Case No: A3/2000/0644

Neutral Citation Number: [2001] EWCA Civ 713

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT,
CHANCERY DIVISION (MR. JUSTICE FERRIS)

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 17th May, 2001

B e f o r e :

THE VICE-CHANCELLOR
LORD JUSTICE ROBERT WALKER
and
LORD JUSTICE SEDLEY

- -

GAIL R. WALLBANK and
ANDREW DAVID WALLBANK — **Appellants**
- and -
THE PAROCHIAL CHURCH COUNCIL OF
ASTON CANTLOW AND WILMCOTE WITH
BILLESLEY, WARWICKSHIRE — **Respondents**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr. Ian Partridge (instructed by Eddowes Perry & Osbourne for the Appellants)
Miss Sarah J. Asplin (instructed by Rotherham & Co. for the Respondents)

- -

Judgment

Judgment of the Court:

The appeal

1. The question in this appeal is whether the appellants, as the freehold owners of Glebe Farm and consequently as rectors of the rectory of Aston Cantlow, are in law liable to defray the cost of repairing the chancel of the parish church.

2. The issue has arisen in this way. The farmhouse stands on a field once known as Clanacre which was allotted by an inclosure award of 1743 to Lord Brooke in exchange for other land which he owned as lay impropriator of the rectory. For reasons explained below, this made Clanacre rectorial property, and its owners then and thereafter lay rectors of the parish. One of the legal obligations of a lay rector is to keep the chancel of the parish church in repair. The power to enforce this obligation rests with the parochial church council (PCC).

3. By 1990 the chancel of the church of St. John the Baptist, Aston Cantlow, was in serious disrepair. On 12 September 1994 the PCC served a notice in proper form upon Mrs Wallbank calling upon her to repair the chancel. Mrs Wallbank disputed her liability, with the result that proceedings were issued against her to recover the estimated cost, a sum of £95,260:84. When it was found that Mr Wallbank was a joint freeholder, he was joined in the proceedings.

4. On 29 September 1999 Master Bragge ordered the trial of two preliminary issues. The first, concerning the existence of a customary liability in somebody other than the lay rector, has gone by common consent. The second was whether the liability of the lay rector to repair the chancel of the church or otherwise to meet the cost of repairs by reason of the provisions of the Chancel Repairs Act 1932 and the common law is unenforceable by reason of the Human Rights Act 1998 or otherwise.

5. On 28 March 2000 Ferris J, having heard argument on this issue, found for the PCC and held the defendants liable for the cost of the chancel repairs. The issue now comes before us by leave of Aldous LJ, who ordered a stay pending our decision.

6. At the time of the decision of Ferris J the Human Rights Act 1998 was enacted but not yet in force. The case for the defendants was accordingly put on the basis that, the law being in doubt, the doubt should be resolved compatibly with the United Kingdom's treaty obligation to observe the European

Convention on Human Rights. Since then, on 2 October 2000, the Act has been brought into effect, with the consequence that before us the shape of the argument has changed significantly. At the outset of the appeal, without objection, we gave permission for the notice of appeal to be amended and a respondent's notice lodged, so that the issues as they now stand might be properly pleaded. They engage two important new questions: whether the PCC is a public authority within s.6 of the Act and, if so, whether its action in serving notice upon the defendants was unlawful by reason of Article 1 of the First Protocol, read either alone or with Article 14, of the Convention.

7. It is accepted by the PCC that these related issues are open to the defendants, notwithstanding that the impugned notice antedates the Human Rights Act, by virtue of ss. 22(4) and 7(1)(b) which permit a potential victim of a breach of a Convention right to rely on that right in any legal proceedings brought by a public authority whenever the act in question took place. We are aware that this construction of the Human Rights Act 1998 is at present contested, but we have accepted the concession because we consider it to have been rightly made. In brief, Parliament's intention in enacting the material provisions appears to us to have been the straightforward one that nobody should be able to attack a public authority for having violated the Convention before the Act brought it into force, but equally that no public authority should be able, once the Convention rights were in force, to continue to rely on earlier acts of its own which, though lawful, were incompatible with the Convention. The words "has acted … in a way which is made unlawful by s.6(1)", used as they are in a statute distinguished by its lack of technicality, are in our view entirely consistent with this meaning. The alternative, which will have been apparent to Parliament, is a continuing residue of non-compliant decisions of public authorities kept indefinitely in effect by their own antiquity. The point not having been the subject of argument, however, we refrain from developing it.

