RECENT ECCLESIASTICAL CASES

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Re All Saints, North Street
(York Consistory Court: Coningsby Ch, September 1999)

Unlawful works—confirmatory faculty—costs

This grade I listed church was seriously damaged by fire in 1997 and restored in 1998 pursuant to faculty. However, certain works were undertaken which were not covered by such faculty and these were brought to the attention of the registry by a parishioner. Accordingly four petitions, largely for confirmatory faculties, fell to be determined. Most controversial was a plinth or shelf upon which a statue of the Virgin Mary was to stand. Prior to the fire the statue had been unsatisfactorily located on a table. The plinth was the gift of a donor and a piece of a medieval pillar had been removed to enable it to be installed. The chancellor was critical of the churchwardens, PCC and parish architect for proceeding without authority of a faculty thereby denying the DAC the opportunity of commenting on the proposal. He also warned of the problems of accepting gifts unconditionally without proper prior consultation. English Heritage and the Society for the Protecction of Ancient Buildings objected to the interference with the ancient pillar but recognised that the damage would not be reversed by the plinth's removal. Evidence was led that the structural integrity of the pillar had not been impaired. At the hearing, a professional stonemason indicated how the shelf could be reduced in size and the carving of the angel which supported it from below recrafted so as to render it more attractive. This suggestion was acceptable to the petitioners and the DAC. The chancellor granted a confirmatory faculty for this and other works. He ordered all the court and registry costs to be borne by the petitioners. He declined to order the party opponent to contribute to the petitioners' costs save for the attendance of the structural engineer whose evidence was not challenged and whose report ought to have been agreed in advance of the hearing. [MH]

Re St Matthew, Hutton Buscel
(York Consistory Court: Coningsby Ch, September 1999)

Chattel—removal from church

A faculty was sought to sell a silver cup which had been donated to the church in or around 1840 but which had been kept in a bank since 1981 for security reasons. The cup was not made for ecclesiastical use and was unsuitable for use as a chalice

because of its shape. It had probably, however, been used occasionally as such. The DAC recommended its sale because of the security problem and because the church needed additional money for repairs. The CCC was not, however, of the view that a sufficient case had been made out. The chancellor had regard to the two requirements laid down in *Re St Gregory's, Tredington* [1972] Fam 236, [1971] 3 All ER 269, Ct of Arches, that in order to obtain a faculty in such a case 'some good and sufficient ground must be proved' *and* a financial emergency must exist in the petitioning church, although he noted that the latter requirement had not been required in earlier cases. In the *Tredington* case the redundancy of the items in question was established as a 'sufficient ground'. The chancellor considered that the cup in question was redundant and that there was a financial emergency at the church. Accordingly the faculty was granted subject to the PCC attempting first to sell the cup to a museum (rather than to a private collector) at market value, and the funds received being placed in a special account with the PCC receiving a specified amount of income annually, provision being made for a larger advance if an urgent need could be established. [LY]

Re St John the Baptist, Bishop's Castle
(Hereford Consistory Court: Henty Ch, November 1999)

Gravestone—further inscription

The deceased was buried in the same grave as his second wife, Brenda Pugh, who had died in 1977 and for whom a memorial stone had been erected at the time. The petitioners, the deceased's sons, removed the existing memorial stone to the stonemasons with the intention of adding a further inscription relating to the deceased. The son of the late Mrs Pugh, as heir in law, objected to any alteration. At the hearing, the parties agreed that the words 'And also of Harold Leslie Pugh, 24th August 1900–8th September 1996' would be an acceptable addition to the original stone by way of compromise. The power of the consistory court in section 3(3) of the Faculty Jurisdiction Measure 1964 to override the wishes of the owner of the memorial is exercisable only in exceptional circumstances. See *Re St Mary, Oldswinford* (1999) 5 Ecc LJ 302, Mynors Ch. The existing inscription was not so much inaccurate or misleading, as incomplete in that it did not record that the deceased was now also buried in the grave. The lacuna would be filled by the addition of the compromise inscription, there being no exceptional circumstances to add the fuller proposed inscription. A petition was granted in those terms. A faculty could be sought to add the inscription originally proposed on a separate ledger to be placed on the grave. [JG]

