House of Lords

Aston Cantlow and Wilmcote with Billesley Parochial Church Council *v* Wallbank and another

[2003] UKHL 37

2003 March 3, 4, 5; June 26

Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Rodger of Earlsferry

Ecclesiastical law — Lay rector — Repairs to chancel — Obligation at common law to repair chancel — Parochial church council's statutory power to recover cost of repairs from lay rector — Whether infringing lay rector's Convention right to peaceful enjoyment of possessions — Whether unlawful discrimination in enjoyment of Convention right — Whether parochial church council "public authority" — Whether entitled to enforce liability against lay rector — Chancel Repairs Act 1932 (22 Geo 5, c 20), ss 1, 2 — Human Rights Act 1998 (c 42), s 6, Sch 1, Pt I, art 14, Pt II, art 1

The defendants were the freehold owners of former rectorial land and consequently, as lay rectors or lay impropriators, they were liable at common law to repair the chancel of their parish church. In September 1994 the plaintiff, the parochial church council, served the first defendant with a notice under section 2(1) of the Chancel Repairs Act 1932[1] calling upon her to repair the chancel. She disputed the liability, and the plaintiff subsequently brought proceedings against the defendants, pursuant to section 2(2) of the 1932 Act, to recover the cost of chancel repairs. On a preliminary issue the judge held that the defendants were liable for the cost of the repairs. The Court of Appeal allowed the defendants' appeal and held that the plaintiff could not recover the cost of chancel repairs from the defendants on the grounds that a parochial church council was a public authority for the purposes of section 6 of the Human Rights Act 1998[2] since it had powers unavailable to private individuals to determine how others should act, that therefore it could not act in a manner which was incompatible with the defendants' rights under the Convention for the Protection of Human Rights and Fundamental Freedoms, and that the defendants' liability to defray the cost of chancel repairs was an indiscriminate form of taxation and amounted to an infringement of their right to peaceful enjoyment of

[1] Chancel Repairs Act 1932, s 2: "(1) Where a chancel is in need of repair, the responsible authority may serve upon any person, who appears to them to be liable to repair the chancel, a notice in the prescribed form . . . stating in general terms the grounds on which that person is alleged to be liable as aforesaid, and the extent of the disrepair, and calling upon him to put the chancel in proper repair. (2) At any time after the expiration of a period of one month from the date when the notice to repair was served, the responsible authority may, if the chancel has not been put in proper repair, bring proceedings against the person on whom the notice was served to recover the sum required to put the chancel in proper repair . . ."

[2] Human Rights Act 1998, s 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 a 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 . . . (b) any person certain of whose functions are functions of a public nature . . . (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."

Sch 1, Pt I, art 14: "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."

Sch 1, Pt II, art 1: see post, para 66.

A their possessions guaranteed by article 1 of the First Protocol to the Convention and unlawful discrimination as between landowners contrary to article 14.

On appeal by the plaintiff—

Held, allowing the appeal, (1) that a "public authority" for the purposes of section 6 of the 1998 Act could be either a core public authority which exercised functions which were broadly governmental so that they were all functions of a public nature, or a hybrid public authority some of whose functions were of a public
B nature; that although the Church of England, as the established church, had special links with central government and performed certain public functions, it was essentially a religious organisation and not a governmental organisation, and parochial church councils were part of the means whereby the Church promoted its religious mission and discharged financial responsibilities in respect of parish churches; that the functions of parochial church councils were primarily concerned with pastoral and administrative matters within the parish and were not wholly of a
C public nature, and therefore they were not core public authorities under section 6(1); that (Lord Scott of Foscote dissenting) the fact that the public had certain rights in relation to their parish church was not sufficient to characterise the actions of a parochial church council in maintaining the fabric of the parish church as being of a public nature, so that when the plaintiff took steps to enforce the defendants' liability for the repair of the chancel, it was not performing a function of a public nature, which rendered it a hybrid public authority under section 6(3)(b); that the
D defendants' chancel repair liability was a private law liability arising out of the ownership of land, and the enforcement of that liability by the plaintiffs was an act of a private nature and therefore excluded by section 6(5) from coming within the ambit of section 6(3)(b); that (per Lord Nicholls of Birkenhead, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Rodger of Earlsferry) in seeking to enforce the defendants' chancel repair liability the plaintiff was acting under primary legislation, namely section 2 of the 1932 Act, and was consequently within the exception in section 6(2)(b) of the 1998 Act; that therefore, there were no grounds
E upon which the plaintiff could be regarded as a public authority within section 6 of the 1998 Act; and that, accordingly, it had no obligation to act compatibly with Convention rights (post, paras 7, 9, 12–14, 16, 17, 19, 58–64, 86–89, 93, 129, 137, 153, 154, 156–166, 169–173).

(2) That (per Lord Hope of Craighead, Lord Hobhouse of Woodborough and Lord Scott of Foscote) a person's right to peaceful enjoyment of his possessions did not extend to the grant of relief from liabilities incurred under the civil law; that the
F defendants had acquired the rectorial property with full knowledge of the potential liability for chancel repair that the acquisition would carry with it; that it was a burden which ran with rectorial land and was similar to any other burden which ran with the land; and that the defendants were not therefore being discriminated against as compared with other owners of rectorial land, nor were they being subjected to an arbitrary form of taxation or being interfered with in the peaceful enjoyment of their possessions contrary to article 14 of, and article 1 of the First Protocol to, the
G Convention (post paras 71–75, 91, 92, 133–136).

Decision of the Court of Appeal [2001] EWCA Civ 713; [2002] Ch 51; [2001] 3 WLR 1323; [2001] 3 All ER 393 reversed.

The following cases are referred to in the opinions of their Lordships:

Ayuntamiento de Mula v Spain Reports of Judgments and Decisions 2001-I, p 531

Barnes, In re; Simpson v Barnes (Note) [1930] 2 Ch 80

H *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585; [1955] 3 WLR 154; [1955] 2 All ER 607

Doughty v Rolls-Royce plc [1992] 1 CMLR 1045, CA

Ely (Bishop of) v Gibbons (1833) 4 Hagg Ecc 156

European Coal and Steel Community v Acciaierie e ferriere Busseni SpA (Case C-221/88) [1990] ECR I-495, ECJ

Foster v British Gas plc (Case C-188/89) [1991] 1 QB 405; [1991] 2 WLR 258; [1990] 3 All ER 897; [1990] ECR I-3313, ECJ; [1991] 2 AC 306; [1991] 2 WLR 1075; [1991] 2 All ER 705, HL(E)
General Assembly of the Free Church of Scotland v Lord Overtoun [1904] AC 515, HL(Sc)
Gilbert v Corpn of Trinity House (1886) 17 QBD 795, DC
Hautanemi v Sweden (1996) 22 EHRR CD 155
Holy Monasteries v Greece (1994) 20 EHRR 1
Hong Kong Polytechnic University v Next Magazine Publishing Ltd [1996] 2 HKLR 260
James v United Kingdom (1986) 8 EHRR 123
Johnston v Chief Constable of the Royal Ulster Constabulary (Case 222/84) [1987] QB 129; [1986] 3 WLR 1038; [1986] 3 All ER 135; [1986] ECR 1651, ECJ
Marckx v Belgium (1979) 2 EHRR 330
Marshall v Graham [1907] 2 KB 112, DC
Pepper v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] 1 All ER 42, HL(E)
R v Benjafield [2002] UKHL 2; [2003] 1 AC 1099; [2002] 2 WLR 235; [2002] 1 All ER 815, HL(E)
R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex p Wachmann [1992] 1 WLR 1036; [1993] 2 All ER 249
R v Kansal (No 2) [2001] UKHL 62; [2002] 2 AC 69; [2001] 3 WLR 1562; [2002] 1 All ER 257, HL(E)
R v Lambert [2001] UKHL 37; [2002] 2 AC 545; [2001] 3 WLR 206; [2001] 3 All ER 577, HL(E)
Representative Body of the Church in Wales v Tithe Redemption Commission [1944] AC 228, HL(E)
Rothenthurm Commune v Switzerland (1988) 59 DR 251
Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35
Wainwright v Home Office [2001] EWCA Civ 2081; [2002] QB 1334; [2002] 3 WLR 405, CA
Walwyn v Awberry (1677) 2 Mod 254
Wickhambrook Parochial Church Council v Croxford [1935] 2 KB 417, CA
Young, James and Webster v United Kingdom (1981) 4 EHRR 38

The following additional cases were cited in argument:

Håkansson and Sturesson v Sweden (1990) 13 EHRR 1
Hentrich v France (1994) 18 EHRR 440
Kjeldsen v Denmark (1976) 1 EHRR 711
Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48; [2001] 3 WLR 183; [2001 4 All ER 604, CA
R v Bolsover District Council, Ex p Pepper [2001] LGR 43
R (Heather) v Leonard Cheshire Foundation [2002] EWCA Civ 366; [2002] 2 All ER 936, CA
R (Molinaro) v Kensington and Chelsea Royal London Borough Council [2001] EWHC Admin 896; [2002] LGR 336
Sunday Times v United Kingdom (1979) 2 EHRR 245
Wandsworth London Borough Council v Michalak [2002] EWCA Civ 271; [2003] 1 WLR 617; [2002] 4 All ER 1136, CA

APPEAL from the Court of Appeal

By leave of the House of Lords granted on 11 February 2002 (Lord Hutton, Lord Hobhouse of Woodborough and Lord Millett) the plaintiff, the Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire, appealed from a decision of the Court of Appeal (Sir Andrew Morritt V-C, Robert Walker and Sedley LJJ) on 17 May 2001 allowing an appeal by the defendants, Gail Wallbank and Andrew

A David Wallbank, from a decision of Ferris J who on 28 March 2000 ruled on a preliminary issue that by virtue of being freehold owners of Glebe Farm, Aston Cantlow, the defendants were lay rectors of the church of St John the Baptist, Aston Cantlow, and were therefore personally liable for the repair of the chancel of the church as set out in a notice served by the plaintiff on the first defendant on 12 September 1994, to recover the sum of £95,260·84, the estimated cost of the repair.

B The facts are stated in the opinions of their Lordships.

Charles George QC and *Mark Hill* for the plaintiff. The lay rector's duty to repair the chancel is the corollary of his right to receive the tithes of the parish. It is the quid pro quo for the grant to him or his predecessor by the Crown, usually at the time of the Reformation, of the tithes, with or without C glebe land. Where, as in the present case, land has been allotted to him under an inclosure award in lieu of his right to the tithes, the duty to repair becomes the corollary of the right to the land so allotted. The fact that the tithe has ceased to be payable is irrelevant. [Reference was made to *Representative Body of the Church in Wales v Tithe Redemption Commission* [1944] AC 228.]

