

RECENT ECCLESIASTICAL CASES

MARK HILL

Deputy Chancellor of the Diocese of Winchester

Re Bulkington St James

(Coventry Consistory Court; Gage Ch. September 1996)

Commemorative slab — cremated remains — churchyards guidelines

The Chancellor refused a faculty for the introduction of a memorial slab into an area of the churchyard reserved for the cremation of human remains. Whilst acknowledging that the widow of the deceased might have been misled by what was said by a retired priest who conducted the service some five years earlier and that elsewhere in the churchyard memorials abounded, the diocesan Guidelines and Rules for the Care and Maintenance of Churchyards (of which the widow was ignorant) provided at D9 that, 'The Chancellor will normally require a condition for any new reserved area that limits commemoration solely to a book of Remembrance in the church and prohibits memorials within the Churchyard.' There was no exceptional reason for not applying the Guidelines. Indeed to do so, he said, 'might be regarded as breaking faith with some of those bereaved who complied with the Guidelines'.

Perry v Glover

(Durham Consistory Court; Bursell Ch. January 1997)

EJM 1963 — leave to withdraw articles

A complaint of adultery was made by a parishioner of her parish priest. The bishop, faced with a conflict of evidence, initiated procedures under the Ecclesiastical Jurisdiction Measure 1963 and the examiner concluded that a prima facie case was made out. A promoter was duly appointed. Shortly before the hearing unchallenged expert evidence commissioned by the defence revealed (i) that a material letter which the complainant had denied on oath having written was undeniably in her hand; (ii) that the complainant had not been pregnant during the time when she claimed to have been carrying the priest's child but she nevertheless persisted in the allegation; and (iii) that the complainant was suffering from a psychiatric syndrome as a result of which she was deluded as to what had taken place. The Chancellor cited rule 16(1)(a) of the Ecclesiastical Jurisdiction (Discipline) Rules 1964, SI 1964/1755, which provides, 'The judge of the Consistory Court may at the hearing, if he thinks that the interests of justice so require, allow the Promoter to withdraw the articles.' Mindful that justice must be seen to be done, the Chancellor sought from the promoter the views of the complainant which were that, although she did not withdraw the allegations of adultery (perhaps not surprisingly in the light of the psychiatric evidence of delusion), she recognised that there was insufficient evidence to proceed and did not wish to give evidence herself. The priest, who had denied the allegations throughout, did not wish to press for a hearing. Accordingly the Chancellor gave his permission for the promoter to withdraw the articles.

Note: This case is illustrative of practical and procedural difficulties faced by those presently preparing the draft measure on clergy discipline giving effect to the recommendations in 'Under Authority' (GS 1217). The reverse of this situation (namely when the prosecuting authority declines to initiate proceedings following a complaint of sexual misconduct) was recently the subject of an action for judicial review in the secular courts. See R v Director of Public Prosecutions and another, ex parte M (13 June 1997, unreported CO1948/96, Brooke LJ and Newman J).

Re Marshchapel (Reginald Dale Deceased)
(Lincoln Consistory Court; Goodman Ch. May 1997)

Exhumation of cremated remains — exceptional circumstances

Whilst not derogating from the strict principle enunciated by Edwards Ch. in *Re Church Norton Churchyard* [1989] Fam 37, *sub nom Re Atkins* [1989] 1 All ER 14, and reaffirmed in a number of subsequent decisions that human remains buried in consecrated ground should generally be treated as having been interred in their final resting place, a faculty was granted for the exhumation of the remains of Reginald Dale for reinterment in North Somercotes. The Chancellor considered the circumstances to be exceptional and had particular regard to the following: (i) that the decision to inter Mr Dale's remains at Marshchapel in 1990 had been taken in haste and without full thought and was very soon regretted in view of the family's connection with North Somercotes; (ii) that Mr Dale's widow, who died in 1996, had wished that her remains should be interred with those of her husband but, as she had an aversion to cremation, this was not practicable in the small plot at Marshchapel where his cremated remains had been buried; (iii) that the body of Mr Dale's widow had subsequently been buried in North Somercotes and, even had the burial taken place at Marshchapel, a faculty might well have been granted for the removal of Mr Dale's ashes for re-interment in Mrs Dale's grave there; (iv) that the length of time since Mr Dale's ashes were interred at Marshchapel was reasonably short, the casket was likely still to be intact and there was no objection from either the PCC or from the Environmental Health Officer.

Note: The law concerning exhumation is discussed in the article "Digging up Exhumation" by Chancellor Rupert Bursell at page 18 above.