Re St James, Birstwith
(Ripon and Leeds Consistory Court: Grenfell Ch, November 1999)

Floodlighting

A petition was sought for the installation of floodlighting to light the steeple and frontage of a Victorian church situated in the Nidderdale Moors Area of Outstanding Natural Beauty. At a directions hearing, ten individual objectors were made parties opponent, the Archdeacon of Richmond was made a party, and the matter proceeded by written representations It was contended that the expenditure was excessive and inappropriate. The capital costs were £8,000 of which £3,600 was to come from the Church Floodlighting Trust. The annual running costs were no more than £115. The objectors also raised environmental issues concerning light pollution

and the effect on wildlife, about which there was little in the way of expert evidence. It was also contended that there had been insufficient and inadequate consultation and that the proposal did not further the mission of the church. The chancellor considered and rejected each of these objections and directed that a faculty might issue subject to the following: any necessary planning permission being obtained; the church being lit for no more than 120 days per year and not later than 11.30 pm save on Christmas Eve and New Year's Eve; the PCC submitting proposals for a review and ecological audit; and the PCC complying with reasonable requests not to floodlight the church on occasions of particular astronomical significance. [MH]

Locabail (UK) Limited v Bayfield Properties Limited and related appeals
(Court of Appeal: Lord Bingham of Cornhill CJ, Lord Woolf MR, Sir Richard Scott V-C, November 1999)

Judicial disqualification—guidelines

The test for the disqualification of a judge (which term embraced every decision maker, whether judge, lay justice or juror) was whether there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard with favour or disfavour the case of a party to the issue under consideration. It was accepted that this was a departure from other decisions which are more closely in harmony with the jurisprudence of the European Court of Human Rights which favours the 'reasonable suspicion' test, although the application of the two tests would lead to the same outcome in the majority of cases. It was held to be dangerous and futile to attempt to define or list the factors which may give rise to a real danger of bias, as everything would depend on the facts which may include the nature of the issue to be decided.

The court could not conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means, sexual orientation, social or educational or service or employment background or history, nor that of any members of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or masonic associations, or previous judicial decisions; or extra curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers), or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him, or membership of the same Inn, circuit, local Law Society or chambers. A real danger of bias might well be thought to arise if there were any personal friendship or animosity between the judge and any member of the public involved in the case, particularly if the credibility of that individual were an issue to be decided by the judge, or if the judge had rejected that person's evidence at a previous hearing, or if the judge had expressed his views in such an extreme and unbalanced view as to throw doubt on his ability to try the issue objectively.

All the appeals were rejected save one, where the recorder had expressed markedly pro-claimant views in published articles. The court concluded, with misgivings, that a lay observer with knowledge of the facts could have concluded that the recorder might unconsciously have leant in favour of the claimant in resolving factual issues between the parties. [JG]

Note: For a full report, see [2000] 2 WLR 870. Note also that the same test applies in respect of arbitrators. See AT&T Corpn v Saudi Cable Co *(2000)* Times *23rd May. By way of example in the ecclesiastical field, an argument that it was improper for the chancellor and counsel for the petitioners both to come from the Temple was rejected by the Court of Appeal in* R v Exeter Consistory Court ex parte Cornish *(1999) 5 Ecc LJ 212.*

Re Holy Trinity, Eckington
(Worcester Consistory Court: Mynors Ch, November 1999)

Font—relocation

A petition sought the removal of the font from the west end of the church (listed grade II) to a position just to the west of the chancel steps to the south side. The benefits were said to be, *inter alia*, that the font would be in a freer area, that parents and godparents would be more visible to the congregation, that the current position of the font meant that the baptism party may feel excluded rather than included in the main act of worship. Canons F 1 and B 21 deal with the number and position of fonts and the timing of baptisms. The chancellor considered the authorities relating to the moving of fonts and the *Response by the House of Bishops to Questions Raised by Diocesan Chancellors* dated June 1992 and came to the following conclusions:

