

RECENT ECCLESIASTICAL CASES

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Re St Laudus, Mabe

(Truro Consistory Court: Briden Ch, January 2003)

Headstone — kerbs — ledger

A petition was lodged for the introduction of a memorial in the churchyard. The proposed memorial consisted of a headstone, kerbs and cover slab in Cornish granite. The PCC and DAC opposed the introduction of the kerbs and cover slab as did one individual objector. The Chancellor found that whilst the headstone fell within his guidelines for memorials, the kerbs and slab did not. Aesthetics, health and safety, and maintenance issues militated against granting an exception from the guidelines. However, the Chancellor did grant a faculty for the introduction of a ledger and stone border over and around the grave to be laid flush with the ground as well as for the headstone as proposed. [WA]

Re St Mary's, Shortlands

(Rochester Consistory Court: Goodman Ch, April 2003)

Tabletop font — confirmatory faculty

St Mary's, Shortlands, was built in 1955 with a wide and open appearance and a traditional stone pedestal font to the west end of the nave. Baptisms had been held in accordance with Canons F 1 and F 21 in that font during principal morning service. Due to discomfort and crowding the incumbent had accepted the gift of a tabletop font and had used it in accordance with Canon F 21, but at the top of the chancel steps. This had been a pastoral success but had not been subject to a faculty. The Chancellor ruled that the use of a tabletop font without the grant of a faculty fell outside the *de minimis* provisions (Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s 11(8)) but that he could exercise his discretion to grant a confirmatory faculty until further order. [JG]

Re St Margaret, Hawes; Re Holy Trinity, Knaresborough
(Ripon and Leeds Consistory Court: Grenfell Ch, May 2003)

Telephone mast — risk to health

Two petitions each sought a faculty for the installation of a mobile telephone antenna in the tower of a church. The petitions had 58 and 49 objectors respectively. The Chancellor heard expert evidence about the risk from such antennae to human health. In considering the objections to the petitions the Chancellor concluded that any stress or anxiety felt about a risk to health was attributable to the perception of risk rather than the level of radio waves caused by the antennae. Dissenting from the dictum of Chancellor Gage in *Re All Saints, Harborough Magna* [1992] 4 All ER 948, [1992] 1 WLR 1235, 2 Ecc LJ 375, the Chancellor indicated that he could see no objection to a church receiving financial support by taking rent for a commercial undertaking that is consistent with its role as a local centre of worship and mission. In granting the faculties the Chancellor stated the following:

- (i) that parishes bringing similar petitions within the diocese would not need to provide cogent and compelling evidence that there is no risk to health so long as the proposed levels of radio waves are within the International Commission on Non-Ionizing Radiation Protection Guidelines as recommended by the government;
- (ii) that an objection to such a petition on the ground that a telecommunications installation is not an appropriate use for a church is unlikely to succeed; and
- (iii) that a telecommunications company should be prepared to accept conditions requiring the monitoring of levels and limiting, so far as is practicable, the inappropriate use of the telecommunications. [RA]

Aston Cantlow Parochial Church Council v Wallbank
(Judicial Committee of the House of Lords, June 2003)

Lay rector — chancel repairs — Human Rights Act 1998

The defendants were the freehold owners of former rectorial land and consequently, as lay rectors or lay impropiators, were liable at common law to repair the chancel of their parish church. In September 1994 the plaintiff, the parochial church council, served the first defendant with a notice under section 2(1) of the Chancel Repairs Act 1932 calling upon her to repair the chancel. She disputed the liability, and the plaintiff subsequently brought proceedings against the defendants, pursuant to section 2(2) of the 1932 Act, to recover the cost of the chancel repairs. On a preliminary issue the judge held that the defendants were liable for the cost of the repairs. The Court of Appeal allowed the defendants' appeal and held that the plaintiff could not recover the cost of chancel repairs from the defendants on the grounds that a parochial church council was a public

authority for the purposes of section 6 of the Human Rights Act 1998 since it had powers unavailable to private individuals to determine how others should act, that therefore it could not act in a manner which was incompatible with the defendants' rights under the Convention for the Protection of Human Rights and Fundamental Freedoms, and that the defendants' liability to defray the cost of chancel repairs was an indiscriminate form of taxation and amounted to an infringement of their right to peaceful enjoyment of their possessions guaranteed by Article 1 of the First Protocol to the Convention and unlawful discrimination as between landowners contrary to Article 14.