The Court of Appeal's decision constituted a windfall for the defendants D in that it let them off their liability and led to their unjust enrichment. That was not the intention of the Human Rights Act 1998.

The parochial church council ("PCC") was not a core public authority for the purpose of section 6 of the 1998 Act. Core authorities are those bodies, whether national or local, through which the state performs its function of administering and protecting its citizens. All the acts of a core E authority must be compatible with Convention rights. If the PCC is a core authority it will never be possible for it to bring a complaint under the Act because it cannot be a victim. [Reference was made to *Rothenthurm Commune v Switzerland* (1988) 59 DR 251; *Ayuntamiento de Mula v Spain* Reports of Judgments and Decisions 2001-I, p 531; *Hautanemi v Sweden* (1996) 22 EHRR CD 155 and *Holy Monasteries v Greece* (1994) 20 EHRR 1.]

F The mere fact that the Church of England is the established church cannot be enough to make a PCC a core public authority. The Church of England is not a department of state and it has no juridical personality. Its ecclesiastical courts are the only parts of the Church of England which are core authorities.

Unlike other public authorities a PCC receives no public funding. The G majority of the funding for the Church comes from its worshipping communities. The members of the PCC are volunteers and there is no provision for payment of attendance allowances to which members of public authorities are normally entitled. The functions of the PCC are essentially private, pastoral and spiritual and include co-operation with the minister in promoting the pastoral, evangelistic, social and ecumenical mission of the Church. Its functions clearly show that a PCC is not a core H public authority.

Section 6 of the 1998 Act draws a distinction between core public authorities and hybrid authorities whose acts must be compatible with Convention rights unless the nature of the act is private. The dividing line between hybrid public authorities and bodies which are not public

authorities at all is a fine one. [Reference was made to *Poplar Housing and Regeneration Community Association v Donoghue* [2002] QB 48; *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936; *R v Bolsover District Council, Ex p Pepper* [2001] LGR 43 and *R (Molinaro) v Kensington and Chelsea London Borough Council* [2002] LGR 336.]

Although there are occasions when church representatives stand in the place of the state in the exercise of public functions such as marriage, education, care of churchyards and the issue of burial certificates, a PCC's functions relate exclusively to pastoral matters. The functions and powers of PCCs when properly analysed fall short of what is required to constitute all PCCs as hybrid authorities if they have no churchyards and the benefit of chancel repair liability. It is improbable that Parliament intended that some PCCs but not others should be hybrid public authorities. There is no indication that Parliament intended that PCCs should be public authorities at all.

If it is held that the PCC is not a core public authority but is a hybrid authority, then the taking of proceedings by the PCC against a lay impropriator for recovery of the costs of chancel repairs is a private act for the purposes of section 6(5) of the 1998 Act. The primary duty of the lay rector is to maintain the chancel in repair. That is not a function of a public nature within the meaning of section 6(3)(b) of the 1998 Act. One of the functions of the PCC is the maintenance of the fabric of the parish church. That is not a function of a public nature within the meaning of section 6(3)(b) and in exercising it the PCC is not acting as a public authority.

Where the lay rector has not effected the necessary chancel repairs himself the PCC may effect them and recover the costs of doing so by the statutory procedure introduced by the Chancel Repairs Act 1932. In recovering the cost by that procedure the PCC is enforcing a private law obligation which rests on the owner of rectorial land. The liability to repair the chancel runs with the land and is enforceable against the owner for the time being of the land personally. The PCC's act in serving a repair notice was a private act whereby it was performing the private function of having the church repaired. The fact that liability attaches to the ownership of particular land and is unrelated to church membership confirms that enforcement is a private act.

There was no interference with the defendants' property under article 1 of the First Protocol to the Convention The defendants came knowingly into ownership of land which they knew was subject to a certain liability, namely, the liability to repair the chancel of the parish church. In using a mechanism that was open to it to enforce that liability the PCC was not imposing a tax as the Court of Appeal concluded. It is necessary to look at the particular case and not at the generality of the situation. [Reference was made to *James v United Kingdom* (1986) 8 EHRR 123; *Håkansson and Sturesson v Sweden* (1990) 13 EHRR 1 and *Sunday Times v United Kingdom* (1979) 2 EHRR 245.]

A landowner who has an obligation cannot, when called upon to honour the obligation, rely upon the prohibition of discrimination in article 14 of the Convention. [Reference was made to *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617.] The defendants' land already had a burden and the defendants never had unencumbered land when they became lay rectors. The relevant class of comparator would not be landowners

A generally but other landowners subject to incumbrances including chancel repair liabilities. In such a case there would be no discrimination or different treatment of the defendants from the chosen comparator. There was no discrimination which related to a personal characteristic and the fact of being a lay rector is not such a characteristic. [Reference was made to *Kjeldsen v Denmark* (1976) 1 EHRR 711.]

B Even if the PCC was a public authority for the purposes of the 1998 Act, section 6(1) of the 1998 Act does not apply because the PCC was acting under the compulsion of primary legislation. As a result of the provisions of the 1932 Act the PCC could not have acted differently and is entitled to rely on section 6(2)(a) and/or (b) of the 1998 Act.

Proceedings under the 1932 Act are not discretionary and there are two requirements: to serve a notice of repair and, in default, to sue for the new C statutory debt. A PCC is a charity. It has a duty and not a discretion to bring in outstanding funds. It has no power to waive debts. If the PCC did not follow the procedures set out in the 1932 Act it would be in breach of its statutory duty, and its members would be in breach of their duties as charity trustees and liable to be held to account by the Charity Commissioners.

D *Michael Beloff QC* and *Ian Partridge* for the defendants. The PCC is a core public authority for the purposes of section 6(1) of the 1998 Act. A public authority is not defined in the Act but is left to the courts to define. "Public" in its ordinary and natural meaning is the antithesis of private. It is to be assumed at least that the legislature wished to impose domestic law obligations upon certain bodies so that if those bodies complied with their E obligations the United Kingdom would not be liable to suit before the European Court of Human Rights. [Reference was made to *Foster v British Gas plc* [1991] 1 QB 405; [1991] 2 AC 306.]

Consideration of whether or not a PCC is a public authority requires consideration of its nature, the source of its existence, powers and duties and the nature of the functions which it carries out. The approach adopted by the Court of Appeal was correct.

F The Church of England, as the church by law established, is a public authority. It enjoys a unique position and is regulated by Acts of Parliament. The sovereign appoints its bishops and deans. Archbishops and certain bishops sit ex officio in the House of Lords. The Church of England's status as the established church distinguishes it from other religious bodies. The public have rights in regard to the Church of England in matters such as G baptism, marriage and burial.

The PCC is an integral part of the Church of England. It is the administrative organ of the parish, which is the basic building block of the church. The PCC is a body corporate with perpetual succession and in effect created by statute. It has powers outside those concerning purely religious matters and beyond those which result from the normal rules applicable between individuals, including statutory power to enforce the chancel repair H liability. When the PCC exercises its functions in promoting the mission of the established church, it is acting in the public interest and is performing a public function. The PCC is therefore part of the fabric of the state and satisfies the public authority test. *Hautanemi v Sweden* 22 EHRR CD 155 and *Holy Monasteries v Greece* 20 EHRR 1 are not decisions which assist

the plaintiff and the latter case suggests that an established church is a public authority.

If it is held that the PCC is not a core public authority but is a hybrid authority, then the taking of proceedings against a lay impropriator, pursuant to the 1932 Act, for the recovery of the cost of chancel repairs is not a "private" act for the purposes of section 6(5) of the 1998 Act. There is no element of mutuality or mutual governance between impropriator and the church in relation to modern repair liability. The enforcement is a function of the PCC supported by statute. The relationship between the plaintiff and defendants arises independently of the volition of either of them. There is a public interest in the repair of historic churches and enforcement of the liability is thus a public function.

The rule of common law which established the liability of the defendants to repair applies to individuals whether or not they are members of the church. It lacks any juridical basis and is wholly capricious. The liability is enforced by a body established by the state by statute, and empowered by the state by statute to enforce the liability. Such an act of enforcement is a public act.

The PCC's action in serving a notice under the 1932 Act on the defendants was unlawful under the 1998 Act by reason of article 1 of the First Protocol to the Convention, read either alone or in conjunction with article 14.

The word "possessions" in article 1 of the First Protocol is to be broadly construed and includes money, which is the possession the defendants have been deprived of. The assumption inherent in Article 1 is that the payment of taxes or other contributions is a deprivation of possessions. Therefore the defendants have been deprived of the peaceful enjoyment of their possessions.

Although it is proper and in the public interest to repair ancient churches, the burden of chancel repairs falls disproportionately on the defendants. It is objectionable that liability can be imposed on those, inter alias, who are not churchgoers, who are not Christians and who do not live in the parish. The chancel repair liability is personal and unlimited and can easily be disproportionate to the value of the land. Therefore the enforcement of the liability to defray the cost of chancel repairs is an unlawful interference with the defendants' personal property rights. [Reference was made to *Håkansson and Sturesson v Sweden* 13 EHRR 1 and *Hentrich v France* (1994) 18 EHRR 440.)

The enforcement of the liability also amounts to discrimination in the enjoyment of a Convention right under article 14. The appropriate class of comparator is that of landowners in England at large or in the parish, and there is no objective or reasonable justification for treating the defendants differently. [Reference was made to *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417.]

There was no compulsion of primary legislation which obliged the PCC to act as it did so as to bring it within section 6(2) of the 1998 Act. The liability of the lay rector exists only at common law. The 1932 Act imposes no duty to serve notice or commence proceedings against the defendants or anyone who appears to be liable to repair the chancel.

George QC replied.

A Their Lordships took time for consideration.

26 June. **LORD NICHOLLS OF BIRKENHEAD**

1 My Lords, 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.

B **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 in its report on Property Law: Liability for Chancel Repairs (1985) Law Com No 152.
C 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 *Wickhambrook Parochial Church Council v Croxford*
D [1935] 2 KB 417 was correctly decided.

4 At first sight the Human Rights Act 1998 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 [2002] Ch 51 was based on the provisions of the Human Rights Act, and this decision has wide
E financial implications for the Church of England, going far beyond the outcome of this particular case. 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
F 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 1998 is applicable in this case, the overall question is whether the plaintiff's prosecution of proceedings against
G 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
H with many different shades of meaning: public policy, public rights of way, public property, public authority (in the Public Authorities Protection Act 1893 (56 & 57 Vict c 61)), 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 1998 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 1998, 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".

