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## Case Notes

### The Responsibilities of Church and State for Preserving Cultural Property

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Ultimately, *Re St Bartholomew's, Aldborough*<sup>1</sup> is a case about money. It concerned the sale of an ancient helmet, originally an accoutrement to a tomb in the eponymous Norfolk church. However, the sale would have had no impact on what happened to the helmet. It had already been removed from the church for security reasons and was loaned for a ten year period to the Royal Armouries who displayed it to the public at the Tower of London. If the sale went ahead, the Armouries would be the likely purchaser and the helmet would probably remain where it was. No change was proposed to the location and control of the item. However, the church building was in dire need of repairs and the parish wished to use the sale to finance the maintenance of the building. The real issue was therefore who should bear the cost of the helmet's being part of the national heritage. The Royal Armouries wished to avoid a precedent which might force them to purchase all the items they displayed instead of accepting them on loan.

The law of the Church of England prevents such a sale unless a church court issues a faculty licensing it under what is essentially an internal planning law regime.<sup>2</sup> Although the churchwardens are the owners of church property,<sup>3</sup> they hold the property as representatives of the members of the parish and cannot alienate it without the consent of the Parochial Church Council. The power to alienate is also severely limited by the legal rule that any sale without a faculty will be void. Property in the items will not pass if a purported sale is made in breach of these requirements, even to a person without notice of the impropriety.<sup>4</sup> The only exception to this principle is market overt under section 22 of the Sale of Goods Act 1979.<sup>5</sup> The grounds on which a faculty will be granted for the sale of church property therefore constitute the protection given against the removal of cultural property from the churches of the Church of England.<sup>6</sup> It was those grounds that were examined in *Re St Bartholomew's, Aldborough*.

The leading case on this area of law is *Re St Gregory's, Tredington*.<sup>7</sup> It established that there was a presumption against sale, which would not be authorised unless some special reason requiring it was established. It was recognised that financial needs might suffice, and this has since been interpreted to justify sale only where

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there is an immediate financial crisis.<sup>8</sup> In *Re St Bartholomew's* it was shown that the church needed to carry out repairs costing some £20,000, and that accounts over a number of years showed that there was no prospect of the parishioners raising the money. The church was insufficiently important to qualify for an English Heritage grant, although a contribution of 40 per cent would be made towards major repairs. The Chancellor, Thomas Coningsby Q.C., found that this was a state of financial crisis and that, as it had existed for a number of years, it could be said to be a chronic state which would continue for the foreseeable future. If the repairs could not be financed the church would inevitably close, either under a pastoral reorganisation<sup>9</sup> or through dilapidation. Sale of the helmet was the only method of raising the necessary funds that could reasonably be anticipated.

Chancellor Coningsby pointed out that if financial arguments are put forward to justify sale, then it has to be established that the sale would make a significant contribution to alleviating the state of crisis.<sup>10</sup> Firstly, it must be shown that it would be possible to find a purchaser for the item. Here it was found that it was likely that the Royal Armouries would buy the helmet. Secondly, the court must be satisfied that the proceeds of sale would be adequate. The helmet was expected to raise between £15,000 and £20,000. The interest on this sum would be approximately £1,500 per annum and this was a significant amount when considered in relation to an annual church income of £5,000. This calculation suggests that it is not necessary to limit consideration to the financial needs for maintenance of the church buildings. It is not therefore solely a case of balancing the cultural 'worth' of preserving the church as a part of the national heritage against that of the item to be sold. Indeed, in *Re St Gregory's, Tredington* it was held that the fact that an item was of national importance should not influence the ecclesiastical court.<sup>11</sup> In *Re St Gregory's, Tredington* the financial need did relate to the repair of the church, but funds raised by the sale were to be available for general purposes.<sup>12</sup> In *Re St Mary's, Broadwater*<sup>13</sup> the proceeds were directed to be used to pay an assistant curate, thus meeting contemporary pastoral needs rather than contributing to the preservation of the cultural heritage.

The possibility of balancing current pastoral needs against cultural heritage considerations raises questions of two distinct types. The first is the extent to which the church's freedom to develop its activities according to contemporary thinking and needs should be constrained by the customs of the past. This has been considered by the ecclesiastical courts in a number of contexts, including perhaps most famously the case of *Re St Stephen, Walbrook*.<sup>14</sup> In that case the Court of Ecclesiastical Causes Reserved held that a faculty should be granted for the installation of a stone altar sculpted by Henry Moore into a church designed by Sir Christopher Wren. The suggestion that a definition of the word 'altar' shaped by doctrinal



The 'Aldborough Helmet'.  
Photo credit: The Board of Trustees of the Royal Armouries.

debates on the nature of the eucharist in past centuries should constrain the court's decision was rejected. So too were arguments based on preserving the architectural purity of the Wren original. The mere fact that the aesthetic symmetry of Wren's creation was altered did not in itself damn the changes. The issue in *Re St Bartholomew's Aldborough* was not one of changing church culture, but one of money. This was emphasised by the acceptance that:

[the] helmet is an item which is only marginally concerned with the Christian faith and is not to be looked on as in the same category as an item such as a chalice.<sup>15</sup> [It] is basically a secular item rather than an item of spiritual significance [I]n many ways the Royal Armouries is a more natural place in which to display this helmet than a church.<sup>16</sup>

The second concern is the matter of who foots the bill. If the faculty had not been granted in the *St Bartholomew's* case, the parish would have borne the cost of ensuring that a national treasure was not lost. If the faculty was granted, the nation, through the Royal Armouries, would have done so. Essentially, the issue was whether a poor, private, organisation should be prevented from realising its assets because of the public interest. As one witness, quoted by the Chancellor, put it:

[i]t was hard on an individual parish to be faced on the one hand with a policy on the part of the church that church buildings should be fully maintained and the contents not alienated, while at the same time no financial help was forthcoming for individual parishes in meeting those commitments.<sup>17</sup>

The Royal Armouries argued that public policy required that the sale should be prevented because of the financial implications for them of granting the faculty. They contended that the effect of the case would be wide-reaching, suggesting that it would open the floodgates to make it probable that faculties would be granted for the sale of virtually every item separated from a church for a lengthy period. Museums and armouries which accepted items on loan (a common practice) would be virtually forced to purchase them if they were to be sold and this would place an intolerable financial burden on their budgets. This in turn would make them reluctant to make loan agreements, to the detriment of the preservation of and public access to items of cultural importance.

