

## LOSING ONE'S FACULTIES

### A PERSONAL REFLECTION ON THE WORKINGS OF THE CONSISTORY COURT IN THE LIGHT OF THE NEWMAN REPORT

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Two main functions are performed by the consistory court. The first is the discipline of clergy<sup>1</sup> which is presently the subject of a wholesale review by General Synod following the recommendations of the Hawker Report<sup>2</sup> and has been the subject of much comment, not least in the pages of this Journal.<sup>3</sup> At the time of writing, a draft Measure is still awaited. The second main function is the exercise of the faculty jurisdiction<sup>4</sup> in relation to church buildings, their contents and their surroundings. Central to the effective exercise of this jurisdiction is the ecclesiastical exemption—a pragmatic 'stand-off' between central government and certain Christian denominations<sup>5</sup> whereby listed church buildings are not subject to the secular system of listed building consent or conservation area control by local authorities. This too has been the subject of recent review.<sup>6</sup> The purpose of this paper is to examine the role of the consistory court in faculty matters and to contribute to the debate which the Newman Report will doubtless engender. The views expressed are, of course, my own and not those of the Ecclesiastical Law Society or any other body.

#### THE ECCLESIASTICAL EXEMPTION

The Church of England is not immune from temporal planning law. Planning permission is still required from the local planning authority<sup>7</sup> for operational development or change of use. The ecclesiastical exemption derives from 1912–13 and the passage of the Ancient Monuments Bill. A proposal to subject cathedrals (and indeed churches) to state control as monuments of national importance was abandoned consequent upon an assurance given by Randall Davidson, Archbishop of Canterbury, that the faculty jurisdiction would be reviewed in order to ensure that 'no harm shall arise to the ecclesiastical buildings whose value is so immeasurable'. Thus the Ancient Monuments Consolidation and Amendment Act 1913 excluded from its statutory regime 'an ecclesiastical building which is for the time being used for ecclesiastical purposes', a form of words which has survived sequential legislative amendments.<sup>8</sup>

<sup>1</sup> The jurisdiction is limited to beneficed clergy in 'conduct' cases. It is unnecessary in the case of licensed clergy (Revised Canons Ecclesiastical, Canon C12, para 5), nor does it extend to cases involving doctrine, ritual or ceremonial (Ecclesiastical Jurisdiction Measure 1963 (No 1), s 6(1)(a)). See generally M Hill, *Ecclesiastical Law* (Butterworths, 1995), pp 220 ff.

<sup>2</sup> *Under Authority: The Report of the General Synod Working Party Reviewing Clergy Discipline and the Working of the Ecclesiastical Courts* (Church House Publishing, 1996) GS 1217.

<sup>3</sup> See the submission to the General Synod Working Party by the Ecclesiastical Law Society Working Party on Clergy Discipline and the Ecclesiastical Courts (1996) 4 Ecc LJ 510–520, and its response to *Under Authority* (1997) 4 Ecc LJ 746–751. It is not here intended to add further to the debate.

<sup>4</sup> See generally G H and G L Newsom, *The Faculty Jurisdiction of the Church of England* (2nd edn) (Sweet & Maxwell, 1993), and Hill, *Ecclesiastical Law*, chapter VII (pp 384 ff).

<sup>5</sup> The Church of England, the Church in Wales, the Roman Catholic Church, the Baptist Union, the Methodist Church and the United Reformed Church.

<sup>6</sup> See *A Review of the Ecclesiastical Exemption from Listed Building Control* conducted for the Department for Culture, Media & Sport and the Welsh Office by John Newman (September 1997). This document is referred to hereafter as the Newman Report.

<sup>7</sup> Or, on appeal, from the Secretary of State.

<sup>8</sup> See the Newman Report, pp 6–12, and the Planning (Listed Buildings and Conservation Areas) Act 1990 (c 9), s 60(1).

