

Ecclesiastical law update

Although the production of new church legislation is unending, no new measures have been passed this year. However, two draft measures, the Care of Cathedrals (Amendment) Measure and the Church of England (Miscellaneous Provisions) Measure, are currently before the Ecclesiastical Committee in Parliament. In July the General Synod rejected proposals that would have led to what were dubbed by the press 'heresy trials' ie a new system for handling complaints against the clergy in respect of doctrinal, ceremonial, or ritual offences. However, the courts have, as usual, been busy.

Church and state

Aston Cantlow PCC v Wallbank [2003] UKHL 37; [2004] 1 AC 546; (2003) 147 SJ 812 has already been the subject of extensive general comment. The case concerned the ancient common law duty, to which certain landowners are subject, to repair the chancel of their parish church. Since 1932 this duty has been enforced by the parochial church council (PCC). The landowners in this case contested liability, seeking to rely upon Art 1 to the First Protocol of the European Convention on Human Rights, incorporated into English law by the Human Rights Act 1998. To succeed, the landowners had to show that the PCC were a 'public authority' within the meaning of s 6(1) of the 1998 Act. A public authority for the purposes of s 6 can be either a core public authority that exercises functions which are broadly governmental – so that they are all functions of a governmental nature – or a hybrid public authority, some of whose functions are of a public nature. The majority of the House of Lords held that although the Church of England, as the established church, had special links with central government and performed certain public functions, it was

- Legislation
- Church and state
- Memorials
- Exhumation
- Telephone masts
- Overlapping jurisdiction
- Stained glass windows
- Community uses
- Child welfare
- Moving a font

by Gregory Jones
and Edward O'Bree

essentially a religious organisation and not a governmental organisation. PCCs were part of the means whereby the Church promoted its religious mission and discharged financial responsibilities in respect of parish churches. The functions of PCCs were primarily concerned with pastoral and administrative measures within the parish and were not wholly of a public nature, and therefore they were not core public authorities under s 6(1).

The majority also considered that the fact the public had certain rights in relation to their parish church was not sufficient to characterise the actions of a PCC in maintaining the fabric of the parish church as being of a public nature, so that when the plaintiff took steps to enforce the defendants' liability for the repair of the chancel, it was not performing a function of a public nature, which



rendered it a hybrid public authority under s 6(3)(b). Accordingly, the defendants' chancel repair liability was a private law liability arising out of the ownership of the land, and the enforcement of that liability by the plaintiffs was an act of a private nature and therefore excluded by s 6(5) from coming within the ambit of s 6(3)(b) of the 1998 Act.

From the point of view of the Church of England it was important to establish that the cost of chancel repairs could still be recovered after the enactment of the Human Rights Act. The effect of this decision will be to make it harder to argue that other aspects of the Church's functions are amenable to review by reference to the provisions of the Human Rights Act. The narrow interpretation of the meaning of public authority will also have implications for non-church cases. It is by no means clear however that the House of Lords was correct and this will be tested if, as must be likely, the landowners take their case to the European Court of Human Rights. That the matter is arguable is demonstrated by the fact that Lord Scott did consider that the enforcement of the chancel repair liability was a function of a public nature. However, he considered that the liability was a law deemed necessary to control the use of property in accordance

Gregory Jones is a barrister at 2 Harcourt Buildings and appeared for the Bishop of Southwark in *R(B) v Southwark LBC*. That part of this article has been written solely by Edward O'Bree who is a barrister

SOLICITORS JOURNAL

In search of a body

In *Re Holy Trinity, Bosham* (Chichester Consistory Court: Hill Ch) [2004] 2 WLR 833 and [2004] 2 All ER 820, the incumbent and churchwardens sought a faculty for the archaeological investigation of a gravesite which some believed contained the remains of King Harold II. The Chancellor held that as a matter of Christian doctrine burial in consecrated ground is final and therefore a presumption exists against exhumation. Departure from the presumption can only be justified by special circumstances. An applicant might be able to demonstrate a matter of great national, historic or other importance concerning the human remains or else that there is value in some particular research or scientific experimentation which would justify exhumation. Only if the combined effect of the evidence relating to these factors proved a cogent and compelling case for the legitimacy of the proposed research would such special circumstances be made out. In the present case, academic opinion was of the view that any human remains were unlikely to be those of King Harold and that the chances of obtaining any DNA samples from such remain was as low as 30 per cent. DNA samples were, however, useless in the absence of a known descendant of King Harold. Given the margin of error in carbon dating, such tests could produce inconclusive results. Against this background, the petition was refused.

It does not seem very important to know where King Harold is buried, and it is a weak justification for exhumation that it would satisfy curiosity in respect of an unimportant historic fact. Nonetheless the Chancellor did not entirely rule out the possibility that a petition might be justified on the basis of historical research. However he was able to refuse the petition on the basis that it was unlikely that historical curiosity would be satisfied in any event.

with the general interest and accordingly did not offend Article 1.

