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COMMENT

Religion, Doctrine and Ecclesiastical Courts

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In recent years the application of, and discussion about, the faculty jurisdiction has come to focus largely on those aspects of the jurisdiction concerned with the making of changes to listed buildings. This *Journal* has recently carried two full-scale articles that have helpfully described, from a legal perspective and a practical one, respectively, the operation of the faculty jurisdiction within the context of listed buildings and the ecclesiastical exemption.[1]

In September 2009 Charles Mynors' article 'Ecclesiastical buildings: constraints and opportunities' appeared.[2] Mynors examined the different systems that existed to control works to churches and the principles underlying the exercise of the faculty jurisdiction in relation to such works; in particular, he considered changes to listed churches that benefit from the ecclesiastical exemption. He quite naturally devoted significant space to the guidance given by the Court of Arches in *Re St Luke the Evangelist, Maidstone*[3] and to the *Bishopsgate* questions, which all chancellors now faithfully apply.

In September 2010 Janet Gough's article 'Church Buildings Council: collaboration in the building of mission'[4] considered the role of the Church Buildings Council within the operation of the faculty jurisdiction. She described the Council's consultation paper *Forging a New Partnership*, which sought to define for diocesan advisory committees what the Council considers significant casework from a national or strategic perspective; part of the context for that was the heritage-based approach of the new Planning Policy 5: Planning for the Historic Environment.

Just as the September 2010 issue of this *Journal* was published, two significant judgments were handed down: one, *Re St Mary the Virgin,*

1 That is, the exemption from listed building and conservation area consent provided for by the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (England) Order 2010 (SI 2010/1176).
2 (2009) 11 Ecc LJ 266–283.
3 [1995] Fam 1.
4 (2010) 12 Ecc LJ 345–354.

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Ashford,[5] a decision of the Court of Arches and the other, *Re St Mary Magdalene, Reigate*,[6] a decision of the Southwark Consistory Court. In the *Ashford* judgment, the Dean held:

> The continuance of the ecclesiastical exemption, so far as the Church of England is concerned, depends on the conscientious fulfilment by all concerned, including Diocesan Advisory Committees and Chancellors, of the difficult task of balancing the pastoral well-being of its churches with the need to protect the best of the heritage, to be conducted within the guidance given by its appeal courts and paying heed to practices applied in the secular system, as well as to the church's particular needs.

Refusing leave to appeal, he held that the Commissary General of Canterbury at first instance had applied an approach that was entirely consistent with that which the secular authorities apply to listed buildings. Meanwhile in Southwark, Petchey Ch, having carried out a thorough survey of government policy and guidance in respect of the historic environment and the principles that lie behind the ecclesiastical exemption, concluded that the principles enunciated by the ecclesiastical courts did not lead to authorisations that would not properly be available in the secular sphere.

These two decisions amply bear out the confidence expressed by Mynors and Gough in their articles in the robustness of the faculty jurisdiction to protect the church's built heritage. As Mynors put it, 'if there were to be no ecclesiastical exemption, the policy approach would be – or should be – much the same. The only difference from the present arrangement, at least in theory, would thus be the need to go through two systems of control.'[7]

The protection afforded by the faculty jurisdiction to listed buildings is now very firmly established. But there is – possibly as a consequence of the (undoubtedly necessary) concentration on that aspect of the jurisdiction in recent years – a potential for other significant aspects of the faculty jurisdiction to be underemphasised and even neglected. In her article, Gough, in a paragraph referring to the strengths of the faculty system, speaks of the existence of the faculty jurisdiction as reflecting 'the fact that [the Church of England] is an episcopal church, where dioceses are the key entities with bishops as leaders in mission and ministry'. This is essential to understanding – and operating – the faculty jurisdiction.

The faculty jurisdiction is not simply a proxy for listed building control: the chancellor is not a planning inspector in a wig. Rather, the chancellor is an

5 (2011) 13 Ecc LJ 244.
6 (2011) 13 Ecc LJ 245.
7 Mynors, 'Ecclesiastical buildings', p 281.

