RECENT ECCLESIASTICAL CASES

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Re St Paul the Apostle, Glass Houghton
(Wakefield Consistory Court: Collier Ch, November 2000)

Removal of nave altar—burden and standard of proof

A petition was sought for the removal of a stone altar from the nave of the church and its re-siting in the Lady Chapel. Reasons advanced for the petition included the creation of a flexible area which could be cleared for the use of dramatic readings and playlets in the liturgy and concerts or other public events. The chancellor stated that the burden of proof in such a petition rests upon the petitioners and that the standard of proof was the ordinary civil standard, namely the balance of probabilities. The chancellor applied the principle set out in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, [1996] 1 All ER 1, HL, that the more serious the allegation, the less likely it is that the event occurred and, hence, the stronger the evidence required to establish that allegation. In the application of the principle the chancellor distinguished this case (in which the church was an unlisted building and the petition did not concern any interference with the fabric of the building) from a case involving the breaking up of the fabric of a Grade I listed building, creating permanent and irreversible change. He stated that more cogent evidence of a particular congregational need would be required in the latter case. This case was at the lower end of the spectrum. The petition was granted. [RA]

Re St John the Baptist, Greenhill
(London Consistory Court: Cameron Ch, November 2000)

Votive candles—legality

The petitioners sought a faculty concerning *inter alia* the placing of a stand containing votive candles next to the font at the eastern end of the north aisle in the church in response to frequent requests by visitors wishing to light a candle. It was not intended that the stand would be used during services but primarily by those coming into the town centre church during the day. There were two objectors to the proposed scheme on the basis that the introduction of such candles would be out of keeping

with the churchmanship of the church in question and might be perceived as being within the Roman Catholic tradition. In granting the faculty sought the chancellor was of the opinion that the introduction of votive candles did not of itself indicate a change in churchmanship but merely reflected that the parish had a breadth of vision which saw it as important to have the broadest possible range of churchmanship in its approach to mission and to meet a pastoral need. In her survey of the relevant law the chancellor stated that she was not aware of any case where a candle stand by itself had been found to be illegal and shared the view expressed by Bursell Ch in *Re St John the Evangelist, Chopwell* [1995] Fam 254, [1996] 1 All ER 275, that such items were permissible as aids to private devotion 'as long as they [did] not detract from the devotions of others, nor more particularly, from the actual services and ministrations within the church itself'. She distinguished *Re St Oswald, King and Martyr, Oswestry* (1998) 6 Ecc LJ 78, in which Shand Ch had not considered the authorities in relation to private devotion which were considered in *Chopwell*. The chancellor also had regard to *Re St Michael and All Angels, Great Torrington* [1985] Fam 81, [1985] 1 All ER 993, requiring her to carry out a balancing act which gave sufficient weight to those who supported the application and noted that the petitioners had a strong case from a pastoral point of view. Following her usual practice the chancellor required the displaying of a notice close to the candle stand explaining the symbolism of light within the Christian tradition. [LY]

Re St Luke's, Grayshott
(Guildford Consistory Court: Goodman Ch, November 2000)

Monument—churchyard—heart-shaped headstone

The petitioners sought a faculty to erect a monument over the grave of their daughter who had died at the age of twenty-four in a road traffic accident. The petitioners' original proposals were altered after a meeting with the vicar, a group from the DAC and their stonemason. The DAC, the PCC and the vicar approved the compromise proposals with specific reference to the fact that the monument would be located at the bottom of the churchyard away from the church. The proposed monument would be of honed blue pearl granite with a double heart headstone, kerbstones set flush with the ground and gold lettering. A parishioner objected on the grounds that the monument would stand out from others in the churchyard, was made of unsuitable material, would be difficult to maintain and that the double heart headstone was inappropriate. The chancellor, after a visit to the churchyard, stated that the churchyard had a harmony. He expressed most concern about the shape of the headstone, stating that it would have an abrasive and discordant effect and would tend to destroy the harmony of the churchyard. The chancellor emphasised the importance of avoiding the setting of a trend or precedent which might become difficult to control. The chancellor adjourned the petition, granting leave to the petitioners to amend the petition, indicating that he felt unable to grant the faculty on the petition in its present form. [RA]

Fraser v Canterbury Diocesan Board of Finance
(Court of Appeal: Peter Gibson, Mummery and Latham LJJ, November 2000)