A **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.

B **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 C 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 D 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 E 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 F 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 G 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, H 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. A

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 1998. 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. B

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. C D E F

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 1998 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. G

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. H

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)

A and 4(6), section 6(2) of the Human Rights Act 1998 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 & Duffy, Human Rights: The 1998 Act and the European Convention* (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
B 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
C the scope of the exception set out in section 6(2)(b).

LORD HOPE OF CRAIGHEAD

20 My Lords, 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,
D 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 & Wedgewood, The Buildings of England: Warwickshire* (1965),
E 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
F 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
G 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
H 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 1998 (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 [2002] Ch 51 held that the PCC was a public authority for the purposes of section 6 of the Act. 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 to 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] 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. *R v Lambert* [2002] 2 AC 545, *R v Kansal (No 2)* [2002] 2 AC 69 and *R v Benjafield* [2003] 1 AC 1099 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

A 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 B 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 C 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* [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 D 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 E the annotations to the Act by the late Peter Duffy QC in *Current Law Statutes*, vol 3 (1998). 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 F 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 G 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 (No 2)* [2002] 2 AC 69, 112, para 84; *Wainwright v Home Office* [2002] QB 1334, 1346–1347, 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 H 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.

31 If the only act of the PCC which was in issue in this case had been the service of the notice on Mr and Mrs Wallbank it would have difficult, in the light of what was decided in *R v Lambert* [2002] 2 AC 545 and *R v Kansal (No 2)* [2002] 2 AC 69, to say that that act, which was lawful at the time when the notice was served and was still lawful when the preliminary issue was decided by Ferris J at first instance, had become unlawful following the coming into effect of the Human Rights Act 1998. But the proceedings to give effect to that notice are still on foot. In this situation there is, in my opinion, no issue of retrospectivity. Mr and Mrs Wallbank do not need to rely on section 22(4). It is sufficient for their purpose to say that they wish to rely on their Convention right in the proceedings which the PCC are still taking against them with a view to having the notice enforced. This is something that they are entitled to do under section 7(1)(b).

32 It should be emphasised that the situation which I have outlined avoids the problems which were discussed in *R v Lambert* and *R v Kansal (No 2)* about extending section 22(4) to appeals. We are, of course, dealing in this case with an appeal against the decision of a court or tribunal: see section 7(6)(a). But the fact is that the appeal relates to a preliminary issue only. This means that the court has yet to reach the stage in these proceedings when effect can be given to the notice which the PCC have served. That still lies in the future. Section 7(6)(a) states that the expression "legal proceedings" in section 7(1)(b) includes "proceedings brought by or at the instigation of a public authority." The preliminary issue has been examined as part of these proceedings.

33 The question whether the proceedings of which an examination of the preliminary issue forms part are "legal proceedings" as so defined brings

A me to the next issue, which is whether the PCC is a public authority for the purposes of section 6(1) of the Act.

The public authority issue

(a) Introduction

34 Section 6(1) provides that it is unlawful for a public authority to act
B in a way which is incompatible with a Convention right. The expression "public authority" is not fully defined anywhere in the Human Rights Act 1998. What the Act does instead is to address itself to some particular issues. In all other respects the expression has been left to bear its ordinary meaning according to the context in which it is used. Section 6(3) provides:

> "In this section 'public authority' includes—(a) a court or tribunal, and
C (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."

Section 6(5) provides: "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."

D **35** It is clear from these provisions that, for the purposes of this Act, public authorities fall into two distinct types or categories. Courts and tribunals, which are expressly included in the definition, can perhaps be said to constitute a third category but they can be left on one side for present purposes. The first category comprises those persons or bodies which are obviously public or "standard" public authorities: *Clayton & Tomlinson*,
E *The Law of Human Rights* (2000), vol 1, para 5.08. They were referred to in the course of the argument as "core" public authorities. It appears to have been thought that no further description was needed as they obviously have the character of public authorities. In the Notes on Clauses which are quoted in *Clayton & Tomlinson*, para 5.06, it was explained that the legislation proceeds on the basis that some authorities are so obviously public authorities that it is not necessary to define them expressly. In other
F words, they are public authorities through and through. So section 6(5) does not apply to them. The second category comprises persons or bodies some of whose functions are of a public nature. They are described in *Clayton & Tomlinson* as "functional" public authorities and were referred to in the argument as "hybrid" public authorities. Section 6(5) applies to them, so in their case a distinction must be drawn between their public functions and the
G acts which they perform which are of a private nature.

36 Skilfully drawn though these provisions are, they leave a great deal of open ground. There is room for doubt and for argument. It has been left to the courts to resolve these issues when they arise. It is plain that the Court of Appeal were being invited to enter into largely uncharted territory. As a result of their efforts we are better equipped as we set out on the same journey. We have the benefit of their decision and of the criticisms that have
H been made of it. We must now see where all this leads us. First, it is necessary to examine what they did.

37 The Court of Appeal declined, rightly in my opinion, to look to Hansard for assistance: [2002] Ch 51, 61D, para 29. They rejected the argument that there was an ambiguity which brought this case within the

scope of the limited exception which was described in *Pepper v Hart* [1993] AC 593. It is true that various attempts were made by ministers in both Houses to explain their approach to the application of the Bill to what it described as public authorities. That was understandable, as some concern was expressed about the implications of this aspect of the legislation. But it is not the ministers' words, uttered as they were on behalf of the executive, that must be referred to in order to understand what Parliament intended. It is the words used by Parliament that must be examined in order to understand and apply the legislation that it has enacted.

38 The Court of Appeal were invited to hold that the test of what is a public authority for the purposes of section 6 was function-based. They rejected this proposition too. As Sir Andrew Morritt V-C delivering the judgment of the court pointed out, this may well be determinative as regards the "hybrid" class of public authorities as defined by section 6(3)(b). But it does not follow that it governs the principal category of "core" public authorities: [2002] Ch 51, 62B, para 33. In the following paragraph he said that 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 hybrid class of public authority. He noted that the authorities on judicial review, as they now stand, draw a conceptual line between functions of public governance and functions of mutual governance. He said that there was no surviving element of mutuality or mutual governance as between the impropriator and the Church in the lay rector's modern liability for chancel repairs.

39 Sir Andrew Morritt V-C set out the conclusions of the Court of Appeal on the public authority issue, at p 63, para 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 whose functions, chancel repairs among them, are functions of a public nature. It follows on either basis by virtue of section 6 that its acts, to be lawful, must be compatible with the rights set out in Schedule 1 to the Human Rights Act 1998."

40 The Court of Appeal, in reaching the conclusion that the PCC is a "core" public authority, appears to have proceeded in this way: (1) the PCC is an authority because it possesses powers which private individuals do not possess to enforce the lay rector's liability; and (2) it is public because it is created and empowered by law, it forms part of the Church of England as the established church and its functions include the enforcement of the liability on persons who need not be members of the church. By a similar process of reasoning the Court of Appeal concluded that the PCC is in any event a person some of whose functions, including chancel repairs, are functions of a public nature. In their view the fact that the PCC has the power and duty to enforce the obligation on persons with whom it has no other relationship

showed that it has the character of a public authority, or at least that it is performing a function of a public nature when it is enforcing this liability: see also para 36.

41 This approach has the obvious merit of concentrating on the words of the statute. The words "public" and "authority" in section 6(1), "functions of a public nature" in section 6(3)(b) and "private" in section 6(5) are, of course, important. The word "public" suggests that there some persons which may be described as authorities that are nevertheless private and not public. The word "authority" suggests that the person has regulatory or coercive powers given to it by statute or by the common law. The combination of these two words in the single unqualified phrase "public authority" suggests that it is the nature of the person itself, not the functions which it may perform, that is determinative. Section 6(1) does not distinguish between public and private functions. It assumes that everything that a "core" public authority does is a public function. It applies to everything that a person does in that capacity. This suggests that some care needs to be taken to limit this category to cases where it is clear that this over-arching treatment is appropriate. The phrase "functions of a public nature" in section 6(3), on the other hand, does not make that assumption. It requires a distinction to be drawn between functions which are public and those which are private. It has a much wider reach, and it is sensitive to the facts of each case. It is the function that the person is performing that is determinative of the question whether it is, for the purposes of that case, a "hybrid" public authority. The question whether section 6(5) applies to a particular act depends on the nature of the act which is in question in each case.

42 The absence of a more precise definition of the expression "public authority" for the purposes of section 6(1) of the Human Rights Act 1998 may be contrasted with the way that expression is used in the devolution legislation for Scotland and Northern Ireland. Sections 88–90 of the Scotland Act 1998 deal with what that Act calls "cross-border public authorities". "Scottish public authorities" are dealt with in Part III of Schedule 5. Definitions of these expressions are provided in section 88(5), which requires "cross-border authorities" to be specified by Order in Council and in section 126(1) which states that "Scottish public authority" means any public body, public office or holder of such an office whose functions are exercisable only in or as regards Scotland. A list of public bodies was appended to the White Paper, Scotland's Parliament (1997) (Cm 3658): see also the note to section 88 of the 1998 Act in *Current Law Statutes*. It included three nationalised industries, a group of tribunals, three statutory water authorities, health bodies and a large number of miscellaneous executive and advisory bodies. Sections 75 and 76 of the Northern Ireland Act 1998 impose a duty on public authorities to promote equality of opportunity and prohibit discrimination in the carrying out of their functions. The expression "public authority" for the purposes of each of these sections is defined in a way that appears to leave no room for doubt as to which departments, corporations or other bodies are included: see sections 75(3), 76(7).

43 The Court of Appeal did not explore the significance of the distinction which is drawn in section 6 between "core" and "hybrid" public authorities. In their view the PCC, for the same reasons, fell into either

category: p 63D–E, para 35. But the width that can be given to the "hybrid" category suggests that the purpose of the legislation would not be impeded if the scope to be given to the concept of a "core" public authority were to be narrowed considerably from that indicated by the Court of Appeal.

44 There is one vital step that is missing from the Court of Appeal's analysis. It is not mentioned expressly in the Human Rights Act 1998, but it is crucial to a proper understanding of the balance which sections 6 to 9 of the Act seek to strike between the position of public authorities on the one hand and private persons on the other. The purpose of these sections is to provide a remedial structure in domestic law for the rights guaranteed by the Convention. It is the obligation of states which have ratified the Convention to secure to everyone within their jurisdiction the rights and freedoms which it protects: *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38, para 49. The source of this obligation is article 13. It was omitted from the articles mentioned in section 1(1) which defines the meaning of the expression "the Convention rights", as the purpose of sections 6 to 9 was to fulfil the obligation which it sets out. But it provides the background against which one must examine the scheme which these sections provide.