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ecclesiastical person: he or she is the bishop's Official Principal[8] and as such has jurisdiction as Ordinary. He or she acts as an independent judge and is in effect the judicial *alter ego* of the bishop. The chancellor is also invariably appointed vicar-general of the diocese.[9] The consistory court of each diocese is the 'court of the bishop thereof'.[10] The judge of the court, the chancellor, is appointed by the bishop (following consultation with the Lord Chancellor and the Dean of the Arches and Auditor). The person appointed must, of course, have the requisite legal qualifications. But the bishop must, before appointing a layperson, also 'satisfy himself that the person to be appointed is a communicant'.[11] In addition to the Oath of Allegiance and the oath to 'deal uprightly in [his or her] office, without respect of favour or reward',[12] a newly appointed chancellor (if a layperson[13]) is required to make and subscribe the Declaration of Assent in a form prescribed for the purpose.[14] That means that a chancellor[15] makes the same declaration as to belief as is required of the clergy at their ordination and when appointed to any office in the Church, save for the omission of the words concerned with officiating at public prayer and the administration of the sacraments.[16]

It is true that the jurisdiction of the consistory court is substantially less than it once was. Jurisdiction in respect of defamation was removed in 1855, and in 1857 the jurisdiction relating to intestate probate and to matrimonial matters was transferred to newly established temporal courts.[17] However, as section 6 of the Ecclesiastical Jurisdiction Measure 1963 makes clear, the jurisdiction of the consistory court continues to extend beyond causes of faculty. Consistory courts are seldom called on to exercise those other aspects of their jurisdiction, but the exercise of the faculty jurisdiction itself will not infrequently require the chancellor to consider questions that might be described as 'religious'.

In *Re St Edward the Confessor, Mottingham*,[18] Garth Moore Ch, sitting in the Southwark Consistory Court, considered a petition for a faculty to authorise the placing of a plaque depicting the washing of the Babe of Bethlehem immediately above the font. The petition was unopposed and the diocesan advisory

8 Ecclesiastical Jurisdiction Measure 1963, s 13(1).
9 See *Halsbury's Laws of England*, vol 14, para 1275.
10 Ecclesiastical Jurisdiction Measure 1963, s 1(1).
11 Ibid, s 2(2).
12 Ibid, s 2(5) and schedule 1, part 1.
13 Currently, at least three ecclesiastical judges are clerks in holy orders who will have taken the Declaration of Assent in its full form at their ordination.
14 Canon G 2.3.
15 The same religious qualifications, oaths and declarations are required of a person appointed to be Dean of the Arches and Auditor, deputy Dean of the Arches and Auditor or deputy chancellor of a diocese: Ecclesiastical Jurisdiction Measure 1963, ss 3(3), (6) and 4(2); Canon G 2.2 and 2.3 and Canon G 3.3 and 3.4.
16 See Canon C 15.1.
17 See *Halsbury's Laws of England*, vol 14, para 1264.
18 [1983] 1 WLR 364.

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committee recommended the proposal. The chancellor nevertheless declined to grant the faculty sought. He was concerned about the proposal and therefore consulted a number of theologians and invited advice from the Central Council for the Care of Churches (as it then was). He held:

> The difficulty in this case is the juxtaposition of such a scene with the font, for it could well suggest to those whom it should instruct that our Lord's baptism took place in infancy instead of some 30 years later in the Jordan. It could further suggest that an ordinary washing can be equated to a solemn initiatory baptism. This is a view to which a member of the Society of Friends might subscribe, for many of them regard every washing as a baptism and every eating or drinking as a communion. But it is not Anglican doctrine.
>
> For these reasons I find myself unable to grant a faculty permitting this plaque to be placed above the font, for it is an important duty of the court to safeguard sound doctrine.

Irrespective of what view one takes on the outcome of the proceedings – and some might consider the chancellor's approach rather narrow – he was nevertheless right in principle that 'Anglican doctrine' was clearly a matter that the court had to consider and that it was the court's duty 'to safeguard sound doctrine'.[19] It would be extraordinary if that were not a duty of the 'court of the bishop'.

