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ARTICLE

Aston Cantlow v Wallbank: a twenty-year retrospective

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Abstract

To mark the passing of two decades since the Judicial Committee of the House of Lords handed down their judgment in the appeal of *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* this article considers the enduring impact of the decision in terms of the constitutional position of the Church of England as a national church and analyses the public and private functions which it undertakes. In the altered landscape of the new Carolean era, with a decline in church attendance and a rise in secularism, it examines the reasoning of the five separate opinions delivered by the Law Lords and evaluates in retrospect various of the issues raised.

Keywords: article 9 ECHR; chancel repair liability; disestablishment; Human Rights Act 1998; national church; public authority; UK constitution

Introduction

From before the sealing of Magna Carta in 1215, *ecclesia anglicana* has connoted a particular understanding of the English Church,[1] a matter which was accentuated in the sixteenth century when the Henrician Reformation saw a break with papal authority and the clear association of the Christian Church in England with the monarch and the State.[2] Whilst in the intervening period the United Kingdom has become more pluralistic and more secular, the Church of England has continued to enjoy a unique position in civil and political society, which is both a privilege and a burden.[3]

[1] Note the reflections of Lord Williams of Oystermouth in R Williams, 'Saving Our Order: Becket and the Law' (2021) 23 Ecc LJ 127–139.

[2] See generally R Griffith-Jones and M Hill, *Magna Carta, Religion and the Law of Law* (Cambridge, 2015); and R Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford, 2004).

[3] Discussed more fully in M Hill, *Ecclesiastical Law*, 4th edn (Oxford, 2018), paras 1.19–1.21.

Accordingly, in 2004 the Law Lords[4] were provided with an opportunity to consider the constitutional status of the Church of England in determining the appeal in *Aston Cantlow v Wallbank*.[5] Although the presenting issue was the enforceability of a landowner's obligation to fund works to the fabric of a parish church under the archaic provisions of the Chancel Repair Act 1932, the greater significance of the case derives from its treatment of the ground-breaking Human Rights Act 1998. At issue, although perhaps not immediately apparent from the papers filed by the parties, was whether the Church of England might be uniquely disadvantaged in enjoying the right to freedom of religion, guaranteed by Article 9 of the European Convention on Human Rights. As Lord Hope observed:

> But the questions about the scope and effect of the Human Rights Act 1998 which your Lordships have been asked to decide in this appeal, and on which I wish to concentrate, are of current interest and very considerable public importance. They raise issues whose significance extends far beyond the boundaries of the Parish of Aston Cantlow.[6]

This article will focus on these larger constitutional issues. I am not a property lawyer or chancery specialist, and was never particularly interested in chancel repair liability as such. For me the enduring importance of this litigation lay in placing the established Church of England under the forensic microscope of the United Kingdom's highest court. Many readers of this *Journal* will be familiar with the facts of the case and the legal issues which it raised. I will therefore take the background and history fairly briefly, but before that a brief word about the nature of the liability and the process for its enforcement.

Chancel repair liability and its enforcement

The Chancel Repairs Act 1932 provides that where a chancel is in need of repair, the Parochial Church Council (PCC) may serve upon any person, who appears to be liable to repair the chancel, a notice stating the grounds on which that person is alleged to be liable, and the extent of the disrepair, and calling on him to put the chancel in proper repair.[7] If the chancel is not put in proper repair within a month, the PCC may bring proceedings to recover the sum required to put the chancel in proper repair.[8] If the court finds that the person would have been liable by the appropriate ecclesiastical court,[9] it must give judgment for the

[4] Who were to mutate into the United Kingdom's Supreme Court with effect from 1 October 2009.

[5] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546; [2003] 3 WLR 283; [2003] 3 All ER 1213, HL.

[6] Ibid at para 23.

[7] Chancel Repairs Act 1932, s 2(1).

[8] Ibid s 2(2).

[9] The legal test for the court is whether the lay rector would have been liable to be admonished, and not whether the ecclesiastical court would in fact have admonished him in the particular case: *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, CA, at 440 per Romer LJ.