In allowing the appeal by the plaintiff it was held:

- (1) that a 'public authority' for the purposes of section 6 of the 1998 Act could be either a core public authority which exercised functions which were broadly governmental so that they were all functions of a public nature, or a hybrid public authority some of whose functions were of a public nature; that although the Church of England, as the Established Church, had special links with central government and performed certain public functions, it was essentially a religious organisation and not a governmental organisation, and parochial church councils were part of the means whereby the Church promoted its religious mission and discharged financial responsibilities in respect of parish churches; that the functions of parochial church councils 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 section 6(1); that (Lord Scott of Foscote dissenting) the fact that the public had certain rights in relation to their parish church was not sufficient to characterise the actions of a parochial church council 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 section 6(3)(b); that 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 section 6(5) from coming within the ambit of section 6(3)(b); that (per Lord Nicholls of Birkenhead, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Rodger of Earlsferry) in seeking to enforce the defendants' chancel repair liability the plaintiff was acting under primary legislation, namely section 2 of the 1932 Act, and was consequently within the exception in section 6(2)(b) of the 1998 Act; that therefore, there were no grounds upon which the plaintiff could be regarded as a public authority within section 6 of the 1998 Act; and that, accordingly, it had no obligation to act compatibly with Convention rights.
- (2) That (per Lord Hope of Craighead, Lord Hobhouse of

Woodborough and Lord Scott of Foscote) a person's right to peaceful enjoyment of his possessions did not extend to the grant of relief from liabilities incurred under the civil law; that the defendants had acquired the rectorial property with full knowledge of the potential liability for chancel repair that the acquisition would carry with it; that it was a burden which ran with the rectorial land and was similar to any other burden which ran with the land; and that the defendants were not therefore being discriminated against as compared with other owners of rectorial land, nor were they subjected to an arbitrary form of taxation or being interfered with in the peaceful enjoyment of their possessions contrary to Article 14 of, and Article 1 of the First Protocol to, the Convention.

Decision of the Court of Appeal [2002] Ch 51, [2001] 3 All ER 393, [2001] 3 WLR 1323, (2001) 6 Ecc LJ 172 reversed, and first instance decision of Ferris J (2000) 5 Ecc LJ 494 reinstated.

The foregoing summary is taken from the headnote to the report of the case at [2003] 3 WLR 283 and is reproduced with the permission of the Incorporated Council of Law Reporting.

Re St Peter, Wrockwardine

(Lichfield Consistory Court: Shand Ch, June 2003)

Reservation of grave space

The petitioner was a parishioner who sought a faculty for the reservation of a single grave space adjoining the grave of her daughter for the establishment of a 'family grave'. The petition was opposed by the incumbent and the PCC on the grounds that there was a parish policy against the reservation of grave spaces which had been applied since at least 1980. The policy had been reviewed and upheld in 1999. The Chancellor stated that there was a strong argument for the court giving significant weight to the existence and terms of a parish policy when exercising its discretion in these circumstances, but expressed unease about giving excessive weight to such a policy. The Chancellor referred to the Human Rights Act 1998 and stated that it was necessary to review the stated reasons for the formulation and implementation of the policy in order to assess whether upholding the policy was a proportionate interference with the petitioner's rights under Article 8 and Article 9. The petition was dismissed. [RA]

Re St Hildeburgh, Hoylake

(Chester Consistory Court: Turner Ch, June 2003)

Churchyard memorials

The incumbent and churchwardens applied for a faculty for the removal and disposal of additions and enhancements around memorial stones in an area designated for cremated remains in the closed churchyard of a

now demolished former parish church. Such additions were in contravention of the Diocesan Churchyard Regulations. The PCC, the local authority (which was responsible for the maintenance of the churchyard) and some individuals had expressed concern that the additions hindered easy maintenance of the churchyard. The petitioners further claimed that the additions presented a tripping hazard. Several accretions were removed voluntarily at the request of the incumbent. There was considerable opposition, particularly from those who had introduced and continued to maintain the memorials.