School site—resulting trust—limitation

The claimants appealed the decision of the Deputy High Court Judge (Peter Leaver QC) who had determined four preliminary questions. The Court of Appeal upheld the

deputy judge's decision on the limitation issue rendering consideration of the three remaining points unnecessary. However, in deference to the arguments advanced, a view was expressed which, in each case, was at variance with that of the deputy judge. The School Sites Act 1841 was passed to encourage grants of land for specified educational purposes with an automatic reverter to the grantor or his successors on the cesser of such use. In 1872, Mr Evan Lake conveyed land to the minister and churchwardens of Chartham for the establishment of a school to be run in accordance with the principles of the Church of England. In 1874 the school was transferred to the school board and became a 'provided' school and ceased to be a 'voluntary' denominational school. The school was sold in 1992 for £50,000.

(i) *Limitation*: The reverter was triggered by the 1874 arrangement. No proceedings were taken for 120 years.
(ii) *Extinguishment of reverter*: The reverter was not extinguished by section 14 of the 1841 Act on the subsequent sale in 1992 since the defendant had no intention of using the proceeds to fund another school.
(iii) *Nature of reverter*: Where land reverted, it was to the estate of the original grantor and not to owners of the neighbouring land out of which it had been carved. The decision of *Marchant v Onslow* [1995] Ch 1, [1994] 2 All ER 707, was disapproved.
(iv) *Beneficiary of reverter*: Section 1 of the Reverter of Sites Act 1987 creates a bare statutory trust of the proceeds of sale of the land for 'the persons who but for this Act would from time to time be entitled to ownership of the land by virtue of its reverter'. It was immaterial that the claimants did not derive their title from Mr Lake's personal representatives, since, as successors in title to the beneficiary, they were, as a matter of fact, the persons absolutely and beneficially entitled to the proceeds.

Despite the reversal of issues (ii) to (iv) above, the appeal failed because the claim was statute barred. The appellants were ordered to pay only half of the respondents' costs of the appeal. [MH]

NB The first instance judgment is noted at (1999) 5 Ecc LJ 490, and the appeal is fully reported at [2001] 2 WLR 1103.

Re St Mary-le-Bow
(London Consistory Court: Cameron Ch, November 2000)

Secular use of church building—restaurant—extension into Court of Arches

The chancellor heard two petitions relating to the operation of a vegetarian restaurant in the crypt of St Mary-le-Bow. The first petition sought permission for the variation of a licence in order that the restaurant could operate during the evening and could serve alcohol. The second petition sought a faculty for the modernisation of the crypt, including the placing of tables and chairs in the area of the crypt known as the Court of Arches. At the hearing it became clear that the Court of Arches area was already being used by the restaurant in breach of a faculty granted in 1994. The chancellor granted a confirmatory faculty for the continued use of the Court of Arches by the restaurant on the condition that no changes were made to the fabric of the building and that only moveable items were used. The Court of Arches area was to be cleared to permit the sitting of the Court of Arches, the Vicar General's Court and the Consistory Court upon proper notice being given. The chancellor further granted a faculty authorising the variation of the licence for the operation of the

restaurant between 5pm and 10pm on weekdays and for alcohol to be served. The sale of alcohol was subject to the condition that it was not to be sold without a food order and last orders were to be taken at 9pm. Unannounced visits to the restaurant were required to ensure proper adherence to the licence granted, together with annual reports to the PCC regarding the operation of the restaurant. The chancellor stated that the primary purpose of church use is for worship and uses connected thereto. Emphasis was placed upon the responsibilities of incumbents and churchwardens to obtain a faculty before permitting secular use of the church building and to monitor closely the terms of any licence granted for such use. Annual reporting to the PCC in relation to any such use of church buildings was recommended. [RA]

Re St Peter, Great Berkhamsted
(St Albans Consistory Court: Bursell Ch, November 2000)