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PCC.[10] The extent of the obligation was considered by Lewison J who concluded that it was the cost of putting the chancel in proper repair, which means more than simply wind and watertight.[11] The liability is personal and several and, in the event that the land in question is subdivided, the chancel repair liability attaches to the owners of each parcel of the divided property.[12] The liability is not limited to the profits received from the rectorial property.[13] There is provision under section 52 of the Ecclesiastical Dilapidations Measure 1923 for a lay rector to compound his liability and thereby obtain a release from it.[14]

A tale from Shakespeare

The Saxon church of Aston Cantlow, dedicated to St John the Baptist, lies three miles from Stratford-upon-Avon. It was here that William Shakespeare's parents, John Shakespeare and Mary Arden, were married in 1557. Mr and Mrs Wallbank owned Glebe Farm. Like their predecessors in title, they were lay rectors, a status which ran with the land.[15] The Wallbanks did not dispute that their property carried with it the obligation to repair the chancel of the parish church. However, they set out to argue that the obligation was unenforceable in consequence of the Human Rights Act 1998. Their argument was that the obligation was akin to an unlawful tax levied by the church,[16] and therefore in violation of Article 1 of the First Protocol to the European Convention on Human Rights.[17]

The Wallbanks' concession may perhaps have been too generously made. I had not been brought into the litigation at that stage. It was widely believed that chancel repair liability had almost fallen into desuetude.[18] Lord Nichols of Birkenhead was scathing about it:

[10] Ibid s 2(3).

[11] *Aston Cantlow Parochial Church Council v Wallbank*, *The Times*, 21 February 2007 per Lewison J, applying *Wise v Metcalfe* (1829) 10 B&C 299; and *Pell v Addison* (1860) 2 F& F 291, the latter using the expression 'substantial repair without ornament' at 292.

[12] *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, CA. An individual held liable would have a right of contribution against co-rectors. See also *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, [1955] 2 All ER 607, Wynn-Parry J.

[13] *Wickhambrook Parochial Church Council v Croxford* (above), per Romer LJ.

[14] Ecclesiastical Dilapidations Measure 1923, s 52.

[15] This was converted into a civil obligation in 1743 as a result of an enclosure award made under a Private Act of Parliament of 1742 entitled *An Act for Dividing and Inclosing, Setting out and Allotting, certain Common Fields and Inclosures within the Manor and Parish of Aston Cantlow, in the County of Warwick.*

[16] The liability was not for not for a trivial sum. At the start of the proceedings, the estimated cost for the repair of the chancel exceeded £95,000.

[17] 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law': European Convention on Human Rights, First Protocol, Article 1.

[18] When the land came into the possession of Mrs Wallbanks' parents in 1970, the conveyance stated it was 'subject to the liability to repair the chancel of Aston Cantlow ... so far as the same still affects the property conveyed and is still subsisting and capable of being enforced'.

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> The anachronistic, even capricious, nature of this ancient liability was recognised some years ago by the Law Commission ... [which] said 'this relic of the past' is 'no longer acceptable' [and] recommended its phased abolition.[19]

The distinguished legal historian, Professor Sir John Baker KC, described the liability as 'One of the more unsightly blots on the history of English jurisprudence'.[20] But this article is not concerned with the hangover of an ancient property right, but with the far-reaching issues concerning the nature and status of the Church of England.[21]

The course of the litigation

In February 2000, the case came before Ferris J at first instance in the Chancery Division of the High Court.[22] The judge determined that the law on chancel repair liability was clear and unambiguous. It did not amount to a deprivation of the Wallbanks' possessions because it was not in the nature of a levy or tax, but an incumbrance[23] and one of the 'incidents of ownership' of the land in question. Article 1 of the First Protocol was not engaged. Ferris J also rejected the argument that the liability infringed the Wallbanks' freedom of religion (Article 9) or discriminated against them (Article 14).

The Wallbanks appealed to the Court of Appeal,[24] and the case was heard on 29 March 2001. Significantly, during the intervening period, on 1 October 2000, the Human Rights Act 1998 had come into force. In consequence, the shape and scope of the argument changed significantly from when it was before the lower court.[25] The architecture of this innovative piece of legislation needs to be fully understood. It was designed to make the provisions of the European Convention on Human Rights directly enforceable in the United Kingdom's domestic courts, without recourse, as hitherto, to the European Court of Human Rights in Strasbourg. However, the Act did not create an unfettered freestanding cause of action for breaches of the Convention. Instead, under section 6, it was made unlawful for a public authority to act in a manner incompatible with a Convention right.[26] Section 7 of the Act provided that a person who claims

[19] *Aston Cantlow v Wallbank* (HL) at para 2.

[20] 'Lay Rectors and Chancel Repairs' (1984) 100 *Law Quarterly Review* 181.

