

RECENT ECCLESIASTICAL CASES

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Re St Giles, Durham

(Durham Consistory Court: Bursell Ch, October 1998)

Unauthorised works—confirmatory faculty

Confirmatory faculties were sought for various unauthorised works to a Grade I listed church including the construction of a path and access ramp, the sanding of a wooden floor, alterations to pews, and the painting of the pulpit, altar rails, roof beams and corbels. The chancellor reminded the parties of the provisions of canon F13 and stated 'because the Church of England and therefore its officers such as the minister and churchwardens are trustees of the heritage for the parish, the diocese and the nation, ignorance of the law and even well intentioned breaches of the law cannot and will not be tolerated'. He noted that there is very rarely anything so urgent that it cannot be dealt within twenty-four hours through the Registry, by telephone, fax or e-mail. The chancellor dealt with the various items in each of two petitions, granting certain faculties several of which had conditions attached. The PCC was ordered to pay the court fees and the costs of an objector whose objections had been vindicated.

Re Seaton Delaval Churchyard

(Newcastle Consistory Court: McClean Ch, November 1998)

Unlawful burial—erection of headstone

The petitioner sought a faculty for the erection of a headstone over the grave of his deceased parents. The burials, which had taken place in 1995 and 1996 respectively, were unlawful, because the graveyard had been closed by an Order in Council made in 1980 pursuant to the Burial Act 1853 and, save in certain exceptional circumstances, subsequent burials are unlawful under section 3 of the Act, for which a penalty is provided under section 2 of the Burial Act 1855. The chancellor considered that the issue of the proposed headstone should be considered separately from that of the illegality of the burials, for which the incumbent took full responsibility. The chancellor considered that a mistake in the administration of the burial laws should not condemn the deceased to lie in an unmarked grave but noted that the presence of a fresh headstone might give others the impression that the churchyard remained open. In granting the faculty he made it clear that this in no way affected the unlawful nature of the burials and that no further burials were to be permitted in the churchyard save under the Order in Council.

Re St Thomas, Kimberworth

(Sheffield Consistory Court: McClean Ch, November 1998)

Memorial—shape—pet names

The petitioners, the widow and other relatives of the deceased, sought a faculty for the erection of a memorial over his grave. The proposed memorial fell outside the chancellor's approved churchyard rules being heart shaped and of polished blue pearl granite. The PCC and the DAC were against granting permission and the chancellor noted that there were neither heart shaped headstones in the churchyard nor any of blue stone. In rejecting the petition the chancellor commented that whilst not wishing to impose absolute uniformity of headstones he felt it important not to encourage inappropriate memorials with some competition to be 'different'. Noting that other chancellors disapproved of the use of pet or nick names and of familiar terms such as Dad or Grandee (as had been proposed here) in epitaphs the chancellor did not share that restrictive approach, stating 'provided there is nothing scandalous or open to theological objection, I take the view that the bereaved should express their love and respect for the deceased in the language which comes naturally to them'.

Note: Regarding pet names and churchyard rules generally, see Re Holy Trinity, Freckleton [1994] 1 WLR 1588, (1994) 3 Ecc LJ 355 per Bullimore Ch and Re Holy Trinity, Freckleton (No. 2) (1995) 3 Ecc LJ 429 per Spafford Dep Ch.

Re St Mary, Oldswinford

(Worcester Consistory Court: Mynors Ch, December 1998)