An important example of a consistory court having to consider 'religious' questions in the context of a petition for re-ordering was *Re St Barnabas, Kensington*.[20] One of the proposals that Newsom QC Ch had to consider was the installation of a pool for the purpose of the baptism of adults by immersion or submersion. The chancellor said that 'any objection, to be valid, must … stand on some specific and present rule of law or practice, or on the danger of the pool actually being used for propagating some unorthodox doctrine'. He was satisfied that there was no such rule of law or practice and – in the light of assurances given by the priest in charge – that there was no danger of unorthodox practices. In particular, the chancellor was assured that infant

19 That causes of faculty may involve dealing with matters of doctrine is expressly recognised by the statutory framework concerned with the jurisdiction of the ecclesiastical appellate courts. An appeal against the decision of a consistory court in a faculty case lies to the Court of Arches or the Chancery Court of York only where the cause of faculty is not one 'involving matter of doctrine, ritual or ceremonial': Ecclesiastical Jurisdiction Measure 1963, s 7(1)(b). Where the cause of faculty does involve such a matter, any appeal lies to the Court of Ecclesiastical Causes Reserved (ibid, s 10(1)). For the purpose of determining to which court an appeal lies, the chancellor is under a duty to certify on the application of the party desiring to appeal whether or not a question of doctrine, ritual or ceremonial is involved (ibid, s 10(3)).

20 [1991] Fam 1, followed by *Re St George's, Deal* [1991] Fam 6.

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baptisms would continue. He made it a requirement that, in addition to the new pool,

> there must be, and he [the priest in charge] must use, a font in the conventional sense of that word for baptism by affusion … Such font will be used for infant baptisms, which will continue to be the normal practice.

To 'ensure against subsequent changes of mind in the parish' (ie changes that sought to depart from the priest's assurances about infant baptisms), the faculty was expressed to operate only until further order and the archdeacon would have liberty at any time to apply for the faculty to be rescinded. The consistory court was fulfilling its role of safeguarding doctrine.

A very wide range of matters that come before consistory courts necessarily involve some consideration of religious matters, even when doctrinal questions are not the most significant aspect of the case. Proposals concerned with the introduction of an altar[21] and with making provision for the reservation of the sacrament[22] have both involved the consideration of religious issues. And these are not isolated examples. Any petition that involves the inclusion of words and pictures on stained glass or on memorials, or is concerned with the introduction (or removal) of images or even of stands to hold candles lit by visitors to the church, may to a greater or lesser degree involve the court in addressing religious questions. The recent decision in *Re St Mary the Virgin, Oxford*,[23] while entirely straightforward in conservation and listed-building terms, involved detailed consideration of the law – including the law as regarded in the light of authorised liturgical provision – concerning the commemoration of persons who had been condemned for treason or heresy.

A particular growth area in the business of the ecclesiastical courts that involves religious questions is exhumation. All petitions considered in accordance with the guidance given by the Court of Arches in *Re Blagdon Cemetery*[24] turn on the question of whether exceptional circumstances exist such as to overcome the presumption that burial in consecrated ground is intended to be final, a presumption based entirely on the Christian understanding of burial.

It may be that some chancellors are concerned that they are not equipped to determine questions of doctrine and other religious questions when they arise in the context of faculty proceedings. However, whether an issue involves the court in performing its 'important duty … to safeguard sound doctrine', or simply of giving due consideration to all matters relevant to a petition,

21 *Re St Stephen, Wallbrook* [1987] Fam 146.
22 See *Re St Thomas, Pennywell* [1995] Fam 50.
23 [2009] Fam 38.
24 [2002] Fam 299.

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ecclesiastical judges need to be able to grasp religious questions and address them. But an ecclesiastical judge does not need to be a professional theologian. What he or she needs to be able to do is to identify religious questions when they arise and to know where – or to whom – to go in order to address them.

The doctrine of the Church of England has been put on a legislative footing by Canon A 5, which may prove a helpful starting point:

> The doctrine of the Church of England is grounded in the Holy Scriptures, and in such teachings of the ancient Fathers and Councils of the Church as are agreeable to the said Scriptures.
>
> In particular such doctrine is to be found in the Thirty-nine Articles of Religion, *The Book of Common Prayer*, and the Ordinal.

The provision contained in the *Book of Common Prayer* and in the Ordinal is therefore normative in terms of the doctrine of the Church of England.[25] The ecclesiastical courts can be expected to take judicial notice of the content of the Prayer Book, for example.