[21] For ease of reference, after the first full citation hereafter, the separate judgments will be designated (HC) for High Court, (CA) for Court of Appeal and (HL) for the House of Lords (now Supreme Court).

[22] *Aston Cantlow Parochial Church Council v Wallbank* (2001) 81 P & CR 14, [2000] 2 EGLR 149 (Ferris J) (HC).

[23] Akin to a mortgage, restrictive covenant or other incumbrance. The land had always been subject to the liability, so the Wallbanks were not being deprived of anything.

[24] *Wallbank v Aston Cantlow and Wilmcote with Billesley Parochial Church Council* [2001] EWCA Civ 713 (CA), where it came before before Sir Andrew Morritt Vice-Chancellor, sitting with Robert Walker and Sedley LJJ.

[25] As the judgment stated: 'the scene has shifted radically, and with it the locus of the argument' (para 25).

[26] Human Rights Act 1998, s 6(1).

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that a public authority has so acted may bring proceedings against the authority if he or she is (or would be) a victim of the unlawful act.[27]

Accordingly, the Court of Appeal had to grapple with an issue that had not been in play before the High Court, namely whether a PCC[28] is a public authority for these purposes? And it dealt with that question swiftly and superficially.[29] Crucially, it relied on the fact that the PCC is created and empowered by law,[30] and 'forms part of the church by law established'.[31] The Court of Appeal went on to hold that the PCC's enforcement of chancel repair liability was incompatible with Article 1 of the First Protocol, being in the nature of a tax whose operation was arbitrary, and that it was discriminatory, contrary to Article 14.

It is at this point of the unfolding drama that I made my first appearance. Leave to appeal to the Judicial Committee of the House of Lords was granted on 11 February 2002[32] and the matter proceeded to a hearing on 3, 4 and 5 March 2003. Judgment was delivered on 26 June 2003. The appeal was allowed. A 3:0 unanimous defeat for the PCC in the Court of Appeal was converted into a 5:0 victory in the House of Lords. Unusually, even though all five Law Lords were in agreement as to the outcome of the appeal, each delivered a separate judgment setting out their reasoning. Front and centre was the legal status of the Church of England.

The legal status of the Church of England

It was affirmed by Lord Hope of Craighead, perhaps to the surprise of some, that 'the Church of England as a whole has no legal status or personality'.[33] Instead, legal personality is dispersed amongst various office-holders and bodies which exist within its overall structure.[34]

[27] Human Rights Act 1998, s 7(1).

[28] PCCs are the elected bodies responsible for parish churches (akin to vestries in the Episcopalian Church) and are not to be confused with parish councils, which, though also elected bodies, are the lowest tier of local civil government.

[29] CA, paras 28–35.

[30] Parochial Church Councils (Powers) Measure 1956.

[31] CA, para 35.

[32] The Law Lords had provisionally indicated that permission to appeal would be granted on condition that irrespective of the outcome of the appeal, the PCC would bear the legal costs of both parties at first instance, in the Court of Appeal and in the House of Lords. The reasoning of the Appeal Committee (Lord Hutton, Lord Hobhouse of Woodborough and Lord Millett) was that the Church Commissioners were wealthy and the Wallbanks were not. It was emphasised by counsel at the permission hearing on 11 February 2002, that the PCC was a separate legal entity from the Church Commissioners. It was further pointed out that the Church Commissioners are themselves lay rectors for many parishes, and may have a financial interest in the appeal failing. Leave to appeal was granted unconditionally, upon the PCC undertaking, if successful, not to pursue its costs in the House of Lords.

[33] HL, para 61 per Lord Hope of Craighead.

[34] HL, para 84 per Lord Hobhouse of Woodborough.

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But as Lord Nicholls of Birkenhead observed:

> But the Church of England remains essentially a religious organisation. This is so even though some of the emanations of the church discharge functions which may qualify as governmental. Church schools and the conduct of marriage services are two instances.[35] The legislative powers of the General Synod of the Church of England are another. This should not be regarded as infecting the Church of England as a whole, or its emanations in general, with the character of a governmental organisation.[36]

Lord Hope was very critical of the Court of Appeal's reasoning that the fact that a PCC forms part of the church by law established showed that it was a public authority.[37] He noted that there is no Act of Parliament that purports to establish it as the Church of England. The relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the powers or functions of government. Lord Rodger of Earlsferry was wistfully enigmatic: 'The juridical nature of the Church is, notoriously, somewhat amorphous'.[38]

What is a public authority?