(1) There must be a 'decent' font in every church that is a permanent fixed object to act as a visible symbol of Christian initiation (*Re St George's, Deal* [1991] Fam 6). It should have a cover and only be used for baptism (Canons F 1 and B 21). All new fonts if possible should be suitable for affusion, immersion or submersion;
(2) There should generally be only one font in a church; anything else is an anomaly. Any pool used for immersion or submersion should generally be concealed (*Bishops' Response* and *Re St George's, Deal*);
(3) The font should be 'in as spacious and well-ordered surroundings as possible' (Canon F 1, para 2);
(4) The basic rule is that the font should generally be 'as near to the principal entrance [to the church] as conveniently may be' (Canon F 1, para 2);
(5) There is no absolute legal, liturgical or theological bar to locating a font elsewhere in a church (*Re St James, Shirley* [1994] Fam 134, 3 Ecc LJ 258) eg if the area around the principal entrance is not spacious and well ordered or where there is a desire to demonstrate a different symbolic point, but this should certainly not be decided solely on the basis of visibility (*Bishops' Response*);
(6) It would only very rarely be appropriate to move a font from a position it has occupied for centuries (*Re St James, Shirley*, and *Re St Luke the Evangelist, Maidstone* [1995] Fam 1, [1995] 1 All ER 321, 3 Ecc LJ 351, Ct of Arches).

The chancellor refused to grant a faculty on the basis that moving the font would not be an advantage, its present location could be made to work more satisfactorily, and the effect of the proposal on the character of the listed building would not be beneficial. [JG]

Starrs and Chalmers v Ruxton
Appeal Court, High Court of Justiciary, Scotland, November 1999

Part-time judges—fair trial—Article 6

A temporary sheriff is a judicial office created by section 11 of the Sheriff Courts (Scotland) Act 1971. Temporary sheriffs act in all material respects in identical manner to a permanent sheriffs in terms of cases listed before them. The appointments, each for a term of one year, are dependent on the Lord Advocate, a member of the Scottish executive, also responsible for criminal prosecutions. Application was made by the defendants in a criminal trial that the post of temporary sheriff was not compatible with Article 6 (1) of the European Convention on Human Rights.

The court emphasised that this decision was limited to the determination of criminal charges, and that different tribunals might achieve independence and impartial-

ity in very different ways. The appointment for one year at the discretion of the Lord Advocate did not square with the appearance of independence, nor did the removal from office through ministerial policy rather than statute. A well informed observer would think that a temporary sheriff might be influenced by his hopes and fears as to his prospective advancement. The combination of a one-year appointment with liability either to recall or suspension or limited use is inconsistent with the requirement of independence. Security of tenure is one of the cornerstones of judicial independence, as the adequacy of judicial independence cannot appropriately be tested on the assumption that the executive will always behave with appropriate restraint. It is fundamental that human rights are no longer dependent solely on conventions which are not legally enforceable. It would be inconsistent with the whole approach of the Convention if the independence of the courts rested upon convention rather than law. The matter was remitted for retrial by a permanent sheriff. [JG]

Note: A full report may be found at [2000] UKHRR 78, and may usefully be contrasted with Clancy v Caird *(4th April 2000, unreported) a decision of the Inner House in which a similar application in respect of temporary judges in the Court of Session was refused, the manner of their appointment being different. These decisions may have a bearing not merely on deputy chancellors but upon all who exercise part-time judicial or quasi-judicial office within the Church of England. Note also the suggestion that an employment tribunal may not be 'independent and impartial, for the purposes of Article 6 since its lay members are appointed and paid by the Secretary of State and their appointment may be determined by him with the consent of the Lord Chancellor. See* Smith v Secretary of State for Trade and Industry (1999) *Times, 15th October.*