Headstone—alteration of epitaph

The petitioner sought a faculty for the replacement of a headstone over the grave of his late son. The original headstone had been erected by his former wife (the mother of his son) and her new husband, and stated that the deceased was their son. When aged 10, the deceased had been formally adopted by his paternal grandfather and his new wife but on joining the army aged 16, the deceased was told he was no longer welcome in their home. Thereafter, until his death aged 24, the deceased's *de facto* home was with his mother and her new husband, contact with his father being very limited. The proposed epitaph would have substituted the name of the mother's new husband with that of the petitioner. The mother of the deceased and her husband, who at common law and under section 3(4) of the Faculty Jurisdiction Measure 1964 were joint owners of the headstone, objected to the granting of a faculty. Although at common law the chancellor had no jurisdiction to allow the alteration of the headstone, he was empowered so to do by section 3 of the Measure. The primary purpose of the statutory power was to enable the reordering of a churchyard for the general good of a parish and it would be inappropriate for it to be exercised at the request of a private individual unless the circumstances were exceptional. The fact that the words on the existing headstone were altogether inaccurate or at best highly misleading constituted exceptional circumstances. Accordingly a faculty was granted for the erection of a new headstone which omitted all reference to the parents of the deceased, speaking merely of 'a precious son'.

Note: Both the chancellor and his predecessor were of the opinion that the archdeacon should be invited to become a party to these proceedings and if possible be represented by counsel who could act as amicus curiae in relation to the point of law. The bishop

declined to give his approval for the archdeacon's costs to be borne by the DBF under section 16(4) of the CCEJM 1991 feeling that the expenditure could not be justified.

Neary & another v Dean of Westminster
(Lord Jauncey of Tullichettle as Special Commissioner, December 1998)

Organist—dismissal—visitor

On 22 April 1998, following a disciplinary hearing preceded by a period of suspension, Dr Martin Neary was dismissed as organist and master of the choristers at Westminster Abbey. He petitioned the Queen who appointed Lord Jauncey as her commissioner for the purpose of exercising her visitatorial jurisdiction. With the consent of the parties, Lord Jauncey also acted as arbitrator in a like dispute concerning Dr Neary's wife, Penelope, who had been similarly dismissed from her job as part-time concert secretary. The following matters of law were determined:

- (1) that the procedure would be by way of a hearing *de novo* and not an appeal against the decision to dismiss;
- (2) that as between master and servant, it was long settled that there existed a fiduciary relationship of trust and confidence. The employee must act in good faith and not make a profit out of his trust;
- (3) that the extent of the duty of fidelity depends on the facts of each case;
- (4) that, contrary to the contention of counsel for the Nearys, the character of the institutional employer, the role played by the employee in that institution and the degree of trust required of the employee *vis-à-vis* the employer must all be considered in determining the extent of the duty and the seriousness of any breach thereof;
- (5) that whether misconduct justifies summary dismissal is a question of fact;
- (6) that, again contrary to the contention of counsel for the Nearys, dishonesty or deceit were not necessary preconditions to a finding of such misconduct;
- (7) that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.

On the facts, Lord Jauncey found that the setting up of a separate bank account was indicative of a lack of openness on the part of Dr Neary but, as the abbey conceded, did not of itself amount to gross misconduct. He further found that charging 'fixing' fees for the choir's salaried duties 'neither accorded with the prior practice at the abbey nor with the usual practice in similar ecclesiastical institutions'. On the question of notional 'fixing' fees, Dr Neary's evidence was considered 'somewhat speculative and unreliable'. Lord Jauncey concluded that Dr and Mrs Neary for some three and a half years ran a business whose principal income earning assets were the lay vicars and the choristers. They derived profits from this business in the shape of fees and surpluses on events involving the choir. They did not tell anybody in the abbey what they were doing. This lack of openness and the deriving of secret profits 'was such as fatally undermined the relationship of trust and confidence which should have subsisted between [the Nearys] and the abbey'. Lord Jauncey was satisfied that the Dean and Chapter were justified in summarily dismissing them and he so reported to Her Majesty.

Williams v Bishop of Bangor

(Provincial Synod of the Church in Wales, January 1999)

Deposition—proportionality

On 11 November 1997, the Bishop of Bangor executed a deed of deposition and expulsion on the Revd Clifford Williams following findings by the Provincial Court of conduct giving just cause for scandal or offence on counts of adultery and lying to his bishop and infringing the declaration of canonical obedience on counts of conducting services contrary to the instructions of his bishop. Mr Williams appealed against such sentence to the Provincial Synod (the Archbishop of Wales and the bishops of Llandaff, Monmouth and St Davids) who, at the request of Mr Williams' counsel, heard the matter in private. Rejecting the appeal and giving reasons in writing, the Synod found no conflict between deposition and the doctrine of indelibility of orders stating that the purpose of deposition was, amongst other things,

'to protect the Church as a whole from the destructive effects of a ministry exercised by someone whose conduct has been shown to result in such a degree of scandal and hurt to individuals and to the Church community as to make any future exercise of that ministry unacceptable. It is by no means a declaration that someone is beyond forgiveness. It makes no irreformable judgment upon the spiritual state of a cleric. It simply enacts that he or she should never exercise the functions of their state again'.

