RECENT ECCLESIASTICAL CASES

MARK HILL
Barrister, Deputy Chancellor of the Diocese of Winchester and lately Visiting Fellow of Emmanuel College, Cambridge
assisted by
LINDSAY YATES
Barrister and Ordinand at Ripon College, Cuddesdon

Re St Mary and St Nicholas, Wilton
(Salisbury Consistory Court: Ellison Ch, April 1997)

Ownership of memorial—removal from church

The petitioners, the 17th Earl of Pembroke and Montgomery together with the rector and churchwardens, sought a faculty authorising the removal of a bust affixed to a memorial in the church commemorating the 7th Earl, and its substitution with a plaster cast replica. The bust had become separated from the main memorial and there was a substantial risk of it being stolen. The present Earl intended to sell the bust and have a replica made out of the proceeds of sale, settling the balance on trust for the future benefit of the church. The DAC and CCC declined to recommend the proposal. English Heritage supported it. It was agreed by all the parties that the bust was a fixture attached to the incumbent's freehold but as its nature was a memorial, its ownership vested in the heir-at-law of the deceased pursuant to section 3 of the Faculty Jurisdiction Measure 1964. Nevertheless a faculty was still required for its removal. The chancellor considered that the only justiciable issue was whether a faculty should be granted for the permanent removal of the bust, the personal property of the present Earl. In reality it was no part of the heritage of the church. Its sale or otherwise was therefore immaterial. The case was distinguishable from *Re Escot Church* [1979] Fam 125, Cons Ct, in which it was held that title in a picture belonged to the churchwardens on behalf of the parish. Equally dicta in *Re St Gregory's, Tredington* [1972] Fam 236, [1971] 3 All ER 269, Ct of Arches, and *Re St Helen's, Brant Broughton* [1974] Fam 16, [1973] 2 All ER 386, Ct of Arches, involving faculties in respect of church property were of no application. No damage would be caused to the fabric of the church by the removal of the bust and a faculty would therefore issue. The chancellor declined to make the grant of the faculty conditional upon the replacing of the bust with a replica or ordering the balance of the proceeds of sale to be settled on trust for the church. As to the introduction of a replica, this was a matter best left to a future application.

Re All Saints (formerly St Aidan's), Small Heath
(Birmingham Consistory Court: Aglionby Ch, June 1998)

Re-ordering—Victorian Society—Costs

A major re-ordering was proposed to a grade II* listed building. It had the approval of the DAC and the support of the CCC. The Victorian Society lodged an objection. The Ancient Monuments Society, whilst making certain observations, did not maintain a formal objection. English Heritage gave qualified approval although the inspector concerned was criticised during the hearing by the representative of the Victorian Society as having 'a reputation for eccentric decisions'. Planning permission was granted by Birmingham City Council. The church was distinguished architecturally with some fine furnishings and included within its curtilage a clergy house

in the style of the Arts and Crafts movement. Industrial and economic decline had led to a dispersal of the community leaving the area less populous and largely Muslim. A Way Forward strategy had been implemented merging neighbouring parishes and declaring certain church buildings redundant. The Bishop of Birmingham was of the opinion that to maintain the church building in its present state was not a viable option. The re-ordering of All Saints and the clergy house and the construction of a new vicarage were integral parts of an interlocking package embracing collaborative ventures with local youth, educational, health care and other community projects. An entrance lobby, meeting rooms, offices, a kitchen and café would be created, together with residential units for commercial letting. Applying the 'Bishopsgate Questions' the chancellor concluded that the construction of a new east entrance, re-orientation of worship to the west end and the erection of a screen dividing the chancel from the nave were necessary for the pastoral well-being of the church. He further found that they would adversely affect the character of the building. Mindful of the integrated nature of the overall scheme, the chancellor concluded that if it could be implemented there would be a realistic future for the parish and the church as an Anglican place of worship containing within its walls all the furnishings that make it so memorable a building. Without it, the future was bleak. Accordingly a faculty was granted. The chancellor found it regrettable that the Victorian Society had felt it right to contest the petition to a full hearing. It should have reassessed its stance once the expert's statements had been disclosed and planning permission given. 'The application of realism and commonsense should have indicated that continuing opposition would not succeed. The three day hearing could and should have been avoided.' The Victorian Society was ordered to pay the court costs of the second and third days of the hearing and for the day when judgment was delivered, together with the costs incurred by the petitioners' experts for the three days of the hearing. The petitioners were not professionally represented.