Lord Nicholls recognised that the expression 'public authority' is not defined in the Human Rights Act,[39] nor is it a recognised term of art in English law.[40] In essence, the reach of the concept of public authority is intended to extend to those bodies for whose acts the state is answerable to the European Court of Human Rights, who are now subject to a domestic law obligation not to act incompatibly with Convention rights.[41] Lord Nicholls sought a touchstone for deciding whether a function is public and found there to be no single test of universal application.[42] Lord Hope noted that the Court of Appeal had left out

[35] Interestingly, at the time of writing, the role of the Church of England as both a provider of education and marriage facility is subject to increasing criticism.

[36] HL, para 13.

[37] CA, para 32.

[38] HL, para 154.

[39] Lord Hope noted, at para 36, that the Court of Appeal 'had been invited to enter into largely uncharted territory' and that in revisiting the matter, the Law Lords had the benefit of criticisms which had been made of its decision, notably, D Oliver, 'Chancel Repairs and the Human Rights Act' (2001) *Public Law* 651.

[40] HL, para 6. The Court of Appeal declined to look to Hansard for assistance in construing the term and Lord Hope considered it correct to do so (para 37). There was no ambiguity so as to bring the issue of statutory interpretation within the limited exception described in *Pepper v Hart* [1993] AC 593.

[41] HL, para 6. See D Oliver, 'The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act 1998' (2000) *Public Law* 476.

[42] Lord Nicholls noted the victim paradox, discussed below, and observed that the fact that a core public authority is incapable of having Convention rights of its own, is a matter to be borne in mind when considering whether or not a particular body is a core public authority. It must always be relevant to consider whether Parliament can have intended that the body in question should have no Convention rights (para 8).

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of account the jurisprudence of the European Court of Human Rights as to the meaning to be given to non-governmental organisations.[43]

These remarks are relevant to what commentators generally refer to as 'core' public authorities.[44] But the Human Rights Act effectively created another category, to which the label 'hybrid' public authority is generally applied,[45] although it does not appear in the legislation. The expansive definition of 'public authority' in section 6 of the Act is stated to include 'any person, certain of whose functions are functions of a public nature'.[46] Here again, the test is one of function.[47]

PCC as a core public authority

Lord Nicholls did not think that PCCs were 'core' public authorities, observing that 'the Church of England remains essentially a religious organisation'.[48] He considered that there was nothing in their constitution and functions to lend support to the view that they should be characterised as governmental organisations. He continued, with greater specificity:

> ... the essential role of a parochial church council is to provide a formal means, prescribed by the Church of England, whereby *ex officio* and elected members of the local church promote the mission of the Church and discharge financial responsibilities in respect of their own parish church, including responsibilities regarding maintenance of the fabric of the building. This smacks of a church body engaged in self-governance and promotion of its affairs. This is far removed from the type of body whose acts engage the responsibility of the state under the European Convention.[49]

Lord Hope stated in clear terms that '[t]he parish itself has been described as the basic building block of the Church and the PCC as the central forum for

[43] HL, paras 48–51: in particular *Holy Monasteries v Greece* (1995) 20 EHRR 1; and *Hautanemi v Sweden* (1996) 22 EHRR CD 156. He also noted that while the two main churches in Germany (Roman Catholic and Lutheran) have public legal personality and are public authorities bound by the provisions of article 19(4) of the German Constitution (Grundgesetz) or Basic Law which guarantees recourse to the court should any person's basic rights be violated by public authority, they are in general considered to be 'non-governmental organisations' within the meaning of article 34 of the Convention. As such, they are entitled to avail themselves of, for example, the right to protection of property under article 1 of the First Protocol: Frowein and Peukert, *Kommentar zur Europäishen Menschenrechtskonvention*, 2nd edn (1996), art 25, para 16.

[44] Lord Hope at para 35 adopted the alternative term 'standard' public authority, borrowing from Clayton and Tomlinson, *The Law of Human Rights* (Oxford, 2000), vol 1, para 5.08.

[45] Or 'functional' as used by Lord Hope, again borrowing from Clayton and Tomlinson.

[46] Human Rights Act 1998, s 6(3)(b).

[47] Human Rights Act 1998, s 6(5). The distinction between public and private acts has a bearing on whether a hybrid public authority may be a victim entitled to bring proceedings under the Act: see below.

