

## RECENT ECCLESIASTICAL CASES

edited by  
RUTH ARLOW  
*Barrister*

JUSTIN GAU  
*Barrister, Deputy Chancellor of the Diocese of Lincoln*

and  
WILL ADAM  
*Priest-in-Charge of Girtton, Ely Diocesan Ecumenical Officer*

*Re St Nicholas, Swayfield*  
(Lincoln Consistory Court: Collier Ch, January 2002)

*Clearing of churchyard—burying over*

The petitioners sought a faculty for the clearing of an area of the churchyard by the removal of four headstones which would be erected elsewhere within the churchyard. The petitioners stated that there was no alternative space for continuing burials within the churchyard and that there was no available adjoining land which could be used for that purpose. No burials had taken place in the relevant area for over 100 years and the whereabouts of any relatives of those buried there were unknown. It was anticipated that the removal of those memorials would provide adequate gravespace for a period of approximately 10 years. Two parishioners objected to the petition. The DAC supported the petition. In granting the faculty the chancellor cited dicta of Chancellor Newsom QC in *Re West Pennard Churchyard* [1992] 1 WLR 32 at 34, [1991] 4 All ER 124 at 127, Bath and Wells Cons Ct, and indicated that the churchyard should not be allowed to close unnecessarily. The chancellor stated that 100 years was a sufficient period to have elapsed between burial and the re-use of the same space. It was a condition of the faculty that any human remains which may be disturbed in the re-use of the area be re-interred at a deeper level in the same place in a discreet and seemly manner at the direction of the priest-in-charge of the churchyard. [RA]

*Hall v Powers*  
(Ontario Superior Court of Justice: McKinnon J, May 2002)

*Discrimination—sexual orientation—Roman Catholic school*

The 17-year-old plaintiff applied for an interlocutory injunction requiring his Roman Catholic school to permit him to bring his boyfriend to the school prom. The principal and the school board had refused him such permission on the ground that such would mean that the school was endorsing or condoning conduct which is contrary to Catholic teachings. The court

stated that there had been no evidence to indicate that same-sex dancing was 'sinful or sexual under Catholic dogma', but rather was chaste behaviour. In granting the interlocutory injunction the court held that the injunction did not prejudicially affect the denominational school rights as attendance at the prom was not part of the religious education at the school. The trial of the substantive matter is to take place in the spring of 2003. [RA]

*Re St Nicholas, Pevensey*

(Chichester Consistory Court: Hill Ch, May 2002)

*Exhumation—opposition within family*

Applying the principles laid down by the Court of Arches in *Re Blagdon Cemetery* [2002] Fam 299, 6 Ecc LJ 420, the chancellor refused a faculty for the exhumation of the cremated remains of the petitioner's wife, stating that the absence of unanimity among the deceased's nearest relatives, namely her husband and her son, was a powerful, if not overwhelming, factor which militated against the granting of a faculty. [RA]

*Re St John the Baptist, Halifax*

(Wakefield Consistory Court: Collier Ch, September 2002)

*Sale of books—redundancy*

The associate vicar, supported by the DAC, petitioned for a faculty permitting the sale of a collection of books known as the 'Priestley Collection' along with several other books given to the church over the past 150 years. The chancellor had directed that academic institutions should be approached to see if they would purchase the collection. Only one institution showed interest in a small part of the collection. The petition was now urgent as Sotheby's, who had inspected the collection and valued it at between £60,000 and £90,000, had an impending sale. The parish identified a pressing need for the proceeds of sale, namely drainage and repair work to the porch, which would be boosted by an English Heritage grant that would be lost unless a swift decision was made. The CCC advised that a university would be the most appropriate place for the collection, either on loan or sold. The chancellor considered *Re St Gregory's, Tredington* [1972] Fam 236, [1971] 3 All ER 269, Ct of Arches, identifying the tests as whether a good reason had been put forward and whether it was a sufficient reason in all the circumstances. The chancellor held that the majority of the books were redundant and that the current financial need amounted to sufficient need to justify the sale. The proceeds of sale would go towards the repair work identified and the history of the connection between the library and the church, along with a catalogue of the books should be deposited in the parish records. [JG]

*Re Lambeth Cemetery; Re Streatham Park Cemetery*  
(Southwark Consistory Court: George Ch, October 2002)