R v Exeter Consistory Court, ex parte Cornish
(Court of Appeal: Butler-Sloss, Auld and Waller LJJ, June 1998)

Judicial review of consistory court

The applicant sought to renew an application for leave to judicially review a decision of Sir David Calcutt, Chancellor of the Diocese of Exeter, given on 1 July 1997 (unreported). Carnwath J, at first instance, took the point that a previous decision of the Court of Appeal [presumably *R v Chancellor of St Edmundsbury and Ipswich Diocese, ex parte White* [1948] 1KB 195, [1947] 2 All ER 170, CA] decided that *certiorari* will not lie in relation to a decision of the consistory court but he went on to consider the application on its merits. Waller LJ, giving the judgment of the court, agreed, stating, 'In my judgment, we should look at this matter on its merits and not consider questions of jurisdiction.' The chancellor had determined by way of written representations a confirmatory petition for works to a boundary wall of a churchyard. The applicant (1) objected to being described as the only objector (which strictly she was); (2) alleged collusion between the parish council, the churchwardens and the neighbour concerned; (3) considered it improper that the chancellor and counsel for the petitioners both came from the Temple; and (4) complained that the neighbour had behaved improperly in relation to the planning authorities and infringed her private property rights. The applicant's alternative solution, namely reinstatement of the churchyard, was regarded as both impracticable and undesirable. The court concluded that there was no chance that a Court of Appeal would review and reverse the chancellor's decision. The applicant could not show an arguable case that the chancellor went wrong in law or reached an unreasonable result.

Note: For a full discussion of the supervisory role of the Divisional Court in cases such as this, see M Hill 'Judicial Review of Ecclesiastical Courts' in N Doe, M Hill & R Ombres (eds) English Canon Law—Essays in Honour of Bishop Eric Kemp, (University of Wales Press, Cardiff, 1998) at pp 104–114. See also R v Provincial Court of the Church in Wales, ex parte Williams (below).

Re Emmanuel, Northwood
(London Consistory Court: Cameron Ch, June 1998)

Re-ordering—expenditure—consultation

A major re-ordering was proposed, the cost of which was in the order of £770,000. Several parties opponent raised the question of the morality of spending such large sums of money on buildings. Since this was not the first time this argument had been presented to the chancellor, she stated in her judgment that it is not the function of the consistory court to refuse to authorise works because they will be expensive, nor to seek to direct the PCC as to what proportion of the funds at its disposal should be spent on various aspects of mission, both at home and overseas. Further, the court can and does exercise control by permitting works to be executed in phases, each part only being permitted to commence as and when funds become available through cash, grants or loans. This can be policed by the registrar. The court is always conscious of the need for the PCC to have funds to make its proper contribution to the diocesan budget or common fund but where there is an appeal and money is donated with a particular purpose in mind, it would be quite wrong for the PCC to divert the money to another purpose. The duty of the PCC to co-operate with the minister in promoting in the parish the whole mission of the church, pastoral, evangelistic, social and ecumenical (see the Parochial Church Councils (Powers) Measure 1956, s 2(2)) includes matters of expenditure. The re-ordering was a major project whose evolution had begun with a more modest and less costly proposal. There was criticism that during the metamorphosis there had been insufficient consultation with the congregation. The chancellor considered it her duty to give guidance to other parishes to help avoid the problems encountered here:

> 'Having considered the evidence in this case, I have concluded that the guidance I should give is that in contemplating re-ordering parishes should address at least three core questions: (a) why? (b) how? (c) when? Under *why*, the PCC should address the perceived problems and need for change and produce a written document identifying them. Under *how*, there should be a feasibility study with drawings and approximate costs based on a detailed brief, which tackles the identified problems and needs and offers alternatives, if any. Under *when*, consideration should be given to whether the changes could or should be introduced in stages, for cost or other reasons, and the extent to which experimentation would be appropriate or desirable.
>
> 'The congregation can be informed as each question is examined (this can usefully be done through the parish magazine or an informatory leaflet) and there should be an opportunity for the congregation to consider the results of the examination of all three questions before any final decision is made by the PCC to proceed with a re-ordering scheme. The lesson to be learned . . . is that a petition for a faculty should not be presented until full consultation has taken place. This does not mean that the PCC has to secure unanimous support before a petition is presented, nor that it has to jeopardise parts of a scheme to try to meet objections if those parts are regarded by the minister and PCC as important in promoting in the parish the whole mission of the Church. The matter has then to be put to the test in the consistory court to be decided by 'the disinterested authority' in the words of Lord Penzance, namely the chancellor'.

