RECENT ECCLESIASTICAL CASES

edited by

JUSTIN GAU

Barrister, Deputy Chancellor of the Diocese of Lincoln

Re St John the Evangelist, Dudley Wood
(Worcester Consistory Court: Mynors Ch, June 2005)

Re-ordering – Disability Discrimination Act 1995

The petitioners sought a faculty: to install a ramp at the east end of the church, create a new north door, introduce a new accessible lavatory and subdivide the choir vestry to provide a new office. No objections were received, planning permission had been granted and the DAC had recommended that a faculty be granted. The chancellor raised a concern that the arrangement appeared to relegate disabled people away from the main door. He proposed a solution so that the west door should be made accessible to all. The petitioners identified practical difficulties with that solution. The chancellor reviewed in detail the Disability Discrimination Act 1995, identifying *inter alia* the anti-commercial duties placed upon organisations covered by the Act. A difficulty raised by the provision of a ramp as opposed to clearly marked steps was identified. He concluded that as far as possible the best way to comply with the Act, both legally and theologically, was for access to and within the church and church hall to be provided in the same way for all. He concluded that the best compromise was to create one common entrance for all at an adapted west door, but as the desire of the parish was to have the north door ramped regardless of any other provision, he granted a faculty as prayed. He noted that the proposal was not so elaborate and expensive that further works at the west door could not be carried out in future.

The comprehensive discussion of the Disability Discrimination Act 1995 contained in this judgment has been adopted in subsequent decisions including Re St Mary, Slaugham (No 2) *(Chichester Consistory Court, January 2006, unreported) per Hill Ch.*

Re Christchurch, Sparkbook
(Birmingham Consistory Court: Cardinal Ch, October 2005)

Demolition -- tornado damage

The diocese sought an instrument under the Care of Churches and

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Ecclesiastical Jurisdiction Measure 1991 to demolish a church which had been damaged by a tornado in July 2005. The Victorian Society were informed and objected. The church, before the damage, no longer met the mission and ministry needs of the diocese. The chancellor decided that neither the quality of the building nor its regular and heavy repair demands were persuasive in determining whether the church should be demolished; he was solely concerned with whether the test under section 18 of the 1991 Measure had been met. The chancellor had been on a site visit and had read the reports of an architect, a structural engineer and a health and safety officer. The chancellor concluded that the loosened masonry was a continuing danger to visitors, part of the building was unstable, the guttering was a danger, water ingress could cause further structural damage and the eventual collapse of parts of the building, and that accordingly any repair work would expose builders to danger. He concluded that the site could not adequately be sealed off to prevent break-ins. The Victorian Society's objections included the fact that the building was not in imminent danger of collapse, that it would set a dangerous precedent, that a valuable church was being demolished, that it could be repaired and that there was no 'urgency' within the meaning of the Measure. The chancellor agreed that the building was not in imminent danger of collapse but concluded it could take place quite soon, but noted that 'imminent collapse' was not a section 18 test. The chancellor concluded that ordering the demolition of a church in Birmingham as a result of tornado damage was unlikely to set a precedent; he agreed that a valuable church was being demolished but identified that this was not 'wanton vandalism' but economic reality, as too was the idea of not repairing the church. He concluded that matters were urgent and that there was insufficient time to obtain a faculty, and with regret signed the instrument.

Re St Mary, Longstock
(Winchester Consistory Court: Hill Dep Ch, October 2005)

Memorial – stained glass – exceptionality – Bishopsgate questions

The petitioners sought a faculty for the installation of a stained glass window in memory of the late wife of a retired priest. The deputy chancellor reviewed the authorities and ruled that the 'exceptionality' test as set out in *Re St Margaret, Eartham* [1981] 1 WLR 1129, Ct of Arches, was inappropriate for a stained glass window which was to be erected as a memorial. The issue, having identified the *Bishopsgate* questions, was to decide whether the replacement of a sound window could properly be styled 'necessary'? Having reviewed various authorities concerning the plurality of approaches to the order in which the *Bishopsgate* questions be addressed, and considered the two reservations expressed by the CCC (who otherwise had no objections to the introduction of the stained glass), the deputy chancellor considered that there were strong pastoral reasons why the window should be introduced. He ruled that the introduction of the window was reasonably necessary and requisite as a matter of pastoral

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well being and for the living out of the Christian gospel. He went on to say that, even if it was not strictly necessary in the more limited sense of the word, then applying the balancing exercise commended in *Re St Gregory, Offchurch* [2000] 4 All ER 378, [2000] 1WLR 2471, Coventry Cons Ct, a good case was made out as it would not adversely affect the appearance of the church nor its historic, architectural or artistic setting or integrity.