However, where it appears to a chancellor that a question that involves difficult theological or religious issues is an issue in proceedings, he or she has the option of inviting evidence from the archdeacon or from some other suitably qualified person who is in a position to assist the court. The archdeacon is deemed to have an interest for the purposes of any proceedings for obtaining a faculty.[26] If the archdeaconry is vacant, if the archdeacon is incapacitated or if, in the opinion of the bishop, the archdeacon is for any other reason unable or unwilling to act, or it would be inappropriate for him or her to act, the bishop may appoint another person to act in place of the archdeacon for the purpose of the proceedings.[27] In *Re St John the Evangelist, Chopwell*[28] – which concerned the introduction into the church of altar standards, candelabra, a votive candle stand, sanctuary bells, acolyte chairs, a thurible and holy water stoups – the bishop appointed counsel to act in the archdeacon's place.

The diocesan advisory committee is likely to have (in addition to the archdeacons of the diocese, who are ex officio members) one or more members who are in a position to assist the court with doctrinal or other religious questions.[29] The

25 The rubrics in the *Book of Common Prayer* no longer have statutory force since the repeal, by the Church of England (Worship and Doctrine) Measure 1974, of the relevant provisions of the Act of Uniformity 1662, but if the purpose of a rubric is to clarify general Church order and is of substantial importance, or its purpose is to set out dogma, it must be followed, irrespective of whether the rite being used is from the Prayer Book or from Common Worship. See *Re St Thomas, Pennywell* [1995] Fam 50 at 67.

26 Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s 16(2).

27 Ibid, s 16(3). Section 16(4) makes provisions as to the costs and expenses incurred by such a person.

28 [1995] Fam 254.

29 In making appointments to the Diocesan Advisory Committee, the Bishop's Council must ensure that the persons appointed have, between them, *inter alia*, knowledge of the history, development

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court might direct that such a person should give evidence as a judge's witness.[30] Decided cases raising the same or similar doctrinal questions are likely to be instructive. It is open to the court, where it would be of assistance to do so, to appoint an *amicus curiae*. What is not open to an ecclesiastical court to do is to duck a difficult religious question or to treat religious questions of being of no, or little, importance as compared, for example, with conservation issues.

The May issue of this *Journal* noted the decision in *Re St Mary the Virgin, Monkseaton*.[31] The parties opponent to a petition for reordering did not object to a nave altar in principle but objected to the specific proposals because of the absence of hand rails and of provision for communicants to kneel to receive communion. It appears from the judgment that there was a dispute between the incumbent and the parties opponent on the theological implications of making no provision for communicants to kneel to receive the sacrament. The chancellor was clearly in a difficult position in that regard because, as he said, 'No evidence was put before me to enable me even to begin considering that question still less trying to answer it.' He disposed of the arguments concerning kneeling simply on the basis that they were 'not of sufficient weight to justify [a] refusal to grant a faculty' when there was no other objection to a nave altar.

The parties opponent appeared in person, so the chancellor did not have the benefit of argument from counsel. But it is suggested that the court could – and should – have given consideration to the merits of the objections of the parties opponent. That consideration might have begun with noting that, until the enactment of the Church of England (Worship and Doctrine) Measure 1974, and its repeal of the provisions of the Act of Uniformity 1662 that gave legal force to the rubrics in the *Book of Common Prayer*, kneeling was the only lawful posture for receiving the sacrament. The court could then have gone on to consider what the position was post-1974.[32] The rubric concerning kneeling remains in the Prayer Book, of course, but (following the precedent of the *Alternative Service Book*) *Common Worship* makes alternative provision in that regard. Note 1 of the Notes to Holy Communion provides:

> **Posture**
> Local custom may be followed and developed in relation to posture. The people should stand for the reading of the Gospel, for the Creed, for

and use of church buildings and knowledge of Church of England liturgy and worship (Care of Churches and Ecclesiastical Jurisdiction Measure 1991, schedule 1, para 5).

30 Faculty Jurisdiction Rules 2000 (SI 2000/2047), rule 25. In *Re Blagdon Cemetery*, the Court of Arches was assisted by a paper on the theology of burial by the Right Reverend Christopher Hill. An extended version of that paper was reproduced in this *Journal*: C Hill, 'A note on the theology of burial in relation to some contemporary questions', (2004) 7 Ecc LJ 447–451.

31 (2011) 13 Ecc LJ 243.

32 See the discussion of the effect of the rubric after the consecration in the *Book of Common Prayer* directing that the sacrament shall be received 'all meekly kneeling' in R Bursell, *Liturgy, Order and the* Law (Oxford, 1996), pp 50–51.

