HOUSE OF LORDS

House of Lords

Judgments - Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire (Appellants) v Wallbank and another (Respondents)

HOUSE OF LORDS SESSION 2002-03

[2003] UKHL 37

on appeal from:[2001] EWCA Civ 713

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire (Appellants)

v.

Wallbank and another (Respondents)

ON

THURSDAY 26 JUNE 2003

The Appellate Committee comprised:

Lord Nicholls of Birkenhead

Lord Hope of Craighead

Lord Hobhouse of Woodborough

Lord Scott of Foscote

Lord Rodger of Earlsferry

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Parochial Church Council of the Parish of Aston

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[2003] UKHL 37

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speeches of all your Lordships. I too would allow this appeal. On some of the issues your Lordships have expressed different views. I shall state my own views without repeating the facts.

2. This case concerns one of the more arcane and unsatisfactory areas of property law: the liability of a lay rector, or lay impropriator, for the repair of the chancel of a church. The very language is redolent of a society long disappeared. The anachronistic, even capricious, nature of this ancient liability was recognised some years ago by the Law Commission: *Property Law: Liability for Chancel Repairs* (1985) Law Com No 152. The commission said 'this relic of the past' is 'no longer acceptable'. The commission recommended its phased abolition.

3. In these proceedings Mr and Mrs Wallbank admitted that, apart from the Human Rights Act 1998, they have no defence to the claim made against them by the Parochial Church Council of the parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire. The House was not asked to consider whether the case of *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417 was correctly decided.

4. At first sight the Human Rights Act might seem to have nothing to do with the present case. The events giving rise to the litigation occurred, and the decision of Ferris J was given, before the Act came into force. But the decision of the Court of Appeal was based on the provisions of the Human Rights Act, and this decision has wide financial implications for the Church of England, going far beyond the outcome of this particular case: [2002] Ch 51. The decision affects numerous parochial church councils and perhaps as many as one third of all parish churches. The Church of England needs to know whether, as the Court of Appeal held, it is unlawful now for a parochial church council to enforce a lay rector's obligation to meet the cost of chancel repairs. Accordingly, in order to obtain the decision of the House on this point, the plaintiff parochial church council conceded that the Human Rights Act 1998 applies in this case. This concession having been made by the plaintiff, no argument was addressed to your Lordships' House on the question of law thus conceded. I express no view on this question.

5. Assuming the Human Rights Act is applicable in this case, the overall question is whether the plaintiff's prosecution of proceedings against Mr and Mrs Wallbank is rendered unlawful by section 6 of the Act as an act by a public authority which is incompatible with a Convention right. In answering this question the initial step is to consider whether the plaintiff is 'a public authority'.

6. The expression 'public authority' is not defined in the Act, nor is it a

recognised term of art in English law, that is, an expression with a specific recognised meaning. The word 'public' is a term of uncertain import, used with many different shades of meaning: public policy, public rights of way, public property, public authority (in the Public Authorities Protection Act 1893), public nuisance, public house, public school, public company. So in the present case the statutory context is all important. As to that, the broad purpose sought to be achieved by section 6(1) is not in doubt. The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights. If they act in breach of this legal obligation victims may henceforth obtain redress from the courts of this country. In future victims should not need to travel to Strasbourg.

7. Conformably with this purpose, the phrase 'a public authority' in section 6(1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression. It is in respect of organisations of this nature that the government is answerable under the European Convention on Human Rights. Hence, under the Human Rights Act a body of this nature is required to act compatibly with Convention rights in everything it does. The most obvious examples are government departments, local authorities, the police and the armed forces. Behind the instinctive classification of these organisations as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution: see the valuable article by Professor Dawn Oliver, 'The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act', [2000] PL 476.