True to his assurance, Archbishop Davidson set up a review which saw the introduction of diocesan advisory committees (DACs) and the Council for the Care of Churches. The rise in the cost of structural repairs led in 1976 to an agreement with the Department of the Environment whereby, in return for the receipt of state aid, the Church of England undertook to review once again the faculty jurisdiction. This led, ultimately, to the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, the Faculty Jurisdiction Rules 1992<sup>9</sup> and the Faculty Jurisdiction (Injunctions and Restoration Orders) Rules 1992.<sup>10</sup> The temporal law embodying the exemption is now to be found in the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994<sup>11</sup> made pursuant to the Planning (Listed Buildings and Conservation Areas) Act 1990, which came into force on 1 October 1994.<sup>12</sup>

### CRITICISMS OF THE FACULTY JURISDICTION

The Newman Report states that:

'the Church of England should in the long term consider the radical step of removing control of listed buildings from the faculty jurisdiction and instituting a control system for them more in line with modern procedures.'<sup>13</sup>

It advocated a further review of the system in three years' time (i.e. September 2000) and perpetual review thereafter.<sup>14</sup> As to individual points of criticism, its recommendations may be summarised as follows:

- Each diocese should appoint a professionally trained conservation officer to assist DAC secretaries.<sup>15</sup>
- The Department for Culture, Media & Sport should:
  - (1) seek to eliminate instances of 'dual control', i.e. where both the faculty jurisdiction and local authority listed building consent apply (there are two specific instances: first, during the period when a listed church has ceased to be used for an ecclesiastical purpose but has not been declared redundant; and secondly, in respect of individual structures within the curtilage of a church which are themselves listed in their own right);<sup>16</sup>
  - (2) liaise with the Faculty Jurisdiction Rules Committee and within one year make recommendations regarding the citation and notification of amenity bodies;<sup>17</sup>
  - (3) review the requirement to make newspaper advertisement of proposals.<sup>18</sup>
- DACs should
  - (1) formulate co-ordinated diocesan archaeological policies and appoint, after consultation with the Council for British Archaeology, archaeologist

<sup>9</sup> SI 1992/2882.

<sup>10</sup> SI 1992/2884.

<sup>11</sup> SI 1994/1771.

<sup>12</sup> See *The Ecclesiastical Exemption: What It Is and How It Works* (Department of National Heritage and Cadw: Welsh Historic Monuments, September 1994).

<sup>13</sup> Newman Report, para 6.26. What such a system might be is not specified although a model akin to that recently introduced for Church of England cathedrals was singled out for particular commendation in the report (see para 7.12). Praise was expressed for the Cathedrals Fabric Commission for England with its professional secretariat and guidance notes, and for individual Fabric Advisory Committees. It is interesting that this tentative suggestion is not included in the report's Summary of Recommendations in chapter 14.

<sup>14</sup> Newman Report, para 4.19.

<sup>15</sup> *Ibid.*, para 6.12. The report concedes that this would 'undoubtedly add significantly to diocesan staff costs' (para 6.7), but no detailed costings are included.

<sup>16</sup> *Ibid.*, para 5.15. Note also trees, which may be subject to preservation orders, on which the report is silent.

<sup>17</sup> *Ibid.*, paras. 5.5 and 6.21.

<sup>18</sup> *Ibid.*, para 5.5. The requirement is currently found in the Faculty Jurisdiction Rules 1992, r 12(4)(b).

- members with voting rights, and endeavour to ensure consistency across the dioceses in dealing with archaeological matters;<sup>19</sup>
- (2) appoint an organs adviser, one of whose principal tasks should be to compile a list of historic organs in conjunction with the British Institute of Organ Studies or other such body;<sup>20</sup>
  - (3) send agenda and minutes of meetings to the local planning authority, the national amenity societies and English Heritage;<sup>21</sup>
  - (4) arrange for all records, including plans and photographs, to be retained indefinitely and duly deposited in some appropriate archive.<sup>22</sup>
- General Synod, in conjunction with the Ecclesiastical Judges Association, the Department for Culture, Media & Sport and the planning inspectorate, should evaluate the suggestion that certain types of cases<sup>23</sup> should be taken of the hands of the chancellor and adjudicated by the equivalent of a planning inspector.<sup>24</sup>
  - Proper notice of proposals for the demolition or alteration of buildings should be given to the Royal Commission on the Historical Monuments of England to enable photographic records to be taken.<sup>25</sup>
  - There should be arrangements for monitoring works and double-checking compliance with conditions.<sup>26</sup>