Re St George the Martyr, Holborn
(London Consistory Court; Cameron Ch. June 1997)

Major re-ordering — need for professional advice

In considering a petition for a substantial re-ordering of a Grade II* listed church (the detail of which does not merit reporting) the Chancellor expressed sympathy with the CCC, English Heritage and the Victorian Society who were hampered in their consideration of parts of the scheme by the lack of detailed plans indicating the nature of the work proposed. The parish's inspecting architect had not been involved and, despite consideration of re-ordering having been ongoing for several years, no architect had been engaged to assist in the preparation of plans or to advise on conservation issues likely to arise. Reliance had been placed on a young architect member of the congregation giving his services voluntarily. The Registry file of correspondence was more than six inches thick. The Chancellor stated:

'Whilst I fully understand the need for prudence in relation to spending the limited resources usually available to a PCC. I regard the approach which was adopted here as a false economy. A scheme such as that as originally proposed in this case, involving alteration to the fabric and furnishings of a listed church, requires to be properly prepared by an architect or surveyor, so that all bodies which have a legitimate concern about the proposal can see exactly what is involved. Far from arousing opposition such plans are likely to alleviate concern. In addition, they form the basis for a dialogue between an experienced church architect or surveyor and the bodies concerned with conservation, which frequently, in my experience, can result in some variation being agreed, which will meet the conservation objection whilst at the same time still preserving the substance of the Petitioner's proposed works. ...

'For the benefit of other parishes in the future I make it quite clear that plans in support of a major scheme of alteration of a listed church will have to be prepared in sufficient detail to enable me, and the bodies concerned with conservation, to understand easily what the details of the work proposed are. [...] If a PCC has sufficient enthusiasm for a project to wish to obtain a Faculty then the reasonable cost of professional advice and assistance must be allowed for in the overall cost of the scheme.'

Coker v Diocese of Southwark and others

(Court of Appeal (Civil Division); Staughton, Ward and Mummery LJJ July 1997)

Assistant curate — 'employee'

The issue in this case was whether the Reverend Dr A. B. Coker, a priest in the Church of England, was whilst an assistant curate an 'employee' within the Employment Protection (Consolidation) Act 1978. If he was, he had the right not to be unfairly dismissed by his employer, whereas if he was not, he had no such right under the Act and the Industrial Tribunal had no jurisdiction to hear his complaint. The Industrial Tribunal had found in Dr Coker's favour but this was reversed by the Employment Appeal Tribunal. The Court of Appeal dismissed Dr Coker's appeal, holding that he had no private law contract transforming him into an 'employee' for the purposes of the 1978 Act. Applying and approving *President of the Methodist Conference v Parfitt* [1984] QB 368, [1983] 3 All ER 747, CA, *Davies v Presbyterian Church of Wales* [1986] ICR 280, [1986] 1 All ER 705, HL, and *Re National Insurance Act 1911, Re Employment of Church of England Curates* [1912] 2 Ch 563, Mummery LJ concluded that there was no contract between the church and a minister of religion by dint of the lack of an intention to create a binding contractual relationship. The legal effect of ordination of a person to the priesthood is that he is called to an office recognised by law and charged with functions designated by law in the Ordinal and the Canons of the Church of England and discharged by him as assistant curate. 'It is unnecessary for him to enter into a contract for the creation, definition, execution or enforcement of those functions. Those functions embrace spiritual, liturgical and doctrinal matters as well as matters of ritual and ceremony, which make what might otherwise be regarded as an employment relationship in the secular and civil courts and tribunals as more appropriate for the special jurisdiction of ecclesiastical courts.' The relationship between the bishop and an assistant curate 'cemented by the oath of canonical obedience' is governed by 'the law of the established church which is part of the public law of England and not by a negotiated, contractual arrangement'.

Re Caythorpe

(Lincoln Consistory Court; Goodman Ch. July 1997)

Sale of picture — special reasons

A faculty was sought for the sale of a seventeenth-century painting in the school of Teniers which had been given to the parish in 1950 and was worth in the order of £2,500. The painting had recently been the subject of a theft during which the frame had been stolen but the canvas not. The Chancellor referred to *Re St Gregory's, Tredington* [1972] Fam 236, [1971] 3 All ER 269, *Re St Helen's, Brant Broughton* [1974] Fam 16, [1973] 3 All ER 386, and *Re St Mary the Virgin, Burton Latimer* (1995) 4 Ecc LJ 527, and concluded that in this instance it would be right to permit the sale since (i) the painting was not thought to be of any artistic merit (in this the CCC concurred); (ii) it had been a small gift to the church unconnected with its design or decoration; (iii) it had suffered serious vandalism which could be repeated hence it was presently kept in a bank vault; (iv) there were urgent works which needed to be carried out at the church including repairs to stained glass damaged by vandals; and (v) the donor's descendants consented to the disposal.