8. A further, general point should be noted. One consequence of being a 'core' public authority, namely, an authority falling within section 6 without reference to section 6(3), is that the body in question does not itself enjoy Convention rights. It is difficult to see how a core public authority could ever claim to be a victim of an infringement of a Convention rights. A core public authority seems inherently incapable of satisfying the Convention description of a victim: 'any person, *non-governmental organisation* or group of individuals' (article 34, with emphasis added). Only victims of an unlawful act may bring proceedings under section 7 of the Human Rights Act, and the Convention description of a victim has been incorporated into the Act, by section 7(7). This feature, that a core public authority is incapable of having Convention rights of its own, is a matter to be borne in mind when considering whether or not a particular body is a core public authority. In itself this feature throws some light on how the expression 'public authority' should be understood and applied. It must always be relevant to consider whether Parliament can have been intended that the body in question should have no Convention rights.

9. In a modern developed state governmental functions extend far beyond maintenance of law and order and defence of the realm. Further, the manner in which wide ranging governmental functions are discharged varies considerably. In the interests of efficiency and economy, and for other reasons, functions of a governmental nature are frequently discharged by non-governmental bodies. Sometimes this will be a consequence of privatisation, sometimes not. One obvious example is the

running of prisons by commercial organisations. Another is the discharge of regulatory functions by organisations in the private sector, for instance, the Law Society. Section 6(3)(b) gathers this type of case into the embrace of section 6 by including within the phrase 'public authority' any person whose functions include 'functions of a public nature'. This extension of the expression 'public authority' does not apply to a person if the nature of the act in question is 'private'.

10. Again, the statute does not amplify what the expression 'public' and its counterpart 'private' mean in this context. But, here also, given the statutory context already mentioned and the repetition of the description 'public', essentially the contrast being drawn is between functions of a governmental nature and functions, or acts, which are not of that nature. I stress, however, that this is no more than a useful guide. The phrase used in the Act is public function, not governmental function.

11. Unlike a core public authority, a 'hybrid' public authority, exercising both public functions and non-public functions, is not absolutely disabled from having Convention rights. A hybrid public authority is not a public authority in respect of an act of a private nature. Here again, as with section 6(1), this feature throws some light on the approach to be adopted when interpreting section 6(3)(b). Giving a generously wide scope to the expression 'public function' in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary.

12. What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.

13. Turning to the facts in the present case, I do not think parochial church councils are 'core' public authorities. Historically the Church of England has discharged an important and influential role in the life of this country. As the established church it still has special links with central government. But the Church of England remains essentially a religious organisation. This is so even though some of the emanations of the church discharge functions which may qualify as governmental. Church schools and the conduct of marriage services are two instances. The legislative powers of the General Synod of the Church of England are another. This should not be regarded as infecting the Church of England as a whole, or its emanations in general, with the character of a governmental organisation.

14. As to parochial church councils, their constitution and functions lend no support to the view that they should be characterised as governmental organisations or, more precisely, in the language of the statute, public authorities. Parochial church councils are established as corporate bodies under a church measure, now the Parochial Church Councils (Powers) Measure 1956. For historical reasons this unique form

of legislation, having the same force as a statute, is the way the Church of England governs its affairs. But the essential role of a parochial church council is to provide a formal means, prescribed by the Church of England, whereby ex officio and elected members of the local church promote the mission of the Church and discharge financial responsibilities in respect of their own parish church, including responsibilities regarding maintenance of the fabric of the building. This smacks of a church body engaged in self-governance and promotion of its affairs. This is far removed from the type of body whose acts engage the responsibility of the state under the European Convention.

15. The contrary conclusion, that the church authorities in general and parochial church councils in particular are 'core' public authorities, would mean these bodies are not capable of being victims within the meaning of the Human Rights Act. Accordingly they are not able to complain of infringements of Convention rights. That would be an extraordinary conclusion. The Human Rights Act goes out of its way, in section 13, to single out for express mention the exercise by religious organisations of the Convention right of freedom of thought, conscience and religion. One would expect that these and other Convention rights would be enjoyed by the Church of England as much as other religious bodies.