In giving judgment the Chancellor stated that any common law right of burial or interment of cremated remains does not carry with it a right to place a memorial in a churchyard, that permission must be given for each memorial, that graves are not private property, that the churchyard remains subject to the control of the Consistory Court and that anything placed in it without permission is technically a trespass and may be required to be removed. However, he found that there had been considerable laxity over a sustained period of time both in the enforcement of the regulations and in the general maintenance of the churchyard.

The Chancellor was not convinced that the complete removal of all unlawful additions would improve the appearance of the area in question. Furthermore he accepted that lax discipline in the past had led the owners of memorials to believe that additions were allowed and that many were maintained to a high standard. In balancing these concerns with those of the petitioners and the community as a whole he ordered that certain specified additions which were not currently maintained be removed, and that the petitioners might apply to the court by letter for permission to remove any unauthorised additions after the date of the order. No order was made in respect of those unauthorised additions that were well maintained. He encouraged the petitioners, parties opponent and the local authority to work together and come to an agreement as to the future upkeep of the churchyard. All parties were granted a general liberty to apply to the court for further directions. [WA]

Re St Laurence, Alvechurch
(Worcester Consistory Court: Mynors Ch, June 2003)

Extension — planning permission

St Laurence, Alvechurch, is a grade II* listed building dating from the 12th century but extensively rebuilt by Butterfield in the 1860s. The proposal was to build an extension being a two-storey structure, boat-shaped in plan, attached at ground floor level. The extension would be funded by the sale for residential development of a plot of land to the south-east of the church. The PCC, DAC, CCC, English Heritage, the Victorian Society, SPAB and the Ancient Monuments Society all warmly recommended the plan. Bromsgrove District Council granted planning permis-

sion. There were local objectors who felt, inter alia, that the extension should not be attached to the church, was too big, had used a church resource (the plot of land) incorrectly and had been granted planning permission without sufficient local inquiry. The Chancellor considered the *Bishopsgate* questions and went on to consider the approach of a chancellor when planning permission has been granted. He took the view that the chancellors in *Re St Mary's, King's Worthy* (1998) 5 Ecc LJ 133, Winchester Cons Ct, and *Re St James, Stalmine* (2000) 6 Ecc LJ 81, Blackburn Cons Ct, were *ad idem*, adding that any decision to allow a Consistory Court to reconsider matters decided by a planning authority would be to grant a right of appeal to those dissatisfied by that decision not permitted by Parliament. He excepted the occasions when a church had become a listed building post planning permission or where the court had to rule upon the interior of a new extension or where there were details of the way in which a new building was to join to an old one. The chancellor granted the faculty. [JG]

The difference in opinion between chancellors as to the status of planning permission which was discussed in a note to Re All Saints, Hordle (2003) 7 Ecc LJ 238, Winchester Cons Ct, would seem to be more apparent than real.

