(2021) 23 Ecc LJ 342–348 © The Author(s), 2021. Published by Cambridge University Press on behalf of Ecclesiastical Law Society
doi:10.1017/S0956618X21000399

COMMENT

A Response to Professor Norman Doe

CHARLES GEORGE QC[1]
Dean of the Arches and Auditor 2009–2020

Keywords: Court of Arches, supervisory jurisdiction of High Court, doctrinal matters, precedent

INTRODUCTION

Mindful of Norman's closing reference to Oughton's invocation, I start with a loud Amen.

Personally, I am feeling both buoyed up, and also a bit deflated, as a result of Norman's lecture (and the accompanying *Ecclesiastical Law Journal* article, to which the lecture is just an hors d'oeuvre). Buoyed up that, according to Oughton's treatise of 1728, in the seat of justice the dean should be addressed as *Domine Judex* or more frequently *Domine Decane*. Either will do excellently for the future! Deflated because, while Dean Phillimore's letters patent as Dean of the Arches recognised his 'sound doctrine, good morals, purity of conscience', my own were, probably rightly, considerably less effusive.

First a word of thanks to the organisers of the lecture, and particularly George Bush and Stephen Coleman, along with Matthew Power, Mark Hill and the Ecclesiastical Law Society, and to all who attended what, by any standards, was a splendid lecture on a splendidly arcane topic, ranging from before the reign of Henry II to 1 April 2020 when the recent amendments to the Faculty Jurisdiction Rules come into force. The audience included several who have served as occasional members of the Court of Arches over the past 20 years, and some of them, as well as others in the audience, have appeared as advocates at the court's sadly infrequent sittings. I trust that advocates in the future will abide by Archbishop Winchelsey's statutes of 1295 and not keep concubines

1 This comment is based on the response and vote of thanks delivered by the author after Professor Norman Doe's lecture, 'The Court of Arches: its jurisdiction and jurisprudence – entirely settled?', given at St Mary-le-Bow Church on 20 November 2019, a version of which is printed above, pp 322–341.

https://doi.org/10.1017/S0956618X21000399 Published online by Cambridge University Press

or wander at night, though it is perhaps too much to expect them never to enter taverns or attend public entertainments.

Before I respond to Norman's lecture, I will begin by saying how much I welcome the renaissance of academic ecclesiastical law which we have seen in the last 25 years, very different from the ecclesiastical wilderness of my own student days when Eric Kemp in Oxford and Garth Moore in Cambridge were reviled John the Baptists in an unwelcomingly secular world. In large part this renaissance is due to Norman's prodigious output and to his Cardiff course, which has appealed so widely to clergy and laity. Indeed, it is a remarkable feature of General Synod, of which as dean I am an ex officio member, that the legal knowledge of clergy members, several of whom are Norman's protegees from the Cardiff course, tends far to exceed that of representatives of the laity.

As Norman has explained, the court over which I have presided for ten years has the strongest of links with St Mary-le-Bow. As an advocate I only twice appeared before this court, both times sitting in this church, on the first occasion in the basement where the café now operates, on the second occasion in the main church, where I disgraced myself by failing to remember that, for the court's luncheon adjournment, I had shed my wig and gown in the chapel of the Holy Sacrament, hence my predecessor's courteous but initially perplexing admonition to me when the court resumed, 'Mr George, the court cannot hear you'. During my time as dean we have sat in the main body of the church whenever possible, most recently at the end of last year, and I am pleased to say that the acoustic problems which were always a feature in the past have now been resolved.