45 The principle upon which the scheme proceeds is that actions by public authorities are unlawful if they are in breach of Convention rights: section 6(1). Effect is given to that principle in section 7. It enables anyone who is a victim of an act made unlawful by section 6(1) to obtain a remedy. The extent to which the scheme derives its inspiration from the Convention is revealed by the definition of the word "victim" which is set out in section 7(7). It provides:

> "For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act."

Article 34 of the Convention is in these terms:

> "The court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

46 The reference to non-governmental organisations in article 34 provides an important guide as to the nature of those persons who, for the purposes of section 6(1) of the Act and the remedial scheme which flows from it, are to be taken to be public authorities. Non-governmental organisations have the right of individual application to the European Court of Human Rights as victims if their Convention rights have been violated. If the scheme to give effect to article 13 is to be followed through, they must be entitled to obtain a remedy for a violation of their Convention rights under section 7 in respect of acts made unlawful by section 6.

47 The test as to whether a person or body is or is not a "core" public authority for the purposes of section 6(1) is not capable of being defined precisely. But it can at least be said that a distinction should be drawn between those persons who, in Convention terms, are governmental

A organisations on the one hand and those who are non-governmental organisations on the other. A person who would be regarded as a non-governmental organisation within the meaning of article 34 ought not to be regarded as a "core" public authority for the purposes of section 6. That would deprive it of the rights enjoyed by the victims of acts which are incompatible with Convention rights that are made unlawful by section 6(1). B Dawn Oliver, "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act" [2000] PL 476, 491–493 has observed that this would have serious implications. It would undermine the protections against state control which are the hallmarks of a liberal democracy.

48 In *Rothenthurm Commune v Switzerland* (1988) 59 DR 251 the Commission held that local government organisations such as the applicant C commune which exercise public functions are clearly "governmental organisations" as opposed to "non-governmental organisations" within the meaning of article 25 (now article 34) of the Convention, with the result that the commune which was complaining that proceedings for the expropriation of land for a military training area were in breach of their rights under article 6(1) could not bring an application under that article. In D *Ayuntamiento de Mula v Spain*, Reports of Judgments and Decisions 2000-I, p 53 the European Court held that under the settled case law of the Convention institutions local government organisations are public law bodies which perform official duties assigned to them by the Constitution and by substantive law and are therefore quite clearly governmental organisations. It added this comment:

E > "In that connection, the court reiterates that in international law the expression 'governmental organisations' cannot be held to refer only to the Government or the central organs of the State. When powers are distributed along decentralised lines, it refers to any national authority which exercises public functions."

49 The phrase "public functions" in this context is thus clearly linked to F the functions and powers, whether centralised or distributed, of government. This point was developed more fully in *Holy Monasteries v Greece* (1995) 20 EHRR 1. The Government of Greece argued that the applicant monasteries, which were challenging legislation which provided for the transfer of a large part of the monastic property to the Greek state, were not non-governmental organisations within the meaning of article 25 (now 34) of the Convention. It was pointed out that the G monasteries were hierarchically integrated into the organic structure of the Greek Orthodox Church, that legal personality was attributed to the Church and its constituent parts in public law and that the Church and its institutions, which played a direct and active part in public administration, took administrative decisions whose lawfulness was subject to judicial review by the Supreme Administrative court like those of any other public H authority. Rejecting this argument, the court said in para 49:

> "Like the Commission in its admissibility decision, the court notes at the outset that the applicant monasteries do not exercise governmental powers. Section 39(1) of the Charter of the Greek Church describes the monasteries as ascetic religious institutions. Their objectives—essentially

ecclesiastical and spiritual ones, but also cultural and social ones in some cases—are not such as to enable them to be classed with governmental organisations established for public administration purposes. From the classification as public law entities it may be inferred only that the legislature—on account of the special links between the monasteries and the State—wished to afford them the same legal protection vis-à-vis third parties as was accorded to other public law entities. Furthermore, the monastery councils' only power consists in making rules concerning the organisation and furtherance of spiritual life and the internal administration of each monastery."

50 The phrase "governmental organisations established for public administration purposes" in the third sentence of the passage which I have quoted from the *Holy Monasteries* case is significant. It indicates that test of whether a person or body is a "non-governmental organisations" within the meaning of article 34 of the Convention is whether it was established with a view to public administration as part of the process of government. That too was the approach which was taken by the Commission in *Hautanemi v Sweden* (1996) 22 EHRR CD 156. At the relevant time the Church of Sweden and its member parishes were to be regarded as corporations of public law in the domestic legal order. It was held nevertheless that the applicant parish was a victim within the meaning of what was then article 25, on the ground that the Church and its member parishes could not be considered to have been exercising governmental powers and the parish was a non-governmental organisation.

51 It can be seen from what was said in these cases that the Convention institutions have developed their own jurisprudence as to the meaning which is to be given to the expression "non-governmental organisation" in article 34. We must take that jurisprudence into account in determining any question which has arisen in connection with a Convention right: Human Rights Act 1998, section 2(1).

52 The Court of Appeal left this jurisprudence out of account. They looked instead for guidance to cases about the amenability of bodies to judicial review, although they recognised that they were not necessarily determinative: p 62D–E, para 34. But, as Professor Oliver has pointed out in her commentary on the decision of the Court of Appeal in this case, "Chancel repairs and the Human Rights Act" [2001] PL 651, the decided cases on the amenability of bodies to judicial review have been made for purposes which have nothing to do with the liability of the state in international law. They cannot be regarded as determinative of a body's membership of the class of "core" public authorities: see also *Grosz, Beatson & Duffy, Human Rights: The 1998 Act and the European Convention* (2000), p 61, para 4-04. Nor can they be regarded as determinative of the question whether a body falls within the "hybrid" class. That is not to say that the case law on judicial review may not provide some assistance as to what does, and what does not, constitute a "function of a public nature" within the meaning of section 6(3)(b). It may well be helpful. But the domestic case law must be examined in the light of the jurisprudence of the Strasbourg Court as to those bodies which engage the responsibility of the State for the purposes of the Convention.

A **53** At first sight there is a close link between the question whether a person is a non-governmental organisation for the purposes of article 34 and the question whether a person is a public authority against which the doctrine of the direct effect of directives operates under Community law: see article 249 EC. Both concepts lie at the heart of the obligations of the State under international law. Individual applications for a violation of Convention rights may be received under article 34 from "any person, B non-governmental organisation or group of individuals". Direct effect exists only against the member state concerned "and other public authorities": *European Coal and Steel Community v Acciaierie e ferriere Busseni SpA* (Case C-221/88) [1990] ECR I-495, para 23; *Brent, Directives: Rights and Remedies in English and Community Law* (2001), para 15.11.

C **54** The types of organisations and bodies against whom the provisions of a directive could be relied on were discussed in *Foster v British Gas plc* (Case C-188/89) [1991] 1 QB 405. The court noted in para 18 that it had been held in a series of cases that provisions of a directive could be relied on against organisations and bodies which were subject to the authority or control of the state or had special powers beyond those which result from the normal rules applicable to relations between individuals. Reference was D made to a number of its decisions to illustrate this point. Its conclusions were set out in para 20:

> "It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the E normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon."

55 This is a broad definition of the concept by which such bodies have come to be referred to as "emanations of the State": e g *Johnston v Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] QB 129, F 154, para 56. It has been described as a starting point: *Doughty v Rolls-Royce plc* [1992] 1 CMLR 1045, 1058, per Mustill LJ. As *Brent*, para 15.11, note 101, points out, the phrase "emanation of the State" is an English legal concept derived from *Gilbert v Corpn of Trinity House* (1886) 17 QBD 795 which was later criticised by the courts as inappropriate and undefined. Whatever its value may be in the context of Community law, however, it G would be neither safe nor helpful to use this concept as a shorthand way of describing the test that must be applied to determine whether a person or body is a non-governmental organisation for the purposes of article 34 of the Convention. There is no right of individual application to the European Court of Justice in EC law. The phrase "non-governmental organisation" has an autonomous meaning in Convention law.

H *(b) Is the PCC a public authority?*

56 The general functions and powers of parochial church councils in the Church of England are set out in the Parochial Church Councils (Powers) Measure 1956. That was a measure passed by the National Assembly of the Church of England under the powers which were conferred on the National

Assembly by the Church of England Assembly (Powers) Act 1919. The National Assembly was renamed and reconstituted as the General Synod of the Church of England by the Synodical Government Measure 1969. Section 7 of the 1969 Measure provides that the rules contained in Schedule 3, which may be cited as the Church Representation Rules, are to have effect for the purpose of providing for the constitution and proceedings of diocesan and deanery synods and making further provision for the synodical government of the church. Part II of the Church Representation Rules provides for the holding of annual parochial church meetings at which parochial representatives of the laity to the parochial church council and the deanery synod are to take place. Rule 14 sets out the membership of the parochial church council. It includes the clergy, churchwardens, any persons on the roll of the parish who are members of any deanery or diocesan synod or the General Synod, elected representatives of the laity and co-opted members.

57 Section 2(1) of the Parochial Church Councils (Powers) Measure 1956 provides that it shall be the duty of the minister, as defined in rule 44(1) of the Church Representation Rules, and the parochial church council to consult together on matters of general concern and importance to the parish. Section 2(2) states that the functions of parochial church councils shall include, among other things, co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical and the consideration and discussion of matters concerning the Church of England or any other matters of religious or public interest other than the declaration of the doctrine of the Church on any question. Among the powers, duties and liabilities vested in parochial church councils by section 4 are those relating to the financial affairs of the church and the care, maintenance and preservation of its fabric. Section 2 of the Chancel Repairs Act 1932 provides that, where a chancel is in need of repair, proceedings to enforce the liability to repair are to be taken by the responsible authority. Section 4(1) of the Act provides that the expression "responsible authority" in relation to a chancel means the parochial church council of the parish in which the chancel is situate.

58 There is no doubt that parochial church councils are an essential part of the administration, on the authority of the General Synod, of the affairs of the Church of England. The parish itself has been described as the basic building block of the Church and the PCC as the central forum for decision-making and discussion in relation to parish affairs: *Hill*, *Ecclesiastical Law*, 2nd ed (2001), pp 48 and 74, paras 3.11 and 3.74. It is constituted by section 3 of the Parochial Church Councils (Powers) Measure 1956 as a body corporate. It has statutory powers which it may exercise under section 2 of the Chancel Repairs Act 1932 against any person who appears to it to be liable to repair the chancel, irrespective of whether that person is resident in the parish and is a member of the Church of England. In that context, perhaps, it may be said in a very loose sense to be a public rather than a private body.