Fraser v Canterbury Diocesan Board of Finance
(High Court, Chancery Division: Peter Leaver QC (Deputy Judge), December 1999)

Change in religion—reverting trust

In 1872 land was conveyed to the rector and churchwardens of Chartham, Kent, under the School Sites Act 1841 to be held on trust for the establishment of a school which was to be run in accordance with the principles of the established church. In 1874, the managers of the school granted a twenty-one year lease to the Chartham school board, which provided that the school be deemed to be one provided by the board within the meaning of the Elementary Education Act 1870, section 14(2) of which provided that denominational religious education could no longer be taught there. A primary school continued to operate on the site until 1992, by which time the Canterbury DBF had become trustee. The claimant, being the assignee of the ultimate beneficiary of the estate of the original donor of the land, challenged the entitlement of the DBF to the proceeds of sale. It was held that the creation of the lease in 1874 involved a material change in the character of the school which went to the heart of the purpose for which the trust had been created in 1872. Thus, the trustees' fee simple immediately determined and the land reverted to the original donor under section 2 of the 1841 Act. It therefore followed that claim was statute-barred. [MH]

Re Christ Church, Cockfosters
(London Consistory Court: Cameron Ch, December 1999)

Repositioning of painting—replacement of font

Two faculties were sought and granted. The first was to authorise the repositioning of a painting of Jesus Christ from the reredos to elsewhere in the church and the repo-

sitioning of an existing cross to take its place. The second was to authorise the removal and disposal of the existing font and the introduction of a new portable font. Both petitions attracted a substantial number of objections but in both cases the views of the congregation and those on the electoral roll were sought. The overwhelming majority supported the petitions. When referring to the first petition the chancellor emphasised that she was not just to look at the issue of numbers for and against the proposal but also at the crucial issue of how the body of worshippers could be drawn together again. The painting was disliked by many but loved by others. The faculty in respect of the repositioning was granted because it was right for the cross to take its place at the centre of the worship of that church. Those who were attached to the picture could see it in the chapel to which it would be removed.

The font had only been used for occasional private baptisms over the last twenty-five years. The vast majority of baptisms during that period had been conducted using a portable font at the chancel steps. Removal of the existing font had been considered by the PCC since 1992 but once again there were those who were sentimentally attached to it. Citing *Nickalls v Briscoe* [1892] P 269, the chancellor stated that sentiment could not be the determining factor in cases of this sort and that the prospect of the font coming back into regular use was so remote that it ought not to be retained. After taking photographs of the existing font which should be placed with the parish records, attempts should be made to donate it to another church. If these attempts failed the font was to be removed in pieces and buried in the churchyard. [LY]

Re St Mark, Marske-in-Cleveland
(York Consistory Court: Coningsby Ch, January 2000)

Telecommunications equipment—effect on health

A petition was sought for the erection on a grade II listed church of a flagpole-shaped aerial, a microwave dish and a street level cabinet together with some associated electrical cables for use by Orange PCS Limited. The chancellor was satisfied that the installation was visually acceptable within normal conservation and aesthetic criteria. A local resident objected to the petition on the grounds, *inter alia*, of the adverse effect of microwave radiation and concern for the health of those living nearby. She produced two papers published by the National Radiological Protection Board, the fuller being *Background Information on Mobile Phones* dated June 1999. The second was a response statement published on 21 November 1999 sub-headed *National and International Exposure Standards for Electric and Magnetic Fields*. Such documents indicated a need for continuing research but concluded that there was no scientific evidence of risk to the health of persons living within the vicinity of installations such as that proposed. Accepting such conclusion and applying *Re All Saints, Harborough Magna* [1992] 4 All ER 948, [1992] 1 WLR 1235, 2 Ecc LJ 375 (Gage Ch) and the guidelines of the Ecclesiastical Judges Association of November 1998, the chancellor granted the petition. [MH]