The Chancellor regarded these arguments with some suspicion. Firstly, he found that the Armouries already envisaged the purchasing of loaned items, and in fact included a right of preemption in the loan agreement. Secondly, he did not accept that there was likely to be a large number of similar cases. There were twenty six pieces of church armour on loan to the Royal Armouries at the time of

the hearing, and no other applications for sale were pending. He noted that sale would be authorised only if there were a financial crisis in the church in question and regarded that as a sufficient safeguard, although he recognised that if there were to be a flood of similar applications it would be a factor to be taken into consideration by the court. This constitutes an acknowledgement that the public interest might be relevant, but denies that it is yet sufficiently pressing to require parishes to be confined to their state of poverty.

After consideration of these various factors Chancellor Coningsby granted the Faculty authorising the sale of the helmet. However, he stipulated a number of conditions. First, that it should be sold to the Royal Armouries or to another museum that would ensure that it remained in England and was on public display. Second, that the sale was not to take place until the terms had been approved by the registrar of the consistory court. The price was fixed at £20,000, with liberty to apply to review it. After payment of the legal costs, the proceeds of the sale were to be held by the diocesan board of finance on trust to pay the income to the parochial church council of St Bartholomew's, Aldborough to be spent on the fabric of the church. Provision was also made for the advancement of some of the capital within the discretion of the board of finance to be replaced by retaining subsequent interest. The order thus linked the proceeds of sale to the repair of the church, rather than supplementing general church funds.

In the end, therefore, the Chancellor tipped the balance in favour of permitting the church to capitalise its cultural assets. He refused to allow the public interest in preserving the past to prejudice the viability of the parish. However, the balance was not destroyed. By ensuring that the money would go to safeguarding the church building he discouraged the routine sale of church artifacts to support regular activities. To this extent the decision marks a retreat from that in *Re St Mary's, Broadwater* which implied that the past could be sold to finance the present. His judgment also left open the possibility for brakes to be applied if applications for the sale of church property became commonplace. Finally, he ensured that the helmet would remain in England. In effect, this shifted financial responsibility from the church to the state. As a legal precedent, this case probably alters little, but it exemplifies the faculty jurisdiction in practice, allowing its place in the English law of cultural property to be assessed.

## Notes

1 [1990] 3 All ER 440.

2 The standard work on this area of English ecclesiastical law is G.H. Newsom, *Faculty Jurisdiction of the Church of England* (London, Sweet & Maxwell,

- 1988). The section dealing with disposal of moveable objects by sale is at pp. 121 – 125.
- 3 In the cases of tombs and their accoutrements ownership will usually lie with the person who erected the monument and their successors, Faculty Jurisdiction Measure 1964 s. 3(4). In this case the current owner, the Earl of Huntingdon, was happy to transfer title to the helmet to the church in order that they might receive the proceeds of the sale, [1990] 3 All ER 440, 444.
  - 4 *Re St Mary's, Barton-on-Humber* [1987] 2 All ER 861; Palmer AU E.R. Rev. 1987, p. 33.
  - 5 See *Opinions of the Legal Advisory Commission* (6th edition, London, Church Information Office, 1985 with supplements) pp. A9-A14 for discussion of these points. For a discussion of market overt, see Davenport and Ross, p. 25, above.
  - 6 The Church of England is an established church. The faculty jurisdiction applies only within the Church of England, although the buildings of other churches are also exempted from secular planning control whether or not they have their own planning regimes; Town and Country Planning Act 1971 s. 56, *A-G v Howard Church Trustees* [1976] AC 363, Newsom, *op. cit.* pp 251 – 255, C. Mynors, 'Render unto Caesar...The Ecclesiastical Exemption from Listed Building Control' [1985] J.P.L. 599 – 610, J.D.C. Harte, 'Church v State in Listed Building Control: The Faculty Jurisdiction; a case for conservation' [1985] J.P.L. 611 – 621, 690 – 697.
  - 7 [1971] 3 All ER 269.
  - 8 *Re St Helen's, Brant Broughton* [1974] Fam. 16.
  - 9 This would take place because the parishioners could no longer meet their obligations to contribute to diocesan finances. The church would be closed and the pastoral responsibilities incorporated with those of a neighbouring parish.
  - 10 [1990] 3 All ER 440, 451.
  - 11 [1971] 3 All ER 2698, 276 – 277.
  - 12 [1971] 3 All ER 269, 277.
  - 13 [1976] 1 All ER 148.
  - 14 [1987] 2 All ER 578. For discussion see J.D.C. Harte, 'Doctrine, Conservation and Aesthetic Judgement in the Court of Ecclesiastical Causes Reserved' (1988) 2 *Ecclesiastical Law Journal* 8 – 26.
  - 15 [1990] 3 All ER 440, 451.
  - 16 [1990] 3 All ER 440, 454.
  - 17 [1990] 3 All ER 440, 452.