# EDITORIAL

Readers, I know, would be disappointed if this Editorial did not begin with reference to the House of Lords' decision in *Aston Cantlow PCC v Wallbank*,[1] an emphatic 5:0 reversal of the unanimous judgment in the Court of Appeal.[2] Readers will likewise need little reminding that the distinguished editor of this Journal's case notes (as I then was) took the unusual course of adding a robust comment as a footnote to the summary of the Court of Appeal decision which appeared in Issue 29 in July 2001. Some may think it merits a second reading:

> Note: This judgment (in the opinion of the case notes editor) is unsatisfactory in a number of ways and it is regrettable that the wider interests of the Church of England were not ventilated ... The question of whether a PCC is a public authority is only superficially addressed. Whilst it may be arguable that certain of its functions are of a public nature (Human Rights Act 1998, s 6(3)(b)), it is not to be treated as a public authority in relation to acts which are private (s 6(5)). The recovery of the costs of chancel repairs, the burden of which runs with rectorial land, is self-evidently a private act akin to the enforcement of any other encumbrance on land. Defining the liability to defray the cost of chancel repairs as 'inescapably' a form of taxation is little more than reasoning by assertion. It gives no account of the extent to which the market value of the rectorial land is reduced by dint of this inchoate liability. [...][3]

This Journal was not alone in publishing comment critical of the reasoning and conclusions of the Court of Appeal. Professor Ian Leigh of the University of Durham found it unconvincing,[4] as did Ian Dawson and Alison Dunn, both lecturers in the School of Law at Newcastle-upon-Tyne.[5] It is gratifying that the Judicial Committee of the House of Lords reached a decision which accords with the received wisdom of practitioners and academics; all the more so that it did so convincingly in five separate, lengthy and finely reasoned opinions, the distillation of which will prove a fertile source of debate for years to come.[6] A brief case note appears towards the end of this Issue and it is hoped a substantive article assessing the judgment and its wider implications will appear in a future Issue. Pending its appearance, readers will have to make do with some

[1] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2003] 3 WLR 283; [2003] 3 All ER 1213.
[2] [2002] Ch 51; [2001] 3 WLR 1323; [2001] 3 All ER 393.
[3] (2001) 6 Ecc LJ 173.
[4] I Leigh, 'Freedom of religion: public/private, rights/wrongs' in M Hill (ed), *Religious Liberty and Human Rights* (University of Wales Press, 2002) 128-158, particularly 152.
[5] I Dawson and A Dunn, 'Seeking the principle: chancels, choices and human rights' (2002) 22 LS 238. See also S Whale, 'Pawnbrokers and parishes: the protection of property under the Human Rights Act' [2002] EHRLR 67 at 78-79; D Oliver 'Chancel Repairs and the Human Rights Act' [2002] PL 651; and D Rook, 'Property law and the Human Rights Act 1998: A review of the first year' [2002] 66 Conv 316.
[6] The judgment exceeds fifty pages in the law reports.

thoughts of my own, which were first voiced in the *Church Times*, and with a comment on the resultant revision of statute law.

The importance of the House of Lords' decision for the Church of England lies not in provisions of the Chancel Repairs Act[7] but rather in the discussion of the nature of the Church itself and its place in society and government. In order for the European Convention on Human Rights to come into play, the court had first to be satisfied that an alleged wrongdoer was a 'public authority' for the purposes of the Act. The Court of Appeal had found that the PCC was such an authority, basing its assessment principally upon the fact that the Church of England is an established church. The five Law Lords unanimously rejected both the reasoning and the conclusion of the lower court. They acknowledged that historically the Church of England has discharged an important and influential role in the life of this country and as the established church has special links with central government. However they concluded that the Church of England remained essentially a religious organisation.

Lord Hope of Craighead noted that the Church of England as a whole has no legal status or personality, but that its relationship with the state is one of recognition, not the devolution to it of any of the powers or functions of government. Lord Rodger of Earlsferry stated that 'the juridical nature of the Church is, notoriously, somewhat amorphous' but considered that the mission of the Church is a *religious* mission, distinct from the secular mission of the government, whether central or local. The ties with the state are intended to accomplish the Church's own mission, not the aims and objectives of government. He concluded that the PCC exists to carry forward the Church's mission at the local level.

Were it to be otherwise, and the component institutions of the Church of England classified as 'public authorities', then, by virtue of the way the Human Rights Act is drafted, those institutions would lose the status of 'victim'. This would prevent them from complaining of any violation of Convention rights, including that of freedom of religion. This would have been an extraordinary conclusion since, as Lord Nicholls of Birkenhead pointed out, the Act goes out of its way in section 13 to single out for express mention the exercise by religious organisations of the Convention right to freedom of thought, conscience and religion.

The House of Lords[8] also rejected an alternative argument that although a PCC was not a core 'public authority', its action in enforcing chancel repair liability was the exercise of a public *function*. Certain organisations, though non-governmental in essence, nevertheless perform activities of a public nature. When engaged in such an activity (though not otherwise) these so-called 'hybrid authorities' are required to act in accordance with Convention rights. Within the Church of England, for example, a priest

[7] Admittedly rather arcane. See JH Baker, 'Lay rectors and chancel repairs' (1984) 100 LQR 181.

[8] Lord Scott of Foscote dissenting on this discrete issue.

when performing the solemnisation of marriage would be so regarded. Here, however, the PCC was performing a private function as would any other beneficiary of a private property right.[9] Not being classified a public authority, the Church of England will remain free to engage in its mission and witness and, in doing so, it will be on an equal footing with all other denominations and faith communities in the United Kingdom.