Disposal of property—necessity

St Peter, Great Berkhamsted is a Grade II* listed building. The rector and churchwardens requested permission to dispose of six Victorian pews, one Victorian pew front and one 1950s choir stall. The DAC recommended the proposed works. English Heritage was consulted and identified the pews and pew front as being the work of Butterfield. English Heritage and the Victorian Society were specially cited. Both parties identified the importance of the pews and pew front, stating they should be restored and not disposed of. The petitioners stated that the 1950s restoration of the church changed Butterfield's arrangement. The Inspector of Historic Buildings for English Heritage stated that the pews had 'intrinsic value' and, as they were not impeding the pastoral work of the church, should be kept. The chancellor found that the pews and pew rail had historic interest. He considered *Re St Gregory, Offchurch* [2000] 4 All ER 378 and *Re St Luke the Evangelist, Maidstone* [1995] Fam 1, [1995] 1 All ER 321, identifying the need for the petitioners to prove a necessity for the disposal of the pews. In this case the petitioners only identified that the pews were 'gathering dust'. The petitioners failed to meet the burden placed on them and the petition was refused save in relation to the modern choir stall. [JG]

Re All Saints, Hollingbourne
(Canterbury Commissary Court: Walker Com Gen, November 2000)

Costs—reasonableness of objection

The Commissary General considered representations on costs, in relation to an earlier petition, determined on written representations, where an objector had been unsuccessful. The substantive decision, which is unreported, concerned the siting of a wall bordering the churchyard as part of the commercial development of contiguous land. The court fees had been taxed at £2,269.40, and the petitioners, Cox Restorations, calculated their internal office costs in dealing with the objections as £4,772.30 plus VAT. These were effectively 'litigant-in-person' costs. Applying *Re St Mary the Virgin, Sherborne* [1996] Fam 63, [1996] 3 All ER 769, in the light of the general approach of the ecclesiastical courts, the Commissary General extracted the following principles:

(i) the faculty jurisdiction receives no public funding, thus the cost of administering the system has to be met by those who use it;
(ii) court fees arise as part of the process of obtaining a faculty and should be budgeted for by prospective petitioners in estimating the overall costs of the works

for which a faculty is sought, particularly where (as here) the petitioner is a property development company carrying out works as part of a commercial project;

(iii) as a general rule, petitioners will be ordered to pay court fees even where they are successful. Here the practice in the ecclesiastical courts varies significantly from that in the civil courts;

(iv) an order that some or all of the court fees be paid by an objector is most unlikely to be made unless there is clear evidence of unreasonable behaviour by that objector which has unnecessarily added to the procedural costs prior to the hearing or determination of the petition. In similarly exceptional circumstances it may be appropriate to order one party to pay the costs incurred by another party in preparing and presenting his case. This is akin to the secular planning process;

(v) even where there are grounds for concluding that it is appropriate for an objector to bear some of the court costs, the petitioners shall bear the primary liability to pay these costs to the registry, but have an entitlement to seek reimbursement of whatever part of these the court deems just from the unreasonable objector;

(vi) the Commissary General (or chancellor) has an overall discretion as to costs to be exercised on the facts of each case.

The Commissary General noted a number of factors of relevance in this instance. Most significant, however, was the absence of merit in the objection which should have been apparent no later than the directions hearing on 6 May 2000, when the petitioner's expert archæologist indicated to the Commissary General in the presence of the objector the traces in the ground of the earlier wall. The objection was maintained but no contrary evidence was advanced. Mindful of the principle of proportionality, the Commissary General declined to conduct a further detailed assessment of costs. He ordered the petitioners to pay the court fees and further ordered the objector to pay the sum of £500 by way of costs to the petitioners. [MH]

Re St Mary the Virgin, Hurley
(Oxford Consistory Court: Boydell Ch, November 2000)

Exhumation—Brazilian national

A faculty was sought by the Brazilian Ambassador on behalf of a charitable trust to exhume from a vault beneath the nave the remains of Hipolito José Da Costa for reburial in a consecrated mausoleum in Brasilia and to introduce to the parish church a plaque to record the event. The remains of the deceased had been interred in the parish church on his death in 1823. He was an important national figure in Brazil and credited as being the founder of the free press in that country. At the time of his death transportation of his remains to Brazil would have been impracticable. The chancellor considered that, following the law as set down in *Re Christ Church, Alsager* [1999] Fam 142, [1999] 1 All ER 117, he was required to ask if there was a 'good and proper reason for exhumation'. He found that such reasons existed; *viz* that the deceased was regarded as a national hero in a friendly country; that he played a major part in the creation of Brazil as a sovereign state; that his remains would be re-interred in a consecrated mausoleum in Brasilia; the principle of the comity of nations and that the faculty application was unopposed and unanimously supported by the PCC. Despite the fact that a significant amount of time had elapsed since the burial which would normally militate against the grant of a faculty the petition was granted. [LY]

Note: This case is fully reported at [2001] 1 WLR 831. It was the last substantive judgment delivered by Peter Boydell QC prior to his death, whilst still in office as Chancellor of the Diocese of Oxford, in February 2001. He is much missed by his family and by his many friends at the Bar and elsewhere.

