

RECENT ECCLESIASTICAL CASES

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JUSTIN GAU
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and
WILL ADAM
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Calvert v Gardiner and Others
(High Court, Queens Bench Division: Burton J, May 2002)

Authority of bishops—ringing of bells

The claimant had sued a number of defendants for damages for nuisance caused by the ringing of bells at the parish church at Down St Mary, Crediton, Devon. The defendants in question were first the team vicar of the parish, second and third the churchwardens, fourth the PCC and fifth the Bishop of Exeter. This was the hearing of the claimant's appeal against the dismissal by Master Trench of the claim against the bishop as fifth defendant. The basis of the appeal was as follows:

- (i) As a factual matter, the bishop authorised the bell-ringing by the campanologists;
- (ii) The bishop must be held responsible for such bell-ringing by virtue of what the claimant called the co-operative and collaborative nature of the structure of the church; and
- (iii) The bishop had the power to make the vicar stop the bell-ringing, and he did not do so. He must therefore be held to have authorised the nuisance.

The judge rejected point (i) as without factual foundation. Indeed, in the only extant correspondence from the bishop on the point it is clear that he did not approve the bell-ringing. On point (ii) the judge found that there was a clear structure and division of responsibility within the Church of England on this point. The bishop's powers of visitation do not indicate a co-operative collaborative style of management. Responsibility for bells falls entirely to the minister, as set out in Canons F 8 and F 15, para 1. Point (iii) turned on two questions: could the bishop dismiss the vicar and could the bishop discipline the vicar in this case? The judge found that a team vicar appointed for a specified term of years shall, during that term, have the same security of tenure of his office as an incumbent of a benefice (see the Pastoral Measure 1983, s 20(3)). The provisions for the revocation of a licence set out in Canon C 12 do not apply to team vicars and, in any case, canons are dele-

gated legislation and cannot override a Measure. Thus the bishop does not have the power summarily to revoke the licence of a team vicar. The judge went on to review the law regarding the disciplining of clergy by their ecclesiastical superiors. He found that proceedings under the Ecclesiastical Jurisdiction Measure 1963 presupposed a gravity of offence a far cry from failure to stop bell-ringers causing a private nuisance. He concluded that the bishop has no powers to give orders regarding bells which are, by canon, the responsibility of the incumbent. He found that the bishop did not fail to exercise his powers of visitation in the matter and that there was no arguable case that the bishop authorised, or permitted, the nuisance. The appeal was dismissed. [WA]

Re St Catherine, Drayton

(Bath and Wells Consistory Court: Briden Ch, May 2002)

Re-ordering—control of PCC finance

A faculty was sought and granted for the installation of a raised platform in the tower of this Grade I listed church. The platform would serve as a floor for bell-ringing, would be in the same position as a previously existing gallery and would be accessed through a new doorway from the existing tower stair. Objections to the creation of a new doorway in the tower were received from English Heritage and the Society for the Protection of Ancient Buildings. The chancellor found that the design of the proposed doorway and the absence of viable alternatives weighed in favour of the granting of a faculty. A further objection was received from three parishioners that the project was an expensive luxury which the parish can ill afford. Following his earlier judgment in *Re St Catherine's, Montacute* (1996, unreported; 15 CCC no 23) the chancellor stated that the settled practice of the court is to refrain from interfering with decisions reached by PCCs in accordance with their rules of procedure. In considering whether or not to grant a faculty the chancellor or archdeacon will want to know whether funds are available. There may be other exceptional circumstances in which the proposed manner of funding will affect the decision whether to grant a faculty, but it is not a ground for interference that a PCC decides one call on its assets to be more pressing than another. He added that it was common practice to grant faculties on condition that no contract shall be entered into until a proportion of funding (commonly at least two-thirds) is in place. In this case the PCC had sufficient funds so no interference was necessary. [WA]

Re St Mary the Virgin, Chislet

(Canterbury Commissary Court: Walker Com Gen, April 2002)