The historical liability for chancel repairs

8. In addition to the judgment of Ferris J, we have had the advantage both of well-informed submissions and of valuable synoptic material in the form of Professor John Baker's article "Lay rectors and chancel repairs" (1984) 100 LQR 181 and of Appendix B to the Law Commission's report *Liability for Chancel Repairs* (Law Com. 152, 1985), which reproduces the historical conspectus set out in its earlier working paper on the topic. It is possible in consequence to restrict this judgment to an outline. It is useful, however, first to be clear about nomenclature. The term canon law is properly applied to the law made by the churches for the regulation of legal matters within their competence (see Bray, "Canon law and the Anglican Church", *The Anglican*

Canons 1529-1947 (1998), xxi ff.). Ecclesiastical law is a portmanteau term which embraces not only the canon law but both secular legislation and common law relating to the church.

> "The law of the Church of England is part of the law of the land. As Uthwatt J stated in *Attorney-General v Dean and Chapter of Ripon Cathedral* [1945] 1 Ch. 239, 245: 'The law is one, but jurisdiction as to its enforcement is divided between the ecclesiastical courts and the temporal courts'," (Hill, *Ecclesiastical Law*, 2nd ed., p.1)

While some matters (for example defamation, probate and matrimony) have passed from the canon law to the general law, others have always been within the jurisdiction of the secular courts. Among the latter is the law governing church property (Bray, loc.cit.; but see also paragraph 13 below).

9. The liability of the rector of a parish to repair the chancel of the parish church (the nave commonly was, though it no longer is, the responsibility of the parishioners) has been known to the law from time immemorial. It was part of the medieval canon law and has been absorbed by the common law; but its form has changed radically over time. The rectory of a parish included the right to receive tithes (the surrender of a tenth) of the product of the labour of parishioners, and the whole produce of the rectorial glebe (land forming part of the endowment, other than the parsonage house and grounds). This income was for the rector's maintenance. A rectory also included the obligation to keep the chancel of the church in repair out of the same profits. It was these proprietary rights and concomitant repairing obligations which the word 'rectory' in its original usage connoted.

10. Many rectories in the course of the later middle ages became monastic property. The mechanism was for the monastery to acquire by royal licence the advowson (the right - usually vested in lay persons - of appointment to a rectory) and to use it to appoint itself to the rectory, with the benefit of its tithe income and glebe holdings. The cure of souls in the parish would thereafter be discharged by a vicar, that is to say a surrogate for the monastery. But the liability to repair the chancel vested in the monastery as rector along with the property rights.

11. Upon the dissolution of the monasteries in the reign of Henry VIII these rectories were given or (more often) sold by the Crown to lay persons or to lay corporations, frequently colleges. These became the lay rectors of parishes, entitled like their predecessors to the fruits of the rectory and bearing the associated burden of chancel repairs. Since the same lay impropriators (as they

are called in ecclesiastical law) held the advowsons, lay rectories never fell vacant and became perpetual.

12. The major benefit of a rectory, tithe, has its own complex history; but it is enough for present purposes to say that no tithes now survive. They went first by voluntary commutation, then by statutory conversion under the Tithe Act 1836 into tithe rentcharges, and finally by extinction with compensation by the Tithe Act 1936. Glebe has undergone no such legal metamorphosis. Fate, as Professor Baker remarks (loc. cit.), had its own revenge in store for its lay impropriators. Spiritual rectors were relieved of the repairing liability in 1923. But wherever rectorial glebe has come through monastic hands to a lay rector it continues at common law to carry (subject to immaterial exceptions) the ultimate liability to repair the chancel of the parish church.

13. The penalty for breach of this obligation was admonition by ecclesiastical courts, followed - if the breach continued - by excommunication. If these spiritual expedients failed, the final resort was committal by the High Court for contempt of the ecclesiastical court.