*Exhumation—cremated remains—exceptional circumstances*

The chancellor granted a faculty for the exhumation of the cremated remains of S for reburial in Ireland where the deceased's family had moved and where the deceased's widow intended that she would ultimately be buried. The chancellor applied the principles laid down by the Court of Arches in *Re Blagdon Cemetery* [2002] Fam 299, 6 Ecc LJ 420. The chancellor found that at the time of the burial the family had made it clear to cemetery staff that they intended S's ashes to be buried temporarily pending removal to Ireland. They were not made aware of the legal consequences of burial in consecrated ground. The chancellor found that these were exceptional circumstances and so unusual as to minimise the likelihood of precedent being created. [WA]

*Re Locock, deceased*  
(Rochester Consistory Court: Goodman Ch, November 2002)

*Exhumation—extraction of DNA*

The petitioner sought a faculty for the opening of a family vault, for the removal of a bone from the remains of his paternal grandfather (who died in 1907) by a forensic scientist, for DNA testing to be carried out on the bone fragment and for the fragment to be re-interred in the soil above the vault. The petitioner sought the faculty in order to ascertain whether the deceased, in accordance with family legend, was the illegitimate son of the daughter of Queen Victoria, HRH Princess Louise. This would be ascertained by comparison of the deceased's DNA with the DNA of the murdered Tsarina Alexandra, whose remains were discovered in Russia in 1991. A positive comparison would show that the mother of the deceased was one of the daughters of Queen Victoria, historically most likely to have been Princess Louise. The petitioner stated that he sought the faculty in order (i) to satisfy family curiosity; (ii) to inform the biographer of Sir Charles Locock (First Physician Accoucher to Queen Victoria and a member of the deceased's adoptive family); and (iii) to inform nineteenth century historians generally. Applying the principles laid down by the Court of Arches in *Re Blagdon Cemetery* [2002] Fam 299, 6 Ecc LJ 420, the chancellor found that there were insufficient grounds to rebut the presumption against exhumation. The petition was refused. [WA]

*Re North Wingfield*

(Derby Consistory Court: Bullimore Ch, November 2002)

*Churchyard—unauthorised additions to monuments*

The team rector and churchwardens sought a faculty to remove 'all unauthorised materials, including ornamental edgings, chippings and free-standing items, from graves in the churchyard'. There was considerable opposition from families who had introduced such items. The chancellor found that the unlawful additions to the graves were put in position without permission and, as a matter of pure law, were a trespass. They contravened the chancellor's guidelines and made maintenance more difficult. Failure to prevent or remove such additions did not amount to a waiver of the rules. However, he found that interference with the additions (which had been tolerated for a number of years) would be deeply resented by those who used such memorials to help in their grief. The chancellor stated that the materials in question may remain until further order and gave the petitioners leave to re-apply for the removal of additions to such graves as were not maintained in good order and for the removal of such additions as would impede the transfer of the maintenance of the churchyard to the local authority in due course. The chancellor directed that no further such unlawful additions were to be made and that the rector, churchwardens and PCC were to take steps to clarify the need to obtain permission to erect a memorial. [WA]

*Re All Saints, Hordle*

(Winchester Consistory Court: Clark Ch, December 2002)

*Construction of new church hall—planning permission—contempt of court*

The vicar and churchwardens petitioned for a faculty permitting the construction of a new church hall on part of the churchyard, funded in part by the sale of the land upon which the current church hall stood. Members of the public vigorously opposed the petition. The chancellor found that there was a real and genuine need for a church hall without which the mission of the church would be impaired, and therefore went on to consider the relevant factors using the balancing exercise propounded by the Court of Arches in *Re St Michael and All Angels, Tettenhall Regis* [1996] Fam 44, [1996] 1 All ER 231. The objectors had urged the chancellor to ignore the decision of the New Forest District Council that had granted planning permission. The chancellor reviewed the authorities and held that a consistory court should assume that a planning decision made by a local planning authority was correct unless there was convincing evidence to the contrary. Having considered at length all objections raised, the chancellor granted the faculty.

The chancellor went on to state that a consistory court's jurisdiction was established under section 6 of the Ecclesiastical Jurisdiction Measure 1963 and that under section 81 such court was effectively in the same position as

any civil or criminal court. No media interview should be conducted with a witness before or during his evidence as it could amount to a contempt of court.

