RECENT ECCLESIASTICAL CASES

edited by

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Re St Barbara, Earlsdon
(Coventry Consistory Court: Gage Ch, May 2002)

Altar—re-siting

The church was built in 1930-1931 in Gothic style with a high altar for the celebrant east facing. There was no gap between the east side of the altar and the reredos at the east end of the church. A faculty was sought to move the altar one metre west to allow the celebrant at the Eucharist to face west during the service. The petitioners argued that at the service the celebrant represented Christ and gathers the people of God together to celebrate with thanksgiving the salvation offered through his sacrifice on the cross; that the celebrant is able better to minister to the congregation and participate with them in the communion by standing behind the altar and facing them; and that that position is more welcoming. The objectors argued that the celebrant would be given undue importance, distracting the congregation from the supremacy of God and detracting from the role of facilitator or mediator between the congregation and God; it would be difficult to observe what was going on and would interfere with the architecture of the church; and there would be difficulties created by the confined space. The chancellor reviewed Canon F2, para 1, the rubrics before the Holy Communion and the Prayer of Consecration in the *Book of Common Prayer*; *Ridsdale v Clifton* (1877) 2 PD 276, Ct of Arches; *Re St John the Divine, Richmond* [1953] P 155, [1953] 1 All ER 818, Southwark Cons Ct; and R Bursell, *Liturgy, Order and the Law* (Oxford, 1996). He concluded that neither east nor west facing position was unlawful. There was no doctrinal reason to support or oppose either side in the dispute. Having reviewed the arguments the chancellor concluded that the touchstone for his decision had to be the will of the majority, giving due weight to the views of the vicar, and accordingly he granted the faculty. [JG]

Regina (Williamson) v Secretary of State for Education and Employment (Court of Appeal: Buxton, Rix and Arden LJJ, December 2002)

Corporal punishment—religious justification—Convention rights

The claimants were teachers at, or parents who sent their children to, independent private schools that had been established specifically to provide Christian education based on biblical observance. As part of the regime administered by those schools, and agreed to by the parents, discipline was enforced when thought appropriate by the use of mild corporal punishment. The claimants contended that it was part of their fundamentalist Christian beliefs that such discipline should be administered, when appropriate, as an integral part of the teaching and education of children. They also believed that such discipline was efficacious. Section 548 of the Education Act 1996 provided that corporal punishment could not be justified in any proceedings on the ground that it had been given in pursuance of a right exercisable by a member of staff by virtue of his position as such. The claimants contended that that provision interfered with their freedom to manifest their religion or beliefs, contrary to Article 9(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998, and with their right to education in conformity with their religious convictions, contrary to Article 2 of the First Protocol to the Convention, as well as with their right to respect for their family life, contrary to Article 8 of the Convention.

The court held: (1) that the claimant's belief in the use of mild corporal punishment as part of a Christian education was a 'belief' for the purposes of Article 9 of the Convention; that the use of corporal punishment in the schools concerned was a manifestation in teaching or practice of the parents' belief within the meaning of Article 9 and not merely motivated by that belief, and so Article 9 was engaged. But (2), dismissing the appeal, that the immediate infliction of such punishment by teachers was not a manifestation of the teachers' belief for the purposes of Article 9; that section 548 of the 1996 Act did not materially interfere with the parents' rights under Article 9 since the application of such punishment could be carried out by the parents themselves either at school or at home and their beliefs did not, in the case of most of the claimants, require that the punishment be administered at schools and the parents were in any event free to educate their children at home in accordance with their beliefs. (3) That, although the claimants' belief in the use of mild corporal punishment as part of a Christian education was a religious or philosophical conviction for the purposes of Article 2 of the First Protocol, section 548 of the 1996 Act did not violate that article; and that section 548 would not in any event materially interfere with any right of the parents under Article 2 since the application of such punishment could be carried out by the parents themselves. (4) That there was no breach of the parents' rights under Article 8 of the Convention or Article 10. Article 2 of the First Protocol is concerned solely with the rights of parents, and

therefore the interests of the teachers were not engaged by it. The beliefs expressed and sought to be practised by the parents did not attain the level or cogency and cohesion which is required if those beliefs are to count as religious and philosophical convictions of the nature which is protected by Article 2. [JG]

This case is reported at [2003] QB 1300.