The Synod was satisfied that the offences at issue were sufficiently grave to merit a permanent inhibition from exercising priestly functions and were compounded by a refusal to comply with legitimate demands of the bishop to whom he had promised canonical obedience and by lying both to the bishop and to the Provincial Court. It was immaterial that the same penalty would be imposed for offences which might be argued to be more serious.

Note: The judgment of Latham J on Mr Williams' unsuccessful application for leave to move for a judicial review of the decision of the Provincial Court is noted at (1999) 5 Ecc LJ 217-218.

Re All Saints, Stanton on the Wolds

(Southwell Consistory Court: Shand Ch, February 1999)

War memorial—relocation

It was proposed to relocate a war memorial from the churchyard to an unconsecrated area proximate to the church so that the memorial would become more accessible and visible and more readily identifiable as a village memorial. The proposal was supported by the PCC and the DAC but there was a small body of opposition within the community. In granting the faculty sought the chancellor stressed that the removal of a memorial was different from the removal and reinterment of human remains considered recently by the Chancery Court of York in *Re Christ Church, Alsager* [1999] Fam 142, (1999) 5 Ecc LJ 214. There was however a parallel in that a disturbance of the status quo was more likely to be acceptable if it was from consecrated to consecrated ground. Apart from the symbolic and pastoral considerations this would have the advantage of continued control within the faculty jurisdiction. The bishop had indicated that he was prepared to execute a deed of consecration and accordingly a faculty was granted on condition that the new area be consecrated and a scheme agreed for the maintenance of the memorial and its landscaped surroundings.

Cheesman and others v Church Commissioners
(Judicial Committee of the Privy Council, March 1999)

Pastoral Measure 1983—scheme—purpose

The appellant and eleven others appealed against the decision of the Commissioners to make a pastoral scheme for part of the diocese of Leicester. The appeal concerned the construction and application of the Pastoral Measure 1983 and fell to be heard as a genuine appeal on the merits and not by way of judicial review. See *Hargreaves v Church Commissioners* [1983] AC 457 at 460. The facts were as follows:

- a previous scheme made in 1982 had united several villages into a single benefice comprising three parishes;
- in 1988, pursuant to a further scheme, the three parishes were combined into a single parish, such benefice being styled the Gaulby group;
- Mr Cheesman became incumbent of the Gaulby group in February 1988;
- in January 1989 Mr Cheesman was charged with an offence of indecency of which he was convicted by the magistrates the following September;
- he was suspended under the EJM 1963 and a request was made by the PCC for the institution of proceedings under the Incumbents (Vacation of Benefices) Measure 1977;
- in October 1990, the divisional court quashed the conviction on the basis that public annoyance had not been proved, the only witnesses to Mr Cheesman's solitary act of masturbation being police officers on duty. See *Cheesman v DPP* [1992] QB 83;
- the archdeacon then commenced further proceedings under the EJM 1963 and progressed the invocation of the 1977 Measure;
- upon the arrival of a new diocesan bishop in July 1991, a satisfactory pastoral solution was sought. Mr Cheesman's suspension was terminated and the proceedings under the 1977 Measure put on hold pending further discussions. These led nowhere and in November 1977 the proceedings were resumed;
- the proceedings were beset by procedural difficulties and were discontinued in January 1994;
- in May 1994, the bishop met the parishioners of the parish, who requested him to review all aspects of pastoral supervision including the existing scheme;
- a process of consultation involving the diocesan pastoral committee reviewed the pastoral arrangements for an area covering four parishes of which the Gaulby group was one and produced a proposed scheme which was duly submitted to the Commissioners in September 1996;
- after a 15 month consultation period, the Commissioners adopted the scheme and in January 1998 submitted it to Her Majesty in Council for confirmation;
- one of the effects of the scheme was to sub-divide the Gaulby group into three parts and transfer two of them to adjoining benefices, leaving Mr Cheesman as incumbent of a much reduced Gaulby benefice.

