

Update: ecclesiastical

Gregory Jones and Cain Ormondroyd discuss works to listed and other church buildings, equality legislation and cremation of human remains

THE 'ECCLESIASTICAL EXEMPTION'

means that works to listed Anglican churches – of which there are a large number – do not require listed building consent but are governed by the faculty jurisdiction of the consistory court. In relation to external works, planning permission for the secular authorities is also required but internal works are controlled solely through the faculty jurisdiction.

Each diocese has a consistory court (presided over by a chancellor) which has the same status as any other court. Appeals against decisions of the consistory court may be made with leave to the Court of Arches (for those dioceses within the Province of Canterbury; and the Chancery Court of

York for those within the Province of York). The test for the grant of leave to appeal to the Court of Arches has been recently considered which confirmed that it should have: "A real prospect of success," or that "there is some other compelling reason why the appeal should be heard" (*In Re St Mary's Churchyard* [2010] PTSR 274 at 285 B-E).

Works to listed church buildings

The principal guidance for works to the interior of a listed church is found in the *St Helens, Bishopsgate* [1993] 3 Ecc LJ 256, 12 CCCC No 23 (endorsed by the Court of Arches in *St Luke the Evangelist, Maidstone* [1995] Fam 1, Ct of Arches) which posed the following questions:

- (1) Have the works been shown to be necessary for pastoral wellbeing or some other compelling reason?
- (2) Will the works adversely affect the character of the church as a building of special architectural or historic interest?
- (3) If the answer to (2) is yes, does the necessity outweigh the adverse impact such that a faculty should be granted?

The application of these questions was considered by Mynors Ch. in *Re Great Malvern Priory* [2009] PTSR 1408, which held that there should be no presumption against

change in general, just against change that is harmful. Therefore, if a change is not strictly necessary, but is also not harmful to the character of the church, then it should be allowed. Thus the court held there is no real significance to the order in which the *Bishopsgate* questions are asked (this seems contrary to the clear line taken by the Court of Arches in *St Mary the Virgin, Sherbourne* [1996] Fam 63). However, in *Re St Peter, Draycott* [2009] Fam 93, the Court of Arches indicated that the order of these questions is indeed significant. If the works are not shown to be necessary, then it is not permissible to ask the following questions. This applies a clear presumption against any major changes to the interior of a listed church, not just adverse changes. The rejoinder may be that these remarks were *obiter* (see Mynors Ch. writing extra-judicially (2009) 11 Ecc LJ 266); it seems therefore that the debate will continue.

Jurisdiction to grant interim faculties

In *Re St Mary White Waltham* planning permission had been granted for a new church hall. A faculty was also required. The faculty proceedings were delayed to such an extent (including by an attempt at mediation) that the period by which the planning permission had to be commenced was nearing expiry. The chancellor granted an interim faculty for



minor works to allow its implementation (Judgment No 1, [2010] PTSR 274). The Dean of the Arches, refusing permission to appeal, held that there was no real prospect of overturning the conclusions, that a chancellor does have jurisdiction to grant an interim faculty and that it is not necessary to comply with the formal notification procedures in respect of the proposed interim works.

Interrelationship between faculty and planning jurisdiction

In *Re St Mary White Waltham* (Judgment No 3, 15 January 2010) the final determination of the petition required the chancellor to determine to what extent he could or should revisit issues considered and determined by the planning authority. His preferred approach, aside from authority, would have been to hold that the faculty jurisdiction was limited in its extent to matters that directly impinge on the church or churchyard (thus excluding, for example, traffic issues except to the extent that the traffic noise might impinge on services in the church). However, in light of the body of existing decisions by chancellors (which, although not binding, were persuasive) he took the approach that a consistory court should accept the reasoned decisions of a planning authority *unless* these were shown to be wrong by cogent evidence. In *Re St Mary, Westham* (24 June 2009) Hill Ch held that: "Where matters have been considered in relation to planning permission and such permission has duly been granted, it is not open for this court to revisit the matter." If he is suggesting that as a matter of law it is not open to the chancellor to reopen such matters then he is overstating the position.

Building on burial grounds

Re St Mary White Waltham (Judgment No 3, 15 January 2010) is also notable for the conclusion, reached following a careful consideration of the authorities, that the law does permit the construction of a detached building for ecclesiastical purposes in a churchyard that is still in use for burials (although curiously the same would not be permissible in a disused churchyard by virtue of section 3 of the Disused Burial Grounds Act 1884).