[48] HL, para 13.

[49] HL, para 14.

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decision-making and discussion in relation to parish affairs'.[50] He noted that a PCC was constituted by statute,[51] as a body corporate, and that they had statutory powers which they might exercise against any person liable to repair the chancel,[52] adding: 'But none of these characteristics indicate that it is a governmental organisation'.[53] Lord Hope's firm conclusion was that a PCC is not a core public authority.[54] Lord Hobhouse was equally forthright: 'clearly not'.[55]

Lord Rodger's examination of the status of the PCC was the fullest. He concluded:

> The mission of the Church is a *religious* mission, distinct from the secular mission of government, whether central or local. [...] The PCC exists to carry forward the Church's mission at the local level.[56]

PCC as a hybrid public authority

The question of whether a PCC is a hybrid public authority turns on whether the enforcement of chancel repair liability is a private act as opposed to the discharge of a public function. Lord Nichols was able to deal with this matter very shortly:

> ... when a parochial church council enforces, in accordance with the provisions of the Chancel Repairs Act 1932, a burdensome incident attached to the ownership of certain pieces of land: there is nothing particularly 'public' about this. This is no more a public act than is the enforcement of a restrictive covenant of which church land has the benefit.[57]

Lord Hope similarly identified the relevant act as the enforcement of a civil liability, and noted that the liability is one which arises under private law,

[50] HL, para 58, citing M Hill, *Ecclesiastical Law*, 2nd edn (Oxford, 2001), 48 and 74, paras 3.11 and 3.74.

[51] Parochial Church Councils (Powers) Measure 1956, s 3. PCCs were introduced by its statutory forerunner, the Parochial Church Councils (Powers) Measure 1921. Strictly this Measure conferred powers onto PCCs already constituted under the Schedule to the Church of England (Powers) Act 1919. Lord Rodger considered this important: PCCs were created by the Church to carry out functions to be determined by the Church (paras 151–152).

[52] HL, para 58, citing Chancel Repairs Act 1932, s 2.

[53] HL, para 59.

[54] HL, para 63. Lord Scott of Foscote agreed with him, and with Lord Rodger of Earlsferry (para 129).

[55] HL, para 86. 'The fact that the Church of England is the established church of England may mean that various bodies within that Church may as a result perform public functions. But it does not follow that PCCs themselves perform any such functions.'

[56] HL, para 156.

[57] HL, para 16.

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enforceable by the PCC as a civil debt by virtue of the 1932 Act.[58] Lord Hobhouse was of the same opinion:

> From the point of view of both the PCC and the Wallbanks, the transaction and its incident were private law, non-governmental, non-public activities and not of a public nature.[59]

On the hybrid public authority point, Lord Scott of Foscote disagreed with the other four Law Lords. He considered several factors pointed towards a PCC carrying out functions of a public nature: (1) the Church of England, is by law established; (2) the general public are entitled to have recourse to the parish church, regardless of whether they are practising Anglicans, for marriage, baptism, weddings, funerals and burial; (3) the parish church is a public building; (4) the PCC is corporate and its functions are charitable; and (5) a decision by a PCC to enforce a chancel repairing liability is a decision taken in the interests of the parishioners as a whole and may be impeachable by judicial review.[60] Notwithstanding being an outlier on the issue of the public nature of the function, Lord Scott was, however, in full agreement with the other Law Lords that the obligation was enforceable notwithstanding the Wallbanks' arguments under the Human Rights Act.[61]

The victim paradox

As Lord Nicholls pointed out, one consequence of being a 'core' public authority is that the body in question does not itself enjoy Convention rights. It is difficult to see how a core public authority could ever bring a claim for an infringement of a Convention right, being 'inherently incapable' of satisfying the Convention description of a victim.[62] Only victims of an unlawful act may bring proceedings under section 7 of the Human Rights Act.[63]

One ironic consequence of the Court of Appeal's determination (had it been left unchallenged) would have been that a PCC, being a core public authority, would not enjoy any Convention rights. Thus a PCC would not be able to claim the right to freedom of religion under Article 9.[64] As Lord Nicholls stated:

[58] HL, para 63.
[59] HL, para 90.
[60] HL, para 130.
[61] HL, paras 133–135.
[62] HL, para 8. Under Article 34 of the European Convention on Human Rights, the status of victim (a pre-requisite for bringing a claim for relief in Strasbourg) is defined as: 'any person, *non-governmental organisation* or group of individuals' (emphasis added). Lord Hope deals with the matter at paras 45–48, emphasising at para 52 the significance of the jurisprudence of Strasbourg as to 'those bodies which engage the responsibility of the State for the purposes of the Convention'.
[63] HL, para 8. The Convention description of a victim (above) is incorporated into the Human Rights Act, by section 7(7).
[64] The associational nature of the right is clear from the fact it is to be enjoyed: 'either alone or in community with others'.