Memorial—objection

The petitioner sought a faculty for the erection of a memorial headstone to his parents who had died in 2000 and 2001 respectively. The PCC and DAC

had approved the memorial. An objection was raised by M who claimed that the petitioner's parents had been buried in a grave already occupied by the remains of his grandfather who had died in 1949. There was no correct churchyard plan to which the court could refer. The gravedigger who had dug the double depth grave in 2000 gave evidence that he had not come across any existing remains despite digging to a depth of nine feet. This evidence, along with the existence of a dip in the ground immediately adjacent to the grave in question, led the commissary general to conclude that the grave of M's grandfather was in all likelihood beside that of the petitioner's parents. A faculty was granted. [WA]

Re St Anne, Chasetown

(Lichfield Consistory Court: Shand Ch, May 2002)

Introduction of IT training centre—considerations—secular use

The Lichfield Church Urban Fund, supported by the PCC, the archdeacon and the DAC, sought the introduction of an IT training centre into a church building. Only upon the chancellor being satisfied that the following issues had been adequately addressed did he grant a faculty for such introduction:

- (i) the security of the church building;
- (ii) whether there would be any interference with the weekday acts of worship in the church; and
- (iii) whether the parish would bear an additional financial burden as a result of such introduction.

The chancellor considered that such a secular use of the church building was in no way offensive, scandalous or incompatible with the primary use of the church for worship and that it provided an exciting opportunity for out-reach into the community. [RA]

Re Mary Wood, deceased

(Sheffield Consistory Court: McClean Ch, June 2002)

Exhumation—cremated remains—exceptional circumstances

The petitioners sought a faculty for the removal of the cremated remains of W from the graveyard of St Michael's Church, Rossington for re-burial in Fort William. Burial in Scotland had been the wish of the deceased although her family had opted to bury her remains in Rossington for ease of visiting. The family were now moving to the north of Scotland and wished to move the remains with them. The chancellor deferred his decision until the handing down of the Court of Arches judgment in *Re Blagdon Cemetery* [2002] 3 WLR 603, 6 Ecc LJ 420. The chancellor read the Blagdon judgment as not departing from the guidance set out by the Chancery Court of York in *Re*

Christ Church, Alsager [1999] Fam 142, [1999] 1 All ER 117, that a good and proper reason needed to be shown for any exhumation; that a mistake is likely to be a good and proper reason but that a change of mind on behalf of relatives is not. He drew on a theological statement by the Bishop of Stafford quoted in the *Blagdon* judgment and stated that 'theology and law ... both require me to allow exhumation only in exceptional circumstances'. He found no such circumstances in this case and the petition was refused. [WA]

Re St Giles, Horsted Keynes

(Chichester Consistory Court: Hill Ch, July 2002)

Installation of aumbry

In granting a faculty for the installation of an aumbry the chancellor referred to the incumbent's inalienable right, as set out in *The Bishop's Regulations for the Reservation of the Sacrament*, to reserve the sacrament in the church and found that the decision of the democratically elected PCC to support the petition was determinative of the fact that the 'churchmanship' within the parish, as represented by the installation of an aumbry, accorded with the prevailing wishes of the parish. [RA]

Re Bromley Hill Cemetery

(Rochester Consistory Court: Goodman Ch, August 2002)

Exhumation—exceptional circumstances

The petitioner had purchased a gravespace in the consecrated section of the cemetery for the future burial of her two brothers. On the death of one brother it was discovered that a tree stump and roots made burial in the plot in question impossible. Spurred on by urgency the petitioner accepted the offer of an alternative plot where an unrelated body had been buried in 1994. The cemetery authority stated at the time that they would be able to find a suitable plot for the re-interment of the deceased brother and the subsequent burial of the second brother on his death. Following the judgment in *Re Blagdon Cemetery* [2002] 3 WLR 603, 6 Ecc LJ 420, the chancellor stated that exhumations would only be allowed in exceptional cases. He found that the petitioner had rebutted the presumption against exhumation in this case and noted that the application had been made very quickly after the first burial. A faculty was issued accordingly. [WA]

Re St Edward the Confessor, Barnsley

(Wakefield Consistory Court: Collier Ch, August 2002)

Installation of clock—presumption

In granting a faculty for the installation of a clock in the tower of a Grade II listed church the chancellor relied upon the dictum of Gray Ch in *Re St*

James, New Malden [1994] Fam 44, [1994] 1 All ER 85, that the court should approach faculty cases on the basis that the faculty should be granted unless there were good reasons for a refusal. [RA]

Re St Peter's, Walworth

(Southwark Consistory Court: George Ch, August 2002)