The best history of the early Court of Arches is that by Donald Logan, professor emeritus of history at Emmanuel College Boston, and well summarised by him in chapter 8 of the admirable *History of St Mary-le-Bow*, first published in 2007 and co-edited by the rector.[2] Some years ago I had the pleasure of meeting Professor Logan on one of his frequent visits to London, and he delighted in the fact that the court which had played so major a part in his researches over his academic lifetime was still alive and well, and more particularly still officiating at St Mary-le-Bow. Mystery surrounds what happened to the court's early records prior to the reign of Edward VI, which were no longer extant at the time that the Great Fire destroyed this church in 1666, along with its records from the mid-sixteenth century. Happily, two fragments of the Act Book of Arches, dealing with court sessions for late 1445 and early 1446, were discovered a few years ago by Professor Eckhardt of Pennsylvania State University, used in the late seventeenth or eighteenth century as endleaves, when a mediaeval English-language chronicle at the university of Göttingen was rebound (apparently the binder's opportunistic choice among available

2 M Byrne and G Bush (eds), *St Mary-le-Bow: a history* (Barnsley, 2007).

https://doi.org/10.1017/S0956618X21000399 Published online by Cambridge University Press

pieces of parchment). Those of you who read the admirable journal of the Pontifical Institute of Mediaeval Studies will know the article by Professors Logan and Eckhardt, with the text of the court record converted from illegible into readily readable medieval Latin, though sadly absent a translation.[3]

By 1850, when Dickens' *David Copperfield* was published, the Court of Arches was sitting at Doctors' Commons in the building it shared with the Admiralty Court in Knightrider Street near St Paul's, and its proceedings were memorably described by him as 'a cosy, dosey, old-fashioned, time-forgotten, sleepy-headed little family party'. Of course, as Norman has explained, the court's jurisdiction is now only a shadow of what it once was. But its history lives on, since significant reported consistory court and appellate court decisions, which from the late nineteenth century were reported in the Probate, Divorce and Admiralty reports, now find their way into the reports of the Family Division, though this court has not, as Norman explained, exercised a family jurisdiction since 1857. Norman's lecture is primarily concerned with the court's illustrious history, rather than the present. What perhaps is worth drawing attention to is the relative frequency with which the judgments of this court are thought worthy, by today's court reporters, of inclusion in volumes 2 or 3 of the Weekly Law Reports, en route to the Family Reports. That series began in 1972, and since then no fewer than 16 decisions of this court have been so reported, three in the 1970s, one only in each of the 1980s and 1990s, and then five in the period 2000–2009, and six in the period 2010–2019. Let this mini-boom be celebrated!

The court's fare today is in effect confined to appeals in faculty cases and, as Norman has rightly mentioned, appeals from bishops' disciplinary tribunals in Clergy Discipline Measure cases, when the court sits in an unwieldly five-person formation, including two clergy and two laity. The details of the last reported disciplinary appeal were so salacious that the court retreated south of the river to Southwark for the hearing, and it would be improper to recite them from a lectern in this august church.

In addition to faculty cases but not specifically mentioned by Norman, the Court of Arches has jurisdiction in appeals in proceedings for an injunction or a restoration order, including most recently the difficult but sad case of Christ Church, Spitalfields,[4] in this very diocese of London, of which Sir Christopher Howes, writing this February in the 'Sacred mysteries' column in the *Daily Telegraph*, and having cited Dickens' description, said that 'In any case the Court of Arches is not sleepy today', which I think was meant as a compliment of sorts.

3 F Logan and C Eckhardt, 'Fragments from a lost Court of Arches act book, 1445–1446', (2015) 77 *Medieval Studies* 183–201, available at <https://pims.ca/wp-content/uploads/2019/11/ms77-183.pdf>, accessed 26 May 2021.

4 [2019] Fam 343.

https://doi.org/10.1017/S0956618X21000399 Published online by Cambridge University Press

Section 14(1)(b) of the 2018 Measure also confers jurisdiction in respect of appeals 'in proceedings of the kind mentioned in section 7(1)(h)', a category consisting of 'any other proceedings which immediately before the passing of [the Ecclesiastical Jurisdiction Measure] 1963 on 31 July, the [consistory] court had power to determine (except proceedings the jurisdiction of which was expressly abolished by that Measure)'. Others in this audience more learned in the law will know what that mysterious category embraces. Suffice to say that it has never come my way, whether as chancellor or as dean.