Re Christ Church, Alsager
(Chancery Court of York: Owen (Auditor), Coningsby and Bursell Chs, July 1998)

Exhumation—guidelines—written representations—additional evidence

The appellant sought to appeal a decision in Chester Consistory Court (3 September 1997, unreported) in which Lomas Ch had refused to grant a petition for the exhumation of the cremated remains of the appellant's late father.

Procedure
The court acknowledged that there was no express provision in the Ecclesiastical Jurisdiction (Faculty Appeals) Rules 1965, SI 1965/251, for a hearing on written representations even if (though not the case here) the original hearing had been so disposed of pursuant to rule 25 of the Faculty Jurisdiction Rules 1992, SI 1992/2882. Relying on its inherent right to regulate its own procedure the court gave directions for the matter to be so determined. Here there were no objectors, no other interested parties and the appellant did not desire to make representations in person. 'In such a case the cost of a hearing would be quite unjustified and possibly oppressive unless this court believed that it would be assisted by an oral hearing.' In this instance it did not.

Further, the court declined to admit in evidence a letter from the crematorium manager. Under rule 8(1) of the 1965 rules, further evidence can be adduced only in 'exceptional circumstances', and this normally means that it could not have been adduced in the lower court: see *Re St Gregory's, Tredington* [1972] Fam 236, [1971] 3 All ER 269, Ct of Arches.

Guidelines on Exhumation
The court cited *Re Dixon* [1892] P 386; *Re Matheson* [1958] 1 All ER 202, [1958] 1 WLR 246, Cons Ct; and *Re Church Norton Churchyard* [1989] Fam 37, *sub nom Re Atkins* [1989] 1 All ER 14, Cons Ct, and affirmed the established principle that human remains should not be regarded as portable. The court commended the guidance given by McClean Ch in *Re Stocks, deceased* (1995) 4 Ecc LJ 527 which it reformulated, but only in minor ways, as follows:

'1. Once a body or ashes have been interred in consecrated ground, whether in a churchyard or in a consecrated section of a municipal cemetery, there should be no disturbance of the remains save for good and proper reason.
2. Where a mistake has been made in effecting the burial, for example a burial in the wrong grave, the court is likely to find that a good reason exists, especially when the petition is presented promptly after the discovery of the facts.
3. In other cases it will not normally be sufficient to show a change of mind on the part of the relatives of the deceased, or that the spouse or another close relative of the deceased has subsequently been buried elsewhere. Some other circumstance must usually be shown.
4. The passage of time, especially when this runs into a number of years, may make it less likely that a faculty will be granted.
5. No distinction is to be drawn between a body and cremated remains, except insofar as the processes of decay may affect a coffin more than a casket containing ashes and may also affect the sensibilities of a congregation or neighbours.
6. It is immaterial whether or not a Home Office licence has already obtained.'

The Question for Chancellors:
'Bearing in mind that it is the applicant who seeks to disturb the accepted norm we are satisfied that the critical question for the chancellor is: Is there a good and proper reason for exhumation, that reason being likely to be regarded as accept-

able by right thinking members of the Church at large? If there is, he should grant a faculty. If not, he should not.

'To the end of assisting the chancellor to a proper decision we recommend that when the application is made it should be accompanied by a plan of the graveyard or cemetery showing the church building (if appropriate), any residential dwellings within close proximity, and the situation of the grave from which the remains are to be removed. Upon receipt of the application the chancellor should also consider whether he needs a resolution of the PCC.

'The chancellor will need to bear in mind that the applicant must prove the good and proper reason to the usual standard applicable in faculty cases, namely on a balance of probabilities. Various factors will help him in deciding whether or not this has been done. It is not possible to list all the factors which may be relevant. However, experience has shown that some factors re-occur frequently, some arguing for a faculty and some against.

'Although mistaken advice by a funeral director or anyone as to the likelihood of a successful petition in itself is unlikely to carry much weight, a mistake by the applicant or by a third party, such as an incumbent, churchwarden, next of kin, an undertaker, or some other person, e.g. as to locality, may be persuasive to the grant of a faculty. Other matters which may be persuasive are medical reasons relating to the applicant; that all close relatives are in agreement; and the fact that the incumbent, the PCC and any nearby residents agree. That there is little risk of affecting the sensibilities of congegations or neighbours may be persuasive although in practice this is not likely to apply to municipal cemeteries.