The Church of England is entitled to be content, though not complacent, that its systems have been so highly thought of in the Newman Report. The faculty jurisdiction is, for the most part, working well. Few of the particular recommendations can be considered contentious, and the long term radical step of 'instituting a control system ... more in line with modern procedures' is merely floated as a possibility, being unsupported by cogent evidence or reasoned argument, and is not a recommendation of the report. The appointment of diocesan conservation officers may well prove cost prohibitive. The report fails fully to acknowledge the breadth and depth of knowledge and experience which already exists in DACs and the gratuitous services provided by experts in various fields. Arrogating certain matters for adjudication by the equivalent of a planning inspector may deny the court the advantage of a tribunal sensitive to pastoral, liturgical and evangelistic concerns.<sup>27</sup> The heightened notice and circulation procedures will place an additional administrative burden on DACs, local authorities, English Heritage and the amenity societies. There will be cost

<sup>19</sup> Newman Report, para 5.7.

<sup>20</sup> *Ibid.*, para 5.8.

<sup>21</sup> *Ibid.*, para 6.15. In practice many DACs already do this. At present English Heritage is in the privileged position of receiving notice of further proposed works in relation to churches which since 1977 have benefited from a grant under the State Aid for Churches Scheme.

<sup>22</sup> *Ibid.*, para 5.10.

<sup>23</sup> The Summary of Recommendations at *ibid.*, p 120, speaks of 'certain controversial cases which turned exclusively on conservation issues'. It is difficult to envisage a faculty case which might turn *exclusively* on conservation issues, although the report mentions the replacement of stained glass windows and of historic doors (para 6.23).

<sup>24</sup> *Ibid.*, para 6.23. In the unlikely event that a chancellor may lack expertise in a particular field, recourse may be made to the provisions which already exist for the appointment of a more suitably qualified person as deputy chancellor: see the Ecclesiastical Jurisdiction Measure 1963, s 4 (amended by the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s 8(1), Sch 4, para 4). There is no mention of this in the Newman Report.

<sup>25</sup> *Ibid.*, para 5.6.

<sup>26</sup> *Ibid.*, para 5.11.

<sup>27</sup> Note, however, that the chancellor is excluded from the category of 'any person or body carrying out functions of care and conservation' which are required to 'have due regard to the role of a church as a local centre of worship and mission' under the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 (No 1), s 1. See *Re St Luke the Evangelist, Maidstone* [1995] Fam 1 at 7AC, [1995] 1 All ER 321 at 326. Ct of Arches. His role under the Ecclesiastical Jurisdiction Measure 1963 (No 1), s 6(1)(b), is to 'hear and determine' faculty matters, and in so doing his broad discretion is unfettered by section 1 of the 1991 Measure, although such matters will inevitably feature and may well prove determinative.

ramifications. It may, however, lead to the possibility of a mutually acceptable compromise emerging at an earlier time and, in any event, will enable the chancellor to make a more informed decision. So also will detailed provisions for organs and for archaeological matters. Removal of the anomalous instances of dual control is to be welcomed.

### STRENGTHS OF THE FACULTY JURISDICTION

The strengths of the faculty jurisdiction in the Church of England are not the subject of particular comment in the Newman Report. In the main they fall to be inferred. Both procedurally and substantively the conservationists are well served. The notification process, though not perfect, gives to English Heritage, local authorities and the amenity societies the right to make recommendations and to appear in the consistory court.<sup>28</sup> Further, as the Newman Report succinctly recognises, 'Under the Faculty Jurisdiction Rules 1992 objectors as well as petitioners may appeal, making the system more even-handed than the secular system.'<sup>29</sup> The report does not suggest that in the course of modernising its procedures the Church of England dispenses with the objectors' right of appeal.