Re Emmanuel Church, Bentley
(Court of Arches: Dean; Bursell and Briden Chs, November 2005)

Telecommunications installations – best practice – discretion

This was an appeal from a decision of Shand Ch (2005) 8 Ecc LJ 235, who had refused a faculty for the installation of mobile telephone aerials on the outside and inside of a church tower on the basis that the strong local opposition to the installation would be to undermine the prime objective of the mission and worship of the church. The appellant, QS4 Limited, had not been given a chance to comment on the issues in relation to local feeling and argued that the Archbishops' Council's model licence 'Best Practice Commitments' would be complied with. The Court criticised the decision of the chancellor in his analysis of *St Luke the Evangelist, Maidstone* [1995] Fam 1. The Court concluded that the appellant had satisfied the best practice commitment in relation to the aesthetics of the project by adopting the recommended alterations suggested by the DAC. The Court criticised the behaviour of the appellant's agents in terms of 'local consultation' and advised that, in future, advertisements in local newspapers were to be commended. The Court criticised the DAC and Registrar for failing adequately to give public notice of the application for the faculty. The Court approved the use of properly proved petitions but criticised the chancellor for failing to consider ordering a fresh display of public notice for objection to cure the breach of Faculty Jurisdiction Rules. The Court criticised the further breaches of the rules in terms of the failure to obtain the objectors' agreement in writing to proceeding by way of written representations and drew attention to the procedural alternatives open to a chancellor under the Faculty Jurisdiction Rules, and further criticised the chancellor's decision to take into account a letter from an objector who had not been given the option whether she wished her objections to be taken into account or not. The Court agreed with the appellant's submission that the chancellor had misdirected himself in law in relation to section 1 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 and accordingly misdirected himself by attaching disproportionate weight to the 'subjective perception of hazard' on the part of the objectors. The Court rejected the submission by the appellant that the concept of 'material consideration' (for example the question of unjustified local concern) should be incorporated into the deliberations of the Consistory Court by analogy with planning law. The Court concluded that the chancellor had misdirected himself by giving undue weight to the 'depth of feeling locally'. The Court concluded that clause 6 of the licence agreed by the Archbishops' Council sufficiently

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answered the objectors concerns over safety. The Court concluded that the flawed consultation process had engendered a lack of trust between the objectors and petitioners, so that the objections were directed towards the companies rather than the church itself. The Court set aside the chancellor's decision and allowed the appeal.

Re St Margaret of Scotland, Castletown
(Durham Consistory Court: Bursell Ch, November 2005)

Church plate – removal – Pastoral Measure 1983

The church was due to be demolished and individuals whose parents had given a chalice and paten to the church as a thanksgiving for sixty years marriage asked that it be transferred to another church. The prescribed procedures in such circumstances were that first consideration of transferring the chalice and paten would be to a church in the immediate area. The family were unhappy that the chalice and paten should be removed to the proposed church in the immediate area as, *inter alia*, former worshippers from St Margaret's did not worship at that church. The chancellor noted that the relevant provisions of the Pastoral Measure1983 (as amended) did not yet apply but observed that section 64(1) of the Measure directs that the font, communion table and plate should be transferred to a church in the area of the benefice of any church that is to be demolished. Section 64(2) underlines that commemoration to a deceased person (although excluding church plate) may be relevant when reaching any decision. Bearing in mind those considerations and the representations made, the chancellor directed that the chalice and paten should be removed from the church in the immediate area (where they had been placed as a place of safety) and introduced to the church that the family had identified.

Percy (AP) v Church of Scotland Board of National Mission
(House of Lords: Lords Nicholls, Hoffman, Hope, Scott and Baroness Hale, December 2005)

Clergy – employment status

For a detailed summary and critique of this judgment, see F Cranmer and S Peterson 'Employment, Sex Discrimination and the Churches: The Percy *Case' at p 392 of this Issue.*

Dödsbo v Sweden
(European Court of Human Rights, January 2006)

Exhumation – human rights

The applicant complained that the refusal to remove her husband's urn

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to the family plot in Stockholm from a plot in Fagersta was in breach of Article 8 of the European Convention on Human Rights. By a bare majority (4:3) the Court rejected her application. The Court reviewed the domestic legislation in the light of Article 8, reiterating that the concepts of 'private and family life' were broad terms and proceeded on the assumption that the domestic law involved an interference with the applicant's Article 8 rights. The majority determined that the refusal to move the urn was necessary in a democratic society for the prevention of disorder, for the protection of morals and/or the protection of the rights of others. The assessment balanced the individual's interest in having a burial transfer against society's interest in ensuring the sanctity of graves. Such a sensitive issue should be afforded a wide margin of appreciation. The removal of the urn appeared to be quite easy and no public health interests seemed to be involved. There were however no indications that the applicant's husband was not buried in accordance with his wishes, and it was assumed the burial so accorded. The applicant's husband had been buried in the town where he had lived for 25 years and had raised his family. There was nothing preventing the applicant being buried with her husband. The dissenting judgment did not accept how the removal of the urn from the current burial plot to the family plot could jeopardise the concept of the sanctity of the grave as it would be the removal from one sacred place to another. There was no conflict among the family. The dissenting judges could find no reason to believe that the applicant and her family regarded cemeteries and burial places as temporary repositories for the deceased's ashes. They noted that the deceased had not expressed any wish as to his final resting place and that the Funeral Act provided for particular regard to be had to the wishes of the last remaining spouse. It had to be noted that since the interment the family had no connection with Fagersta. The Stockholm plot was a family plot with an irrevocable contract whereas the Fagersta contract was only temporary. They concluded that the interference with the applicant's rights was not necessary in a democratic society.

For a consideration of the application of this Strasbourg decision in English jurisprudence, see the Comment of R Sandberg, 'Human Rights and Human Remains: The Impact of Dödsbo v Sweden' *at p 453 of this issue.*

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