Listed building—special architectural or historic interest—Bishopsgate questions

The petitioners sought a faculty to convert the crypt of a Grade I listed church which is the best preserved church of the architect Sir John Soane. The parish sought to turn the crypt (at present wasted space) into a community hall for the economically deprived area in which the parish was situated. They also sought to install a lift to enable disabled access to this facility and to improve the entry to the crypt from the exterior of the building. Over £1 million out of a projected budget of £1.3 million had already been raised. The Georgian Group opposed the petition. The chancellor re-visited the principle that there is a strong presumption against any change which would adversely affect the character of a building as a building of special architectural or historic interest. He applied the questions posed by Mynors Ch. in *Re St Thomas, Stourbridge* (2001, unreported) as follows:

- (i) Do the proposed alterations adversely affect the character of the church as a building of special architectural or historic interest?
- (ii) If they do, what is the necessity for carrying them out?
- (iii) Does that necessity outweigh the adverse effect?

This reversed the order of the first two *Bishopsgate* questions. In applying this approach the chancellor stated that it in no way questioned the principle that the presumption is heavily against change (see *Re St Mary the Virgin, Sherborne* [1996] Fam 63, [1996] 3 All ER 769). He treated necessity as something less than essential, but more than merely desirable or convenient following his earlier judgment in *Re St John the Evangelist, Blackheath* (1998) 5 Ecc LJ 217. The chancellor found that the character of the building as a whole would not be adversely affected by the proposed works but that the character of the crypt would be. The necessity for the re-ordering of the space, however, rebutted the presumption against change and a faculty was granted. [WA]

Re Keynsham Cemetery

(Bath and Wells Consistory Court: Briden Ch, September 2002)

Gravestones—cemeteries—confirmatory faculty

Being concerned about the safety of monuments in a cemetery that it managed the local authority, in the mistaken belief that no faculty was required,

used a 'Topple Tester' to apply a measured force of 50kg to each monument or tombstone. If the monument failed the test, it was dismantled and laid upon the grave. Thereafter a letter was sent to any known relative of the deceased explaining the situation. The local authority petitioner applied for a confirmatory faculty some months after the event. The chancellor rejected the argument that he had no jurisdiction over the cemetery, citing *Re West Norwood Cemetery* [1994] Fam 210, [1995] 1 All ER 387. He reviewed in detail the law pertaining to monuments and identified the potential liabilities of the petitioner under the Occupiers' Liability Act 1957 and the Health and Safety at Work Act 1974. The remedy chosen by the petitioner was, he ruled, a drastic one but not *Wednesbury* unreasonable. He issued a confirmatory faculty subject to owners of certain of the monuments in limited circumstances being given liberty to apply for reinstatement of them. The chancellor accepted that the method of testing used by the petitioner was justifiable on the information available in 2001 but he ruled that in future monuments may be laid flat if they fail a hand testing or testing to a 30kg standard by a Topple Tester or similar device. Conditions were attached to the faculty, namely that where practicable the petitioner shall give any person known to have an interest notice that a monument has been found to be unstable and afford that person reasonable opportunity to remedy the defect, and a list of displaced monuments shall be maintained by the petitioner along with a photograph. [JG]

Re St Mary Magdalene and St Denys, Midhurst
(Chichester Consistory Court: Hill Ch. September 2002)

Re-ordering—consultation

A petition was sought to re-order the west end of the church by the replacement of oak doors with glazed doors, the removal of an existing screen and its replacement with a glazed screen, the introduction of a new kitchen and disabled toilet facility, improved disabled access, the introduction of a new lighting system and internal redecoration. The chancellor considered the petitioners' arguments and the objectors' arguments and granted the faculty having considered and applied *Re St Luke the Evangelist, Maidstone* [1995] Fam 1, [1995] 1 All ER 321. In doing so he chose to make a comment he hoped would assist other petitioners, having noted misgivings expressed in the diocese and in the letter page of the Church Times. Concern had been raised about the problem of adopting the contributions of a plethora of consultees so that at the time the petition is presented 'all one's ducks are in a line'. Consultation, he advised, must not be confused with subjugation. A parish should not feel obliged to take on board each and every comment from an amenity society or consultee. It should give them adequate weight but should not incorporate every aspect of sometimes mutually contradictory advice as a valid project may thereafter be compromised. Petitioners should not feel that a proposal that lacks support in one or more particulars is necessarily doomed to failure. If a case is cogent and convincing as a matter of fact and law then a faculty will issue. He recommended the guid-

ance set out in Part 2 of the *Chancellor's General Directions Concerning Churches and Churchyards*, entitled 'Preliminary Steps' which mentions within it *Making Changes to a Listed Church* (1999) and *The National Amenity Societies: Their Role in the Conservation of Anglican Churches* (1998). [JG]