The present law

14. The present situation is described in this way in the leading textbook, Hill, *Ecclesiastical Law* (2nd ed., 2001), para. 3.75:

> "[T]he liabilities of the incumbent in respect of the church and churchyard are limited to reflect the emasculation of his rights of ownership. The responsibility for maintaining the church building and the churchyard falls upon the PCC to the extent that it has funds at its disposal to do so [fn: *Northwaite v Bennett* (1834) 2 Cr & M 316*; Millar and Symes v Palmer and Killby* (1837) 1 Curt 540]. The personal liability of the rector for repairs to the chancel no longer exists [fn.: Ecclesiastical Dilapidations Measure 1923, s. 52], although the obligations of a lay rector subsist."

15. The obligation to effect chancel repairs, being several, rests in its entirety upon each lay rector no matter into how many freeholds the glebe has been divided. It attaches to the land, notwithstanding that the land is no longer a source of income for a spiritual rector accommodated elsewhere. It is not limited or proportioned to the value or fruits of the benefice: its sole measure is the cost of necessary repairs to the chancel: *Wickhambrook PCC v Croxford* [1935] 2 KB 417, C.A. (the decision which prompted the Tithe Act 1936).

16. The liability passes with the land irrespective of the will or even the knowledge of the parties, so as to make the transferee a co-rector: *Chivers v Air Ministry* [1955] Ch. 585; 14 Halsbury *Laws of England* (4th ed.) §1100.It is not registrable, whether as a land charge or otherwise, although it may be noted on the Land Register.

17. In 1982 the General Synod of the Church of England gave its support to the phased abolition of the legal residue of chancel repair liability. In its 1985 report mentioned above, the Law Commission endorsed this proposal. It noted without dissent the criticism that the law on this topic was "anomalous, uncertain and obscure", capable of creating financial hardship and unsuited to a modern society. It adopted Professor Baker's description of it as "one of the more unsightly blots on the history of English jurisprudence".

18. By the Chancel Repairs Act 1932 the jurisdiction of the ecclesiastical courts to enforce chancel repairing obligations is replaced by a process of notice to repair followed if necessary by proceedings brought by the PCC to recover the requisite sum (s.2). This is the procedure which has been duly followed in the present case. The Act, however, contains no substantive provision about the liability itself; it makes provision for "proceedings to enforce liability to repair a chancel" (s.1), assuming therefore the existence of the liability at common law.

Glebe Farm

19. The local inclosure act of 1742 recited that the lay impropriator of the parish of Aston Cantlow, Lord Brooke, was entitled both to the great tithes of the parish and to parcels of open and common land; while the vicar held the title to, inter alia, glebe lands. The act empowered the commissioners to allot Lord Brooke land in lieu of his tithes. In the event he was allotted 52 acres, 2 roods and 21 perches within the parish, of which Clanacre was part. We have been told, however, by Mr Ian Partridge for the appellants that the assertion in the statement of claim that Clanacre was allotted to Lord Brooke in the exercise of this power of conversion may be incorrect, and that the allotment was probably an exercise of the commissioners' general power. Ferris J in his judgment took the land to have been allotted in substitution for glebe land, and Miss Sarah Asplin, for the PCC, has not objected to this assumption.

20. Whichever is the case, Clanacre, and in time Glebe Farm, was from 1743 impressed by law with an obligation upon its successive owners to repair the chancel of the church. As Ferris J pointed out, the defendants are in consequence severally liable for the whole cost of chancel repairs "even though

they do not own the whole of the rectorial property and there are doubtless other lay impropriators".

21. The defendants came into ownership of Glebe Farm by way of a gift in 1974 from Mrs Wallbank's parents to her of the farmhouse and orchard. In 1990 these were conveyed, with other land, into the defendants' joint names. The land had come to Mrs Wallbank's parents by a conveyance made in 1970 "subject to the liability to repair the chancel of Aston Church … so far as the same still affects the property conveyed and is still subsisting and capable of being enforced". Minutes of the PCC in 1963 and 1968 display a similar dubiety about the continuing liability of the owners for the time being of Glebe Farm. But a conveyance of the land in 1875 as part of a larger conveyance of almost 220 acres recites that it carries with it the tithes and tithes rentcharges and is "subject to … the repairs of the chancel of Aston Church"; and a subsequent conveyance in 1918 of just under 180 acres (in effect the defendants' present holding) to the predecessors in title of Mrs Wallbank's parents is likewise "subject primarily and in priority to the other hereditaments charged therewith to the repairs of the chancel of Aston Church".