As to the approach of the courts, both at first instance and on appeal, the burden of proof lies heavily on the petitioners and is not easily discharged. Indeed, recent decisions of the Court of Arches impose a higher test for petitioners to satisfy than might be required by a temporal authority applying the Planning Policy Guidelines in PPG15. *Planning and the Historic Environment*.<sup>30</sup> The consistory court adopts a threefold approach:

- (1) have the petitioners proved a necessity for the proposed works?
- (2) if so, will the works adversely affect the character of the church as a building of special architectural and historical interest?
- (3) if again so, is the necessity such that in the exercise of the court's discretion a faculty should be granted?<sup>31</sup>

A distinction—perhaps more apparent than real—has been made between this approach, as advocated by the Court of Arches, and a seemingly less restrictive formula laid down by the Court of Ecclesiastical Causes Reserved.<sup>32</sup> The latter court considered that there was nothing in the relevant legislation to justify an approach as strict as 'clearly proved necessity' being a condition precedent to the grant of a faculty.<sup>33</sup> In reality the distinction between necessity and the wording now to be found in departmental guidelines<sup>34</sup> is semantic

<sup>28</sup> There is a surprising statement in paragraph 6.19 of the Newman Report that amenity bodies which are specially cited 'can only influence the chancellor's decision whether or not to hold a court and what conditions to put on a permission'. This bold statement misrepresents the capacity of such bodies successfully to resist the grant of a petition.

<sup>29</sup> *Ibid.*, para 6.22. The statutory right of appeal is contained in the Ecclesiastical Jurisdiction Measure 1963 (No 1), s 7(2)(a).

<sup>30</sup> See in particular Annex C of the Newman Report, which gives specific guidance on alterations to listed buildings.

<sup>31</sup> See *Re St Helen's, Bishopsgate* (26 November 1993, London Consistory Ct. Cameron Ch), noted in (1993) 3 Ecc LJ 256, and approved in *Re St Luke the Evangelist, Maidstone* [1995] Fam 1, [1995] 1 All ER 321, Ct of Arches.

<sup>32</sup> *Re St Stephen, Walbrook* [1987] Fam 146 at 197G–198B, [1987] 2 All ER 578 at 600, Ct of Ecclesiastical Causes Reserved, per Sir Ralph Gibson. For a discussion of this dichotomy, see Hill, *Ecclesiastical Law*, p 397.

<sup>33</sup> This phrase was lifted for the judgment of the Dean of the Arches in *Re St Mary's, Banbury* [1987] Fam 136 at 145C–F, [1987] 1 All ER 247 at 250, Ct of Arches.

<sup>34</sup> *Historic Buildings and Conservation Areas—Policy and Procedure* (23/77 and 8/87 successively); thereafter *Planning and the Historic Environment* (PPG 15). The history of the emergent secular test is discussed by George Ch in *Re St John the Evangelist, Blackheath* (September 1998, Southwark Consistory Ct), noted in 'Recent Ecclesiastical Cases' at p 217 post.

only<sup>35</sup>. 'Necessity' has been interpreted by one chancellor as meaning 'something less than essential but more than merely desirable or convenient.'<sup>36</sup> Just as departmental guidelines are not binding,<sup>37</sup> neither are the guidelines contained in the judgment of the Court of Arches. They are not rules of law.<sup>38</sup> Put shortly, when dealing with listed churches there is a presumption that there shall be no change.<sup>39</sup> However the test is expressed, a heavy burden lies on those who advocate the alteration of a listed building.<sup>40</sup>

### SUCCESS OF THE CONSERVATION LOBBY

The Newman Report states that it is the perception of the amenity bodies that it is harder for them to win consistory court cases than to win at a secular public inquiry.<sup>41</sup> In the period 1993–97 the Victorian Society appeared in six consistory court cases and judgment was given against it in three.<sup>42</sup> Its only fully successful case was largely overturned on appeal.<sup>43</sup> This compared with its success rate in planning inquiries where, out of twelve at which it appeared, eight were decided in its favour and two others partly so. Comparable figures were given for the Society for the Protection of Ancient Buildings.<sup>44</sup>