Memorial without a body

In *Re St Peter, Limpsfield* (Southwark Consistory Court: Petchey Deputy Ch) [2004] 3 All ER 978, a faculty was sought for a memorial in a churchyard. As the deceased's ashes had already been scattered elsewhere upon Limpsfield Common, the memorial, if constructed, would not have served to mark a grave. The deceased had been church warden and treasurer of the PCC. The Deputy Chancellor held that although there was a reasonable objection to the erection of a memorial in a churchyard which resembled (but was not) such a headstone commemorating interred remains, such an objection could be met by appropriate wording on the memorial. There was, nonetheless, more fundamental objection. The purpose of a churchyard was first and foremost for the interment of human remains. 'Memorialisation' was a consequence of remains being buried in a churchyard and, first and

foremost, it is to enable relatives and others to know where the remains of the deceased are interred. More general memorialisation such as to record the achievements of the deceased and his standing in the community and to contribute what may be an artefact of intrinsic value to enhance the churchyard are secondary. As consecrated ground for burials was in short supply both in this churchyard and generally, permitting such a memorial would not be appropriate. The faculty was refused. As the Deputy Chancellor remarked, this appears to be the first time that such a question has been considered by a consistory court. In the circumstances the approach adopted by the court was thoroughly sensible.

Photographic memorials

In *Re Christ Church, Timperley* (Chester Consistory Court: Turner QC Ch, 29 January 2004), a petition was sought to introduce a photographic plaque on to a memorial in a churchyard. Tragically, the deceased had died in a road accident, aged 30. The relevant diocesan churchyard regulations did not permit such plaques and both the diocesan advisory committee and the PCC opposed the petition. There is no reported case in which permission has been given for a photographic representation. The Dean of the Arches in the leading case refers to this as "alien to an 'English country churchyard'". There was however no theological objection, and the Chancellor observed that the time may come when tastes and practice have changed so that it is appropriate to grant permission. He did not think that that time had come and accordingly refused the petition.

For the time being the courts have held this line against photographic representations. No doubt petitioners will keep trying and where the circumstances are tragic the refusal can look 'tragic and heartless' (as the Chancellor accepted). The petitioners did not seek to rely on Art 8 of the ECHR which might be considered to be relevant.

Telephone masts

In *Re St Mark, Talbot* (Salisbury Consistory Court: Wiggs Ch, 30 March 2004), a faculty was sought for leave to enter into a licence with a mobile telecommunications provider to install an antenna in

the roof of the church. Objections to the licence concerned the proximity of the proposed antenna to the village primary school. In the absence of any evidence that such antennae constitute a hazard to human health, the faculty was granted.

This judgment follows that of Grenfell Ch in *Re St Margaret, Hawes* [2003] 1 WLR 2568, in which it was held that there could be no objection on health grounds to a proposed antenna which would cause levels of radio waves that fell within the International Commission on Non-Ionising Radiation Protection guidelines recommended by the government. This is a similar approach to that taken by planning inspectors in relation to planning permission for radio masts. Nonetheless cases of this kind pose pastoral problems for the Church. If local people protest sufficiently vociferously, the parish may be reluctant to proceed – feeling that potentially alienating its neighbours is not the right way to promote mission.

Overlapping jurisdiction

In *Re St Lawrence, Alvechurch* (Worcester Consistory Court, Mynors Ch) (2003) *The Times*, 4 September, a petition was sought to extend a Grade II* listed church building – also in a conservation area – to provide a church hall and related facilities and to construct a car park. Planning permission had been issued in respect of the works. The planning authority in so doing had taken account of the effect of the proposal on the listed building and the conservation area – as it was bound by statute to do. The Chancellor took the view that where a consistory court has before it an application for works affecting the interior of a church that is a listed building or in a conservation area, and where planning permission has been granted for those works, then – unless the court can be shown that the planning authority failed to have special regard to the preservation of the building or to the preservation or enhancement of the character of the conservation area – the court is entitled to assume that the authority made the correct decision. In so holding, the Chancellor is likely to have been wrong – he certainly was differing from the approach taken by in *Re St Mary, St Giles and All Saints, Canwell* (Lichfield Consistory Court: Coates

Deputy Ch) (1997) 5 Ecc LJ 71. Nonetheless the point in most cases is probably a semantic one – a chancellor is on any view entitled in the exercise of his judgment to attach weight to the fact that, having considered the effect on the listed building and conservation area, the local planning authority considered it appropriate to grant the requisite permission.

Stained glass windows

In *Re St Petroc, Inwardleigh* (Exeter Consistory Court: Briden Deputy Ch, 11 March 2004), the Diocesan Advisory Committee opposed the grant of a faculty for a new stained glass window on what were, essentially, aesthetic grounds. The Committee had four separate objections to the artist's design for the new window. The Chancellor noted that it was not part of the judge's function to "supplant the role of the artist by imposing a scheme of his own". Nevertheless, he held that if two particular elements of the design were modified to the satisfaction of the Committee, a faculty would be granted.