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> The conclusion that the church authorities in general and parochial church councils in particular are 'core' public authorities, would mean these bodies are not capable of being victims within the meaning of the Human Rights Act. Accordingly they are not able to complain of infringements of Convention rights. That would be an extraordinary conclusion. The Human Rights Act goes out of its way, in section 13,[65] to single out for express mention the exercise by religious organisations of the Convention right of freedom of thought, conscience and religion. One would expect that these and other Convention rights would be enjoyed by the Church of England as much as other religious bodies.

Professor Lee has repeatedly bemoaned the lack of systematic judicial consideration of Article 13. It has effectively become a legislative dead letter.

The lasting effects of the House of Lords' judgment

The decision of the House of Lords had a range of consequences. Let me begin with a consideration of chancel repair liability itself.

Conveyancing, insurance, registration and over-riding interests

Historically, chancel repair liability was an over-riding interest,[66] binding on owners of land even without notice. The Land Registration Act 2002 declared the liability to be unenforceable. Parliament had unwisely proceeded on the basis that the Court of Appeal decision was correct and that chancel repair liability was no more. When the Law Lords took a different view, corrective legislation needed to be brought into effect.[67] A statutory instrument was needed and the Land Registration Act 2002 (Transitional Provisions) (No. 2) (Order) 2003[68] was therefore rushed through Parliament. This introduced provisions into the 2002 Act under which chancel repair liability continued to be an over-riding interest for ten years, from the coming into force of the Act on 13 October 2003.[69] Upon successful registration of the interest within that deadline, the PCC will have gained priority over the interests of a first registered proprietor or anyone taking from him, or anyone taking from a registered proprietor.[70] If the interest was not registered before the 13 October 2013 deadline, and has not been registered subsequently, it is still

[65] For a trenchant discussion of judicial disregard of section 13, see S Lee, 'The cardinal rule of religion and the rule of law: a musing on Magna Carta' in R Griffith-Jones and M Hill (eds), *Magna Carta, Religion and the Rule of Law* (Cambridge, 2015), 314–333.

[66] Land Registration Act 1925, s 70(1)(c).

[67] Land Registration Act 2002 (Transitional Provisions) (No. 2) Order 2003, SI 2003/2431: see M Hill, *Ecclesiastical Law*, 4th edn (Oxford, 2018), para 3.46.

[68] Land Registration Act 2002 (Transitional Provisions) (No. 2) (Order) 2003, SI 2003/2431.

[69] Land Registration Act 2002, sch 1 para 16, and sch 3 para 16.

[70] Ibid, ss 11(4)(a), 12(2)(b); and 29(2)(a)(i), 30(2)(a)(i).

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enforceable against the owner of rectorial land, but a purchaser for value without notice will obtain the land free of the liability.[71]

As chancel repair liability is no longer an over-riding interest, the worst excesses of its enforcement have been largely ameliorated. Someone buying affected land without notice of the incumbrance take free of it, however the liability remains enforceable against the rectorial land until it is disposed of: only a successor in title who buys the land will take it free of liability. There is no need to take out insurance routinely. I suspect hundreds of thousands of pounds have been wasted over the years by house buyers taking out wholly unnecessary policies of insurance. Arguably the only people to have profited from the recovery of public awareness in the long-forgotten issue of chancel repair liability has been the insurance industry.

The duty of PCCs to register and/or enforce chancel repair liability

This public awareness caused thousands of parishes to register chancel repair liability and sent a shock wave though conveyancing practitioners and mortgage providers.[72] As I recall the situation here in Aston Cantlow, it was Historic England (or its forerunner) which provoked the prodding of the sleeping bear. Although it was able to channel resources to assist in the maintenance and repair of certain listed church buildings, it had an (understandable) policy of requiring parishes to exhaust all other potential sources of funding. This included pursuing lay rectors in respect of chancel repair liability.