RESPONSE

I believe that 'wow' is the appropriate first response to Norman's lecture, typical for his inventiveness in identifying the topic, the scholarship in developing his themes, and the characteristic panache with which he delivered what might in others' hands have been indigestible gruel to this hungry audience. In responding I simply highlight four matters.

Ecclesiastical Jurisdiction Measure 1963

First, Norman rightly describes the EJM 1963 as marking a landmark change. I would add another landmark change: Schedule 4, paragraph 8 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, whereby in its civil jurisdiction the Court of Arches became a three-person court, a change requested by Sir John Owen, and which has added markedly in my view to the respect afforded to this court's judgments.

Supervisory jurisdiction

Second, I cannot let Norman get away unchallenged with his aside that nowadays the Court of Arches is under the supervisory jurisdiction of the High Court. I appreciate that Sir Edward Coke unearthed 'a very Ancient Record of prohibition, In Curia Christianitas coram Decano de Arcubus London' in a case from 1279. But the position is entirely unsettled. While George Newsom was clear that the ecclesiastical courts are 'subject to the control of those of the temporal courts which now make orders of judicial review to the extent', this was

> only to the extent, that prohibition will issue to an ecclesiastical court which entertains a matter not within its jurisdiction, and perhaps also mandamus to such a court if it refuses to deal with a matter which is within its jurisdiction. But certiorari [that is today's quashing order] can never issue to an ecclesiastical court and the only way in which its errors can be corrected is by appeal.[5]

5 G H Newsom and G L Newsom, *Faculty Jurisdiction of the Church of England* (second edition, London 1993), p 7.

https://doi.org/10.1017/S0956618X21000399 Published online by Cambridge University Press

I accept that in *Cart v Upper Tribunal*[6] the Supreme Court held that even decisions of the Upper Tribunal were subject to judicial review, notwithstanding the existence of a right of appeal, such as there is also from the Court of Arches to the Privy Council, last exercised in 2015. But if the Court of Arches were subject to judicial review more generally, there would surely be a need for an equivalent of rule 54(7)A(7) of the Civil Procedure Rules, with which the audience will all be familiar, and by which judicial review from the Upper Tribunal is only available where the case raises an important point of principle or practice, or there is some other compelling reason to hear it.

Doctrinal matters

Third, there remains an element of uncertainty as to how far the Court of Arches (and its sister court in York) may venture into doctrinal matters, given that section 14(1) of the 2018 Measure excludes an appeal which 'to any extent relates to matter involving doctrine, ritual or ceremonial'–as Norman mentioned, such appeals go to the Court of Ecclesiastical Causes Reserved, which has been eagerly awaiting such an appeal since 1987. Norman referred in a different context to *Re Blagdon Cemetery* [2002] Fam 299, an appeal in which I was myself a winger in the Court of Arches, where undoubtedly part of the reasoning related to a matter of doctrine, namely the alleged Anglican doctrine of the one-off nature of burial and the importance of maintaining, save most exceptionally, its permanence. Was the evidence of Bishop Christopher Hill in that case inadmissible? Once the relevance of the issue became clear, should the court have referred the matter to the three bishops and two senior secular judges of the Court of Ecclesiastical Causes Reserved? In *Re Sam Tai Chan (sub nom re St Chad's, Bensham)* [2017] Fam 68, Chancellor Bursell, sitting in the other province, boldly described the Court of Arches' 'active consideration of the theology of burial' in *Blagdon* as having been ultra vires and to 'raise questions as to the overall authority of that decision'. For like reasons, in the court's judgment in *Spitalfields* we declined an invitation to determine a particular issue by reference to the precise nature of a funeral service conducted by the rector, despite a theological analysis which we set out and described as 'intriguing'.

Judicial precedent

Fourth, I turn to the doctrine of judicial precedent. And here it is important to be clear of the distinction between strict *stare decisis* and a looser recognition that great weight ought to be given to certain previous decisions in certain circumstances. The dictum of Sir George Lee which gives the title to Professor Doe's lecture was narrowly confined: namely, that the jurisdiction was entirely

6 [2012] 1 AC 663.

https://doi.org/10.1017/S0956618X21000399 Published online by Cambridge University Press

settled on the particular issue in that case, and not more generally. I want to refer to two areas on which the jurisprudence of this court in relation to precedent remains very far from settled.