59 But none of these characteristics indicate that it is a governmental organisation, as that phrase is understood in the context of article 34 of the Convention. It plainly has nothing whatever to do with the process of either central or local government. It is not accountable to the general public for what it does. It receives no public funding, apart from occasional grants

A from English Heritage for the preservation of its historic buildings. In that respect it is in a position which is no different from that of any private individual. The statutory powers which it has been given by the Chancel Repairs Act 1932 are not exercisable against the public generally or any class or group of persons which forms part of it. The purpose of that Act, as its long title indicates, was to abolish proceedings in ecclesiastical courts for enforcing the liability to repair. The only person against whom the liability B may be enforced is the person who, in that obscure phrase, "would, but for the provisions of this Act, have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court in a cause of office promoted against him in that court on the date when the notice was served": see section 2(3); *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, 429, per Lord Hanworth MR.

C **60** Then there is the fact that the PCC is part of the Church of England. The Court of Appeal said that it exemplifies the special status of the church of which it forms part: [2002] Ch 51, 61, para 32. The fact that it forms part of the church by law established showed, it was said, that the PCC is a public authority: p 63, para 35. The implication of these observations is that other bodies such as diocesan and deanery synods and the General Synod itself fall into the same category. In my opinion however the legal framework of the D Church of England as a church by law established does not lead to this conclusion.

61 The Church of England as a whole has no legal status or personality. There is no Act of Parliament that purports to establish it as the Church of England: *Sir Lewis Dibden*, *Establishment in England: Essays on Church and State* (1932), p 111. What establishment in law means is that the state E has incorporated its law into the law of the realm as a branch of its general law. In *Marshall v Graham* [1907] 2 KB 112, 126 Phillimore J said:

> "A Church which is established is not thereby made a department of the state. The process of establishment means that the state has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position, and to its decrees, if rendered F under certain legal conditions, certain civil sanctions."

The Church of England is identified with the state in other ways, the monarch being head of each: see *Doe*, *The Legal Framework of the Church of England* (1996), p 9. It has regulatory functions within its own sphere, but it cannot be said to be part of government. The state has not surrendered or delegated any of its functions or powers to the Church. None of the G functions that the Church of England performs would have to be performed in its place by the state if the Church were to abdicate its responsibility: see *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex p Wachmann* [1992] 1 WLR 1036, 1042A, per Simon Brown J. The relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the powers or functions of government. H

62 The decisions of the Strasbourg Court in *Holy Monasteries v Greece* 20 EHRR 1 and *Hautanemi v Sweden* 22 EHRR CD 156 support this approach. It is also worth noting that, while the two main churches in Germany (Roman Catholic and Lutheran) have public legal personality and are public authorities bound by the provisions of article 19(4) of the German

Constitution (Grundgesetz) or Basic Law which guarantees recourse to the court should any person's basic rights be violated by public authority, they are in general considered to be "non-governmental organisations" within the meaning of article 34 of the Convention. As such, they are entitled to avail themselves of, for example, the right to protection of property under article 1 of the First Protocol: *Frowein and Peukert*, *Kommentar zur Europäishen Menschenrechtskonvention*, 2nd ed (1996), art 25, para 16. *Maunz and Dürig*, *Kommentar zum Grundgesetz* (looseleaf), art 33, para 38 explain the position in this way:

> "Keine hoheitsrechtlichen Befugnisse nehmen die Amtsträger der Kirchen wahr, soweit sie nicht kraft staatlicher Ermächtigung (etwa in Kirchensteurangelegenheiten) tätig werden; die Kirchen sind, auch soweit sie öffentlich-rechtlichen Status haben, nicht Bestandteile der staatlichen Organisation."

[Church officeholders do not exercise sovereign power so long as they are not acting by virtue of state empowerment (for example, in matters concerning church taxes); the churches do not, even though they have public law status, form an integral part of the organisation of the state.] This reflects the view of the German Constitutional Court in its 1965 decision (BVerwGE 18, 385) that measures taken by a church relating to purely internal matters which do not reach out into the sphere of the state do not constitute acts of sovereign power. The churches are not, as we would put it, "core" public authorities although they may be regarded as "hybrid" public authorities for certain purposes.

63 For these reasons I would hold that the PCC is not a "core" public authority. As for the question whether it is a "hybrid" public authority, I would prefer not to deal with it in the abstract. The answer must depend on the facts of each case. The issue with which your Lordships are concerned in this case relates to the functions of the PCC in the enforcement of a liability to effect repairs to the chancel. Section 6(5) of the Human Rights Act 1998 provides that a person is not a public authority by virtue only of subsection (3) if the nature of the act which is alleged to be unlawful is private. The Court of Appeal said that the function of chancel repairs is of a public nature: [2002] Ch 51, 63, para 35. But the liability of the lay rector to repair the chancel is a burden which arises as a matter of private law from the ownership of glebe land.

64 It is true, as Wynn-Parry J observed in *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, 593, that the burden is imposed for the benefit of the parishioners. It may be said that, as the church is a historic building which is open to the public, it is in the public interest that these repairs should be carried out. It is also true that the liability to repair the chancel rests on persons who need not be members of the church and that there is, as the Court of Appeal observed, at p 63B, para 34, no surviving element of mutuality or mutual governance between the church and the impropriator. But none of these factors leads to the conclusion that the PCC's act in seeking to enforce the lay rector's liability on behalf of the parishioners is a public rather than a private act. The nature of the act is to be found in the nature of the obligation which the PCC is seeking to enforce. It is seeking to enforce a civil debt. The function which it is performing has nothing to do with the responsibilities which are owed to the public by the State. I would

A hold that section 6(5) applies, and that in relation to this act the PCC is not for the purposes of section 6(1) a public authority.

The incompatibility issue

65 This issue does not arise if, as I would hold, the PCC is not for present purposes a public authority. But I should like to offer these brief B comments on it, as I do not agree with the Court of Appeal's finding that Mr and Mrs Wallbank's right to peaceful enjoyment of their possessions under article 1 of the First Protocol, read either alone or with article 14 of the Convention, has been violated: [2002] Ch 51, paras 38–46.

66 Article 1 of the First Protocol provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of C 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 D or penalties."

Article 14 of the Convention prohibits discrimination in the enjoyment of the rights and freedoms which the Convention sets forth.

67 Article 1 of the First Protocol contains three distinct rules: see *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 61; *James v United Kingdom* (1986) 8 EHRR 123, para 37. The first rule is set out in the E first sentence, which is of a general nature and enunciates the principle of the peaceful enjoyment of property. It then deals with two forms of interference with a person's possessions by the state: deprivation of possessions which it subjects to certain conditions, and control of the use of property in accordance with the general interest. In each case a balance must be struck between the rights of the individual and the public interest to determine F whether the interference was justified. These rules are not unconnected as, before considering whether the first rule has been complied with, the court must first determine whether the last two rules are applicable. As it was put in *James*, para 37, the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. They should be construed in the light of the general principle enunciated in G the first rule.

68 The Court of Appeal appear to have overlooked this guidance. They did not address the question whether Mr and Mrs Wallbank were being deprived of their possessions according to the second rule, and they did not deal with the question whether there was an interference with the first rule. They held that the liability to defray the cost of chancel repairs was levy upon the personal funds of Mr and Mrs Wallbank, that this was a form of H taxation within the third rule in the second paragraph of article 1, and that it was arbitrary and disproportionate. They rejected the PCC's argument the source of the liability was their ownership of Glebe Farm. They held that there was in this case an outside intervention by the general law which made ownership of the land a fiscal liability: para 40.

69 Ferris J said in his judgment that, if the law relating to chancel repairs was as understood it to be (which he described as "the supposed rule"), it did not involve a deprivation of possessions. As he put it, at para 23:

> "The argument for Mr and Mrs Wallbank seems to assume that the starting point is that they are to be regarded as the owners of Glebe Farm free from incumbrances or other burdensome incidents attached to the ownership of the land. But this is not in fact correct if the supposed rule represents the law. The liability to repair the chancel is, on that basis, one of the incidents of ownership of that part of Glebe Farm which consists of land allotted under the inclosure award in lieu of tithe or other rectorial property. It is, of course, an unusual incident because it does not amount to a charge on the land, is not limited to the value of the land and imposes a personal liability on the owner of the land. But in principle I do not find it possible to distinguish it from the liability which would attach to the owner of land which is purchased subject to a mortgage, restrictive covenant or other incumbrance created by a predecessor in title."

He said that the case was quite different from that in which there was some kind of outside intervention in the form of taxation, compulsory purchase or control over the way in which the property can be used.

70 I prefer Ferris J's analysis to that of the Court of Appeal. The principle which we must follow was described in *James v United Kingdom* 8 EHRR 123, para 36. We must confine our attention, as far as possible, to the concrete case which is before us. It must not be directed to the impact of the law relating the enforcement of the chancel repair liability in the abstract, but to its impact as it affects Mr and Mrs Wallbank.

71 How then does the liability arise? It cannot be considered in isolation from the obligation that gives rise to it. That is the obligation which rests on the owner of rectorial land, not as a result any outside intervention with the possession of the land by the state but as a matter of private law. The conveyance of Glebe Farm to Mrs Wallbank's parents in 1970 described the land as subject to the liability for the repair of the chancel mentioned in previous conveyances. Their deeds of gift to Mrs Wallbank in 1974 and 1986 also referred to the chancel repair liability. This is a burden on the land, just like any other burden that runs with the lands. It is, and has been at all times, within the scope of the property right which she acquired and among the various factors to be taken into account in determining its value. She could have divested herself of it at any time by disposing of the land to which it was attached. The enforcement of the liability under the general law is an incident of the property right which is now vested jointly in Mr and Mrs Wallbank. It is not, as the Court of Appeal said (para 40), an outside intervention by way of a form of taxation.

72 I recognise that Mr and Mrs Wallbank may well need to draw on their personal funds to discharge the liability. But they are not being deprived of their possessions or being controlled in the use of their property, as those expressions must be understood in the light of the general principle of peaceful enjoyment set out in the first sentence of article 1 of the First Protocol. The liability is simply an incident of the ownership of the land which gives rise to it. The peaceful enjoyment of land involves the discharge of burdens which are attached to it as well as the enjoyment of its rights and privileges. I do not think that in this case the right which article 1 of the First

Protocol guarantees, read alone or in conjunction with article 14 of the Convention, is being violated.