The question then arose whether PCCs could be permitted to decline to enforce chancel repair liability, if there would be adverse pastoral consequences, such as alienating a lay rector who had hitherto been a loyal and generous benefactor of the parish. The benefit of a chancel repair obligation is an asset of the PCC whose duties as trustee extend to safeguarding the trust assets of which they are temporary custodians. What are the consequences of (a) failing to register, and or (b) declining to enforce, the liability? The Legal Advisory Commission of the General Synod of the Church of England issued an Opinion entitled *Registration and Enforcement of Chancel Repair Liability by Parochial Church Councils.*[73] The first step is for the PCC to gather more information about the land in the parish to which a chancel repair obligation might still attach. If to continue with this exercise would incur disproportionate cost, then the Charity Commission should be consulted. If one or more lay rectors are identified but the PCC has genuine concerns about the effects of registration on the perception of the Church and its effective ministry in the parish, then again the Charity Commission should be consulted. If compounding the liability is not considered feasible, and the PCC remains unwilling to register the liability (still less to enforce it) the PCC would be prudent to invoke the power of the Charity Commission under

[71] The conveyancing trap of purchasing property with a potential substantial liability no longer applies, and recourse to insurance has ceased to be necessary.

[72] See E Nugee, 'The Consequences of *Aston Cantlow*' (2004) 7 Ecc LJ 452–461.

[73] See <https://www.churchofengland.org/sites/default/files/2017-12/chancel-repair-liability.pdf>, accessed 1 October 2023.

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section 105 of the Charities Act 2022,[74] to authorise dealings with charity property. So authorised, the PCC could pass a resolution to decide not to proceed with registration, or not to enforce against a particular lay rector.

Marriage

Several times in the judgment reference is made to the function of parochial clergy in the solemnisation of marriage. This is repeatedly – and correctly – identified as a public function of priests of the Church of England. The right and corresponding duty are recognised as part of the ecclesiastical customary law. In a subsequent case to reach the Supreme Court, *Baiai v The Secretary of State for the Home Department*[75] concerning government legislation intended to combat sham marriages and the evasion of immigration control, Lady Hale commented:

> the Church of England believes itself (with some Parliamentary encouragement (for example in sections 57 and 58 of the Matrimonial Causes Act 1857) required to marry for the first time anyone who lives in the parish regardless of faith or the lack of it.[76]

Several passages in *Aston Cantlow* (albeit *obiter dicta*) declare that the responsibility of Church of England parochial clergy to solemnise marriage is properly classified as a public function; and this may present some difficulties.

In the two decades which have followed the judgment, the nature of marriage has changed almost beyond recognition. We have witnessed the introduction of civil partnerships[77] and subsequently same-sex marriage.[78] Neither process permitted the clergy of the Church of England to solemnise such unions. Furthermore, a document issued by the House of Bishops indicated that it would not be appropriate to authorise a public liturgy to follow the solemnising of a same-sex marriage, or for clergy to provide a service of blessing.[79] The mood of the nation, and perhaps also the Church of England,[80] seems to be changing.

On 20 January 2023, the House of Bishops published its Response to *Living in Love and Faith* (GS 2289). That response included the joyful affirmation of committed same-sex relationships and the provision of a resource in the form, *Prayers of Love and Faith*. A separate document, *Prayers of Love and Faith: A Note*

[74] Formerly section 29 of the Charities Act 1993. In my experience, the Commission was more inclined to offer favourable advice under section 29 when registration was a procedural nightmare than where one lay rector was identifiable but there were pastoral reasons for not registering against that person's land.

[75] *Baiai (and others) v The Secretary of State for the Home Department and others* [2008] UKHL 53.

[76] Ibid, para 37.

[77] Civil Partnership Act 2004, creating a legal union for same-sex couples, subsequently extended to opposite-sex couples in consequence of a decision of the Supreme Court: *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2017] UKSC 32.

[78] Marriage (Same Sex Couples) Act 2013.

[79] *House of Bishops' Pastoral Guidance on Same Sex Marriage* (15 February 2014).

[80] See the Living in Love and Faith project: <https://www.churchofengland.org/resources/living-love-and-faith>, accessed 1 October 2023.

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from the Legal Office, sought to draw a clear distinction between civil marriage on the one hand and holy matrimony on the other.[81] General Synod approved and adopted this report during its February 2023 group of sessions,[82] although further progress seems to have stalled somewhat. But this state of flux will inevitably have an impact on the public functions of the clergy, and the established status of the Church of England.