16. I turn next to consider whether a parochial church council is a hybrid public authority. For this purpose it is not necessary to analyse each of the functions of a parochial church council and see if any of them is a public function. What matters is whether the particular act done by the plaintiff council of which complaint is made is a private act as contrasted with the discharge of a public function. The impugned act is enforcement of Mr and Mrs Wallbank's liability, as lay rectors, for the repair of the chancel of the church of St John the Baptist at Aston Cantlow. As I see it, the only respect in which there is any 'public' involvement is that parishioners have certain rights to attend church services and in respect of marriage and burial services. To that extent the state of repair of the church building may be said to affect rights of the public. But I do not think this suffices to characterise actions taken by the parochial church council for the repair of the church as 'public'. If a parochial church council enters into a contract with a builder for the repair of the chancel arch, that could be hardly be described as a public act. Likewise when a parochial church council enforces, in accordance with the provisions of the Chancel Repairs Act 1932, a burdensome incident attached to the ownership of certain pieces of land: there is nothing particularly 'public' about this. This is no more a public act than is the enforcement of a restrictive covenant of which church land has the benefit.

17. For these reasons this appeal succeeds. A parochial church council is not a core public authority, nor does it become such by virtue of section 6(3)(b) when enforcing a lay rector's liability for chancel repairs. Accordingly the Human Rights Act affords lay rectors no relief from their liabilities. This conclusion should not be allowed to detract from the force of the recommendations, already mentioned, of the Law Commission. The need for reform has not lessened with the passage of time.

18. On this footing the other issues raised in this case do not call for decision. I prefer to express no view on the application of article 1 of the First Protocol to the Convention or, more specifically, on the compatibility

of the Chancel Repairs Act 1932 with Mr and Mrs Wallbank's Convention right under that article. The latter was not the subject of discrete argument.

19. I add only that even if section 6(1) is applicable in this type of case, and even if the provisions of the 1932 Act are incompatible with Mr and Mrs Wallbank's Convention rights under article 1 of the First Protocol, even so the plaintiff council would not be acting unlawfully in enforcing Mr and Mrs Wallbank's liability as lay rectors. Like sections 3(2) and 4(6), section 6(2) of the Human Rights Act is concerned to preserve the primacy, and legitimacy, of primary legislation. This is one of the basic principles of the Human Rights Act. As noted in *Grosz, Beatson and Duffy* on *Human Rights*, (2000) p 72, a public authority is not obliged to neutralise primary legislation by treating it as a dead letter. If a statutory provision cannot be rendered Convention compliant by application of section 3(1), it remains lawful for a public authority, despite the incompatibility, to act so as to 'give effect to' that provision: section 6(2)(b). Here, section 2 of the Chancel Repairs Act 1932 provides that if the defendant would have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court, the court shall give judgment for the cost of putting the chancel in repair. When a parochial church council acts pursuant to that provision it is acting within the scope of the exception set out in section 6(2)(b).

LORD HOPE OF CRAIGHEAD My Lords,

20. The village of Aston Cantlow lies about three miles to the north west of Stratford-upon-Avon. It has a long history. The parish church, St John the Baptist, stands on an ancient Saxon site. Two images of its exterior can be seen on the website Pictorial Images of Warwickshire, www.genuki.org.uk/big/eng/WAR/images. It is the church where Shakespeare's mother, Mary Arden, who lived at Wilmcote within the parish, married John Shakespeare. The earliest part of the present structure is the chancel which has been there since the late 13th century. It was built in the decorated style and contains a fine example of the use of flowing tracery: *Pevsner and Wedgewood, The Buildings of England: Warwickshire*, (1965) pp 19, 75. As time went on the condition of the structure began to deteriorate, and it is now in need of repair. It has been in that state since at least 1990.

21. In January 1995, when this action began, it was estimated that the cost of the repairs to the chancel was £95,260.84. By that date the Parochial Church Council ("the PCC") had served a notice under the Chancel Repairs Act 1932 in the prescribed form on Mrs Wallbank in her capacity as lay-rector calling upon her to repair the chancel. She disputed liability, so the PCC brought proceedings against her under section 2(2) of the Act. When the notice was served on 12 September 1994 it was thought that Mrs Wallbank was the sole freehold owner of Glebe Farm. In fact, as a result of her conveyance of the farm into their joint names in 1990, she is its joint owner together with Mr Wallbank. So a further notice was served on 23 January 1996 on both Mr and Mrs Wallbank and an application was made for Mr Wallbank to be joined as a defendant in the proceedings. Several years have gone by. The dispute between the parties has still not been resolved. The cost of the repairs must now greatly exceed the amount of the original estimate.