Re St Mary's, Leigh
(Rochester Consistory Court: Goodman Ch, November 2000)

Floodlighting—lack of consultation

St Mary's Leigh is a Grade II* listed church dating from the thirteenth century. The PCC voted by a majority to seek a petition to install floodlighting. The DAC was consulted and recommended approval subject to three structural matters being finalised. Objections were raised by five parishioners on the bases, *inter alia*, that sky pollution would occur; it would be a waste of money; there had been inadequate consultation; it would be a distraction to road users; and it would attract vandals. At the invitation of the chancellor a meeting was held with the archdeacon to resolve or narrow differences. As a result of the meeting Kent County Council was approached and stated that the floodlighting would not be a threat to road safety, and the local police indicated that vandals would be put off by the lighting, although other anti-social behaviour might occur. An open meeting was then held, chaired by the Archdeacon of Tonbridge, where various points were made. The PCC then met and agreed to press for the faculty with a trial period of six months with the lighting on from dusk to 11pm. The parishioners maintained their objections. It was agreed that the matter could be dealt with by written representations. The chancellor considered *Peek v Trower* (1881) 7 PD 21 and 27 and *Nickalls v Briscoe* [1892] P 269 in relation to the burden of proof and the weight attached to parishioners' objections. He went on to consider the issues and ruled that:

(i) *Effect of floodlighting on the church itself*: He was satisfied that floodlighting would enhance the beauty and role of the church.
(ii) *Effect on the night sky and environmental pollution*: There was no evidence that the floodlighting would be seriously detrimental from an environmental point of view.
(iii) *Effect on neighbouring houses and residents*: So long as the floodlighting was carried out sensitively there was not sufficient weight to the objection.
(iv) *Waste of resources*: This was a proper use of PCC funds.
(v) *Hazard to motorists*: The expert evidence of the Council that there would be no major hazard was accepted.
(vi) *Risk of burglary or vandalism*: There was evidence that burglars would be deterred and vandals identified.
(vii) *Lack of consultation*: Reviewing the number of meetings and circulation of relevant documentation, there could be no criticism of the PCC.

A faculty was granted. [JG]

Re St John the Baptist, Halifax
(Wakefield Consistory Court: Collier Ch, December 2000)

Disposal of church property—redundancy—financial need

The petitioners sought a faculty for the sale and disposal of four silver cups and four silver patens to assist in fundraising for major restoration works of this 'historic

and beautiful' church. The chancellor referred to *Re St Gregory's, Tredington* [1972] Fam 236, [1971] 3 All ER 269, and *Re St Matthew, Hutton Buscel* (1999) 5 Ecc LJ 486. The chancellor set out the following principles:

(i) church property cannot be sold by churchwardens without the consent of the PCC and the authority of a faculty;
(ii) some good and sufficient grounds must be proved to obtain a faculty;
(iii) a number of grounds might amount to 'good' grounds, including, but not limited to, redundancy;
(iv) the 'good' ground must also be 'sufficient', *ie* of sufficient weight to persuade the chancellor that a faculty should issue.

The chancellor should consider all relevant considerations in exercising his discretion in these circumstances. The chancellor's discretion was not fettered by requiring redundancy or dire financial need to be established, although such considerations were relevant. The chancellor found that the silverware was redundant. The faculty was granted. [RA]

Re Crawley Green Road Cemetery, Luton
(St Alban's Consistory Court: Bursell Ch, December 2000)