Established status of the Church of England

This landmark case made clear that the Church of England is, essentially, a religious organisation and not a limb of government. It marks the conclusion of a journey which began when Henry VIII sought an annulment of his marriage, and in doing so claimed ultimate authority over the Church in England. Nearly twenty years on from the decision of the House of Lords, defining and describing the cleavage between the public and private functions of the Church of England remains problematical and is more immediate following the death of Her Late Majesty and the accession of Prince Charles.[83] The Law Lords' decision in *Aston Cantlow* hinted at a trajectory towards the redrawing of the bonds between the Church and the State.[84] The Church of England is judicially recognised as essentially a religious organisation, not an organ of government. Whilst there may be some enduring symbolism in the retention of vestiges of establishment, the judgment opens the way to secularism, side-lining religion into little more than a hobby or leisure pursuit.[85] Summarising the import of *Aston Cantlow* in the subsequent case of *Johnson v London Borough of Havering*, Buxton LJ observed that:

> in public law, and without any disrespect, the PCC had no different status from that of the committee of a golf club.[86]

In terms of the legal history of the Church of England as an established Church, many believe we are in the end game. Centuries of church law – in the sense of the law of the state as it applies to the Church of England – are drawing to a close.

[81] GS Misc 1339, 25 January 2023, para 3.

[82] The voting figures were decisive, but did not reach the two-thirds majority that would have been required had the proposal amounted to a change of doctrine.

[83] The deference owed to the Queen following her seventy years of devoted service as monarch and Supreme Governor had provided a powerful restraint on disestablishment. Her words, spoken on her 21st birthday in 1947, speak volumes: 'I declare before you all that my whole life whether it be long or short shall be devoted to your service and the service of our great imperial family to which we all belong'. I predicted that public deference and restraint might well die with her, and so it seems to have done.

[84] See the papers delivered at the Ecclesiastical Law Society Conference, March 2018, *Church and State in the Post-Elizabethan Age*: C Podmore, 'Self-Government Without Disestablishment: From the Enabling Act to the General Synod' (2019) 21 Ecc LJ 312; M Brown, 'Establishment: Some Theological Considerations' (2019) 21 Ecc LJ 329; and W Fittall, 'The Practice and Politics of Establishment' (2022) 24 Ecc LJ 332.

[85] See J Rivers, 'The Secularisation of the British Constitution' (2012) 14 Ecc LJ 371–399.

[86] *Johnson v London Borough of Havering and Others* [2007] 2 WLR 1097, at para 39.

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As we enter the new Carolean era, the nature of the Church of England as the established Church in England is under question. The coronation of King Charles III on Saturday, 6 May 2023, contained many, though not all, of the religious trappings of those of previous monarchs. But with growing secularism and religious pluralism, and with constitutional reform threatening the presence of bishops in the legislature,[87] many see the Church of England as increasingly irrelevant,[88] both at home and overseas, where its status of primacy is diminished throughout the Anglican Communion. A body of opinion suggests that it is hard to conceive of the Church of England remaining a state church when its practice on equal marriage is discriminatory. Establishment is a rope of many strands. Individual threads may break with no perceivable impact on establishment. But once a critical number of threads are severed, the rope can no longer hold. Some form of disestablishment or re-establishment seems inevitable in the next decade, and there are those who consider it is likely that the historic nexus between the Church of England and the State will be completely lost in a generation. The Church of England will not cease to exist, but it will morph into a voluntary association: a members club, governed by its internal regulations. This will be by way of quasi-contract, just as other faith groups operate and have done for centuries.[89]

The remarks of the Law Lords have not immunised the Church of England from disestablishment. Far from it. But history will come to see the House of Lords' decision in *Aston Cantlow* as a pivotal moment in the slow evolution of the relationship between the Church and the State in England.

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[87] The opening shot of the skirmish came on 6 July 2023 in the form of general debate in Westminster Hall on bishops in the House of Lords confected by humanist Tommy Sheppard MP (SNP).

[88] For a thoughtful discussion, see J Chaplin, *Beyond Establishment: Resetting Church State Relations in England* (London, 2022).

[89] See M Hill, 'Change and Decay – the Twilight Years of an Established Church: 1994–2023' in N Doe (ed), *The Legal History of the Church of England* (Oxford, 2024), 213–232.

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