Re Dorchester Abbey

(Oxford Consistory Court: Bursell Ch, October 2002)

Re-ordering—disabled access—fees

A petition was sought to improve the access to this Grade I listed building. The plans included the replacement of a Victorian draught lobby (designed by an architect in the practice of Sir George Gilbert Scott) and its replacement with a new, primarily glass lobby. The chancellor indicated that he would follow the approach to the law as laid down in *Re St Gregory, Offchurch* [2000] 4 All ER 378, [2000] 1 WLR 2471. He stated further that he did not entirely agree with the definition of necessity formulated by George Ch in *Re St John the Evangelist, Blackheath* (1998) 5 Ecc LJ 217, in that his use of 'reasonably' in the phrase 'requisite or reasonably necessary' failed to stress that a compelling reason needs to be shown before change can be sanctioned. In addressing the Disability Discrimination Act 1994 the chancellor found a possible conflict between this Act and the faculty jurisdiction where the value of a feature of a listed building sought to be removed or altered in pursuance of the 1994 Act is so great that it nonetheless ought to remain unaltered. In such a case, the chancellor stated that the court's duty would be to rule that the presumption for its retention outweighs the argument for change based on disability discrimination. The Victorian Society proposed the alteration of the existing lobby by the addition of glass panels. The secretary to the DAC gave evidence, accepted by the chancellor, that the Victorian Society's proposals would cater for wheelchair users but not for the visually impaired for whom the consequent sudden changes of light when moving through the entrance would cause a hazard. The chancellor found that the character of the abbey as a building of architectural or historic importance would be adversely affected by the proposals but that the necessity for change had been proved. The faculty was granted subject to a condition that the dismantled lobby be labelled and stored in the abbey. [WA]

Bishop of Stafford v Owen

(High Court: Sullivan J, November 2002)

Team rector—possession of rectory—settlement

On the opening day of the hearing of this matter which had been listed for eight days, Mr Justice Sullivan delivered a Case Management Statement running to 6 pages. It contained his provisional view based upon a number

of assumptions being made in the Defendant's favour. He indicated that even if he were to find that the bishop were a public authority and Mr Owen a victim for the purposes of the Human Rights Act 1998; and even if it were open to Mr Owen to re-argue the fairness of the bishop's decision not to extend his term of office as team rector notwithstanding the Court of Appeal's decision (noted at (2001) 6 Ecc LJ 83 and reproduced in full in M Hill, *Ecclesiastical Law* (2nd edition, Oxford 2001) at 723–739), he did not consider that the court would be in a position to afford any relief to Mr Owen beyond that which had been contained in an open offer of settlement made on behalf of the bishop. No financial loss had been put forward such as to found a claim in damages. A mandatory injunction compelling his reinstatement would not be appropriate having regard to the passage of in excess of three years and the breakdown of trust between the bishop and Mr Owen as to the latter's suitability as team rector and as between Mr Owen and the team vicars. Following discussions between the parties, Mr Justice Sullivan approved a consent order by which Mr Owen agreed to give up possession of the rectory by the end of February 2003 and for his counterclaim to be dismissed. Attached to the consent order was a Schedule containing a joint statement from the parties. This recognised that the non-renewal of Mr Owen's term of office was not occasioned through any finding of fault or impropriety on his part but was considered by the bishop to be in the best interests of the parish, the congregations and the team as well as Mr Owen, his family and his ministerial career. Although Mr Owen did not share the bishop's view, he no longer wished to pursue a claim that the bishop's decision was unlawful. It was also agreed that Mr Owen be appointed pastoral auxiliary to the bishop from 1 March 2003 to 30 September 2004, which would involve him in pastoral care to parishes in interregna or reorganisation together with the development of an industrial ministry. [Editor]