Conclusion

73 The law relating to the liability for chancel repairs is open to criticism on various grounds. The liability has been described by the Law Commission as anachronistic and capricious in its application and as highly anomalous: Liability for Chancel Repairs (1985) (Law Com No 152), para 3.1; Land Registration for the Twenty-first Century (1998) (Law Com No 254; Cm 407), para 5.37. The existence of the liability can be difficult to discover, as most lay rectories have become fragmented over the years as a result of the division and separate disposals of land: Transfer of Land, Liability for Chancel Repairs (1983) (Law Commission Working paper No 86), para 2.29. The fact that it is a several liability may operate unfairly in cases where there is more than one lay rector and the person who is found liable is unable to recover a contribution from others who ought to have been found liable.

74 On the other hand it was noted in the 1983 Law Commission Working Paper that there were some 5,200 chancels for which there is a chancel repair liability. Not all of these cases involve individual landowners. About 800 are the liability of the Church Commissioners, 200 the liability of cathedrals and 200 the liability of educational foundations. Charitable donations may provide relief in some cases, while in others grants may be available from English Heritage. But there is no other source of private funding that can be relied upon, and there is no right of access to public funds. Unsatisfactory though the system may appear to be, there is no obvious alternative. Ferris J recognised, in para 18 of his judgment, that the law relating to chancel repairs is capable of operating arbitrarily, harshly and unfairly. But he did not find any basis for declaring the law to be otherwise than it appeared to be on the authorities.

75 It is not open to us to resolve these problems judicially. All one can say is that the Human Rights Act 1998 does not provide a vehicle for doing so. I would allow the appeal and restore the order and determination made by Ferris J.

LORD HOBHOUSE OF WOODBOROUGH

76 My Lords, it is admitted by the defendants that, apart from the Human Rights Act 1998, they are, as the joint owners of Glebe Farm, Aston Cantlow, and have been at all material times personally responsible for the repair of the chancel of the church of St John the Baptist Aston Cantlow and that, they having failed to repair the chancel, the Parochial Church Council ("PCC") is entitled to a judgment against them under section 2(3) of the Chancel Repairs Act 1932 for such sum as represents the cost of putting the chancel into a proper state of repair. This is because the defendants, Mr and Mrs Wallbank, being liable to repair the chancel, would, but for the 1932 Act, have been liable to be admonished to repair the chancel by an ecclesiastical court. The obligation of the defendants is the obligation to repair. Under the 1932 Act the remedy of an order that the obligation be performed is no longer to be available and the monetary remedy is provided in lieu but the character of the obligation was left unchanged.

77 The obligation to repair is one which derives from the ownership of land to which the obligation is attached. The obligation runs with the land. The 15th and 16th century origins of this are helpfully explained in the opinion of my noble and learned friend, Lord Scott of Foscote. In the present case the obligation arose not from the receipt of tithes but as a result of an enclosure award of 1743 made under the private Act of Parliament of 1742 (15 Geo 2, c 42). It is a personal obligation but only exists so long as the person in question is the owner of the land. Thus he acquires it by a voluntary act—the acquisition of the title to the land of which the obligation is an incident. He can divest himself of the obligation by a further voluntary act—the disposal of the land or, under section 52 of the Ecclesiastical Dilapidations Measure 1923, by redemption. At all the times material to this case, the obligation was categorised by section 70 of the Land Registration Act 1925 as an overriding interest. The person or persons who are under such an obligation are described, using the historical terminology, as the "lay rectors" or the "lay impropriators".

78 In fact the defendants knew that ownership of the land was believed to carry with it the obligation. It was referred to in all the title deeds and, in at least one conveyance, an express indemnity had been taken by the vendor. In other cases some special consideration might arise from the fact that the relevant landowner had acquired the title to the land without any notice of the existence, or possible existence, of the obligation. But that is not this case and it need not be discussed further.

79 The only defence now raised by the defendants to the claim of the PCC under the 1932 Act is based upon the Human Rights Act 1998 and/or the Convention. The 1998 Act had not come into force at the time when the defendants failed to carry out the relevant repairs, nor when the PCC served the notice required by section 2(1) of the 1932 Act, nor at the time when Ferris J tried the case and gave judgment for the PCC. He was formally trying two preliminary issues ordered by Master Bragge but, when he decided the human rights issue against the defendants, the defendants, having abandoned their case on the other issue, admitted that they had no defence to the claim except as to quantum. He accordingly made a declaration of liability, ordered an inquiry as to quantum and ordered the defendants to pay to the claimants the sum found due on the inquiry. The question of quantum arose under section 2(3) of the 1932 Act: "[the] court . . . shall give judgment . . . for such sum as appears to the court to represent the cost of putting the chancel in proper repair". The points which the defendants were taking on quantum were pleaded in paragraph 1 of the outline defence. The judgment of Ferris J was in English procedural law a final judgment. The defendants appealed to the Court of Appeal. By the time that the defendants' appeal was heard, the 1998 Act had however come into force.

80 This timetable raises again the question of the extent to which the Act has a retrospective effect, a question on which the Court of Appeal did not express an opinion since no point was taken in that regard by the PCC. Your Lordships were not satisfied that this was necessarily correct; however it was clearly convenient and in the interest of both of the parties that the House should first hear the parties' arguments upon the points which the Court of Appeal did decide. I stress that the House have not heard any argument upon the question of the extent, if at all, to which the Act has

retrospective effect. It is not appropriate that any view should be expressed on it in the present case. Anything said will not be authoritative. The retrospectivity point will arise for decision in other unrelated appeals and will then fall to be decided after full argument and due consideration. It is in any event not correct to approach that question on the basis that the judgment of Ferris J was undeterminative or merely interlocutory. In English procedural law, it was a final judgment which, unless reversed on appeal, determined the parties' rights and liabilities, subject only to quantum. I will accordingly proceed on the basis of assuming that the Human Rights Act 1998 applies to this case in accordance with the provisions of sections 22(4), 7(1)(b) and 6.

81 The structure of the defendants' argument under the Human Rights Act 1998 is that they have to establish three propositions. If they fail on any one of these, their defence fails. They are: (a) that the PCC is a public authority, the sections 6(1), (3) and (5) point, and (b) that there has been a breach of article 1 of the First Protocol, the article 1 and article 14 point, and (c) that the exclusion in section 6(2) does not apply. Before Ferris J only point (b) arose and he decided it in favour of the claimants. In the Court of Appeal all three points were decided in favour of the defendants.

82 These were the questions of law raised on this appeal. They are questions which are of relevance not only to the present case but to many other cases or potential cases concerning the enforcement under the 1932 Act of the obligation to repair chancels. Other cases may, on their facts, raise special considerations not found in this case and, similarly, legal questions not dependent upon the Human Rights Act 1998 may arise. Your Lordships' decision on this appeal does not touch upon any of them. But I must expressly disassociate myself from any suggestion that there is a cap upon the monetary liability under section 2(3) of the 1932 Act or that any such point is presently open to the defendants upon the inquiry ordered by Ferris J as discussed in the opinion of my noble and learned friend, Lord Scott of Foscote, which I have had the privilege of reading in draft after I had prepared this opinion, together with his questioning of the correctness of the decision in *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417. The question was neither raised nor argued. There are contentious points which will arise if it ever is. Does the cap apply where the express words of the 1932 Act are applicable? How does it apply to successive or continuing and cumulative breaches of the obligation to repair? Does the cap apply where the liability is not attributable to the ownership of a tithe rentcharge but simply to the ownership of land? If so, how does one assess what the cap should be? It is by no means clear that any of these questions should be answered in a way that could assist the defendants. But they have not been argued and I will say no more about them.

Is the PCC a public authority?

83 Historically parochial church councils did not exist. They were introduced by the Parochial Church Councils (Powers) Measure 1921 as a body at parish level which would better enable the lay members of the congregation to be represented. It was agreed that at the material times the powers and functions of PCCs were defined by the Parochial Church Council (Powers) Measure 1956. Section 2 (as amended) provided:

"*General Functions of Council*

"(1) It shall be the duty of the minister and the [PCC] to consult together on matters of general concern and importance to the parish.

"(2) The functions of [PCCs] shall include—(a) cooperation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical; (b) the consideration and discussions of matters concerning the Church of England or any other matters of religious or public interest, but not the declaration of the doctrine of the Church on any question; (c) making known and putting into effect any provision made by the diocesan synod or the deanery synod, but without prejudice to the powers of the council on any particular matter; (d) giving advice to the diocesan synod and deanery synod on any matter referred to the council; (e) raising such matters as the council consider appropriate with the diocesan synod or deanery synod.

"(3) In the exercise of its functions the [PCC] shall take into consideration any expression of opinion by any parochial church meeting."

Section 3 provided that the PCC was to be a body corporate with perpetual succession. Section 4 made provision for the PCC as successor to certain other bodies to have the relevant powers of those bodies:

"(1) . . . the council of every parish shall have . . . (ii) the like powers duties and liabilities as, immediately before [1 July 1921], the churchwardens of such parish had with respect to—(a) The financial affairs of the church including the collection and administration of all moneys raised for church purposes and the keeping of accounts in relation to such affairs and moneys; (b) The care, maintenance, preservation and insurance of the fabric of the church and the goods and ornaments thereof; (c) The care and maintenance of any churchyard (open or closed) and the power of giving a certificate under the provisions of section 18 of the Burial Act 1855 with the like powers as, immediately before [1 July 1921] were possessed by the churchwardens to recover the cost of maintaining a closed churchyard . . ."

Of these powers, the most relevant to the present case are those in section 4(1)(ii)(b) but it is important to note that these are only those powers and duties which the churchwardens had and that the churchwardens did not have a duty to repair the fabric but only a duty to report its disrepair. As stated by Richard Burn Ch in his work *Burn on Ecclesiastical Law*, 9th ed (1842), edited by Robert Phillimore, vol 1, p 357,

"And although churchwardens are not charged with the repairs of the chancel, yet they are charged with the supervisal thereof, to see that it be not permitted to dilapidate and fall into decay; and when any such dilapidations shall happen, if no care be taken to repair the same, they are to make presentation thereof at the next visitation."

It was no doubt following this logic that the PCC were given the power (and correlative duty) in 1932 to bring the action to obtain a remedy for the failure of a lay rector to repair the chancel. (The changes later introduced by section 39 of the Endowments and Glebe Measure 1976 relating to incumbents of a benefice are not relevant to this case.)

A **84** The PCC is thus the creature of a statutory provision by what was then the National Assembly of the Church of England. It has only those functions, duties and powers which have been conferred on it by that or other legislation. It is part of the structure known as the Church of England but the Church of England is not itself a legal entity. The legal entities are the various office-holders and various distinct bodies set up within that structure.