22. On 17 February 2000 Ferris J heard argument on the question whether the liability of the lay-rector to repair the chancel or otherwise to

meet the cost of the repairs was unenforceable by reason of the Human Rights Act 1998 or otherwise. He had been asked to determine this question as a preliminary issue. On 28 March 2000 he answered the question in the negative. At the end of his judgment he observed that it had been posed in terms which would only be appropriate if the Act was already in force. The only provisions which were in force then were sections 18, 20 and 21(5): section 22(2). By the time of the hearing in the Court of Appeal on 19 March 2001 the position had changed. The remaining provisions of the Act were brought into force on 2 October 2000: the Human Rights Act (Commencement No 2) Order 2000 (SI 2000/1851). Mr and Mrs Wallbank were allowed to amend their notice of appeal so that the issues which they wished to raise could be properly pleaded. On 17 May 2001 the Court of Appeal held that the PCC was a public authority for the purposes of section 6 of the Act: [2001] EWCA Civ 713; [2002] Ch 51. The court also held that the PCC's action in serving the notice on Mr and Mrs Wallbank was unlawful by reason of article 1 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms, read either alone or with article 14 of the Convention.

23. The circumstances in which Mr and Mrs Wallbank are said to be liable for the cost of the repair have been helpfully described by my noble and learned friend Lord Scott of Foscote. I gratefully adopt what he has said about them. It is clear from his account that the liability of the lay impropriator to pay the cost of repairing the chancel has been part of ecclesiastical law for many centuries. As Wynn-Parry J explained in *Chivers & Sons Ltd v Air Ministry* [1955] 1 Ch 585, 593, it rests on the maxim, which has long been recognised, that he who has the profits of the benefice should bear the burden. But the questions about the scope and effect of the Human Rights Act 1998 which your Lordships have been asked to decide in this appeal, and on which I wish to concentrate, are of current interest and very considerable public importance. They raise issues whose significance extends far beyond the boundaries of the Parish of Aston Cantlow.

24. The principal Human Rights issues which arise are (a) whether Mr and Mrs Wallbank can rely upon an alleged violation of their Convention rights as a ground of appeal when both the act complained of and the decision which went against them at first instance took place before 2 October 2000 ("the retrospectivity issue"), (b) whether the PCC is a public authority for the purposes of section 6(1) of the Act ("the public authority issue") and (c) whether the act of the PCC in serving the notice under the Chancel Repairs Act 1932 on Mr and Mrs Wallbank was incompatible with their rights under article 1 of the First Protocol read either alone or in conjunction with article 14 of the Convention ("the incompatibility issue").

The retrospectivity issue

25. When the case came before the Court of Appeal the PCC conceded that it was open to Mr and Mrs Wallbank to raise the question whether its act in serving the notice was unlawful under section 6(1) of the Human Rights Act 1998 by virtue of sections 7(1)(b) and 22(4) of the Act, notwithstanding that service of the notice predated the coming into force of those sections. The Court of Appeal accepted this concession, which they considered it to have been rightly made: [2002] Ch 51, 56, para 7. Those were, of course, early days in the life of the Act. The cases of *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545, *R v Kansal (No 2)* [2001]

UKHL 62, [2002] 2 AC 69 and *R v Benjafield* [2002] UKHL 2, [2002] 2 WLR 235 had yet to come before your Lordships' House. In the light of what was said in those cases about the issue of retrospectivity the PCC gave notice in the Statement of Facts and Issues of its intention to apply for leave to dispute the issue in the course of the hearing of this appeal. But in the PCC's written case it is stated that this contention is no longer being pursued. In the result, although the parties were told at the outset of the hearing that it should not be assumed that the House would necessarily proceed on the basis of this concession, the issue was not the subject of argument.