The Newman Report sympathises with the societies' disappointment at their lack of success in the ecclesiastical courts.<sup>45</sup> For a number of reasons it can be seen that both the societies' disappointment and the report's sympathies are misplaced. First, the sample is statistically insignificant and extrapolations do not permit of any meaningful conclusions. Secondly, a consistory court judgment is a genuine first instance decision whereas, by its nature, a planning inquiry is an appeal from a refusal by a local authority acting on the advice of its conservation officers. The appeal process naturally favours the heritage lobby.<sup>46</sup> Thirdly, the whole purpose of the ecclesiastical exemption is to bring into account the use of the building for an ecclesiastical purpose. It is unsurprising that when liturgical and spiritual factors are brought into the equation the voice of the heritage lobby will not inevitably prevail. Equally, representations by the heritage lobby at an early stage often lead to proposals being varied or abandoned. These interventions must properly be counted as 'successes', although no account of them is taken in the report's crude win/lose assessment. Each petition turns on a careful evaluation of particular facts, and a 'scorecard' analysis adds little to the debate, particularly when the faculty jurisdiction concerns permissive rights and not litigation of the conventional adversarial type.

<sup>35</sup> See *Re All Saints, Melbourn* [1992] 2 All ER 786 at 796, [1990] 1 WLR 833 at 843F–844C, Ct of Arches, per the Dean of the Arches. See also *Re St Barnabas, Dulwich* [1994] Fam 124 at 132C–D, per Gray Ch, and *Re St Mary the Virgin, Sherborne* [1996] Fam 63 at 76G–77D, [1996] 3 All ER 769 at 781a–f, Ct of Arches, per the Dean of the Arches; but note *Re St Chad, Romily* (1997) 4 Ecc LJ 769, Cons Ct, per Lomas Ch, and *Re St John the Evangelist, Blackheath* (September 1998, Southwark Consistory Ct, George Ch).

<sup>36</sup> *Re St John the Evangelist, Blackheath* (September 1998, Southwark Consistory Ct, George Ch).

<sup>37</sup> See *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 2 All ER 10, [1991] 1 WLR 153, HL.

<sup>38</sup> See *Re All Saints, Melbourn* [1992] 2 All ER 786 at 796, [1990] 1 WLR 833 at 843E, Ct of Arches, and *Re St Mary the Virgin, Sherborne* [1996] Fam 63 at 76G, [1996] 3 All ER 769 at 781a, Ct of Arches.

<sup>39</sup> *Re St Mary the Virgin, Sherborne* [1996] Fam 63 at 77C, [1996] 3 All ER 769 at 781f, Ct of Arches.

<sup>40</sup> This is in marked contradistinction to petitions concerning non-listed churches where it has been stated that the 'more apt' approach is that 'The answer should be "Yes" unless there are good reasons for saying "No"; see *Re St James's, New Malden* [1994] Fam 44 at 48H, [1994] 1 All ER 85 at 90, Cons Ct, per Gray Ch.

<sup>41</sup> Newman Report, para 6.22.

<sup>42</sup> Of the other three, judgment went in its favour in one, and partly so in two. See now also *Re All Saints (formerly St Aidan's), Small Heath* (June 1998, Birmingham Consistory Ct, Aglionby Ch), noted in 'Recent Ecclesiastical Cases' at pp 211f post.

<sup>43</sup> Further, the appeal which it initiated in *Re St Mary the Virgin, Sherborne* [1996] Fam 63, [1996] 3 All ER 769, Ct of Arches, was unsuccessful.

<sup>44</sup> In the period 1991 to 1997 all four consistory courts at which the society appeared went against it, whereas of seven public inquiries five were decided in its favour.

<sup>45</sup> Newman Report, para 6.22.

<sup>46</sup> In fairness to the Newman Report, both these matters are recognised but accorded less weight than they deserve.