Exhumation—Human Rights Act 1998—humanism

The petitioner sought a faculty in respect of the exhumation of the cremated remains of her late husband which were buried in the consecrated portion of the cemetery. The deceased was from part Jewish parentage and neither he nor the petitioner had any Christian allegiance. She was unaware of the fact that the plot where the interment had taken place was consecrated, and the funeral had been a humanist one. The petitioner had since moved away from the area although she visited her husband's grave every fortnight and wished to have her husband's cremated remains re-interred in the grounds of a crematorium close to where she lived. In applying *Re Christ Church, Alsager* [1999] Fam 141, [1999] 1 All ER 117, the chancellor was of the view that in the absence of any medical condition the petitioner had failed to displace the presumption against exhumation. However, the Human Rights Act 1998 made it 'unlawful for a public authority to act in a way which was incompatible' with a right under the European Convention of Human Rights. By section 6(3) a 'court or tribunal' was a public authority and included an ecclesiastical court. Applying and approving the judgment of Hill Ch in *Re Durrington Cemetery* [2001] Fam 33, the chancellor held that although no rights accrued to the deceased after his death, his widow had rights under Article 9 of the Convention. Following *Arrowsmith v UK* (1978) 3 EHRR 110 and *Kokkinakis v Greece* (1994) 17 EHRR 397, Article 9 embraced not only religious beliefs but also non-religious beliefs and humanist beliefs and referred not only to the holding of such beliefs but also to some extent to the expression thereof: see *C v UK* (1983) 37 DR 142. The fact that the ashes were not to be reburied in consecrated ground could not be determinative of the matter and the faculty for exhumation was granted. [LY]

Note: This case is fully reported at [2001] 2 WLR 1175.

Re All Hallows, Harthill
(Sheffield Consistory Court: McClean Ch, January 2001)

Window—replacement—unlawful introduction

All Hallows Harthill is Grade I listed dating from the twelfth century. Burglars damaged a Victorian stained glass window. A modern window of modern design similar to another modern window in the church replaced the damaged Victorian window. No attempt had been made to comply with faculty jurisdiction. A confirmatory faculty was applied for. Five parishioners appeared as objectors. It became clear that the window had been replaced due to a misunderstanding between the parish architect who had in the past replaced one window with a modern design, and the lay vice-chairman of the PCC. The parish architect had obtained quotations both to repair the window and to replace the window. The PCC accepted the lower quotation without realising that it was the quotation to replace rather than to repair the window. In relation to the faculty itself the parishioners were split, the DAC positively recommended it, English Heritage opposed it, and the CCC advised the chancellor to grant the faculty. In considering whether to grant the faculty the chancellor considered *Re St Michael and All Angels, Great Torrington* [1985] Fam 81, [1985] 1 All ER 993, and *Re St Stephen's, Walbrook* [1987] Fam 146, [1987] 2 All ER 578. He accepted that 'pastoral considerations' are not the only considerations that need apply, and that he was bound to consider the application in the light of the usual considerations, in particular the idea of 'necessity' (citing with approval *Re St Mary's, Banbury* [1987] Fam 136, [1987] 1 All ER 247; *Re All Saints, Melbourn* [1992] 2 All ER 786, [1990] 1 WLR 833; and *Re St Mary the Virgin, Sherborne* [1996] Fam 63, [1996] 3 All ER 769). The chancellor found that there had been a genuine misunderstanding, and that the new window now formed part of a considered plan for the use of the north aisle. The increase in light was a 'need' in the sense identified by the authorities, and the change did not adversely affect the character of the church as a building of special architectural or historic interest. The confirmatory faculty was granted, half the costs to be borne by the parish architect who accepted that had there been no misunderstanding there would have been no need for a hearing. [JG]

Re Cathedral Church of St Eunan, Raphoe
(Diocesan Court of the Diocese of Derry and Raphoe, March 2001)

Church of Ireland—introduction of cross

The petitioners sought a faculty to sanction the placing of a cross on or behind the communion table of the cathedral church of St Eunan, Raphoe, in the Republic of Ireland. The cross was offered in memory of the late archdeacon of the diocese by his widow. At a meeting of the select vestry of the cathedral vestry, eight voted in favour of seeking a petition, four voted against and three (including the dean) abstained. No objection was expressed to the size or design of the cross. Its introduction was opposed on theological grounds and upon the basis that the voting in the vestry did not reflect the opinion of the congregation at large. A letter of objection bearing forty-six signatures was submitted. It indicated that images such as the cross were unnecessary in order to come to God in worship, that it marked an unwanted move in the direction of the Roman Catholic tradition, that there had been insufficient consultation, and that the posting of the citation beside the footpath had turned the private affair of the cathedral into a public matter. The court noted that the Constitution of the Church of Ireland (chapter IX, s 39) provides that a cross may be placed on or behind the communion table provided that approval by faculty is obtained with the