22. It follows, in Miss Asplin's submission, that whatever may be the situation in other cases, the present defendants cannot say they took the property in ignorance of the risk of having to pay for repairs to the church chancel.

The arguments

23. Mr Partridge maintained before us the initial position adopted by him before Ferris J that the law is uncertain, at least as to the liability of a part-owner of the rectory or of land allotted otherwise than in lieu of the great tithe. While tithe is extrinsic to the rectory, he argues, glebe is intrinsic and so is not necessarily governed by the same logic in relation to the transmission of its incidents. If so, the common law falls to be ascertained consistently with the European Convention on Human Rights: *Derbyshire County Council v Times Newspapers* [1992] QB 770,822, 830. Miss Asplin disputes his premise, and Ferris J, agreeing with her, concluded:

> "I have to say that I am unable to discern this uncertainty in the common law."

24. Although there is plenty of room for argument about what the law ought to be, and although not all the relevant authority binds this court, the state of the common law, for better or for worse, is plainly enough what is set out in paragraphs 14 and 15 above. If it were not for the intervention of the Human

Rights Act 1998 it might have been appropriate for this court to decide whether it was necessary to reconsider it, and to this end to use the Convention as a touchstone. But the scene has shifted radically, and with it the locus of the argument. It is to this that we therefore turn.

25. For the reason explained in paragraph 7 above, the critical issue since the coming into force of the Human Rights Act 1998 on 2 October 2000 has been whether the common law liability upon which the claim is based is one which the PCC is debarred from enforcing because it is incompatible with the defendants' Convention rights. The defendants' argument that it is incompatible is available before this court as it was not before Ferris J; but Ferris J most helpfully turned in the latter part of his judgment to the Convention issues and gave, albeit obiter, his reasoned view on them.

26. For the defendants Mr Partridge contends

> (a) that the PCC is a public authority within the meaning of s.6; and
>
> (b) that the enforcement by the PCC of the defendants' common law liability to repair the chancel infringes the defendants' right to the peaceful enjoyment of their possessions - viz. their money - in breach of Article 1 of the First Protocol read without or if necessary with Article 14 of the Convention.

He no longer invokes Article 9 (freedom of religion).

27. Miss Asplin contends

> (a) that the PCC is not a public authority;
>
> (b) that if it is, it is compelled by primary legislation to act as it has done;
>
> (c) that in any event the liability involves no deprivation of possessions but simply the realisation of a contingency inherent in the property; and
>
> (d) that the liability does not involve any impermissible discrimination in the enjoyment of a Convention right.

Is the Parochial Church Council a public authority?

28. Section 6 of the Human Rights Act 1998 materially provides:

> " *Public authorities*
>
> 6. (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if –
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3) In this section "public authority" includes –
>
> (a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature,
>
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
>
> ……..
>
> (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private."

29. The phrase "public authority" is not a term of art; nor is its application always obvious or easy. This, however, is some distance from Miss Asplin's submission that it is so ambiguous or obscure that resort may be had to Hansard for help in interpreting it (see *Pepper v Hart* [1993] AC 593). The words are perfectly intelligible. The fact that there will be cases in which their application is problematical does not begin to bring them within the class of words for which Parliamentary debates have been held to be an admissible aid to construction. We accordingly declined Miss Asplin's invitation to look at these.

30. It would be a mistake to attempt an abstract definition. It is more useful first to look at the characteristics of a parochial church council and then to see

how far they match the statutory concept (which is more than the two statutory words).

31. The Church of England has enjoyed a unique status (the Church in Wales having been disestablished in 1914) since the passage in 1532-4 of the five statutes which severed the hegemony of Rome and placed the Church under the spiritual and temporal sovereignty of the Crown; this notwithstanding its theological continuity since Saxon times (see *Marshall v Graham* [1907] 2 KB 112, 226). Both the spiritual and the temporal courts were thenceforward the King's courts, and it is by the latter that the liability of first spiritual and then lay rectors to repair the chancel has been both enunciated and enforced.