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> the Peace and for the Dismissal. Any changes in posture during the Eucharistic Prayer should not detract from the essential unity of that prayer. It is appropriate that, on occasions, the congregation should kneel for prayers of penitence.

The court might then have received evidence on what the local custom currently was with regard to 'posture' at the receiving of the sacrament. The court might also have considered what might be appropriate in terms of facilitating the development of local custom in that regard: should the court grant a faculty that would have the effect of changing that custom almost overnight – by authorising the implementation of proposals that would remove facilities for kneeling to receive the sacrament – or did 'developing' local custom with regard to posture require something of a more gradual approach?

It is possible that, having considered those questions, the court would have come to the same conclusion in the end and granted the faculty as sought. But by considering the question in the way suggested here, the court would have taken into consideration a matter that was material to the issues before it, and the particular objection of the parties opponent would have been addressed – and been seen to be addressed – within the legal context applicable to that issue.

Other recently decided cases in which 'religious' questions might have been considered, but (apparently) were not, include *Re Bromsgrove Old Cemetery*,[33] where a faculty for exhumation of ashes was granted so that they could be scattered without, apparently, considering the implications of Canon B 38.4(b), and *Re St Andrew, Sedburgh*,[34] where the chancellor did not consider it appropriate for him to seek to resolve 'sensitive and difficult doctrinal issues' when deciding a petition for the introduction of a cross above the pulpit to which doctrinal objections had been raised. By way of contrasting examples, in the cases of *Re Long Bennington Parish Church*[35] and *Re All Saints, Crawley Down*[36] chancellors did engage directly with the religious or doctrinal issues to which the petitions before them gave rise. An inconsistency of practice seems to have arisen, so that some ecclesiastical judges are ready and willing to address religious questions as they arise in faculty proceedings while others are not.

Ecclesiastical judges are now very familiar with the tests that they must apply with regard to making changes that adversely affect listed buildings. They faithfully apply those tests, and the conditions identified by the Dean of the Arches as necessary for the continuance of the ecclesiastical exemption in *Re St Mary the*

33 (2011) 13 Ecc LJ 122.
34 (2011) 13 Ecc LJ 121.
35 (2009) 11 Ecc LJ 361.
36 (2010) 12 Ecc LJ 126.

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Virgin, Ashford are being met. That is to be welcomed. But in the midst of these (very real) concerns, ecclesiastical judges must not forget that they are just that: *ecclesiastical* judges, sitting in church courts and applying the law of the Church of England. That law is wider than matters concerned with the conservation of the Church's built heritage, crucial though that is. Religious questions of the sort with which Chancellors Garth Moore and Newsom concerned themselves continue to be an equally important aspect of the faculty jurisdiction. Indeed, in many ways it is that aspect of the jurisdiction that clearly distinguishes it from the secular system of listed building control and, by making it distinctive in terms of the matters that it is able to address, provides much of the rationale for the ecclesiastical exemption. The Church of England has the ecclesiastical exemption because it has the faculty jurisdiction, not the other way round.

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Lift High the Cross? An American Perspective on *Lautsi v Italy*

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The European Court of Human Rights has upheld Italy's policy of displaying crucifixes in its public school classrooms. In *Lautsi v Italy*,[37] an atheist mother of two state school children challenged this policy, in place since 1924. After losing in the Italian courts, she appealed to the European Court of Human Rights, arguing that the presence of these crucifixes in schools violated her and her children's rights to religious freedom and to a secular education guaranteed by the European Convention on Human Rights. On 3 November 2009, a unanimous seven-judge chamber of the European Court held for Ms Lautsi. On 18 March 2011, the Grand Chamber reversed this decision and held 15 to 2 in favour of the Government of Italy.[38]

The court stated clearly that the crucifix is a religious symbol, that atheism is a protected religious belief and that public schools must be religiously neutral. But the court held that a 'passive display' of a crucifix in a school classroom was no

37 [2011] ECHR 30814/06.
38 A full discussion of the judgment appears elsewhere in this issue: P Ronchi, 'Crucifixes, margin of appreciation and consensus: the Grand Chamber ruling in *Lautsi v Italy*', (2011) 13 Ecc LJ 287–297.

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