Re Keynsham Cemetery (No 2)
(Bath and Wells Consistory Court: Briden Ch, March 2003)

Topple testing—industry standard

The chancellor varied an earlier faculty to substitute a force of 30 kg with one of 35 kg for the testing of headstones in a municipal churchyard. This was to reflect the revised industry standard. The earlier judgment is reported at [2003] 1 WLR 66; (2003) 7 Ecc LJ 103. [JG]

Re St Nicholas, Kenilworth
(Coventry Consistory Court: Gage Ch, May 2003)

Re-ordering—necessity—liturgical change

A faculty was granted for the removal of some pews in the nave, the erection of decking and a nave altar and the removal of sections of the chancel screen (erected in 1913). The alteration of the screen was to allow for easier movement of people through the screen between nave and chancel. There were no parties opponent but English Heritage and the Victorian Society voiced objection to the alteration of the screen. The DAC supported the scheme. The chancellor paid attention to the guidelines set by the Court of Arches in *Re St Luke the Evangelist, Maidstone* [1995] Fam 1, [1995] 1 All ER 321, and in particular held that alterations which were proposed as a result of changes in liturgical practice and that adversely affected the character of the building needed to pass a test of necessity before being allowed. He found that the modification of the screen would not cause an adverse effect and that the petitioners did not need to meet the requirement of necessity. The faculty was granted on condition that those parts of the screen to be removed be properly stored and maintained in a manner approved by the DAC to enable the alteration to be reversed by some future generation. [WA]

Re Jean Gardiner deceased
(Carlisle Consistory Court: Tattersall Ch, May 2003)

Exhumation—mistake of fact

Mrs Gardiner was buried in error in a grave reserved for Mrs Elizabeth Nevin. There had been an error numbering the graves not appreciated by anybody. The priest-in-charge petitioned to exhume Mrs Gardiner and re-inter her in an adjacent grave. Mrs Gardiner's family opposed the application on the basis that she had been buried in good faith, the remains should not be disturbed, the exhumation would affect the widower's health, the faculty to reserve the grave space could be varied and that there were issues relating to Article 8 of the European Convention on Human Rights and Article 1 of the First Protocol. The chancellor referred to *Re Matheson* [1958] 1 All ER 202, [1958] 1 WLR 246, Liverpool Cons Ct; *Re Christ Church, Alsager* [1999] Fam 142, [1999] 1 All ER 117, Ch Ct of York; and *Re Blagdon Cemetery* [2002] Fam 299, [2002] 4 All ER 482, Ct of Arches. He concluded, on the basis of the decision in *Re St Luke, Holbeach Hurn* [1990] 2 All ER 749, [1991] 1 WLR 16, Lincoln Cons Ct, that where a mistake had been made in effecting the burial a faculty would be more readily granted. He rejected the arguments in relation to Article 8 of the European Convention on Human Rights and Article 1 of the First Protocol on the grounds, inter alia, that there was no property in human remains, and granted the faculty. [JG]

Re St John the Divine, Pemberton
(Wakefield Consistory Court: Collier Ch, November 2003)

Exhumation—theology of burial

In hearing together five petitions for the exhumation of human remains the chancellor considered the judgments in *Re Christ Church, Alsager* [1999] Fam 142, [1999] 1 All ER 117, Ch Ct of York, and *Re Blagdon Cemetery* [2002] Fam 299, [2002] 4 All ER 482, Ct of Arches. The chancellor indicated that although strictly he was bound by the *Alsager* decision in the Northern Province he found it 'wholly unreal' to ignore the *Blagdon* decision of the Southern Province, not least where the court in the *Blagdon* decision had the additional benefit of full argument on both sides. The chancellor was not persuaded that there was much of real substance between the decisions, observing that both cases agreed:

(i) on the basic principle that burial in consecrated ground is final, and

(ii) that each case must be decided upon its own facts.