McGonnell v United Kingdom
European Court of Human Rights, February 2000

Separation of judiciary and executive—Article 6—fair trial

The Bailiff of Guernsey is appointed by the Sovereign and holds office during the sovereign's pleasure. He is President of the States of Election, President of the States of Deliberation, President of the Royal Court, President of the Court of Appeal and

Head of the Administration. In his judicial capacity he is the sole professional judge with lay Jurats in the Royal Court. The applicant complained that there had been a breach of Article 6(1) of the European Convention on Human Rights, the right to a fair trial. The applicant pointed to the non-judicial functions of the Bailiff, contending that they gave rise to such close connections between the Bailiff as a judicial officer and the legislative and executive functions of government that the Bailiff no longer had the independence and impartiality required by Article 6. In particular the Bailiff had presided over the States of Deliberation when a particular development plan was adopted. The court ruled that there was no suggestion that the Bailiff was subjectively prejudiced or biased. It was solely concerned with the question of whether the Bailiff had the required appearance of independence or the required 'objective' impartiality. The court stated that holding even a purely ceremonial constitutional role must be classified as a 'function'. The European Court considered that any direct involvement in the passage of legislation or of executive rules is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue. [JG]

Note: With effect from 2nd October 2000, the European Convention on Human Rights will become directly justiciable in English courts, including consistory courts. Although this case turned on very particular facts, the roles of the Dean of the Arches, the Vicars General and certain chancellors who both sit in the legislative chamber of General Synod and also exercise judicial functions may need to be reconsidered. See M Hill, 'The Impact for the Church of England of the Human Rights Act 1998' *at pp 431 to 439 of this issue.*

Re St Christopher, Church Cove
(Guildford Consistory Court: Goodman Ch, February 2000)

Partial demolition—urgency

In August 1999, a faculty was granted for the conversion of the boiler room of a grade II listed church to provide a meeting and storage space. The external chimney stack was to remain, supported by steels. During the course of the works, an internal chimney was discovered which could not conveniently be so supported. The only sensible solution which would provide adequate stability was the removal of the external and internal stack. Work was halted pending urgent consultations with the PCC, LPA and DAC, all of whom endorsed the stack's removal. The area was cordoned off and use of the church beneath the chimney suspended due to the risk of collapse in high winds. Applying the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s18(1) the chancellor concluded that the only satisfactory and safe course was the removal of the external section of the chimney. He was mindful of the risk to people and to the fabric of the church, not least the elaborately braced interior roof which had been the reason for the church's listing. [MH]

Re St Mary, Kingswinford
(Worcester Consistory Court: Mynors Ch, February 2000)

Headstones—diocesan guidelines

There were three petitions before the chancellor concerning two separate headstones, each in the shape of a sloping open book in black polished granite. The first

headstone had been erected in 1996 without a faculty, consent by the incumbent for a somewhat different headstone having been given due to no fault of the petitioner. A faculty for its authorisation was sought by relatives of the deceased and a faculty for its removal was sought by the archdeacon. The third petition was in respect of a similar headstone which had yet to be erected. Neither headstone conformed with the churchyard regulations issued by the chancellor of the diocese, nor with the policy of the PCC, which was anxious to avoid the setting of a precedent. The DAC expressed certain reservations and the chancellor was unimpressed by the incumbent's indifference as to whether an open book should be allowed. In granting faculties authorising the two headstones in question the chancellor observed:

(1) The diocesan rules enable (but did not require) an incumbent to give permission for a standard memorial but do not prevent anyone from seeking a faculty for a non-standard memorial.
(2) Where a memorial did not come within such standards, it was necessary for incumbents to decide whether they supported the application or not. The chancellor suggested a list of criteria which would lead to support for a petition as follows:
(*a*) where a proposed memorial is a fine work of art in its own right;
(*b*) where a proposed memorial is suitable in the particular churchyard concerned, even though it might well be unsuitable elsewhere;
(*c*) where a proposed memorial is of a type, which may or may not be desirable in itself of which there are so many examples in the churchyard concerned that it would be unconscionable to refuse consent for one more;
(*d*) in any other case, where there are compelling personal or other circumstances suggesting that the memorial should nevertheless be approved.
(3) Having discussed the criteria it was decided that the first three did not apply to the present case but that there were special circumstances which suggested that faculties for the retention and erection of the headstones in the present case should be granted. It was not the fault of the first petitioner that consent for a different headstone from that erected had been obtained and it would be unreasonable not to allow the erection of a virtually identical memorial in a neighbouring burial plot. [LY]