'The passage of a substantial period of time will argue against the grant of a faculty. Public health factors and improper motives, e.g. serious unreasonableness or family feuds will be factors arguing against the grant. If there is no ground other that that the applicant has moved to a new area and wishes the remains also to be removed, this is likely to be an inadequate reason. In normal circumstances if there is no intention to re-inter in consecrated ground this will be a factor against the grant of a faculty. If the removal would be contrary to the intentions and wishes of the deceased; if there is reasonable opposition from members of the family; or if there is a risk of affecting the sensibilities of the congregation or the neighbourhood, these will be factors arguing against the grant of a faculty.

'The chancellor will need to weigh up all the relevant pointers, for and against, whether illustrated here or not, and then answer the question which we have stated.'

The appeal was dismissed with no order for costs.

Note: Since this judgment provides guidance for the determination of future applications in both provinces, the salient part has been reproduced verbatim. It is not now intended to summarise any of the recent first instance decisions on exhumation which have been overtaken by this judgment. Note, however, R Bursell, 'Digging Up Exhumation' (1998) 5 Ecc LJ 18-33.

Re St Peter, Lynchmere
(Chichester Consistory Court: Edwards Ch, August 1998)

Memorial plaques—book of remembrance—precedent

The petitioner sought two faculties, (1) for the erection of a memorial stone in honour of her late husband to be situated on a wall of the churchyard alongside an exist-

ing memorial to his late mother, and (2) after her death, a third memorial, for herself. The PCC had resolved to support an application for her late husband's name to be inscribed on the existing plaque. The DAC did not recommend approval since the proposals were contrary to the chancellor's general directions that a book of remembrance kept in the church was the appropriate means of recording the names of those whose ashes were interred in the churchyard. The DAC had no objection to additional wording being inscribed on the existing plaque. The petitioner withdrew her second petition but maintained the first. The chancellor considered himself bound by his own decision in *Re Cecilia Searight deceased* (1991), an unreported case concerning the same churchyard. In 1987 a faculty had been granted setting aside a plot within the churchyard for the interment of created remains and creating and maintaining a book of remembrance recording of the names of those whose cremated remains were so interred. The PCC had thereafter adopted a policy ceasing the practice of erecting memorials on the churchyard wall. The petitioner could show no sufficient grounds for departing from the principle and her application was refused. The chancellor, however, gave leave for the petitioner to amend her petition and apply for the existing stone to be replaced with one commemorating her late husband and his late mother, leaving space for the commemoration of herself in due course.

Re St Leonard, Beoley
(Worcester Consistory Court: Mynors Dep Ch, September 1998)

Reservation of grave spaces—guidelines

Four petitions were considered, each concerning the reservation of a grave space in a churchyard in which there was sufficient space for burials for approximately five years. Mindful that this scenario was becoming more frequent within the diocese and beyond, the deputy chancellor set out broad guidelines to assist with future applications. The general principle was that these petitions require careful scrutiny since reservation deprives the incumbent of his absolute right to determine where in a churchyard any given burial should take place and the right of all those on the church electoral roll or resident within the ecclesiastical parish to be buried in the churchyard so long as space remains available. He stated:

- That applications for a faculty should be accompanied by (a) a statement from the incumbent giving the likely future capacity of the churchyard; and (b) evidence of support for the application by the incumbent and the PCC, the latter being on behalf of present and future parishioners.
- That where a number of petitions are likely, the parish should have in place a policy as to the principles on which support will be given or withheld. These include the extent of any link of the person concerned with (a) the church as a worshipping community; (b) the churchyard, for example close relatives buried there; and (c) the town or village concerned. Any compelling pastoral or other circumstances should also be considered.
- That thought should be given to dioceses preparing standard policies which could be adopted (with or without amendment) by parishes.
- That in the absence of compelling reasons to the contrary every faculty for the reservation of a grave space should be expressed to endure for not more than twenty-five years or until further order.
- That faculties should generally be granted on condition (a) that the right reserved is marked and endorsed on an up-to-date churchyard plan; and (b) that the space reserved is physically marked on the ground in some small and discreet way.

Reference was made to *Re St Luke's, Holbeach Hurn* [1990] 2 All ER 749, [1991] 1 WLR 16, Cons Ct.

Note: A number of chancellors require a payment to be made to the churchyard maintenance fund as a condition to the grant of a faculty for the reservation of a grave space.