He applied part of the guidance in *Alsager* subject to observations made in the *Blagdon* decision. The chancellor indicated his belief that the increased number of petitions for exhumation was due to a widespread lack of understanding of the Christian theology of burial and urged efforts by the diocese, clergy, funeral directors and cemetery managers to ensure that the bereaved were made aware of the issues arising therefrom. [RA]

Note the article by Christopher Hill at p 447 of this issue

Re Holy Trinity, Bosham
(Chichester Consistory Court: Hill Ch, December 2003)

Exhumation—DNA testing

The petitioners sought a faculty for the archaeological investigation of a gravesite believed to contain the remains of King Harold II. The chancellor adopted the following approach to his decision:

(i) as a matter of Christian doctrine, burial in consecrated ground is final;
(ii) there is thus a presumption against exhumation;
(iii) exhumation in this context comprises any disturbance of human remains which have been interred;
(iv) departure from the presumption can only be justified by special circumstances;
(v) an applicant might be able to demonstrate a matter of great national, historic or other importance concerning the human remains;
(vi) an applicant might also be able to demonstrate the value of some particular research or scientific experimentation;
(vii) only if the combined effect of the evidence under (v) and (vi) proves a cogent and compelling case for the legitimacy of the proposed research will such special circumstances be made out.

In considering the extensive historic, scientific and archaeological expert evidence the chancellor considered that there were a number of matters which undermined the legitimacy of the proposed research including:

(i) academic opinion indicated that any human remains found were highly unlikely to be those of Harold;
(ii) the chance of obtaining DNA from any such remains was as small as 10 to 30 %;
(iii) DNA testing was, in any event, useless in the absence of a comparative sample from a descendant of Harold, as to which there was none;
(iv) the margin of error in carbon-dating could produce, at best, inconclusive results.

The faculty was refused. [RA]

This full judgment may now be found at [2004] 2 WLR 833 and [2004] 2 All ER 820.

Lydbrook Parochial Church Council v Forest of Dean District Council
(Gloucester County Court: District Judge Thomas, December 2003)

Closed churchyard—maintenance—public or private law

The PCC brought an action against the local authority seeking a mandatory order compelling it to repair and maintain its churchyard. Section 215(1)

of the Local Government Act 1972 provides that a PCC shall maintain a churchyard which has been closed by Order in Council 'by keeping it in decent order and its walls and fences in good repair'. However, the PCC may require the parish council to take over the liability to maintain the churchyard, which in turn can require the same of the district council, as had happened here. Such liability is one of substantive maintenance and not merely management of decline (note the relief granted at first instance in *R v Bishopwearmouth Burial Board* (1879) 5 QBD 67 at 68); nor is it conditional on adequate funds being available. The local authority conceded the duty to maintain, but sought to strike out the claim on the basis that its obligation was one of public law, enforceable only by way of judicial review in the Administrative Court and not by private action. The district judge applied the decision of the Court of Appeal in *Dennis Rye Pension Fund v Sheffield County Council* [1998] 1 WLR 840, CA, and rejected suggestions to the contrary in L Leeder, *Ecclesiastical Law Handbook* (Sweet and Maxwell, 1997), at paragraph 8.28, and in *Legal Opinions of the Church of England* (Church House Publishing, 1994), page 68. Since the issue between the parties concerned not the duty to maintain, but a detailed assessment of the level of maintenance necessary, the district judge considered that the matter was properly brought by private law action in the county court. He therefore dismissed the defendant's application to strike out the claim and ordered a stay of the proceedings for the parties to consider mediation or alternative dispute resolution.