Re St Mary, Bozeat
(Peterborough Consistory Court: Coningsby Ch, February 2000)

Stained glass window—dispensing with written representations

A faculty was sought for the replacement of an existing plain glass window in a grade I listed church with one of stained glass designed by Christopher Fiddes depicting scenes of village life over the ages. Reservations were expressed by the DAC, the CCC and English Heritage. Local opinion within the PCC and more widely supported the proposal. Although the petition was uncontested, the chancellor was mindful that the wishes of the parishioners were but one element in the bundle of factors to be considered. He cited *Peek v Thower* (1881) 7 PD 21 at 27, per Lord Penzance, and drew an analogy with the burden of proof in reordering cases as laid down by the Court of Arches in *Re St Luke the Evangelist, Maidstone* [1995] Fam 1, [1995] 1 All ER 321, 3 Ecc LJ 351. The chancellor decided that a hearing in court was unnecessary as the issues and arguments were plain from the papers and photographs already before him. Nothing would be gained from receiving oral evidence and hearing cross-examination. It would be a costly exercise for the parish, the DAC, the CCC and English Heritage. Further, the chancellor considered that he did not need to go through the procedure of a formal decision on written representations as he already had all the material he needed. Such summary disposal was only available

because there was no formal objector and the petition was unopposed. The chancellor resolved in favour of the petitioners finely balanced arguments concerning the spiritual message of the design, the loss of light, the unbalancing effect in relation to other plain glass windows, the inadequacy of the design, and the inscription. A faculty was issued accordingly. [MH]

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another
(High Court, Chancery Division: Ferris J, March 2000)

Chancel repairs—lay rector

The liability of a lay rector to repair or meet the cost of repairing the chancel of a church by reason of the provisions of the Chancel Repairs Act 1932 is not removed by the European Convention on Human Rights. Citing *Halsbury's Laws of England* (4th edn),vol 14, para 1100), *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, CA, and *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, [1995] 2 All ER 607, and noting that no action had been taken to implement the Law Commission Report *Liability for Chancel Repairs* (Law Com No 152, 1985) which condemned the 1932 Act as 'anachronistic and capricious in its modern application', the judge rejected the contention that the law was uncertain or that it was any more arbitrary, harsh and unfair than it had been previously. He held that there was no contravention of Article 1 of the First Protocol to the Convention since there was no deprivation of possession or property, merely an incumbrance created by a predecessor in title. There was no discrimination under Article 14 in the enjoyment of Convention rights. All persons liable to pay for chancel repairs were treated equally. Further, the liability did not affect freedom of religion under Article 9. It arose from the decision to buy the land and differed from, for example, a tax imposed by a government agency over which the payers had no choice. [MH]

Note: A report of this case is to be found in (2000) Times, *30th March. For a general discussion of the possible effect on the Church of England of the provisions of the European Convention on Human Rights, see M. Hill,* The Impact for the Church of England of the Human Rights Act 1998 *at pages 431 to 439 of this issue.*

Re SS Mary and Andrew, Pitminster
(Bath and Wells Consistory Court: Briden Ch, March 2000)