32. The PCC itself exemplifies the special status of the Church of which it forms part. The parish itself is aptly described (Hill, *Ecclesiastical Law*, 2nd ed, para. 3.74) as "the basic building block of the Church". The successor of the vestry, the PCC is constituted not as a voluntary association but by law. In the exercise of statutory powers originating (Miss Asplin tells us) in the Act of Supremacy 1568, but found more immediately in the Church of England Assembly (Powers) Act 1919, the Parochial Church Councils (Powers) Measure 1956 as amended provides for the discharge of the functions of the PCC and, by s.3, constitutes it a body corporate. That a measure of its National Assembly can make every PCC a statutory corporation is an index both of the public character of the Church of England and (to some extent) of that of a PCC. The functions of the latter, which include but are not confined to those set out in s.2 of the Measure, subsume those of the vestry (s.4) which included both spiritual and civil matters (see 14 Halsbury *Laws* (4th ed.) 568). It is sufficient for present purposes that these include the recovery of the cost of chancel repairs from lay rectors.

33. Miss Asplin submits that the test of what is a public authority for the purposes of s.6 is function-based. There is plainly force in this in relation to the "hybrid" class of public authority created by s.6(3)(b), which depends on the performance of "functions of a public nature". But it does not follow that this governs the principal category of "public authority", though it may well have a bearing on it. The long title of the Human Rights Act 1998 describes it as "An Act to give further effect to the rights and freedoms guaranteed under the European Convention on Human Rights …", and Article 1 of the Convention, though for obvious reasons not scheduled to the Act as a Convention right, obliges each High Contracting Party to secure the Convention rights to everyone within its jurisdiction. Article 34 limits the status of potential victim of a breach of the Convention to "any person, non-governmental organisation or group of individuals". In other words, the Convention assumes the existence of a state which stands distinct from persons, groups and non-governmental

organisations. It is in order to locate that state for the Act's purposes that the concept of a public authority is used in s.6.

34. For this reason the decided cases on the amenability of bodies to judicial review, while plainly relevant, will not necessarily be determinative of a body's membership either of the principal or of the hybrid class of public authority. Miss Asplin relied in this regard upon the decision of this court in *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909 as demonstrating that the possession of a legal power to determine matters of great significance to individuals, even if underpinned by Royal Charter, does not necessarily make a body amenable to judicial review. As Sir Thomas Bingham MR recounts in the leading judgment, the Jockey Club was and, despite incorporation in 1970 remained, a voluntary association whose authority over its members derived entirely from their contract with it and with each other. What arguably made the difference was its practical monopoly of the control of horse-racing and training in Great Britain. To this end the applicant had relied heavily on the decision of this court in *R v Panel on Takeovers and Mergers, ex parte Datafin plc* [1987] QB 815 in which a non-statutory City panel with dispositive powers over companies involved in takeover or merger bids was considered to be exercising quasi-governmental functions and so held amenable to judicial review. There, having rejected a "checklist" definition of amenability, Sir John Donaldson MR said (at 838):

> "Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to [their] jurisdiction."

While the *Jockey Club* decision has not escaped academic criticism (see Bamforth [1993] PL 239; Wade and Forsyth, *Administrative Law*, 8th ed, 633), the authorities as they now stand draw at least a conceptual line between functions of public governance and functions of mutual governance. Neither of these classes is defined, though each may be indicated, by the presence or absence of statutory authority: thus its absence did not protect the Panel on Takeovers and Mergers from judicial review, and its presence does not render a limited liability company amenable to judicial review. It may be, as Miss Asplin suggests, that this analysis sits well with the concept of the state to which s.6 of the Human Rights Act 1998 seeks to give effect. It may also be - though there is room for debate about it - that the concept of a public authority is function-based. But neither proposition, in our judgment, comes to the aid of the PCC, for there is no surviving element of mutuality or of mutual governance as between the impropriator and the church in the lay rector's modern liability for chancel repairs, and no question but that the recovery of the cost of such

repairs, like much else that characterises it, is a function of the PCC. The relationship in which the function arises is created by a rule of law and a state of fact which are independent of the volition of either of them.

35. In our judgment it is inescapable, in these circumstances, that a PCC is a public authority. It is an authority in the sense that it possesses powers which private individuals do not possess to determine how others should act. Thus, in particular, its notice to repair has statutory force. It is public in the sense that it is created and empowered by law; that it forms part of the church by law established; and that its functions include the enforcement through the courts of a common law liability to maintain its chancels resting upon persons who need not be members of the church. If this were to be incorrect, the PCC would nevertheless, and for the same reasons, be a legal person certain of whose functions, chancel repairs among them, are functions of a public nature. It follows on either basis by virtue of s.6 that its acts, to be lawful, must be compatible with the rights set out in Schedule 1 to the Human Rights Act 1998.

