

## COMMENT

---

# The Legal Effect of Consecration of Land ‘Not Belonging to the Church of England’

ALEXANDER MCGREGOR

Deputy Legal Adviser to the Archbishops’ Council and the General Synod  
Deputy Chancellor of the Diocese of Oxford

In January 2009, this *Journal* published an article by Kenyon Homfray, ‘Sir Edward Coke gets it wrong? A brief history of consecration’,<sup>1</sup> which was concerned with the historical origins of a legal concept of consecration. While it is not especially germane to the direction of Mr Homfray’s argument, his statement that ‘[i]n England, consecration does not appear to have any recognised legal effect on any land or building not belonging to the Church of England’<sup>2</sup> was somewhat surprising. It may be that he intended the expression ‘belonging to the Church of England’ as meaning no more than ‘affiliated to’ the Church of England or something similar. If that is all that was meant, then the statement could be accepted as more or less correct: consecration for worship according to the rites of, for example, the Roman Catholic Church would not have any effect in English law. But the words ‘belonging to’ would naturally tend to imply *ownership* of the land or building in question by the Church of England,<sup>3</sup> in which case some qualification is needed. It may, therefore, be helpful to set out, briefly, the extent to which consecration is recognised, and has effect, in English law.

The basic position is that described by Newsom Dep Ch in *Re St John, Chelsea*:<sup>4</sup>

The sentence [of consecration] . . . is definitive and operates *in rem*. In consequence of the sentence, the building, and with it the land on which it stands, becomes consecrated land, held to sacred uses, and subject to the jurisdiction of this court.<sup>5</sup>

1 (2009) 11 Ecc LJ 36–50.

2 *Ibid*, p 38.

3 The Church of England does not, of course, have corporate personality as such. References to property belonging to the Church of England here are simply meant as shorthand for property belonging to a corporation (sole or aggregate) within the Church of England.

4 *Re St John, Chelsea* [1962] 1 WLR 706 at 708, [1962] 2 All ER 850, London Cons Ct.

5 ie the consistory court of the diocese.

Newsom Dep Ch continued, explaining that the position was essentially the same in relation to the consecration of a churchyard, the effect of consecration in that case being ‘to set the land apart as land held on sacred uses and to subject it to the court’s jurisdiction’.<sup>6</sup> Chancellor Newsom was, of course, referring to a sentence of consecration executed by a diocesan bishop of the Church of England. He was therefore concerned with consecration for the sacred purposes of the Church of England. But it is by no means the case that a bishop of the Church of England will only be asked to consecrate buildings or land that are the property of the Church of England.

In addition to parish churches and their churchyards, bishops will not uncommonly consecrate (or at least in the past have consecrated) other places, including chapels in private houses and in colleges, schools and other institutions. Although the relevant passage in *Halsbury’s Laws of England* suggests that the position ‘is not sufficiently clear to justify any general statement of the law’ in relation to the position of consecrated private chapels,<sup>7</sup> this seems to represent an unduly cautious approach. The general rule ought to be that such places, once consecrated, are brought within the jurisdiction of the consistory court of the diocese in which they are situated.<sup>8</sup> If, as was held by Newsom Dep Ch in *Re St John, Chelsea*, consecration operates *in rem*, then the *ownership* of the particular land or buildings in question ought not, of itself, to be material to the question of whether they are subject to the jurisdiction of the consistory court.<sup>9</sup> The only matter that would seem to be properly germane to that question is whether, in consecrating the land or buildings in question, the bishop acted as ordinary. It will only be in the most exceptional case that he will not have so acted. As a matter of principle, if the owners of a chapel have submitted to the consecration of the chapel by the

6 The Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s 11(1) gives statutory recognition to these principles in relation to ‘all parish churches in the diocese and the churchyards and articles appertaining thereto’, declaring, ‘for the avoidance of doubt’, that the jurisdiction of the consistory court applies to them. Buildings licensed for public worship that are not likely to be consecrated are automatically subject to the faculty jurisdiction, unless the bishop directs to the contrary (ss 11(2) and (3)). The position of the unconsecrated curtilage of churches was put beyond doubt by the Faculty Jurisdiction Measure 1964, s 7, which declared that the court has the same jurisdiction over such land as over the church.

7 *Halsbury’s Laws of England* (fourth edition, London, 1975), vol 14, para 1309.

8 The exceptions should essentially be limited to ‘peculiarities’ – places by custom exempt from the jurisdiction of the consistory court on the basis that the ordinary of the place is someone other than the bishop – the largest category of which are the old ‘dean and chapter’ cathedrals but also including, in particular, the chapels of the older Oxbridge colleges. ‘Parish church cathedrals’ were removed from the jurisdiction of the consistory court by virtue of the Cathedrals Measure 1963, s 10(2).