It was contended that in reducing the size of the Gaulby benefice, the bishop and the Commissioners were effectively exercising powers which could only be exercised under the Incumbents (Vacation of Benefices) Measure 1977. This was rejected. The Pastoral Measure 1983, being a consolidating re-enactment of the Pastoral Measure 1968, concerned a mechanism for pastoral reorganisation separate from the 1977 Measure which provided a remedy for cases of serious pastoral breakdown. If the scheme, therefore, could be justified under the 1983 Measure, it would be upheld. The second contention was that the Commissioners exceeded their powers by taking into account the personal characteristics of Mr Cheesman, since such considerations exclusively fell within the purview of the 1977 Measure. This was rejected by a

majority (Lord Hobhouse of Woodborough and Sir Christopher Slade) who considered, on a detailed examination of the evidence, that the scheme was genuinely designed to make better provision for the cure of souls within the diocese under the Pastoral Measure 1983. Lord Lloyd of Berwick (dissenting) would have allowed the appeal, being of the opinion that the scheme was nothing other than a way round the 1977 Measure.

Re Peniel Pentecostal Church, Brentwood
(Advertising Standards Authority, April 1999)

Miracle—substantiating a claim

The ASA upheld a reader's complaint that a regional press advertisement for a Pentecostal church implied physical healing of a man unable to walk. It found that the claim was not substantiated by medical evidence and that the advertisement might raise the hopes of vulnerable readers who could infer that, whether or not they believed, they were likely to be cured of physical pain or disability.

Note: A degree of editorial licence has been exercised in including this extra-judicial decision. A complaint against the same church had been rejected in October 1998 because it referred to spiritual, as opposed to physical, healing and was less susceptible to scientific proof. Both adjudications may be found at www.asa.org.uk.

Re Plaxtol Churchyard
(Rochester Consistory Court: Goodman Ch, April 1999)

Epitaph—Christian content

The petitioner wished to erect a headstone over the grave of her late husband with an inscription which the priest-in-charge felt unable to approve because of its lack of any specifically Christian content and, in particular, any mention of Christian hope. It read 'Gone from our sight but never our memories. Gone from our touch but never our hearts'. The PCC was prepared to approve the inscription but was of the view that future inscriptions should convey the Christian hope. The DAC concluded that the wording was inappropriate for a memorial located within the churchyard. Having visited the churchyard the chancellor noted that many of the inscriptions found on headstones also lacked any specifically Christian content. In granting the faculty the chancellor emphasised that no decision on one given set of facts can be regarded as a precedent when considering a different one. The future discretion of the minister was unaffected.

Re St Peter and St Paul, Wantage
(Oxford Consistory Court: Boydell Ch, April 1999)

Floodlighting

The petitioners sought a faculty for various works to a twelfth century grade I listed church. Only the provision of external floodlighting proved contentious and this fell for separate determination on written representations. The party opponent objected on a number of grounds: that the spirituality of the church would be damaged, making it more like a theatre and detracting from its dignity; that floodlighting was

unnecessary in the absence of a substantial tourist interest which should not be encouraged; that it would appear to endorse the behaviour of drunken individuals behaving noisily in the early hours; that there was local opposition; and, that it represented a quest for modernity to which, it was suggested, the PCC had supinely acceded. The chancellor noted that the proposal had the unanimous support of the PCC, was recommended by the DAC and was not opposed by any other body. The chancellor rejected all the objections, considering that careful and discreet flood-lighting would enhance the dignity of the church and discourage vandalism by making culprits more visible. A faculty was therefore granted.