Re Holy Trinity, Batley Carr (Parish of Dewsbury)

(Wakefield Consistory Court; Collier Ch. August 1997)

Disposal of furniture — re-ordering — citing of CCC

Three separate petitions were lodged. Two, dated January 1995, concerned the disposal of items of furniture, the proceeds of sale being required for the cost of treatment for dry rot and the third, not lodged until February 1997, related to a re-ordering scheme. The DAC decided not to recommend disposal and regarded the petitions of January 1995 as premature, there being other possible means of raising finance for the works. The Chancellor visited the church in April and again in June 1996 and, following the second visit, directed that the Council for the Care of Churches should be cited under rule 14 of the Faculty Jurisdiction Rules 1992, SI 1992/2882, in relation to the items which it was proposed be disposed of. The letter accompanying the citation stated that 'it would also be useful if the CCC bore in mind the ultimate project when making [its] assessment and recommendations'. The CCC responded on 31st October 1996. In the meantime alternative sources of funding had potentially become available for the re-ordering and the third petition was duly lodged. The DAC recommended the scheme and further stated that there was not any article or matter in the church affected by the third petition which might be of historic or artistic interest under rule 14. The Chancellor convened a hearing for 30 June 1997 at which all three petitions would be determined and directed the Registrar to write to the CCC and ask if it would be able to attend the hearing to give evidence in relation to the furnishings and comment on the overall scheme. This letter was not, nor was it intended to be, a reference under rule 14. Citation had already taken place in relation to the items for which disposal was sought and such citation had been couched in terms of the overall scheme. However, the CCC wrote to the Registrar on 27 May stating that it had not discussed the disposal within the context of the overall reordering, that a report could not be produced until 18th June and that it wished the hearing scheduled for 30 June to be postponed. The Registrar replied on 30 May informing the CCC that the potential for funding would be prejudiced by any deferment of the hearing. On 25 June, following its meeting on 18 June, the CCC wrote to the Registrar strongly protesting at the way its advice was being treated and again requesting an adjournment. The Chancellor was satisfied

that, the furniture apart (which was the subject matter of the first two petitions and upon which he had already received the written advice of the CCC), there was no other article or matter affected by the re-ordering which was or might be of such historic or artistic interest that he was required by the Rules to seek further advice from the CCC. The Chancellor further reviewed the matter after hearing evidence and concluded that he had learned nothing to contradict the opinion which he had reached and which was consistent with the original view expressed by the DAC. He therefore determined each of the three petitions taking into account the written advice of the CCC in relation to the first two. The Chancellor was satisfied that the Faculty Jurisdiction Measure 1964 and the Faculty Jurisdiction Rules 1992 had been followed both in letter and in spirit.

Re St Peter, Shipley

(Bradford Consistory Court; Savill Ch. August 1997)

Communications equipment — terms of licence — costs

A faculty was sought for a licence for the erection of telecommunications equipment comprising three panel antennae upon the pillared section of the tower together with a link transmission dish, a small equipment cabin and a modest cabin to house electrical items. The Chancellor noted that faculties for the use of the church for secular purposes should only be granted in rare and exceptional purposes. He cited, by way of example, *Re All Saints, Harborough Magna* [1992] 4 All ER 948, [1992] 1 WLR 1235. The Chancellor regarded this instance as exceptional since:

(i) The installation and apparatus would be deployed sensitively and would not have a detrimental visual impact. The church was not a traditional village church, nor was it listed.

(ii) The bishop, the archdeacon and the DAC supported the proposal.

(iii) Mobile telephone services can confer great benefits for the public and serve the interests of the local community.

(iv) The church provided probably the only location in which to site the installation, and were a faculty not granted it was unlikely that an alternative site could be found.

(v) The annual income from the licence would be of great assistance to the PCC in the discharge of its continuing responsibility for major works of maintenance to the church. The tower required repainting and roof repairs were necessary.