consent of the incumbent and a majority of the select vestry. The court was satisfied that the faculty had the necessary consent. Although the dean, being also incumbent, had abstained in the voting, he was a petitioner. The court reminded itself that the select vestry acts on behalf of the parish as a whole, having been elected by general members of the parish, and rejected the argument that its voting did not reflect the feeling of the congregation as a whole. It further noted that the dean had no option under the Rules of the Diocesan Courts but to comply with the requirement of citation. The court therefore exercised its discretion in favour of granting the faculty, in the belief that the parishioners 'will rise above their apparent differences and continue to work together in harmony and Christian understanding'. [MH]

Note: The diocesan court comprised the Bishop of Derry and Raphoe advised by Mr W. Bristow Stevenson (Chancellor), and assisted by Ven M Scott Harte, Archdeacon of the Diocese of Raphoe, and Mr W. S. McCarter. An appeal lies to the Court of General Synod from every judgment of a diocesan court except in the case of exclusion from the communion of the church. Such appeal must be lodged with the registrar within fourteen days of the judgment. See the Constitution of the Church of Ireland (Chapter VIII, ss 26, 39).[1]

Re St Mark's, Woodthorpe
(Southwell Consistory Court: Shand Ch, April 2001)

Altar frontal—churchmanship

A petition was sought for the introduction of four altar frontals. There were six objectors, most of whom were members of the PCC which had unanimously resolved to seek a faculty. The petition was determined on written representations. The chancellor rejected the contention that their introduction represented a shift towards a 'High Church' tradition, considering them entirely legal and firmly within the mainstream of Anglican liturgy. He considered there to be no foundation in the allegations that there had been inadequate consultation, or that they were too expensive. On a minor aesthetic point the chancellor referred the matter back to the DAC. A faculty was granted on condition that plans be submitted for appropriate storage of the frontals when not in use. [MH]

Re St Paul, Birkenshaw
(Wakefield Consistory Court: Collier Ch, April 2001)

Re-ordering—necessity

St Paul, Birkenshaw is a Grade II listed church built in 1831. It was substantially rebuilt in 1893. The entrance is *via* the tower. The main body of the church consists of a nave containing four bays. A fifth bay forms a chancel, to the north of which is the organ and to the south of which is the vestry. The chancel is separated from the nave by a rood screen erected as a war memorial. To the east of the chancel lies the sanctuary. The petition to re-order the building was, in effect, an application for outline permission on the basis that different phases of the work would be the subject of separate petitions. The proposals were to create a narthex in the westernmost bay for kitchen and lavatory facilities, to create a first floor room over that, to use the rood

[1] I am grateful to the Reverend Kenyon Homfray for bringing this judgment to my attention and for his assistance in preparing the case note.

screen as the eastern wall of the upper room, to turn the sanctuary into the vestry, to reposition the choir in the enlarged present vestry, to remove the memorial screen to create an enlarged sanctuary space, to move the font, to reduce the size of the pulpit and move it, and to install a new glazed portico to the south of the tower to form a new entrance. The DAC recommended the works. Three objections were received. After a directions hearing, all parties were agreeable to the matter being dealt with by written representations. The chancellor considered that the consultation processes that had been undertaken were satisfactory. He went on to consider *Re St Luke the Evangelist, Maidstone* [1995] Fam 1, [1995] 1 All ER 321, in relation to necessity, and *Re St John the Evangelist, Blackheath* (1998) 5 Ecc LJ 217. The petitioners identified the areas of need as 'to accommodate our young people', 'to accommodate church meetings' and 'to upgrade facilities'. The objectors stated that the needs were already substantially met by the facilities in the community hall. The chancellor was satisfied that there were needs of a theological and pastoral nature amounting to necessity. He went on to consider the effect of each of the proposed changes upon the character of the church as a building of special architectural and historical interest. He was satisfied that any effect that the implementation of these proposals would have upon the character of the church would not be so adverse that it should not be permitted. Faculty granted subject to each phase of the development being the subject of a further and more detailed faculty petition. [JG]