Details of this decision kindly supplied by Mr Guy Adams of counsel.

Re St Augustine, Scissett
(Liverpool Consistory Court: Hedley Ch, January 2004)

Reordering—parochial objection

The petitioners sought a faculty for the re-ordering of this Grade II listed church by the replacement of choir stalls, pews and pew platforms with chairs and the replacement of the pulpit with a movable lectern. The purpose of the re-ordering was to provide greater flexibility and accessibility for worship in and community use of the church. The petition for the faculty was supported by the PCC and (subject to conditions) the DAC and the Victorian Society. Three objections were filed by parishioners along with a 'petition' against the proposals signed by more than half of the members of the electoral roll of the parish. After applying the *Bishopsgate* questions the chancellor considered the decisions in *Re St Luke, Chelsea* [1976] Fam 295, [1976] 1 All ER 609, London Cons Ct, and *Re Christ Church, Chislehurst* [1974] 1 All ER 146, [1973] 1 WLR 1317, Rochester Cons Ct, in determining what weight should be attached to the 'petition' filed by the objectors. The chancellor made the following observations:

(i) The persons who have signed the 'petition' cannot be subject to cross-examination and the court cannot know what was said to them before they appended their signatures to the 'petition'.

(ii) The Faculty Jurisdiction Measure 1964 provides the means by which those who object to proposals may object formally.
(iii) The PCC is a democratically elected and representative body and the court must assume that a petition for a faculty presented by the minister and churchwardens with the full support of the PCC represents the views of those responsible for leadership in the parish and accountable for what they do.
The faculty was granted upon the conditions proposed by the DAC and the Victorian Society. [RA]

Re Christ Church, Timperley
(Chester Consistory Court: Turner Ch, January 2004)

Memorial—photograph

A faculty was sought to place a black granite vase tablet with a small, oval, ceramic photographic plaque attached to commemorate a young man killed in a road accident. The proposed photograph was described by the chancellor as a 'holiday snapshot'. The DAC declined to recommend the petition and the PCC opposed it on four bases; the Diocesan Churchyard Regulations, the consistency of a photograph that, by definition, represented but a moment of a life lived with the Christian theology of death and resurrection, the durability of any photograph and concerns about setting a precedent. The petitioners argued that the photograph would help them grieve, that it was of good quality and that it would be a worthy focus of recollection, especially for younger relatives. The chancellor reviewed the case law identifying the fact that no reported case existed permitting a photographic plaque in a churchyard. The chancellor accepted that the petitioners would be afforded a real measure of comfort by the faculty being granted, that the plaque was of good quality and he was not persuaded that there were any fundamental theological reasons precluding a photographic image. He was not however convinced that a photograph would be useful to younger relatives. The chancellor concluded that this was not a case however, in which a clear departure from Diocesan Churchyard Regulations was justified. The regulations serve to create fairness, equality and consistency of treatment for all. They exist to promote peace, dignity and good order in churchyards where it is necessary to balance concerns of the past, present and future. He refused the petition. [JG]

Hammond v Director of Public Prosecutions
(Divisional Court: May LJ, Harrison J, January 2004)

Public order—European Convention on Human Rights

The appellant was an evangelical Christian and preacher who, during the summer of 2001, had preached in public holding a double-sided sign