36. There is an ancillary reason for coming to this conclusion. Article 1 of the First Protocol protects the appropriation of private possessions only if, among other things, it is done in the public interest. While Miss Asplin both accepts and asserts that if the PCC is a public authority its present action will be in the public interest, she resists the inverse proposition that because the upkeep of church chancels is in the public interest the PCC, at least to the extent that it has the power and duty to enforce this obligation on persons with whom it has no other relationship, is either manifesting its character as a public authority or performing a function of a public nature. It seems to us that, understandably cautious though her stance is, she cannot have the one without the other. If, for reasons to which we now turn, the imposition of this financial burden is to be legitimated by the Convention, it must be in part because it is in the public interest; and if it is in the public interest, this will be relevant certainly to the function which the PCC is carrying out and arguably also to the legal character of the PCC.

Is the PCC acting under the compulsion of primary legislation?

37. For well-known constitutional reasons, action which may be incompatible with the Convention is at least provisionally protected if it is demanded by statute: see s. 6(2) of the Act. For reasons which will be apparent from the account given in paragraph 18 above, Miss Asplin's resort to this provision in the present case cannot succeed. Nothing in the Chancel Repairs Act 1932 requires the PCC to recover the cost of chancel repairs from Mr and Mrs Wallbank. The Act simply changes the mechanism by which this is to be done. The power, and no doubt duty, of recovery which the PCC seeks to exercise is a common law power unprotected by s. 6(2).

The right to the peaceful enjoyment of possessions

38. The principal right relied on by the defendants is the right set out as Article 1 of the First Protocol to the Convention:

> " ***Protection of property***
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

In interpreting and enforcing this right, we are required by s.2 of the Human Rights Act 1998 to take into account any relevant jurisprudence of the European Court of Human Rights or opinion of the (now defunct) Commission.

39. It is clear that possessions, for the purposes of this article, may include money. In *Darby v Sweden* (1991) 13 EHRR 774, para. 30, the European Court of Human Rights derived this proposition from the simple fact that the second paragraph of the article refers explicitly to taxation. We would adopt the same view.

40. Is the liability to defray the cost of chancel repairs a form of taxation? In our view it inescapably is. Miss Asplin has argued bravely that it is simply a characteristic of the particular piece of land, like (she suggests) a grub in an apple. The appellants may well regard the simile as apt, but it does not deflect the essential fact that a private individual who has no necessary connection with the church is required by law to pay money to a public authority for its upkeep. Erratic though its incidence is, the liability is a tax upon the ownership of land. It may also be, as Ferris J was disposed to hold, that it is an incident of such ownership; but it does not follow that it is not a tax. The liability to pay council tax, which equally is a personal liability deriving from a legal relationship with land (Local Government Finance Act 1992, s.6), can similarly bear both descriptions. The fallacy in Miss Asplin's argument is to treat Glebe Farm as the possession of which Mr and Mrs Wallbank's enjoyment is being disturbed. This is not so: the levy is upon their personal funds. Their ownership of Glebe

Farm, while it is the source of their liability to pay, is undisturbed. For this reason we do not, with respect, share the judge's view that

> "The case is quite different from that in which an outright owner of property finds that his ownership is entrenched upon by some outside intervention in the form of taxation."

In our judgment there is in this case, as in that postulated by Ferris J, an outside intervention - that of the general law - which makes ownership of the land a fiscal liability.

41. Is the tax in the public interest? Miss Asplin, if she is to be driven this far, submits that it is; Mr Partridge does not disagree; and we would readily accept that the upkeep of England's church buildings, at least of those old and interesting enough to be part of our history and landscape, is in the public interest.

42. Next, is the tax levied in conditions provided for by law? Mr Partridge has not pressed the argument that although the law itself is ascertainable, its effect, both on the identity of land affected by it and on the amount of the consequent liability, is not. He allocates these issues to his case on proportionality, to which we therefore turn.