Re Seabrook
(Appeal Tribunal, Clergy Representation Rules: April 2001)

General Synod election—election addresses—fairness

The Revd Richard Seabrook complained that in the course of the election of clergy from the Diocese of Chelmsford for membership of Canterbury Convocation and the General Synod, only 500 out of the 517 electors received a copy of his election address. Fr Seabrook represented himself in the appeal, Mr David Brown, the diocesan election officer, attended the hearing and supplied information and, with the consent of the parties, Canon Michael Hodge, General Synod Elections Scrutineer, assisted the tribunal with the technicalities of the single transferable vote system. The tribunal was satisfied that each candidate was asked to supply 500 copies of his election address. The evidence of Fr Seabrook, which the tribunal accepted, was that at least eight or nine electors had informed him that they had not received copies of his address in the bundle despatched to them. Since Mr Brown was unable to give firm evidence that the necessary additional photocopies had been made, the tribunal concluded, on the balance of probabilities, that seventeen clergy did not receive Fr Seabrook's address. Noting the infelicity of the drafting of rule 26 of the Clergy Representation Rules 1975-1999, the tribunal was mindful that on the evidence of Canon Hodge, Fr Seabrook could have beaten either of the last two successful candidates had he received four additional high preference votes. The tribunal found as follows:

(i) that the mistake in asking for only 500 addresses was both an infringement of the rules and a procedural irregularity in the conduct of the election. Reliance should not be placed on out-of-date statistics as to the number of clergy as had been the case here;
(ii) that there was a possibility that if seventeen more clergy had received the address, Fr Seabrook might have received enough further preference votes to have overhauled his nearest rival;

(iii) that the appeal should be allowed. It would require an unusual set of circumstances to justify dismissing an appeal where there is a significant risk that there has been unfairness.

A fresh election was therefore ordered. [MH]

Re Wadsley Parish Church
(Sheffield Consistory Court: McClean Ch, April 2001)

Re-ordering—Bishopsgate questions

A faculty was sought for a major re-ordering of a Grade II listed church dating from 1834. In the course of his judgement the chancellor set out his understanding of the legal principles involved in coming to a decision in such a case. The proctor for the petitioners maintained that the *Bishopsgate* questions are guidelines only, and that the law as to the criteria to be applied in considering proposed changes to listed churches is in a 'fluid state'. The chancellor did not agree and pointed to a number of recent cases that showed that courts of first instance and appellate courts were 'loyally applying [...] the *Bishopsgate* questions' as adopted by the Court of Arches in *Re St Luke the Evangelist, Maidstone* [1995] Fam 1, [1995] 1 All ER 321, and *Re St Mary the Virgin, Sherborne* [1996] Fam 63, [1996] 3 All ER 769. He considered himself 'bound, morally if not in the strictest of theory, by what was said in the *Sherborne* judgment'. He also rejected the contention that a chancellor was bound to have regard to the role of a church as a local centre of worship and mission, adopting the analysis of the Court of Arches in the *Maidstone* judgment at pages 6G–7E. The chancellor was not attracted by the notion of a fourth *Bishopsgate* question as suggested by Mynors Ch in *Re Holy Cross, Pershore* (2000) 6 Ecc LJ 86, and considered the *Bishopsgate* questions an adequate framework which allowed all relevant matters to be considered on the facts. He commented, 'I do not think it would be helpful to develop a *Bishopsgate* catechism and so impose an unduly prescriptive frame-work on the balancing process chancellors must perform'. The decision to grant the faculty was, therefore, made by resolving the *Bishopsgate* questions, balancing the need for re-ordering to facilitate the worship and mission of the church with the concerns of English Heritage and the CCC who had objected to some of the proposals. This resulted in the granting of a faculty for most, but not all, of the petitioners' proposals. [LY]

Wallbank v PCC of Aston Cantlow and Wilmcote with Billesley, Warwickshire
(Court of Appeal: Sir Andrew Morritt V-C, Robert Walker and Sedley LJJ, May 2001)