## COSTS

An important factor in the effective running of the faculty jurisdiction is the incidence of costs, which deter both frivolous applications and capricious opposition. The archdeacon, under whose auspices many faculty matters are transacted,<sup>47</sup> has no jurisdiction in cases concerning the alteration of a listed building,<sup>48</sup> nor is he empowered to order the payment of costs.<sup>49</sup> The consistory court, however, does have such a power.<sup>50</sup> The Court of Arches recently availed itself of 'the opportunity to say something generally on the subject of costs, because the principles which apply within the faculty jurisdiction do not appear to be well known, or understood'.<sup>51</sup> What follows is a brief summary of those principles so that through the circulation of this Journal they may be disseminated yet further:

- (1) When proposed works are unopposed and have the support of the DAC, the fees are generally borne by the diocesan board of finance, hence the faculty is effectively obtained for nothing;
- (2) if proposed works are opposed, fees become payable at rates fixed by Fees Orders made by the Fees Advisory Commission under the Ecclesiastical Fees Measure 1986;
- (3) such fees are prima facie payable by the petitioner;<sup>52</sup>
- (4) petitioners will be ordered to pay the court costs even when they are successful. Whilst the consistory court retains a discretion, 'an order for reimbursement of some or all of the court fees is unlikely to be made unless there is clear evidence of *unreasonable behaviour* by a party opponent which has *unnecessarily added* to the procedural costs prior to the hearing';<sup>53</sup>
- (5) since appeals to the Court of Arches lie only with leave,<sup>54</sup> the same principles will apply on the question of costs;
- (6) the practice in the consistory court is not to make an order for costs between the parties save where unreasonable behaviour has occurred;<sup>55</sup>
- (7) if a party appeals to the Court of Arches and is unsuccessful, then there is no reason why as a general rule that party should not pay the other party's costs of resisting the appeal.<sup>56</sup>

<sup>47</sup> Faculty Jurisdiction Rules 1992, SI 1992/2882, r 6(1).

<sup>48</sup> Works under *ibid.*, r 12(3), are expressly excluded by r 6(1).

<sup>49</sup> Care of Churches and Ecclesiastical Jurisdiction Measure 1991 (No 1), s 14(5)(a).

<sup>50</sup> Ecclesiastical Jurisdiction Measure 1963 (No 1), s 60 (amended by the Church of England (Legal Aid and Miscellaneous Provisions) Measure 1988 (No 1), s 14(1), Sch 2, para 1, and the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 (No 1), s 8(1), Sch 4, para 9).

<sup>51</sup> *Re St Mary the Virgin, Sherborne* [1996] Fam 63 at 68F, [1996] 3 All ER 769 at 774b, Ct of Arches.

<sup>52</sup> This may include the costs of a hearing. Prudent parochial church councils should include in their budget for the works an allowance for such fees: *Re St Mary the Virgin, Sherborne* [1996] Fam 63 at 69F, [1996] 3 All ER 769 at 774j, 775a Ct of Arches.

<sup>53</sup> *Re St Mary the Virgin, Sherborne* [1996] Fam 63 at 69H, [1996] 3 All ER 769 at 775b, Ct of Arches (emphasis added). Presumably conduct during the hearing adding needlessly to its length might also be reflected in such an order: see *Re St Peter, Oundle* (1996) 4 Ecc LJ 764, Cons Ct, and *Re All Saints (formerly St Aidan's), Small Heath* (June 1998, Birmingham Consistory Ct, Aglionby Ch), noted in 'Recent Ecclesiastical Cases' at pp 211f post.

<sup>54</sup> Ecclesiastical Jurisdiction Measure 1963 (No 1), s 7(2) (amended by the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 (No 1), 2 8(1), Sch 4, para 6(b)). Such leave may be granted either by the chancellor or by the Dean of the Arches.

<sup>55</sup> This is a practice akin to that adopted at planning inquiries. For examples of the power being exercised, see *Re St Peter and St Paul, Scrayingham* [1991] 4 All ER 411 at 417, [1992] 1 WLR 187 at 193, Cons Ct. For an example of a petitioner being ordered to make a contribution to the costs incurred by the acting archdeacon, even in the absence of unreasonable behaviour, see *Re St John the Evangelist, Blackheath* (September 1998, Southwark Consistory Ct), noted in 'Recent Ecclesiastical Cases' at p 217 post.

<sup>56</sup> I.e. as distinct from the court fees. Curiously, however, the Court of Arches indicated that in this particular instance it was 'very unlikely' that the successful petitioners would have been awarded the costs of legal representation had they been so represented. They appeared by the incumbent.