bearing the words 'Stop Immorality', 'Stop Homosexuality' and 'Stop Lesbianism'. He had been arrested in The Square, Bournemouth, after his preaching had caused a disturbance. He was charged with an offence under section 5 of the Public Order Act 1986 of displaying a writing or sign which was threatening, abusive or insulting within the hearing or sight of a person likely to be caused harassment, alarm or distress. The magistrates convicted him and his estate appealed by way of case stated (the complainant having died before the appeal could be brought on). The complainant submitted that his conduct had been reasonable as he was exercising his rights enshrined in Articles 9 and 10 of the European Convention on Human Rights (freedom of thought, conscience and religion and freedom of expression respectively). It was further argued that no reasonable tribunal of fact could conclude that the words on the sign were insulting within the meaning of section 5(3)(c) of the Act; further and in the alternative the insults were not gratuitous but formed part of the complainant's sincere position of religion and morality, they were for the purpose of converting others and he was not using threatening language or inciting violence. It was accepted by the complainant that the respondent's behaviour in arresting him and charging him had been prescribed by law, for a legitimate aim and was proportionate. The court ruled that the magistrates had found as a matter of fact that the words displayed were insulting by relating homosexuality and lesbianism to immorality; further that they had taken into account Articles 9 and 10 when reaching the conclusion that the complainant's conduct was not reasonable. The appeal was dismissed. [JG]

This case is reported at [2004] EWHC 69 (Admin) and (2004) The Times, 28 January.

Re Wraxall Churchyard
(Bath and Wells Consistory Court: Briden Ch, February 2004)

Reservation of grave spaces

Part of the churchyard had been reserved in perpetuity by a conveyance dated 1933 under the Consecration of Churchyards Act 1867 for the burial of members of one particular family. The departure of that family from the parish resulted in the donation by the family of the reserved land to the parish for other burials. However, the landowner had petitioned for a faculty to reserve a small part of the donated land for the continuing burial of members of his family. The chancellor held that a faculty was not strictly necessary as the land was still reserved under the 1933 conveyance. However, a faculty was granted reserving the small portion of donated land for 100 years. In addition the chancellor had received a petition from an individual parishioner for the reservation of a double-depth grave space in the same churchyard. The PCC, which had supported the first petition which had increased the area of the churchyard that was available for burials, opposed the second on the grounds that there was little space left

for burials and that it did not wish that limited space to be limited further by reservations. The incumbent (who had subsequently retired) had supported the petition. In granting the faculty the chancellor stated that such matters were entirely in the discretion of the court, that the petition was exceptional, that it did not set a precedent for future reservations and that, in the light of the small amount of space remaining, future petitions would be unlikely to succeed. [WA]

Bishop of Roman Catholic Diocese of Port Louis v Suttyhudeo Tengur (Judicial Committee of the Privy Council: Lords Bingham of Cornhill, Slynn of Hadley, Lloyd of Berwick, Steyn, and Hope of Craighead, February 2004)

School admissions policy—religious discrimination—Mauritius

The Supreme Court of Mauritius had held that state funding of a group of twelve Roman Catholic Secondary Schools (known as the Catholic Colleges), which, via their admissions policy, ensured that half of all entrants were Roman Catholic, was unconstitutional. These colleges had originally been self-funding via the payment of fees but had received state subsidy since 1947. In 1977 school fees were abolished in favour of direct grants from the government, thus making the Catholic Colleges state funded. In dismissing the appeal the Judicial Committee had in mind the provisions of the Constitution of Mauritius and in particular the right of religious organisations to establish and maintain schools (sections 3 and 14) and the obligation of those discharging a public function (in this case the Minister of Education channelling grant aid to schools) to do so without discrimination *inter alia* on the grounds of religion (section 16). The respondent (the father of a Hindu prospective pupil) had claimed that the Catholic Colleges' admissions policy discriminated against non-Roman Catholics in that a non-Roman Catholic applicant could be refused admission in favour of a Roman Catholic applicant with lower examination grades so as to maintain the 50 % quota. He claimed that the government of Mauritius, in channelling grant-aid to the Catholic Colleges, sanctioned and acquiesced in this discriminatory admissions policy. The Judicial Committee held that the admissions policy was discriminatory. No argument had been forthcoming to justify the discrimination. The Constitution violated no internationally accepted principle by precluding discrimination in the way that it did. Had the Catholic Colleges received no public subsidy then section 16 of the Constitution would not have applied and such discrimination would not have been unconstitutional. However, state funding meant that the section did apply and the policy, and its support by government funding, was therefore unconstitutional. [WA]