43. In *James v United Kingdom* (1986) 8 EHRR 123 the European Court of Human Rights rejected the claim of the Duke of Westminster's trustees that the United Kingdom's leasehold enfranchisement legislation contravened Article 1 of the First Protocol. In doing so, however, the Court made it clear that in its jurisprudence (for example, *Ashingdane v United Kingdom* (1985) 7 EHRR 528, para. 57) a requirement in the Convention of a legitimate aim carries with it a requirement that the aim be pursued by means which are both appropriate and proportionate (para. 50). In *Håkansson v Sweden* (1990) 13 EHRR 1, para. 51, the Court said:

> "Article 1 of Protocol 1 also requires that there be a reasonable relationship of proportionality between the means employed and the end sought to be realised. The requisite proportionality will not be found if the person concerned has had to bear 'an individual and excessive burden'."

Although footnoted in the judgment by reference to *Lithgow v United Kingdom* (1986) 8 EHRR 329, para. 120, where it is adopted, the origin of the last phrase in the above passage is *Sporrong v Sweden* (1982) 5 EHRR 35, para. 73. There the Court by a majority of 10 to 9 held that the prolonged blight caused by a compulsory purchase notice which was finally withdrawn imposed "an

individual and excessive burden which could have been rendered legitimate only if [the applicants] had had the possibility of seeking a reduction of the time-limits or of claiming compensation". The minority disagreed as to the outcome, but not as to the test.

44. Our task is not to cast around in the European Human Rights Reports like blackletter lawyers seeking clues. In the light of s.2(1) of the Human Rights Act 1998 it is to draw out the broad principles which animate the Convention. These, in our view, include a requirement that the legitimate aim of taxation in the public interest must be pursued by means which are not completely arbitrary or out of all proportion to their purpose. We deliberately put it in these strong terms because the second paragraph of Article 1 of the First Protocol makes it plain that the state in this area enjoys a large choice of measures to control the use of property or redistribute wealth. How large is well illustrated by the unanimous decision of the Court in *James v United Kingdom* confirming the compatibility with the Convention of the expropriative measures contained in the Leasehold Reform Act 1967. But that it has limits relevant to the present case is illustrated by the Court's decision in *Hentrich v France* (1994) 18 EHRR 440, where a power of pre-emption had been exercised by the state against a buyer of land on the ground that she had paid too low a price. The Court, applying Article 1 of the First Protocol, accepted that the system has a legitimate aim - the prevention of tax evasion - but held that in the absence of any independent and objective process for deciding whether the power ought to be exercised,

> "the pre-emption operated arbitrarily and selectively and was scarcely foreseeable…" (para. 42).

This went to legality. The interference was also held, however, to be disproportionate (paras. 47-8) because the power could be exercised against bona fide purchasers *pour encourager les autres*, placing an unacceptable degree of risk upon the former.

45. Without being schematic, it can be said in the light of this jurisprudence that a tax which operates entirely arbitrarily violates the Convention right contained in Article 1 of the First Protocol. In our judgment, the liability for chancel repairs attaching to former rectorial glebe land is such a tax. It is arbitrary in its incidence, first because the land to which it attaches, now shorn of any connection with the rectory, does not differ relevantly from any other freehold land, and secondly because the liability may arise at any time and be (within the cost of total reconstruction) in almost any amount. The rationale which once distinguished such land materially from other freehold land has vanished into history. No rational link is discernible between the extent or value of the interest in the land and the potential amount of the liability. Arbitrariness

is thus not simply a side-effect but the dominant feature of this historical form of taxation.

46. Because the system is an historical legacy and not a parliamentary enactment it suffers the additional handicap of being much harder than ordinary tax systems to bring within the second paragraph of Article 1 of the First Protocol. To defend under this provision a considered system, voted upon by a representative legislature familiar with contemporary social conditions, is one thing. To defend under it a residual common law liability to a special local tax which has long since lost its factual and legal basis is another. It is unsurprising, in the end, that Article 1 of the First Protocol will not accommodate the legal liability with which this case is concerned.

Discrimination in the enjoyment of Convention rights

47. The foregoing, if right, is enough to conclude this appeal in the defendants' favour. If, however, it is wrong, there remains the question whether the way in which the liability operates results in impermissible discrimination in the enjoyment of the right to peaceful enjoyment of the individual's possessions.

48. Article 14 of the Convention provides:

> " *Prohibition of discrimination*
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

If this article applies to the present case, it has to be because the state, by its laws, is failing on grounds related to their property to secure to the defendants the enjoyment without discrimination of the right assured by Article 1 of the First Protocol.