First, to what extent is the Court of Arches bound by decisions of the Court of Ecclesiastical Causes Reserved? In *Duffield* this court escaped the possible strictures of a test of necessity in listed building cases, propounded by the Court of Arches in *St Mary's, Banbury* [1987] Fam 136, because that test had been expressly rejected by the Court of Ecclesiastical Causes Reserved in *St Stephen's Walbrook* [1987] Fam 146. But was it bound to do so?

Second, even more importantly, and Court of Ecclesiastical Causes Reserved apart, to what extent is the Court of Arches bound by its own previous decisions? And if so, is there a *Young v Bristol Aeroplane* exception?[7] This goes unmentioned in Norman's lecture, although Norman described to us the use of precedent as 'central to Arches' practice' and told us that 'by the nineteenth century, the binding force of precedent was fully accepted'. You may recall that in *Duffield* the Court of Arches departed quite considerably from the approach to listed buildings in *St Luke the Evangelist, Maidstone* [1995] Fam 1, which had endorsed the *Bishopsgate* principles. What we said was this:

> Because this court stated in Maidstone that it was merely 'setting out certain guidelines, emphasising that they are not rules of law', we are not constrained by the doctrine of judicial precedent (in so far as, if at all, that doctrine is strictly applicable in this court, a point we do not have to decide: see *In re Lapford (Devon) Parish Church*).[8]

In *Lapford* the Dean of Arches, Sir Philip Wilbraham-Baker, declined to hold that he was bound by a previous decision of the Court of Arches. He said:

> Sitting in this court I am perhaps less strictly bound [than the consistory court]. The question of re-opening previous decisions of ecclesiastical courts was discussed in *Read v Bishop of Lincoln*; but although some latitude may be allowable it would need strong reason to justify me in departing from Sir Lewis Dibdin's decision in the *Capel St Mary* case.[9]

Read v Bishop of Lincoln (to which the dean was referring) is instructive as showing that the Privy Council is not strictly bound by its previous ecclesiastical decisions. As Lord Halsbury LC said:

7 *Young v Bristol Aeroplane Company Limited* [1944] 1 KB 718.
8 *In re St Alkmund, Duffield* [2013] Fam 158, at para 85, citing *In re Lapford (Devon) Parish Church* [1955] P 205.
9 *In re Lapford*, citing a Privy Council decision of 1892, *Read v Bishop of Lincoln* [1892] AC 644 PC.

https://doi.org/10.1017/S0956618X21000399 Published online by Cambridge University Press

> whilst fully sensible of the weight to be attached to such [previous] decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest and to give effect to their own view of the matter (something quite different from a strict doctrine of *stare decisis*).[10]

But Norman Doe in *The Legal Framework of the Church of England* is clear that 'the Arches Court is bound by its own previous decisions'.[11] In *Sam Tai Chan* Chancellor Bursell endorsed this view, but made no mention of *Lapford*, notwithstanding, I may playfully add, that he had himself been a member of this court in *Duffield*.[12]

Careful readers of section 7 of the Church of England (Miscellaneous Provisions) Measure 2018 to which Norman referred in his lecture will have noticed the absence of any reference to precedent, binding or otherwise. That oversight was deliberate.

CONCLUSION

The various matters I have mentioned suggest to me that quite plainly today, whatever may have been the case in times past on one particular matter in the mid-eighteenth century, the jurisdiction and jurisprudence of this court is not finally settled.

doi:10.1017/S0956618X21000399

10 *Read v Bishop of Lincoln* at para 655.
11 N Doe, *The Legal Framework of the Church of England* (Oxford, 1996), p 156.
12 *Re Sam Tai Chan (sub nom re St Chad's, Bensham)* [2017] Fam 68.

https://doi.org/10.1017/S0956618X21000399 Published online by Cambridge University Press