Re St John the Evangelist, Blackheath
(Southwark Consistory Court: George Ch, September 1998)

Bishopsgate Questions—'necessity'—costs of archdeacon

In addressing the 'Bishopsgate Questions' in relation to a major re-ordering, the chancellor was referred to the apparent conflict between the approach of the Court of Arches (*Re St Mary the Virgin, Sherborne* [1996] Fam 63, [1996] 3 All ER 769) and that of the Court of Ecclesiastical Causes Reserved (*Re St Stephen, Walbrook* [1987] Fam 146, [1987] 2 All ER 578), as noted in *Re St Chad, Romiley* (1997) 4 Ecc LJ 769, per Lomas Ch. Commenting on the historic evolution of departmental guidance concerning listed buildings, the remarks of Gray Ch in *Re St Barnabas, Dulwich* [1994] Fam 124 at 129–132, and various definitions to be found in civil and planning jurisprudence, the chancellor concluded that he interprets 'necessity' and 'necessary' in the Bishopsgate context as 'something less than essential, but more than merely desirable or convenient; in other words something that is requisite or reasonably necessary.'

As to costs, the petitioners were ordered, as is usual when a faculty is granted, to pay the prescribed court fees. Although the practice is not to make an order for *inter partes* costs (see *Re St Mary the Virgin, Sherborne* [1996] Fam 63 at 70, [1996] 3 All ER 769 at 775, Ct of Arches), and although provision is made for the payment of the archdeacon's costs by the diocesan board of finance (see the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s 16(4)), the court has jurisdiction to order a party to pay some or all of the costs incurred by the archdeacon (see *Re St Mary's, Barton-on-Humber* [1987] Fam 41 at 57, [1987] 2 All ER 861 at 878, Cons Ct; *Re St Stephen, Walbrook* [1987] Fam 146 at 158, [1986] 2 All ER 705 at 715, Cons Ct; and *Re St Matthew's, Wimbledon* [1985] 3 All ER 670 at 673, Cons Ct). Since here the evidence of an expert called by those acting for the archdeacon and the questioning of the petitioners' witnesses had worked overall to the benefit of the petitioners in improving the detail of the scheme for the long-term benefit of the parish, the appropriate course was to order the petitioners to pay half of the costs of the acting archdeacon.

R v Provincial Court of the Church in Wales, ex parte Williams
(High Court of Justice, Crown Office List: Latham J, October 1998)

Church in Wales—disciplinary proceedings—judicial review

The applicant had been found guilty in the Provincial Court of the Church in Wales of three charges of misconduct. The Provincial Court had refused him leave to appeal against the findings to the Supreme Court. The applicant sought judicial review of the initial decision of the Provincial Court and its refusal of leave to appeal. Dismissing the application, Latham J concluded that the Divisional Court had no jurisdiction to entertain the proceedings. Whilst accepting that the consistory courts of the Church of England were amenable to judicial review, he regarded the analogy as inapposite since it failed to have regard to the effects of the disestablishment of the Church in Wales as a result of the passing of the Welsh Church Act 1914. Accepting

the analysis of Sedley J in *R v Dean and Chapter of St Paul's Cathedral and the Church in Wales, ex parte Williamson* (1998) 5 Ecc LJ 129, he stated 'that the Church in Wales is a body whose legal authority arises from consensual submission to its jurisdiction, with no statutory or (de facto or de jure) governmental function. It is analogous to other religious bodies which are not established as part of the State.' He cited *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 All ER 249, [1992] 1 WLR 1306; *R v London Beth Din, ex parte Bloom* (1998) COD 131; and *R v Imam of Bury Park Jame Masjid, Luton, ex parte Sulaiman Ali* (1994) COD 142. As to the possibility of a private law claim, Latham J rejected each of the grounds of unfairness advanced by the applicant. He considered the Provincial Court correct to adopt the civil standard of proof as discussed by Lord Nicholls in *Re H* [1996] AC 563, [1996] 1 All ER 1, HL. He did not regard the penalty, namely a recommendation that the applicant be deposed from holy orders, as perverse or disproportionate. In any event the applicant had not exhausted the remedies available to him in the Church in Wales, since his appeal against deposition to the Provincial Synod of Bishops was still outstanding. Finally, there could be no breach of natural justice or of article 6(1) of the European Convention on Human Rights in the bishop effectively acting as prosecutor and sentencer. At ordination and by subsequent ministry the applicant had consented to the procedures set out in the Constitution of the Church in Wales and there could be no real risk of bias when the bishop took no part in the decision as to guilt and was precluded from imposing any greater sanction than that recommended by the court. This situation was wholly different from a court martial whose procedures had been the subject of criticism by the European Court of Human Rights in *Findlay v United Kingdom* 24 EHRR 221.