Electronic organ

The PCC sought a faculty for the replacement of an existing pipe organ which needed frequent re-tuning and had a heavy tracker action with an electronic organ costing £15,000 at the most. Replacement of the existing organ with another pipe organ would be prohibitively expensive and repair of the existing organ would cost in the region of £20,000. The application to replace the organ was not supported by the DAC. In declining to grant the faculty sought, the chancellor stated that because pipe organs are valued for their authentic musical qualities and because with periodic maintenance a well-made instrument is robust enough to stand the test of time and was a considerable investment by the previous generation who bought it, where it is sought to substitute an existing pipe organ with an electronic organ, good reason must be shown for the change. Relevant factors will include the qualities of the respective instruments, the financial burden involved, the musical tradition in the

parish, and any resultant alteration in the internal arrangements of the churches involved. In borderline cases, the presumption should be in favour of retaining a pipe organ. [LY]

Re St James' Chapel, Callow End
(Worcester Consistory Court: Mynors Ch, April 2000)

Demolition

Section 17 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 lays down certain additional procedural requirements in the case of faculties for the demolition or partial demolition of a church. These include the consent of the bishop, advertisement in the *London Gazette* and notification to the CCC. Objections are required to be heard in open court. The decision of the House of Lords in *Shimizu v Westminster City Council* [1996] 3 PLR 89 indicates that 'demolition' did *not* embrace within its definition the removal of part only of a building, contrary to what many had previously understood. On consideration of a preliminary point, the chancellor stated that in relation to any proposal for works, one should consider whether the overall operation is best characterised as:

(1) demolition or partial demolition alone;
(2) demolition or partial demolition followed by the building of something else;
(3) alteration; or
(4) extension.

In the first two, section 17 applies and the additional procedures will need to be followed. If the third or fourth then, even though the works may involve demolition of some of the existing fabric, section 17 will not apply. The quality of what is to be demolished, altered or extended is irrelevant in this preliminary analysis. [MH]

Re Whixall Old Burial Ground
(Lichfield Consistory Court: Shand Ch, April 2000)

Disused burial ground—uses—Open Spaces Act 1906

The parish council petitioned for the occasional extension of the permitted uses of a disused burial ground, the management of which had passed to the council under an agreement made in 1973 pursuant to the Open Spaces Act 1906. The limitation on profane and sacred uses of consecrated land (*Morley Borough Council v Vicar and Churchwardens of St Mary the Virgin, Woodkirk* [1969] 3 All ER 952, sub nom *Re St Mary the Virgin, Woodkirk* [1969] 1 WLR 1867, Ch Ct of York; *Re All Saints, Harborough Magna* [1992] 4 All ER 948, [1992] 1 WLR 1235, 2 Ecc LJ 375; *Re All Saints, Featherstone* (1999) 5 Ecc LJ 391) applies less restrictively where the management of a burial ground has already been alienated to the secular local authority under the Open Spaces Act 1906. See *Bermondsey Borough Council v Mortimer* [1926] P 87. The chancellor rejected the test of what would be offensive to right thinking members of the public since it would amount to no more than the court expressing its own view. He noted that section 11(2) of the 1906 Act permits the playing of games or sports if sanctioned by the bishop, that the availability of playing fields was diminishing, and also that chapter 11 of the Archbishops' Commission on Rural Areas *Faith in the Countryside* condoned the use of open spaces such as this for purposes beyond those conveniently used in the past. Despite the strongly-voiced misgivings of the incumbent, the chancellor granted a faculty as sought for purposes of

village fetes, including stalls, dog shows and annual five-a-side junior football competitions, refreshments (including barbecues), children's parties, games (eg by the youth club) and access for maintenance. [MH]

NOTE

The following ecclesiastical cases have been reported in the Law Reports, the Weekly Law Reports and the All England Law Reports during the period 1997–1999:

Re West Norwood Cemetery (No 2) (Southwark Consistory Court) [1998] Fam 84; [1998] 3 WLR 128; [1998] 1 All ER 606 (management of municipal cemetery)

Re Christ Church, Alsager (Chancery Court of York) [1999] Fam 142, [1998] 3 WLR 1394; [1999] 1 All ER 117 (exhumation)

Cheesman v Church Commissioners (Privy Council) [1999] 3 WLR 630 (pastoral reorganisation)

For a list of those cases reported in the period 1994–1996, see (1997) 4 Ecc LJ 690.