The chancellor approved an annual fee of £3,200 reviewable on an open market basis which was significantly more beneficial than the £2,000 initially offered. He further made it a condition of the faculty and a term of the licence that the incumbent, the PCC and the telecommunications company use their best endeavours to ensure that the rights granted by the licence would not be used in a way which might embarrass the Church of England or cause distress or scandal to its parishioners. In order that such condition might be policed the faculty was granted 'until further order'. The petitioners were ordered to pay the costs of the archdeacon who had intervened in the proceedings at the instance of the Chancellor and whose intervention had led to an improvement in the wording of the licence as well as an increase in the annual fee. The telecommunications company duly met the entire costs.

Re St Mary, St Giles and All Saints, Canwell

(Lichfield Consistory Court; Coates Dep Ch. September 1997)

Construction of hall — pastoral need — adverse effect on church — necessity

A faculty was sought to construct a new multi-purpose hall linked to the listed Grade II* church by a glazed corridor. Planning permission had been granted by the LPA but the DAC was split in its views and the scheme was opposed by English Heritage, the Victorian Society and the CCC. The Chancellor referred to the legal tests and guidelines propounded in *Re St Luke the Evangelist, Maidstone* [1995] Fam 1, [1995] 1 All ER 321, and *Re St Mary's, Banbury* [1987] Fam 136, [1987] 1 All ER 247. The need for modern facilities such as toilets, catering and a meeting room was overwhelming and uncontested. Without it the small congregation would dwindle and fade. There was consensus that a building be constructed within the churchyard to the north of the church. What was in issue was its design, the suitability of building materials and whether it should be linked to the church and, if so, how. The petitioners, the amenity societies and the DAC each led expert evidence from architects. The Chancellor found that the proposed works would adversely affect the character of the church but proceeded to exercise his discretion in favour of granting a faculty (subject to certain provisos) having regard to the present and future pastoral well-being of the church. Professional opinion may have favoured a detached building but need dictated otherwise.

Note: This is a slightly unusual case, involving the application of the well-established principles of St Luke the Evangelist, Maidstone to external works.

Re West Norwood Cemetery (No 2)

(Southwark Consistory Court; George Ch. October 1997)

Municipal cemetery — amendment of faculty and scheme of management — photographs on headstones

The continuing saga of West Norwood Cemetery (see *Re West Norwood Cemetery* [1994] Fam 210, [1995] 1 All ER 387) rolls inexorably on. It is now in the hands of the new Chancellor of the diocese following the untimely death of his predecessor, Robert Gray QC, and the subsequent involvement of a Deputy Chancellor. There were two matters involved on this occasion which, curiously, appear to have come before the court by way of original petitions and not as applications within the existing proceedings or under a liberty to apply. In the first, the London Borough of Lambeth petitioned for the amendment of a confirmatory faculty granted on 3 February 1997. It sought further time within which to complete a record of the tombstones and memorials which it had removed and to restore three specific memorials. Whilst not uncritical of the local authority, the Chancellor granted each of the extensions of time sought. In the second, the Archdeacon of Lambeth petitioned for the amendment of the South Metropolitan Cemetery (West Norwood Cemetery) Scheme of Management 1997 which had been approved by the court on 3 February 1997. The Scheme provided for the Archdeacon's Official to have delegated authority to grant a faculty in the future in respect of new monuments in the consecrated part of the cemetery so long as the proposed monument complied with the Diocesan Churchyards Regulations as amended. The Scheme was supplemented by a Practice Direction couched in terms readily understandable by funerary masons and the bereaved. The Chancellor summarised that, '[i]n the interests of both the living and the dead, the intention was to reverse the trend by which a magnificent his-

torical cemetery risked becoming an unplanned and tasteless rag-bag of funerary offerings'. However, the Scheme had proved too strict in practice and was misunderstood in its operation. Accordingly certain amendments were approved. These included permitting use of a wider variety of stone; inclusion of integral flower holders; erection of temporary wooden crosses and cremation tablets; planting of trees; and permitting certain alterations to existing monuments by way of additional inscription. More contentious matters namely the use of polished granite, monuments of untraditional shape (such as hearts) and headstones incorporating photographs were regarded as inappropriate for the exercise of discretion by the Archdeacon's Official and future petitions would continue to be determined by the Chancellor on their individual merits. The Chancellor stated in clear terms that were he to permit the incorporation of a photograph on a headstone it should not be regarded as a precedent elsewhere in the diocese, 'where such applications will almost certainly be refused'. He cited *Re St Mary's, Fawkham* [1981] 1 WLR 1171, *Re St Mary, Grendon* (1990) 2 Ecc LJ 64, *Re St Anne, Clifton* (1992) 3 Ecc LJ 117, and *Re St Mary, Coxhoe* (1996) 4 Ecc LJ 686.