Chancel repairs—enforceability—Human Rights Act 1998

In allowing an appeal from the decision of Ferris J (noted at (2000) 5 Ecc LJ 494), the Court of Appeal rejected the contention that the relevant law was uncertain. Citing J. Baker, 'Lay rectors and chancel repairs' (1984) 100 LQR 181; Appendix B to the Law Commission's report, *Liability for Chancel Repairs* (Law Com 152, 1985); G. Bray *The Anglican Canons 1529–1947* (1998); and M. Hill, *Ecclesiastical Law* (2nd edition, Oxford 2001), the court recognised the long-standing obligation upon lay rectors to pay for repairs to a chancel. The Chancel Repairs Act 1932 was predicated upon the existence of such a common law duty. Unlike the first instance decision where the matter was *obiter*, the appeal was determined subsequently to the Human Rights Act 1998 coming into force on 2 October 2000. The Court of Appeal applied the Act as follows:

(i) It was of the opinion that a PCC is a 'public authority' for the purposes of section 6 of the Human Rights Act 1998, thus its acts, to be lawful, must be compatible with the rights set out in Schedule 1 to the Act.
(ii) The PCC was not acting under the compulsion of primary legislation, since the Chancel Repairs Act 1932 merely affected the mechanism by which the PCC was to recover the cost of chancel repairs. The duty to collect was a common law duty unprotected by section 6(2) of the Human Rights Act 1998.
(iii) Article 1 of the First Protocol to the European Convention on Human Rights creates an entitlement to the peaceful enjoyment of one's possessions. The court considered the liability to defray the cost of chancel repairs to be a form of taxation. It was a levy on the personal funds of the landowners. The mere fact (as Ferris J had held) that the liability was an incident of ownership did not mean that it was not also a tax. The Court of Appeal likened it to council tax which could similarly bear both descriptions.
(iv) The tax was in the public interest, serving to assist in the upkeep of the national heritage.
(v) However, the tax acted entirely arbitrarily: first, in that the particular land to which it attaches does not differ relevantly from any other land, such distinction having 'vanished into history'; and secondly, because the liability may arise at any time and be (within the cost of total reconstruction) in almost any amount.
(vi) It could not be justified under the second paragraph of the First Protocol (see the note below).
(vii) Furthermore, the law is discriminatory in that the owners of land which was formerly glebe land were treated less favourably that the owners of land which was not, by making the former but not the latter liable for chancel repairs. Thus there was a breach of Article 14 of the Convention in that the state, by its laws, is failing on grounds relating to their property to secure to lay rectors the enjoyment without discrimination of the right assured by Article 1 of the First Protocol.

Thus the appeal was allowed, with the Court of Appeal determining that the PCC may not lawfully recover the cost of repairs, estimated at £95,000, from the appellants. [MH]

Note: This judgment (in the opinion of the case notes editor) is unsatisfactory in a number of ways and it is regrettable that the wider interests of the Church of England were not ventilated by either means of an intervenor or the appointment of an amicus. *The question of whether a PCC is a public authority is only superficially addressed. Whilst it may be arguable that certain of its functions are of a public nature (Human Rights Act 1998, s 6(3)(b)), it is not to be treated as a public authority in relation to acts which are private (s 6(5)). The recovery of the costs of chancel repairs, the burden of which runs with rectorial land, is self-evidently a private act akin to the enforcement of any other encumbrance on land. Defining the liability to defray the cost of chancel repairs as 'inescapably' a form of taxation is little more than reasoning by assertion. It gives no account of the extent to which the market value of the rectorial land is reduced by dint of this inchoate liability. More significant, however, is the failure to take proper account of the second paragraph of Article 1 of the First Protocol to the Convention, which reads:*

> *'The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'*

If the Court of Appeal is right that (a) the obligation to pay for chancel repairs is a tax, (b) that the 1932 Act merely creates a mechanism of enforcement, and (c) that the PCC is a public body and hence an organ of the state, the Court of Appeal has itself violated this latter paragraph by impairing the right of the PCC to enforce the 1932 Act and secure the payment of such tax. The fact that the 1932 Act remains on the statute book is sufficient evidence that the state deems such a law to be necessary. The Court of Appeal did not contemplate making a declaration of incompatibility. This may prove but the first example of the 'litany of unintended consequences' heralded in the prophetic words of the writer in M. Hill, 'The Impact for the Church of England of the Human Rights Act 1998' at (2000) 5 Ecc LJ 431 at 439.

The judgment of the Court of Appeal is reported at [2001] 3 All ER 393.