26. I have, nevertheless, given some thought to the question whether it would be appropriate to examine the issue whether the service of the notice was incompatible with Mr and Mrs Wallbank's Convention rights. The question whether, and if so in what circumstances, effect should be given to the Human Rights Act 1998 where relevant events occurred before it came into force is far from easy. So I should like to take a moment or two to explain why I have come to the conclusion that the concession was properly made and that in this case Mr and Mrs Wallbank are entitled to claim in these proceedings that the PCC has acted in a way that is made unlawful by section 6(1) of the Act.

27. As Lord Woolf CJ observed in *Wainwright v Home Office* [2001] EWCA Civ 208, [2002] QB 1334, 1344G para 22, there has been considerable uncertainty as to whether the Human Rights Act 1998 can apply retrospectively in situations where the conduct complained of occurred before the Act came into force. The position which we have reached so far can, I think, be summarised in this way.

28. The only provision in the Act which gives retrospective effect to any of its provisions is section 22(4). It directs attention exclusively to that part of the Act which deals with the acts of public authorities: see sections 6 to 9. It has been said that its effect is to enable the Act to be used defensively against public authorities with retrospective effect but not offensively: see the annotations to the Act by the late Peter Duffy QC in *Current Law Statutes*, vol 3 (1999). Section 22(4) states that section 7(1)(b) applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place, but that otherwise subsection (1)(b) does not apply to an act taking place before the coming into force of section 7. Section 7(1)(b) enables a person who claims that a public authority has acted in a way which is made unlawful by section 6(1) to rely on his Convention rights in proceedings brought by or at the instigation of the public authority. Section 6(2)(a) provides that section 6(1) does not apply if as a result of one or more provisions of primary legislation the authority could not have acted differently.

29. It has been held that acts of courts or tribunals which took place before 2 October 2000 which they were required to make by primary legislation and were made according to the meaning which was to be given to the legislation at that time are not affected by section 22(4): see *R v Kansal* [2002] 2 AC 69, 112, para 84; *Wainwright v Home Office* [2002] QB 1334, 1346A-1347C, paras 29-36. Section 3(2) states that the obligation in section 3(1) to interpret legislation in a way that is compatible with Convention rights applies to primary and secondary legislation whenever enacted. But the interpretative obligation in section 3(1) cannot be applied to invalidate a decision which was good at the

time when it was made by changing retrospectively the meaning which the court or tribunal previously gave to that legislation. The same view has been taken where the claim relates to acts of public authorities other than courts or tribunals. Here too it has been held that the Act cannot be relied upon retrospectively by introducing a right of privacy to make unlawful conduct which was lawful at the time when it took place: *Wainwright v Home Office* [2002] QB 1334, 1347G-H, para 40.

30. In this case the act which section 6(1) is said to have made unlawful is the enforcement by the PCC of the liability for the cost of the repairs to the chancel. It is the enforcement of that liability that is said to be an unlawful interference with the personal property rights of Mr and Mrs Wallbank contrary to article 1 of the First Protocol. Service by the PCC of the notice on Mr and Mrs Wallbank under section 2(1) of the Chancel Repairs Act 1932 took place in September 1994, well before the coming into effect of the Human Rights Act 1998. But the service of the notice under that subsection was just the first step in the taking of proceedings under the 1932 Act to enforce the liability to repair. If, as has happened here, the chancel is not put in proper repair within a period of one month from the date when the notice to repair was served proceedings must be taken by the responsible authority to recover the sum required to put the chancel in proper repair by means of an order of the court: section 2(2). The final step in the process is the giving by the court of judgment for the responsible authority for such sum as appears to it to represent the cost of putting the chancel in proper repair: section 2(3). The arguments before Ferris J and in the Court of Appeal arose out a direction that there should be trial of preliminary issues. The question which is before your Lordships relates to one of those issues. The proceedings are, in that sense, still at the preliminary stage. The stage of giving judgment under section 2(3) has not yet been reached.