Few things concentrate the mind more than financial considerations. It is not merely the parties who should bear costs in mind. Architects, stonemasons and others who may become involved in works to churches may be made liable to costs in appropriate cases.<sup>57</sup>

### INJUNCTIVE AND OTHER EMERGENCY RELIEF

No mention is made in the Newman Report of the useful provisions of the Faculty Jurisdiction (Injunctions and Restoration Orders) Rules 1992.<sup>58</sup> The level of policing afforded by the provisions of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 relating to orders against persons responsible for default<sup>59</sup> is as extensive as that in the secular system (if not more so), and can be invoked swiftly and efficiently. The consistory court has power to grant injunctions and make other orders to prevent work being performed unlawfully or to restore a church building if such works have taken place.<sup>60</sup> This is far more extensive than the general monitoring and double checking advocated by the Newman Report,<sup>61</sup> and is operated by the same specialist tribunal as determines permissions, unlike in the secular planning field where recourse has to be had to the blunter instrument of the magistrates' court or the crown court. These powers were rendered the more efficacious by provision being made for the payment of costs<sup>62</sup> and for committal for contempt.<sup>63</sup>

### CONTEMPT

A person in contempt of the consistory court, whether by act or omission, may be imprisoned or fined. Such a course is thankfully rare, but it is helpful to keep in mind the procedure which would be invoked. The chancellor certifies the act or omission to the High Court.<sup>64</sup> The High Court may then inquire into the matter and, after hearing witnesses who may be produced against or on behalf of the alleged contemnor, and after hearing any statement that may be offered in defence, may exercise the same jurisdiction and powers as if the person had been guilty of a contempt of the High Court.<sup>65</sup>

### CONCLUSIONS

The ecclesiastical exemption is a privilege which needs to be taken seriously and jealously guarded. In giving judgment in *Re All Saints, Eccleshall*,<sup>66</sup> Chancellor McClean stated:

'If the State is to continue to treat the faculty jurisdiction as a basis for the ecclesiastical exemption, it must be satisfied that the jurisdiction is effective. Effectiveness depends on many things, with a very special responsibility on the members of the diocesan advisory committees ... A special responsibility also rests, however, on the parishes and their officers ... and indeed their professional advisers ...'

<sup>57</sup> See *Re Woldingham Churchyard* [1957] 2 All ER 323, [1957] 1 WLR 811, Cons Ct. and *Re St Mark's, Haydock (No 2)* [1981] 1 WLR 1167, Cons Ct. discussed in Hill, *Ecclesiastical Law*, pp 401–402.

<sup>58</sup> SI 1992/2884.

<sup>59</sup> See the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 (No 1), s 13.

<sup>60</sup> See *ibid.*, s 13(4), (5). A detailed discussion of these procedures is beyond the scope of this paper. For a full discussion of these emergency and remedial powers and their practical application, see Hill, *Ecclesiastical Law*, pp 398–401.

<sup>61</sup> Newman Report, para 5.11

<sup>62</sup> Care of Churches and Ecclesiastical Jurisdiction Measure 1991 (No 1), s 13(1).

<sup>63</sup> *Ibid.*, s 13(11).

<sup>64</sup> See the Ecclesiastical Jurisdiction Measure 1963 (No 1), s 81(2) (substituted by the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 (No 1), s 8(1), Sch 4, para 11).

<sup>65</sup> Ecclesiastical Jurisdiction Measure 1963, s 81(3) (as so substituted).

<sup>66</sup> *Re All Saints, Eccleshall* (14 April 1998, Sheffield Consistory Ct), noted at (1998) 5 Ecc LJ 135.

It is wholly appropriate that the ecclesiastical exemption be kept under review. The faculty jurisdiction of the Church of England received a fulsome but qualified endorsement from the Newman Report. It would be helpful if, prior to the year 2000 when the system next falls to be reviewed, some of the more practical recommendations contained in the report could be implemented by the Rules Committee or by General Synod. So long as the Church remains mindful of its privileged status and ensures that its systems are effectively administered, it is difficult to conceive of any basis upon which the radical step of removing the control of listed buildings from the faculty jurisdiction could be justified. Rumours of its demise are much exaggerated.

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