] Ibid. 20.

[30] Ibid. 21.

[31] Ibid. 41.

[32] Cf. the Dixonian view of "unreasonableness", that is, that an exercise of discretion

the language of the learned visitors that the standards they are willing to apply are far less stringent than those which are applied by the courts. For instance, if a decision-maker takes into account irrelevant considerations, fails to consider relevant considerations or acts for an improper purpose (but not in bad faith) a visitor may refuse to intervene whilst, in these same circumstances, it is well settled that a court exercising supervisory jurisdiction will quash the decision or order that it be made according to law.

Finally, it should be noted that Burt C.J. in *Bloom's* case referred to *Orr* v. *University of Tasmania*[33] and suggested that the only reason why that case was regarded as justiciable was because "the Courts will not take notice of . . . Visitorial jurisdiction unless its existence is brought to their attention".[34] In *Orr's* case a Professor was summarily dismissed for seducing a female student. Both the Tasmanian Supreme Court and the High Court of Australia held that his immorality was totally inconsistent with the proper performance of his duties within the University and summary dismissal was justified. The Professor's conduct was inconsistent with his duties to teach and examine with a detached and dispassionate attitude towards his students. According to Burt C.J. the matters disputed in *Orr's* case were properly within the jurisdiction of the Visitor. Such matters relate to the management and details of the house and can be resolved by application of the "law of the house".[35] This view is fortified by a consideration of the visitor's role as an adjudicator resting his decisions on the consuetude of the kind of institution in question. The ability of a professor to teach and examine his students is surely best assessed by an adjudicator theoretically intimate with the institution's administration and cognizant of its special problems. It is noteworthy that the courts seemed reluctant even to consider Professor Orr's complaint. Indeed, toward the end of proceedings in the High Court Dixon C.J. stated:

> "There is one thing I observe; nobody seems to have referred at all to the Visitor and his jurisdiction in a matter like this. Was that ever referred to at all?"[36]

Apparently the jurisdiction had been overlooked. It may have been as a consequence of this issue being raised by Dixon C.J. that a petition was subsequently addressed to the Visitor, Lord Rowallan. Although His Excellency accepted jurisdiction in the complaint[37] he held that the petition

will be invalid not merely because it is inexpedient or misguided but because it "could not reasonably have been adopted as a means of attaining the ends of the power . . . it is not a real exercise of power": *Williams* v. *City of Melbourne* (1933) 49 C.L.R. 142, 155 per Dixon J.

[33] [1956] Tas. S.R. 155, aff'd (1957) 100 C.L.R. 526.

[34] Reasons for Judgment per Burt C.J., 9.

[35] I.e. the visitor administers a system of law theoretically distinct from the law of the land. His "law" is the intentions of the founder express or implied in the foundation instrument and considerations of what is expedient for the community concerned. Normally the "law of the house" refers to matters governed by the special statutes or regulations of the university: Reasons for Judgment per Smith J., 2.

[36] *Orr* v. *University of Tasmania*, 22 May 1957, High Court Transcript, 139.

[37] See fn. 10 supra, 2. It is suggested that His Excellency was in error and that he did not have jurisdiction, not because the subject matter of the dispute was not

should be dismissed principally because of the long delay (5 years) in bringing the petition.[38]

What then is the result of *Bloom's* case? First, it acknowledges that not all contractual disputes occurring within the university are outside the jurisdiction of the courts. Secondly, it suggests that "internal" contractual disputes are only within visitorial jurisdiction if they directly concern the management of the university as a whole. Finally, albeit unclearly, it indicates that such disputes may nevertheless remain outside visitorial jurisdiction if they do not concern the exercise of discretions. It is suggested that this delimitation is to be applauded. It accommodates both a curial jurisdiction to resolve personal contractual disputes and a visitorial jurisdiction to determine matters which significantly influence the academic management of the university. The decision, unlike those of the Supreme Court of New South Wales which have preceded it,[39] provides for the needs of university "communities". Unfortunately it has not put an end to the uncertainties which surround the visitorial office.

ROBERT J. SADLER*

within visitorial cognizance, but because of the principle that a decision of a superior court stands until set aside on appeal. The fact that the Tasmanian Supreme Court and the High Court had taken the matter to judgment *a priori* removed the jurisdiction of the visitor.

38 Professor Orr persisted. A later action in defamation and assault against his accuser, the girl's father, was struck out as an abuse of the process of the court: *Orr* v. *Kemp* [1962] Tas.S.R 155.

39 *Ex Parte King; re University of Sydney* (1943) 44 S.R. (N.S.W.) 19; *Ex Parte McFadyen* (1945) 45 S.R. (N.S.W.) 200; *Ex Parte Forster; re University of Sydney* (1963) 63 S.R. (N.S.W.) 723, 735.

* B.Ec.