Religious dress

Ms Eweida was a BA hostess not permitted to wear a visible crucifix at work. BA had already bowed to popular pressure and changed its uniform policy. Ms Eweida's claim in respect of discrimination and harassment was rejected by the Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT). Her unsuccessful appeal to

the Court of Appeal (see solicitorsjournal.com, 12 February 2010) was on the single issue of indirect discrimination, and was probably doomed from the start by her admission that wearing a crucifix was not a requirement of her religion but a "personal choice". This had founded the conclusion in the ET (upheld in the EAT) that no group of 'persons' would have been disadvantaged by the uniform policy, as was required for a finding of indirect discrimination.

Noah v Desrosiers (ET, May 2008), relating to a Muslim hairdresser refused a job because she wore a headscarf, and *R (Watkins-Singh) v Aberdare High School* [2008] EWHC 1865 (Admin), a Sikh schoolgirl's challenge to her school's refusal to allow her to wear a small bangle, were both successful on the grounds of indirect discrimination (in the latter case, on racial as well as religious grounds) but not on human rights grounds.

Religion and sexual orientation

Equality legislation has also not infrequently been used against believers to prevent them infringing the rights of others. The case of the gay couple refused B&B accommodation has been much in the news recently following comments by Chris Grayling, Conservative MP. That case illustrates the fact that it is now prohibited (under the Equality Act (Sexual Orientation) Regulations 2007) to refuse the supply of services on the grounds of sexual orientation.

This prohibition was said to be engaged in the case of *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 (see solicitorsjournal.com, 15 December 2009). This was the case of a Christian registrar who refused to register civil partnerships as she believed that marriage was a union between a man and a woman. She was disciplined for this refusal and refused promotion. The ET found direct and indirect discrimination and harassment on the grounds of her belief. This finding was overturned by the EAT and subsequently by the Court of Appeal. Essentially, the ET had erred by (1) finding direct discrimination where in fact all employees had been treated the same in being required to register civil partnerships; (2) not concluding that the treatment was on the basis of Ms Ladele's beliefs as opposed to her conduct in refusing to register civil partnerships; and (3) identifying the incorrect aim in respect of indirect discrimination. If the aim was, as the ET had found, the efficient administration of the system of registration, then the interference with Ms Ladele's rights would be disproportionate. However, the true aim was to provide a non-discriminatory and inclusive service, and the only way of doing that was by obliging all registrars to

register civil partnerships.

The prohibition in the 2007 regulations was relied on with less effect in the case of *Catholic Care v Charity Commission* [2010] EWHC 520 (see solicitorsjournal.com, 17 March 2010). This concerned a catholic adoption agency which refused to provide its adoption support services to gay parents. Following considerable political controversy, no exemption had been made for such agencies from the general prohibition. However, there was an exemption for charities whose charitable purpose confined them to providing benefits only to persons of a certain sexual orientation. One purpose of this was to provide for charities working to benefit those of a minority sexual orientation; e.g. a helpline and support service for gay people suffering victimisation. Briggs J found that there was nothing in the wording or purpose of the legislation to prevent Catholic Care from coming within the exemption, provided that the redefined purpose was indeed a charitable one. There would be a need for the differential treatment of same-sex couples by the agency to be objectively justified by "clear and weighty" reasons if the agency was to remain human rights compliant and a charity. The matter was remitted to the Charity Commission for a determination to be made as to whether the public benefit provided by the agency would give the necessary "clear and weighty" justification for its differential treatment of same-sex couples. A decision is expected from the commission in May this year.

The law in this area is of course due to be governed by the Equalities Act 2010 which was rushed onto the statute book recently. This will, if implemented as expected, harmonise provisions on discrimination with effect from October.

Hindu cremation

The thorough approach of the court in *Catholic Care* to human rights issues can be contrasted with that in *R (Ghai) v Newcastle City Council* [2010] EWCA Civ 59. Mr Ghai wanted a traditional Hindu cremation in the open air, but legislation required that all cremations be carried out within a 'building'. Human rights arguments had failed but a technical argument on the meaning of the word 'building' in the legislation succeeded, as it was argued that the structure on which he wished to be cremated would be a 'building', although it would allow sunlight to shine directly on his body.

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