Coterminously with the progress of *Aston Cantlow* through the appellate courts came the Land Registration Act 2002. Under previous legislation, chancel repair liability had been classified as an overriding interest in registered land, which meant it was protected without being registered. At a late stage in the drafting process, chancel repair liability was dropped from the list of overriding interests in the Bill on the questionable basis that the Court of Appeal decision in *Aston Cantlow* had deemed it to be unenforceable.[10] The government indicated in answer to Parliamentary questions that it would be prepared to look again at the issue in the event that the House of Lords overturned the Court of Appeal.[11] True to its word, the government duly made the Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003.[12] This provided that from the coming into force of the Land Registration Act 2003 on 13 October 2003, chancel repair liability was put on broadly the same footing as comparable rights, such as payments in lieu of tithe, Crown rights and manorial rights.

The Order extends the overriding status of this interest for a transitional period of ten years, by inserting a new paragraph 16 at the end of Schedule 1 (unregistered interests which override first registration) and a new paragraph 16 at the end of Schedule 3 (unregistered interests which override registered dispositions) to the 2002 Act, each referring to a right in respect of the repair of a church chancel. The Order provides that the Schedules, so amended, have effect for the period of ten years beginning with the day on which those Schedules come into force. The Order also provides that, for a period of 10 years from the coming into force of the Act on 13 October 2003, chancel repair liability will remain an interest that binds successive owners of land even though it is not protected by an entry in a register kept by the Land Registry. The Department of Constitutional Affairs has announced that, since no land registration fee is payable for applications to protect similar ancient property rights, the Land Registry intends to waive the fee for applications to protect chancel repair

[9] In the light of these findings the question of the violation of a Convention right became academic. Nonetheless the Law Lords unanimously held there was none, reversing the Court of Appeal on this point as well. The process did not amount to a deprivation of possessions or an arbitrary tax under Article 1 of the First Protocol, nor was it discriminatory under Article 14. It was simply a burden on the ownership of land.

[10] See generally *Land Registration for the Twenty-first Century* (1998) (Law Com No 254; Cmnd 407).

[11] Baroness Scotland of Asthal, Parliamentary Secretary, Lord Chancellor's Department, speaking on 3 July 2001 (HL Deb col 799).

[12] SI 2003 No 2431.

liability for the 10 year period.[13] Parishes should take note—and take action.

How the case will play out in the ongoing church/state debate only time will tell. As ever one need only to look to America for light relief when it comes to litigation. The US Court of Appeals for the Eleventh Circuit recently had to determine whether it was constitutional for the Chief Justice of Alabama to install a large stone monument bearing the ten commandments into the lobby of the court building in Alabama.[14] The district court had ordered the removal of what the Chief Justice styled 'a decorative reminder of the moral foundation of American law'. The Court of Appeals upheld the first instance decision. From the earliest days of the US Bill of Rights, the so-called 'establishment clause' has prohibited any law 'respecting an establishment of religion'.[15] The US Supreme Court developed and applied the threefold '*Lemon*' test whereby to withstand scrutiny a practice (i) had to have a valid secular purpose, (ii) did not have the effect of advancing or inhibiting religion, and (iii) did not foster excessive government entanglement with religion.[16] Applying this test in the present case, the Court of Appeals concluded that the monument did not have a purely secular purpose. The Chief Justice had said in evidence that it was intended to acknowledge God's overruling power over the affairs of man. The Court of Appeals also endorsed the finding of the district court that a reasonable observer would find nothing on the monument to de-emphasize its religious nature, and would feel as though the State of Alabama was advancing or endorsing, favouring or preferring, Christianity. Accordingly the monument was ordered to be removed. The Chief Justice of Alabama, however, gave every indication that he would defy the order. Experiences like these from abroad remind us of how parochial our models of Church and State might be.

This Issue of the Journal takes as its general theme a comparative study of the laws of other jurisdictions to the extent that they impact upon religious organisations. Adelaide Madera, who works under Professor Salvatore Berlingò at the University of Messina, considers religiously affiliated schools in the USA and Italy, while Julian Rivers of Bristol University and Professor Gerhard Robbers from the University of Trier each assess a broad subject on a pan-European basis. The changing world of establishment and the diminishing place of the sacred in society are tackled by Professor David McClean and Lord Justice Laws respectively. Several of these papers derive from lectures first delivered at the Society's residential conference in Durham in April 2003. The comment section is enlivened by a thoughtful reflection on the role of lawyers by Anthony Bash and a revisiting of *episcope vagantes* by our chairman, the Bishop of Stafford, in the light of a recent decision in the High Court.

[13] See HC Deb (2002–03) 411.

[14] *Glassroth & Howard v Moore ( Chief Justice of the Alabama Supreme Court )* 335 F 3d 1282; 2003 US App. judgment filed 1 July 2003.

[15] For a general discussion see M Chopko, 'The Challenge of Liberty for Religions in the USA' in M Hill (ed) *Religious Liberty and Human Rights* (*supra*) at 67-98.

[16] *Lemon v Kurtzman*, 403 US 602 (1971). See Chopko (*op cit*) at 75.

Following a request made at the Society's Annual General Meeting last April, this Issue includes a list of all dissertation titles submitted for the LLM in Canon Law at the University of Wales. It is impressive for the breadth and depth of scholarship which it demonstrates and is no small tribute to the inspiring teaching of Professor Norman Doe at Cardiff Law School. At a time of increasing litigation when the Anglican Communion is looking to its *ius commune* to help define its identity and to its lawyers to try and promote its collegiality, it is comforting that the study and teaching of ecclesiastical law is in such good heart.

Mark Hill
Editor

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