This judgment is contradictory. It professes a 'hands off' approach to artistic judgment, but then imposes conditions relating to matters of artistic judgment. However, the Chancellor adopted a pragmatic and common sense approach which – it is to be hoped – will be to the likely general satisfaction of all parties.

Community uses

Re St Luke, Grimethorpe (Wakefield Consistory Court: Collier QC Ch, 22 May 2004) concerned the large unlisted parish church – built in 1904 – of the well known colliery village of Grimethorpe in South Yorkshire. The pit was closed in 1992. The congregation declined to 10, the church was vandalised and in 2001 the PCC recommended that it be closed and demolished. The diocese disagreed, and a new priest was appointed. He revived the earlier plan for a 'village hall within the church': dividing the church in two and inserting three floors at the western end for communal uses. The rooms so provided would be used by the community, and might even be used by businesses in the 'start-up' phase. The eastern end of the church would be kept as an area for the purposes of worship. The Chancellor held that the scheme was

necessary – the alternative inevitably looked like redundancy – and that it would not adversely affect the architectural or historical character of the church. Accordingly he granted the faculty.

This case is interesting as an example of the pragmatic and flexible way in which chancellors are in appropriate cases prepared to authorise non-church uses of church buildings. There must however be some doubt as to the legality of such a permission. The local planning authority had taken the view that what was proposed did not involve a material change of use of the land and thus require planning permission: surely a surprising decision. The position as regards rating had not been resolved at the time of the Chancellor's decision. One would expect that council tax would indeed be payable (see *Glenwright (VO) and Durham City Council v St Nicholas PCC* [1988] RA 1) on the basis that the relevant parts of the building were not a place of religious worship.

Child welfare

In *R (B) v LB of Southwark and the Bishop of Southwark* [2003] EWHC 3438 (Admin) permission was sought to apply for the judicial review of recommendations concerning the claimant, the incumbent of a parish in the Diocese of Southwark. The claimant had been arrested on suspicion of possessing indecent images of children, but charges were dropped when another man who had been resident in the vicarage admitted possession of the images in question. Shortly after the arrest, a child protection strategy meeting was held by the defendant's social services. One of the recommendations of the meeting was that an officer from social services would provide a professional opinion for the diocese in relation to the safeguarding of children in relation to the claimant. This document recommended that the claimant should not be endorsed as a school governor, nor allowed to exercise responsibility for the welfare of children without close supervision. The claimant contended that it was procedurally unfair that he had not been interviewed for the purpose of the officer's opinion. Both the defendant and the Bishop of Southwark, as interested party, argued that there had been no decision which was amenable to judicial review. Kay J followed *R v Chief*

Constables of C and D, ex p A (unrep, Turner J, 25 October 2000), holding that the passing of information between agencies did not amount to a decision that should be judged according to the principles of procedural fairness.

This case is of importance in the context of public law generally and, more specifically, to the law relating to the care of children. In the context of ecclesiastical law, there will be situations where it is the advice of the bishop – rather than that of social services – which will potentially be subject to criticism by a vicar or church warden or other church officer. The case furnishes an argument why, in these circumstances, the bishop shall not be subject to judicial review. Once however action has been taken that can be categorised as a decision then, of course, different considerations would apply.

Moving a font without a faculty

Re St Mary and All Saints, Trentham (Lichfield Consistory Court: Judge Shand Ch, 12 July 2004) was a case that attracted widespread publicity. The church is Grade II* listed and was designed by Sir Charles Barry. The font at the west end was an integral part of the design. The vicar moved it without a faculty. He thought that he was acting for the good of the mission and ministry in the parish, and had the approval of the PCC; on the other hand, there was a "strong feeling of alienation among many of the older and more traditional members of the congregation". The move was to provide a space for mission-linked activities like a mother and toddler group, prayer breakfasts and marriage enhancement courses. In considering an application for a faculty, the Chancellor accepted that there was a need for the relocation on the basis of these activities, which would outweigh the harm caused to the building's historical and architectural merit. The problem was that the place to which the font had been moved – the east end of the north aisle – was unsatisfactory ("ill thought out and cluttered", as the Chancellor put it). He adopted the test of whether he would have granted a faculty if the application had been made prospectively rather than retrospectively. He clearly would not have granted a permanent faculty. However he held that "on fine balance" granting a five-year temporary faculty would "meet the justice of the case" (he did not say in terms that he would have granted it). The five-year period was to enable the parish to come forward with comprehensive and hopefully acceptable plans for re-ordering.

The vicar and churchwardens were ordered to pay the costs of the proceedings. This will be a disincentive for others to emulate what the vicar did in this case. Nevertheless it is hard to escape the feeling that the vicar did achieve unlawfully what he would not have achieved by using the proper procedure. The ecclesiastical exemption is currently under review by the Department of Culture, Media and Sport. This case is grist to the mill of those who – like English Heritage – wish to see the exemption abolished.