*Note: The chancellor, in holding that a consistory court should assume that a decision made by a local planning authority was correct unless there was convincing evidence to the contrary, relied upon his own decision in Re St Mary, King's Worthy (1998) 5 Ecc LJ 133, Winchester Cons Ct, distinguishing Re St Peter and St Paul, Upper Teddington [1993] 1 WLR 853, London Cons Ct. He derived support for his approach from Re St Kenelm, Upton Snodsbury (2001) 6 Ecc LJ 293, Worcester Cons Ct. In reviewing the authorities he referred to Re St James' Church, Stalmine (2001) 6 Ecc LJ 81, Blackburn Cons Ct in which Chancellor Bullimore had stated, 'I think the proper approach to those points is to say that if they can be raised with the local planning authority, and permission is nonetheless granted, they cannot be raised again in the consistory court'. The chancellor thought that Chancellor Bullimore had misunderstood his views in King's Worthy and that such misunderstanding had been perpetuated in a footnote in Hill, Ecclesiastical Law (Second edition, Oxford, 2001), para 7.71, note 229.*

*Re St James, Braithwell, Churchyard*  
(Sheffield Consistory Court: McClean Ch, December 2002)

*Memorial—porcelain portrait*

The petition sought a faculty for the erection of a headstone over the grave of the petitioner's one-year-old daughter. The memorial was of white marble in the shape of an open book with a small porcelain portrait of the deceased. The PCC supported the petition. The DAC objected to the use of white marble and the inclusion of the portrait. The chancellor allowed the petition in respect of the shape and material for the memorial, but refused permission for the portrait. In reaching his decision the chancellor followed the tenor of the judgment in *Re Christ Church, Harwood* [2002] 1 WLR 2055, 6 Ecc LJ 419, Manchester Cons Ct. [RA]

*Brown v Bishop of Carlisle*  
(Appeal to the Archbishop of York, March 2003)

*Revocation of licence*

B appealed to the Archbishop of York against the summary revocation of his licence by the Bishop of Carlisle on the grounds of sexual harassment, intimidating behaviour, mental abuse and financial irregularities. B argued that the archbishop's jurisdiction on the appeal was limited in nature to a review of the justice and propriety of the bishop's decision. Rejecting that submission, the archbishop referred to Canon C12 para 5, and the 'Elphinstone Rules' which had been approved by the two archbishops under that

canon. He concluded therefrom that he had three main tasks in hearing the appeal:

- (i) to review the fairness of the bishop's handling of the matter;
- (ii) to consider the oral and documentary evidence and submissions in the appeal and decide whether the evidence is sufficient to justify the revocation; and
- (iii) in light of the decisions on (i) and (ii) to decide whether to uphold the order for revocation, or to rescind it or vary it.

The archbishop held that from the date of the lodging of the appeal the jurisdiction in respect of the revocation proceedings passed to himself. Having heard all of the oral evidence, the archbishop upheld all but one of the complaints made against B.

In relation to requirement (i), the archbishop held that Canon C12 para 5, did not necessarily require the bishop to hear oral evidence from and cross-examination of the complainants, and that the bishop discharged his responsibility fairly. In reaching those conclusions he took account of the following facts:

- (a) the bishop was not asked to hold a hearing with oral evidence;
- (b) B's solicitor was able to make legal submissions to the bishop, including those arising from the Human Rights Act 1998;
- (c) the bishop sought and followed independent legal advice about the strength and admissibility of the evidence provided; and
- (d) the bishop took a three-month period between meeting B and reaching his decision in which carefully to consider the appropriate action.

The archbishop held that in future proceedings under Canon C12 para 5, the minister should be provided with a single document listing the allegations made against him and another document listing the findings made by the bishop. He further held that the bishop should have expressly responded to the legal submissions made on behalf of B. Nevertheless, the archbishop found that B was not prejudiced by the lack of such documents or responses in this case. The archbishop held that the minister's opportunity 'to show reason to the contrary' before the bishop under Canon C12 para 5, should be informal and confidential in so far as that is possible. The appeal hearing should have the more formal procedure reflected in the Elphinstone Rules, including oral evidence, cross-examination and submissions. Relying upon *Re H and R (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, [1996] 1 All ER 1, HL, the archbishop confirmed that the standard of proof in an appeal under Canon C12 para 5, was the civil standard, such that the more serious the allegation made, the stronger the evidence required to establish that allegation. The archbishop dismissed the appeal. [RA]

#### *PCC of Aston Cantlow v Wallbank*

On 26 June 2003 the House of Lords allowed an appeal by the PCC and restored the order of Ferris J. A fuller Case Note will appear in the next issue.