B **85** The Human Rights Act 1998 and section 6 do not contain any complete or general definition of the term "a public authority". Section 6 does however contain a secondary definition in subsections (3)(b) and (5) as including, in respect of acts which are not of a private nature, persons (or bodies) certain of whose functions are functions of a public nature. This secondary category has been described as "hybrid" public authorities. It C requires a two-fold assessment, first of the body's functions, and secondly of the particular act in question. The body must be one of which at least some, but not all, of its functions are of a public nature. This leaves what by inference from subsection (3)(b) is the primary category, i e, a person or body *all* of whose functions are of a public nature. This category has conveniently been called by the commentators a "core" public authority. For this category, there is no second requirement; the section potentially applies to D everything that they do regardless of whether it is an act of a private or public nature.

86 Is a PCC a "core" public authority? The answer I would give to this question is that it is clearly not. Its functions, as identified above from the relevant statutory provisions, clearly include matters which are concerned only with the pastoral and organisational concerns of the diocese and the E congregation of believers in the parish. It acts in the sectional not the public interest. The most that can be said is that it is a creature of a church measure having the force of a statute—but that is not suggested to be conclusive—and that some aspects of the Church of England which is the "established church" are of wider general interest and not of importance to the congregation alone. Thus the priest ministering in the parish may have responsibilities that are certainly not public, such as the supervision of the F liturgies used or advising about doctrine, but may have other responsibilities which are of a public nature, such as a responsibility for marriages and burials and the keeping of registers. But the PCC itself does not have such public responsibilities nor are its functions public; it is essentially a domestic religious body. The fact that the Church of England is the established church of England may mean that various bodies within G that Church may as a result perform public functions. But it does not follow that PCCs themselves perform any such functions. Even the monasteries of the established church in Greece, which has strong legal links with the state, such as the presence of representatives of the state on its governing body and direct financial links with the state, has been held not to be an emanation of the state for the purposes of the Convention: *Holy Monasteries v Greece* 20 EHRR 1.

H **87** The Court of Appeal reached a different conclusion. I do not find their reasoning satisfactory. Neither parliamentary material nor references to the law of judicial review assist on this question. The relevant underlying principles are to be found in human rights law not in Community law nor in the administrative law of England and Wales. The Strasbourg jurisprudence

has already been deployed in the opinion of my noble and learned friend, Lord Hope of Craighead, and I need not repeat it. The relevant concept is the opposition of the "victim" and a "governmental body". The former can make a complaint; the latter can only be the object of a complaint. The difference between them is that the latter has a governmental character and discharges governmental functions. If there is a need to find additional assistance in construing section 6 of the Act, this is where it is to be found. The structure of the Act also supports the same conclusion. It is through section 7 and its reference to victims in section 7(1) and (7) that one gets from section 22(4) to section 6(1). Section 7 is drafted having regard to the Strasbourg jurisprudence; it would be inconsistent to construe section 6 in a manner opposed to that jurisprudence. The Court of Appeal's approach cannot be supported.

88 In my opinion it has not been established that PCCs in general nor this PCC in particular perform any function of a public or governmental nature. If it is to be said that they do, I am unaware what specifically it can be said is that function. The Court of Appeal (in paragraph 34) said that the recovery of money under section 2 of the 1932 Act was the function which made the PCC a public authority. This is to be contrasted with the statement in paragraph 37 that the "power and, no doubt duty" to do so is a "common law" power. The nature of the person's functions are not to be confused with the nature of the act complained of, as section 6 makes clear. But in neither case are they governmental in nature nor is the body itself inherently governmental. It follows that in my opinion the PCC was neither a "core" nor a "hybrid" public authority. On that basis the defence of Mr and Mrs Wallbank must fail.

89 But, if I am wrong, and the PCC was a "hybrid" public authority, the further question arises under section 6(5): Is the nature of the relevant act private? The act is the enforcement of a civil liability. The liability is one which arises under private law and which is enforceable by the PCC as a civil debt by virtue of the 1932 Act. The 1932 did not alter the preexisting law as to the obligations of lay impropriators. It is simply remedial (as the Court of Appeal recognised in paragraph 37). Its purpose is to enable repairs to be done which the lay rector ought to have, but has not, himself carried out. It is argued that it is akin to a power of taxation. Whether or not it was once true in the 16th century that such a power existed, it was certainly not true in the 20th century. Whatever the former obligations of lay impropriators may once have been, by the 18th century they were or had been converted into civil obligations. In the present case this occurred in 1743 as a result of an enclosure award made under a private Act of Parliament of 1742 entitled An Act for Dividing and Inclosing, Setting out and Allotting, certain Common Fields and Inclosures within the Manor and Parish of Aston Cantlow, in the County of Warwick (15 Geo 2, c 42). In return for financial and proprietorial advantages then conferred upon them, the impropriators accepted the obligation to repair the chancel as and when the need arose. That is the private law obligation which is being enforced in the present action using the remedy provided in the 1932 Act.

90 The 1932 Act is irrelevant unless and until the lay impropriator fails to perform his obligation to repair the chancel, a failure which may have occurred on a single occasion or may, as in the present case, have been a continuing and cumulative failure over a long period of time. The

responsibility for repairing the chancel was since 1743 an incident of the ownership of certain particular parcels of land. When Mr and Mrs Wallbank acquired the title to that land they assumed that responsibility to repair and the consequent liability in default if they should fail to discharge it. This was not a responsibility and liability which they shared with the public in general; it was something which they had personally assumed voluntarily by a voluntary act of acquisition which at the time they apparently thought was advantageous to them. From the point of view of both the PCC and the Wallbanks, the transaction and its incident were private law, non-governmental, non-public activities and not of a public nature. Again, this conclusion is adverse to the Wallbanks' defence.

Has there been a breach of article 1 (and article 14)?

91 Article 14 (discrimination) is not a freestanding provision but has to be read in conjunction with the recognition of the rights conferred by other articles. Therefore the material article is article 1 of the First Protocol which endorses the entitlement to the peaceful enjoyment of a person's possessions and prohibits depriving a person of his possessions, subject to certain qualifications. The word "possessions" has been considered by the European Court of Human Rights, in particular in the cases of *Marckx v Belgium* (1979) 2 EHRR 330 and *Sporrong and Lönnroth v Sweden* 5 EHRR 35. It applies to all forms of property and is the equivalent of "assets". But what is clear is that it does not extend to grant relief from liabilities incurred in accordance with the civil law. It may be that there are cases where the liability is merely a pretext or mechanism for depriving someone of their possessions by expropriation but that is not the case here. The liability is a private law liability which has arisen from the voluntary acts of the persons liable. They have no Convention right to be relieved of that liability. Nor do they have a Convention right to be relieved from the consequences of a bargain made, albeit some 200 years earlier, by their predecessors in title. They do not make any complaint under article 6 or complain about the fairness of these legal proceedings. They cannot complain that they are being discriminated against. The only reason why they are being sued is because they are the parties liable. This defence also fails. The submission that there should be a declaration of incompatibility likewise fails.

92 For the sake of completeness, it was clear that at all material times both they and their predecessors in title knew of the responsibility to repair or at least that it was asserted that they would be responsible if they acquired the title to the relevant land, an assertion which they have now admitted to be correct subject only to the Human Rights Act 1998. Further, they originally ran a case of waiver by the PCC which they have now accepted was rightly rejected. If they had had a legal defence it would have been recognised by the court and the action would have been dismissed. Their financial liability under the 1932 Act is not arbitrary. It arises from their failure to perform a civil private law obligation which they had voluntarily assumed.

The section 6(2) point

93 This point would only arise if I was wrong on all the preceding points. One therefore has to assume that the PCC is a public authority and the demand for payment is not of a private nature. In such circumstances,

subsection (2) creates an exception to the application of subsection (1). The words of exception relevant to this case are "the authority was acting so as to give effect to or enforce" provisions of primary legislation. The primary legislation is the 1932 Act. Incontrovertibly the PCC were seeking to give effect to and enforce provisions of that Act. On the above-stated assumption, the PCC's act in suing the Wallbanks comes squarely within the exception. Paragraph (b) of the subsection is to be contrasted with paragraph (a) which is manifestly intended to cover cases where the public authority did not have any alternative but to act as it did (i e it was compelled to do so). Paragraph (b), on the other hand, covers situations where the public authority was empowered by legislation to act as it did and the intention of the legislation, whilst leaving open a measure of discretion, was that it should use the power provided. For some unstated reason, the Court of Appeal treated only paragraph (a) as being relevant and this accounts for their mistaken decision on this point.

Conclusion

94 It follows that, far from making out all three of the necessary constituents in their defence, the defendants have made out none. Their defence accordingly fails and the appeal must be allowed. There is no need to consider the retrospectivity question.

LORD SCOTT OF FOSCOTE

Introduction

95 My Lords, the respondents, Mr and Mrs Wallbank, are the freehold owners of Glebe Farm, Aston Cantlow in Warwickshire. Glebe Farm, which consists of a farmhouse and about 179 acres of land, includes five fields amounting to just over 52 acres known, or formerly known, as Clanacre. The Clanacre fields, it is contended, were and remain rectorial property thereby constituting its owners for the time being lay rectors and subjecting them to the liability of paying for all and any necessary repairs to the chancel of St John the Baptist church, the parish church of Aston Cantlow.

96 The appellants, the parochial church council of Aston Cantlow are responsible for supervising the care, maintenance, preservation and insurance of the fabric of the church (see section 4(1)(ii)(b) of the Parochial Church Councils (Powers) Measure 1956) and have served notices on Mr and Mrs Wallbank requiring them to put the chancel in proper repair. The notices were served on 12 September 1994 and 23 January 1996 pursuant to section 2 of the Chancel Repairs Act 1932. The cost of the necessary repairs is put in the notices at £95,260-odd. Mr and Mrs Wallbank dispute their liability. This litigation has resulted.

The law on chancel repairs

97 A description, even a brief one, of the law on chancel repairs must, if it is to be comprehensible, start with mediaeval times when every parish had its parish priest, the "rector". The rector had, by virtue of his office, a number of valuable proprietary rights which, collectively, constituted his "rectory". These rights included the profits of glebe land and tithes, usually one-tenth of the produce of land in the parish. Responsibility for the repair

of the parish church was, absent some special custom to the contrary (see *Bishop of Ely v Gibbons* (1833) 4 Hagg Ecc 156), shared between the rector and the parishioners. The parishioners were responsible for repairing the part of the church where they sat, the western end of the church. The rector was responsible for repairing the chancel, the eastern end of the church. The rector's glebe land and tithes, the "rectory", provided both for his maintenance and a fund from which he could pay for chancel repairs.