9 Certainly the disposal by sale or lease of a privately owned consecrated chapel would not affect its position as being subject to the jurisdiction of the consistory court: see *Re Tonbridge School Chapel* (No. 2) [1993] Fam 281 at 290H, [1993] 2 All ER 338, Rochester Cons Ct. The bishop, however, is empowered by the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s 22, to direct, by order, that consecrated buildings or land that are not Church property shall cease to be subject to the legal effects of consecration if no useful purpose would be served by their remaining so subject.

bishop, then any subsequent claim by them to ‘peculiar’ status should be treated with scepticism and any claimed exemption ought to be strictly proved.<sup>10</sup>

The principle that consecration operates *in rem* is also relevant in the context of another significant category of consecrated land: the consecrated parts of municipal (and privately owned) cemeteries. The Cemeteries Clauses Act 1847 made express provision for the consecration of ‘any portion of the cemetery set apart for the burial of the dead according to the rites of the Established Church’,<sup>11</sup> and the cemetery company was obliged to demarcate the consecrated and unconsecrated parts.<sup>12</sup> The Local Authorities Cemeteries Order 1977<sup>13</sup> now provides for a burial authority to ‘apply to the bishop of the diocese in which a cemetery is situated for the consecration of any part thereof’. There is no doubt that the consecrated parts of municipal and other cemeteries are subject to the jurisdiction of the consistory court, notwithstanding that they are not in the ownership of the Church of England. In its recent judgment in *Re Welford Road Cemetery, Leicester*, the Court of Arches helpfully restated the position thus:

The effect of consecration of land by a bishop has always been to give the land a sacred character. Whether the land consists of a churchyard belonging to the Church of England, or part of a cemetery or burial ground maintained by a local authority, the legal effect of consecration is to subject it to the faculty jurisdiction.<sup>14</sup>

The exercise, by a burial authority, of any of its powers under Article 16 of the 1977 Order<sup>15</sup> remains subject to the requirement to obtain a faculty from the consistory court authorising the works in question.<sup>16</sup>

Gaius, Justinian and the other authorities cited by Mr Homfray in his article may seem very distant indeed in terms of the time that has elapsed since they wrote. But the questions that continue to occupy the ecclesiastical courts – and the answers to those questions – amply demonstrate the continuing

10 See the observations to this effect in GH Newsom and GL Newsom, *Faculty Jurisdiction of the Church of England* (second edition, London, 1993), p 1. Any owner of a private chapel who wishes to continue to rely upon the ecclesiastical exemption in the long term would, in any event, be well advised to accept that the faculty jurisdiction applies to the chapel in question. Where there is a proper case for saying that a chapel is not subject to the jurisdiction of the consistory court (and such cases are likely to be few), the owners can nevertheless apply to have their building included in the list maintained by the Church Buildings Council under the Care of Places of Worship Measure 1999, s 1. Once included on the list, a building becomes subject to the faculty jurisdiction of the consistory court of the diocese in which it is situated (s 3).

11 Cemeteries Clauses Act 1847 s 23.

12 *Ibid*, s 24.

13 Local Authorities Cemeteries Order 1977, SI 1977/204, art 5.

14 *Re Welford Road Cemetery, Leicester*, [2007] Fam 15, para 10, [2007] 1 All ER 426, Ct of Arches.

15 This article confers powers on a burial authority to carry out certain works to graves and memorials, including, in certain circumstances, the removal of tombstones.

16 *Re West Norwood Cemetery* [1994] Fam 210, 224H–226F, [1995] 1 All ER 387, Southwark Cons Ct.

importance of the legal concept of consecration in English law, despite the remoteness of its historical origins.

doi:10.1017/S0956618X09001963

## Indirect Discrimination and Individual Belief: *Eweida v British Airways plc*

LUCY VICKERS

Professor of Law, Oxford Brookes University

### INTRODUCTION

The decision in *Eweida v British Airways*<sup>1</sup> that there was no discrimination where a Christian member of check-in staff was not allowed to wear her cross visibly at work has received much publicity, despite the fact that BA changed its policy before the case even reached the tribunal. The case raises many questions about the equal treatment of religions and the question of whether religious practices must be mandatory before they are protected, issues which have been discussed elsewhere in this *Journal*.<sup>2</sup> The focus of this article, however, is the implications of the decision for the application of indirect discrimination to those who hold minority religious views.

Ms Eweida was a member of the check in staff for BA. She wished to wear a cross over her BA uniform but was refused because this was in breach of the BA uniform policy. The BA policy did not prevent all religious affiliation being visible: the company allowed Muslim women to wear the hijab and Sikh men to wear turbans, because the items were required by the particular religions and they could not be concealed under the uniform. However, Ms Eweida's cross could have been concealed and, in any event (as she accepted), wearing the cross was not a 'mandatory' requirement of her religion, but a personal expression of faith.<sup>3</sup> Ms Eweida claimed direct and indirect discrimination

1 *Eweida v British Airways plc* [2008] UKEAT 0123\_08\_2011.

2 See the case note on the employment tribunal decision: *Eweida v British Airways plc* (2008) 10 Ecc LJ 256, ET. See also I Leigh, 'Recent developments in religious liberty', (2009) 11 Ecc LJ 65, and R Sandberg, 'Underrating human rights: *Gallagher v Church of Jesus Christ of Latter-Day Saints* (2009) 11 Ecc LJ 75. A case note on the employment appeal tribunal decision is at p 240 of this issue.

3 Contrast *R (on the applications of Watkins-Singh) v Governing Body of Aberdare Girls High School* [2008] EWHC 1865, noted in (2009) 11 Ecc LJ 126–127.