Re Miresse deceased; Re Lambeth Cemetery
(Southwark Consistory Court, George Ch, July 2003)

Exhumation

The petitioners' daughter had died unexpectedly at the age of sixteen in 1985. She was buried in the consecrated part of Lambeth Cemetery. As Italian Roman Catholics the family had originally intended to return to Italy and take the daughter's remains with them for reburial in an above-ground mausoleum in South Italy (that style of burial being very common practice in Italy). In 1998, however, a new mausoleum was opened at Streatham Park Cemetery and at great expense a right of burial was secured. The petitioners applied for a faculty to exhume and re-bury their daughter. The Chancellor was assured that this reburial was final. The petitioners argued that a mistake had been made with the original burial, there having been no intention that the burial should be permanent. The Chancellor reviewed the five respects in which the principles set out by the Court of Arches in *Re Blagdon Cemetery* [2002] Fam 299, [2002] 4 All ER 482 were relevant. He decided that this was a case where a mistake had occurred due to a lack of knowledge at the time of the burial that it was taking place in consecrated ground with its associated significance as a Christian place of burial. The petition was granted. [JG]

Blake v Associated Newspapers Ltd

(High Court, Queen's Bench Division: Gray J, July 2003)

Validity of consecration — justiciability

The claimant was ordained priest in the Church of England in 1981 but resigned his orders in 1994. Since that time he continued to style himself 'The Reverend', to wear distinctive clerical dress and to undertake ministry independent of any denomination. In 2000 he founded 'The Society of Independent Christian Ministry' and 'The Province for Open Episcopal Ministry and Jurisdiction' with a former bishop of the Liberal Catholic Church who in turn ordained the claimant first as a priest and then as a bishop. The defendant was the publisher of the *Daily Mail*.

The claimant officiated at a ceremony described as the marriage of two homosexual men in the context of a nationwide daytime television programme. Reporting this, the *Daily Mail* described the claimant as 'a self-styled bishop in costume mitre and cloak' and later as 'an imitation bishop who was a once-divorced former clergyman'. The claimant claimed that these statements were defamatory, that he was a validly ordained bishop and that he had been ordained such by a bishop within the apostolic succession who retained the power to confer episcopal orders. The defendant applied for a stay of the libel action on the ground that questions of the validity or otherwise of Holy Orders were a doctrinal issue and thus not justiciable by the court. Expert evidence was received.

The court held that a stay could only be granted in exceptional circumstances as to grant a stay would deny the claimant the opportunity to establish his good name in the courts. However the court upheld the defendant's claim that the central questions in the case were non-justiciable questions of doctrine and ecclesiastical procedure. Without determining such questions the case could not continue and a stay was therefore granted. [WA]

R v Lewis, Bower & Gibson

(The Crown Court at Southampton, HHJ Boggis QC, October 2003)

Religiously aggravated harassment

Benjamin Lewis, aged 25, Scott Bower, aged 26, and Natalie Gibson, aged 19, were jointly charged with an offence of religiously aggravated harassment, contrary to section 32(1) of the Crime and Disorder Act 1998. The particulars of the offence were that on various days between 1 October and 20 December 2002, they had pursued a course of conduct amounting to harassment of the Reverend Christopher Rowberry, and at the time of doing so, had demonstrated hostility to him because of his Christian religion. Mr Rowberry was appointed vicar of St Mary-the-Virgin Church, Eling in 2000. In October 2002, Lewis and Bower commenced a campaign

of harassment against the vicar, which took many forms. There was constant howling in the graveyard next to the vicarage at all times of night, and howling from Lewis's car on many occasions as it raced past the church. Obscene or blasphemous images, including one of a disembowelled Christ, were placed on the church noticeboard. Satanist symbols were etched on church doors and an elaborate pentagram made of branches was placed outside the church. Fireworks were directed at the vicarage and broken glass was placed under the vicar's car. The most serious form of harassment was a series of nuisance telephone calls to the vicarage at night. The Crown alleged that this was religiously aggravated harassment because the conduct was directed at the vicar, his vicarage and his church. Documents found in Lewis's bedroom revealed an obsession with vampirism and some hostility to the church, including an article beginning with the words, 'I spit on Christian belief'. The jury unanimously convicted all three defendants. The judge sentenced Lewis to 12 months custody, Bower to 6 months custody, and Gibson had her sentence deferred for 6 months due to her pregnancy.

Case note kindly supplied by James Newton-Price (prosecuting counsel)