49. Because the article is framed in such catholic terms, the jurisprudence of the European Court of Human Rights makes the necessary distinction between discrimination which is justified and which is not. Article 14 strikes at discrimination which has "no reasonable and objective justification". This in turn depends upon (a) the aim and effect of the impugned measure, and (b) whether there is a reasonable relationship of proportionality between the means employed and the end sought to be realised: see Starmer, *European Human*

Rights Law, para. 29.10; Clayton and Tomlinson, *The Law of Human Rights*, para. 17.102. In the *Belgian Linguistic Case (No.2)* (1979-80) 1 EHRR 252, para. 7, the Court said:

> "Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention."

50. Ferris J was disposed to reject this ground of challenge on the ground that there was no differential treatment. He said:

> " [I]t seems to me that if a comparison is to be made between the position of Mr and Mrs Wallbank and that of the members of some broader class the appropriate broader class to take is the class of lay impropriators generally. If this is done it does not appear to me that there is any discrimination involved."

While the judge's conclusion follows seamlessly from his premise, the premise is incorrect. The treatment complained of is not that of Mr and Mrs Wallbank personally but that of lay impropriators generally, the Wallbanks included. It is therefore necessary to compare the situation of lay impropriators with that of a larger class of which they form part - a class of persons "in an analogous or relevantly similar situation" (*Stubbings v United Kingdom* (1996) 23 EHRR 213, para.70). This class has therefore to be identified by reference to shared material characteristics other than the impugned one. The material characteristic in the present case is in our view the ownership of freehold land either in England at large or in the parish of Aston Cantlow. Whichever is taken, the answer is the same: the law discriminates between the owners of land which was formerly glebe and of land which was not by making the former but not the latter liable for chancel repairs. (Whether a similar tax on the larger group would amount to unjustified discrimination as against the whole body of taxpayers does not matter here.)

51. Assuming for the present purpose that this discrimination in liability to tax is not arbitrary, does it have a reasonable and objective justification in the sense described above? This turns on proportionality. Proportionality, in the jurisprudence both of the European Court of Human Rights and of the European Court of Justice, calls for consideration of the appropriateness of the measure to the need which it is designed to meet. The need here is the legitimate one of maintaining historic buildings in the public interest. The

means employed, however, are a tax (and therefore a deprivation of possessions falling prima facie within Article 1 of the First Protocol) levied exclusively on the owners of land which has for centuries been divorced from the system of rights and responsibilities with which ecclesiastical law clothed the rectories of which the land once formed part. It may - we do not need to decide the question - be reasonable to raise the necessary funds by a general or local tax, but it cannot in our judgment be appropriate or therefore proportionate to single out those landowners whose property was once glebe. If the liability were a registrable charge or interest reflected in the price or value of the land, an argument to the contrary might begin to run, although the indeterminate extent of the liability would still have to be confronted. But that is not the law. The law is that the defendants are singled out for taxation as owners of former rectorial glebe lands without any surviving reasonable and objective justification for distinguishing them from other freehold property owners whether locally or nationally.

52. In our judgment, therefore, the alternative argument that the liability for chancel repairs amounts to unlawful discrimination in the enjoyment of a Convention right is also correct.

Conclusion

53. To summarise what has been a long judgment, this appeal succeeds on each of two alternative grounds. The first is that the modern liability of lay owners of what was once the glebe land of a rectory to defray the unmet cost of repairs to the chancel of the parish church is a form of taxation which does not meet the basic standard set by Article 1 of the First Protocol for the protection of citizens' possessions from the demands of the state, because it operates arbitrarily. The second is that the way in which the common law singles out the owners of such land from other landowners is unjustifiably discriminatory and so contrary to Article 14. By virtue of s.6 of the Human Rights Act 1998 the Parochial Church Council, as a public authority acting otherwise than under the compulsion of primary legislation, may therefore not lawfully recover the cost of chancel repairs from Mr and Mrs Wallbank.

54. It follows that the preliminary question set out in paragraph 4 above is to be answered in the affirmative and will be dispositive of the claim.

ORDER: Appeal allowed with costs; preliminary question set out in paragraph 4, he answered in the affirmative and the claim is dismissed; set aside Judgments of court below with no order as to costs.

(Order does not form part of approved Judgment)