98 The right of appointment to a rectory, the advowson, was an item of property transferable by conveyance and often in the hands of a lay person, typically the landowner who had built and endowed the church or his successors. But the appointee had to be a spiritual rector and, on appointment, would become entitled to the rectorial rights and subject to the chancel repair liability.

99 In the 300 years or so prior to the dissolution of the monasteries under Henry VIII a great number of advowsons were acquired by monasteries. A monastery, having acquired an advowson, would almost invariably appoint itself the rector and thereby appropriate to itself the valuable rectorial rights, the rectory. It would, of course, be a spiritual rector. The parish would, however, need a parish priest. So the monastery would appoint a deputy, a vicar, to fulfil that role, usually allocating to the vicar some part of the rectorial tithes or glebe. It seems, interestingly, never to have been suggested that the vicar, by virtue of the allocation to him of some part of the rectory thereby became liable for chancel repairs. Vicarial tithes or vicarial glebe did not carry that liability which remained with the rector.

100 On the dissolution of the monasteries under Henry VIII the property of religious houses, including their advowsons and the rectories they had appropriated, were compulsorily sold, impropriated, to lay institutions, such as Oxford and Cambridge colleges, and individuals. The lay institutions and individuals who acquired the rectories became lay rectors, or lay impropriators (the terms are synonymous) and, as such, subject to the chancel repair liability. The lay rector may have, and usually had, also acquired the advowson and thereby become the patron and entitled to appoint the vicar of the parish. A vicar, thus appointed, was no longer a deputy but held office in his own right. The obligation to repair the chancel lay on the lay rector in that capacity and not as owner of the advowson.

101 The proprietary rights acquired by lay rectors would have included the rectorial glebe and the rectorial tithes. These rights could be alienated and divided up. Many rectorial tithes were extinguished under Inclosure Awards made pursuant to Inclosure Acts. Under these Awards plots forming part of the common lands to be enclosed were allotted to lay rectors in lieu of their rectorial tithes. It is generally assumed that the allotted lands then took the place of the tithes as the lay rector's rectorial property (see para 2.11 of the Law Commission's Working Paper No 86 Transfer of land. Liability for Chancel Repairs (1983).

102 Tithes, other than those extinguished under Inclosure Awards, were converted into tithe rentcharges under the Tithe Act 1836 (6 & 7 Will 4, c 71). Tithe rentcharges, unlike their predecessor tithes, were charged on the land in respect of which the tithe had been payable and attracted the same chancel repair liability as had been attracted by the predecessor tithes—see

section 71 of the 1836 Act which subjected the rentcharges to "the same liabilities and incidents as the like estate in the tithes commuted". Over the next 100 years various further statutory changes were made until, finally, the Tithe Act 1936 abolished tithe rentcharges and replaced them with tithe redemption annuities. The annuities were payable to the Government and the owners of the rentcharges received Government stock in compensation for the extinction of their rights.

103 Section 31 of the 1936 Act and Schedule 7 to the Act dealt specifically with chancel repairs. As to liability for chancel repair arising from the ownership of tithe rentcharges (evidently on the footing that the tithe rentcharge had taken the place of the tithes as rectorial property) a part of the Government stock to be issued in respect of that rentcharge was to go to the diocesan authority to provide for the cost of future repairs to the chancel and the cost of insuring against damage by fire (section 31(2)). Subsections (3) and (4) of section 31 merit mention. They provided, in conjunction with section 21 of the 1936 Act and section 1 of the Tithe Act 1839 (2 & 3 Vict c 62), that where the tithe rentcharge and the land on which it was charged were in the same ownership, the rentcharge would be treated as abolished by merger but the land would be subject to the chancel repair liability "to the extent of the value of . . . the rentcharge" (section 1 of the 1839 Act). The chancel repair liability of the lay rector became thereby limited to the value of the rectorial property, the rentcharge, from which his office of lay rector was derived.

104 It is clear that a lay rectorship and liability for chancel repair could attach to a person who had become owner of a part only of the rectorial property. That that is so is implicit in the decision of this House in *Representative Body of the Church in Wales v Tithe Redemption Commission* [1944] AC 228, the "Welsh Commissioners" case. The issue, which arose out of the disestablishment in 1914 of the Welsh Church, was whether tithe rentcharges which, until abolished by the 1936 Act, had become temporally vested in the Commissioner of Church Temporalties in Wales (the Welsh Commissioners) pending their transfer to the University of Wales under provisions in the Welsh Churches Acts 1914 and 1919 had, while so vested, subjected the Welsh Commissioners to chancel repair liability. If the answer was "Yes", Government stock needed to be issued to the appropriate Welsh authority pursuant to the Tithe Act 1936. Their Lordships held that the Welsh Commissioners, so long as they held the tithe rentcharges, were lay impropriators and accordingly under a chancel repair liability. The issue, which applied to a number of parishes in Wales, was examined by reference to a particular parish, Llantwit Major in Glamorgan. Tithe rentcharges valued at £481 7s 11d, representing rectorial property of the parish, were held by the Dean and Chapter of Gloucester. Other tithe rentcharges, valued at £64 4s 2d and also representing rectorial property of the parish were held by a limited company, Plymouth Estates Ltd. Viscount Simon LC said, at p 239, that "Plymouth Estates Ltd . . . plainly and admittedly remain liable for chancel repair". He described the obligation of a rector to repair the chancel as "an obligation imposed by common law": p 240 and see also Lord Wright, at p 247. Lord Porter expressed himself to the same effect. He said, at p 249, "Prima facie, therefore, if the tithe rentcharge gets into the hands of a lay impropriator at anytime it is held

A subject to the liability to repair" and at p 250 that "impropriation exists where the property is in lay hands . . ."

105 But although it must now be regarded as settled law that an individual who becomes the owner of rectorial property of a parish becomes liable for chancel repair, there remain subsidiary issues which, in my opinion, are not settled. For example, the extent of the liability is not settled. Is the liability limited to the value of the rectorial profits the B ownership of which has attracted the office of lay rector and the consequent chancel repair liability or is it unlimited in amount? I have already referred to the effect of section 31(3) and (4) of the Tithe Act 1936 whereby, by reference to section 21 of the 1936 Act and section 1 of the Tithe Act 1839, the chancel repair liability of a lay rector attributable to his ownership of a tithe rentcharge which had merged in the land on which it C was charged was limited to the value of the rentcharge. In *Walwyn v Awberry* (1677) 2 Mod 254 a lay rector brought an action for trespass because the local bishop had sequestered his tithes on account of his failure to obey an admonition to repair the chancel of the parish church. The issue was whether sequestration was an available remedy. It was held that it was not. Atkins J, at p 258 who disagreed on the sequestration point, said that "it was agreed by all, that an impropriator is chargeable with the repairs of D the chancel; but the charge was not personal but in regard of the profits of the impropriation . . ." This suggests that the liability is limited to the amount of the profits. A similar suggestion appears in the Report of the Chancel Repairs Committee presented by the Lord Chancellor to Parliament in May 1930 (Cmd 3571). The chancel repair liability was described in para 4(a) as "an obligation imposed by the Common Law of E England, which annexes to the ownership of the rectory the duty of the rector to maintain the chancel of the church *out of the profits of the rectory*." (Emphasis added.) As to the position where the rectorial property has passed to several owners, the paragraph said "every several owner is, *to the extent of the profits derived by him from his piece of the property*, under the duty of maintaining the chancel." (Emphasis added.)

F 106 In *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, however, the Court of Appeal decided otherwise. The defendants were lay rectors of the parish of Wickhambrook by virtue of ownership of rentcharge of £39 11s 9d per year, a subdivided part of a tithe rentcharge of £120 per year. The cost of the necessary chancel repairs was estimated to be £123 12s 6d. It was this sum that the PCC sought to recover from the defendants. It was proved at trial that the total sum actually received by the G defendants from their ownership of the rentcharge was £50-odd. The trial judge, relying on passages in *Phillimore's Ecclesiastical Law* 2nd ed (1895), held that it was necessary to prove that the impropriator had received tithes or other profits belonging to the rectory sufficient to cover the cost of repair (p 423) and, accordingly, that the PCC's claim failed. He was reversed on appeal. Lord Hanworth MR after examining various reports of *Walwyn v Awberry* expressed the view that the case was an unsatisfactory authority on H which to found a limitation of a lay rector's chancel repair liability (p 437) and concluded that "the liability of a lay impropriator is personal, and is not limited to the amount of the receipts from the tithe". But he held that the defendants had a right of contribution from other owners of parts of the tithe rentcharge. Romer LJ agreed with Lord Hanworth MR, as too did

Eve J who added that "the result . . . does not appear to me to be reasonable or just". A

107 In the "Welsh Commissioners" case [1944] AC 228, 239, Viscount Simon LC, having referred to the chancel repair liability of Plymouth Estates Ltd, said that "It is not necessary for the purposes of the present appeal to discuss the difficult question of the extent of their possible responsibility, or whether *Wickhambrook Parochial Church Council v Croxford* was rightly decided." B

108 Counsel before your Lordships have not argued whether the *Wickhambrook* case was or was not rightly decided. But if Mr and Mrs Wallbank are liable as lay rectors, the question whether their liability should be limited to the profits they have received from the rectorial property may be open to them. The point is certainly still open in this House. C

109 A further point of law that cannot, in my opinion, yet be regarded as settled is whether each and every alienation by a lay rector of impropriatorial assets of the rectory necessarily makes the alienee a co lay rector and liable for chancel repairs. The point arose in *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, 594 where Wynn-Parry J held that the liability to repair the chancel "is not a charge on the rectorial property, but a personal liability imposed on the owner or owners for the time being of the rectorial property". and that "If there is more than one owner, each is severally liable". For reasons which will appear, this is not a point which can have any bearing on the present case but, none the less, the conclusion to which the judge came may be open to question. Is it really the case that on every disposition of any part of former rectorial property, no matter how small and no matter what may be the intentions of the parties, express or implied, regarding the assumption by the transferee of chancel repair liabilities, the transferee becomes willy-nilly by dint of inflexible legal principle a lay impropriator liable to chancel repairs? I doubt it. D E

The conveyancing history of Clanacre

110 At the time of the Inclosure Act 1742 and the Award of 1743, under which the common lands of Aston Cantlow were enclosed, Lord Brooke was the lay impropriator of the rectory of the parish church of Aston Cantlow. A recital to the Act so states. It appears from another recital to the Act that Lord Brooke was the owner of tithes and it appears from the terms of the Award that the impropriated property included glebe land. F

111 Under the Award Lord Brooke was allotted Clanacre. It was described as "one plot lying in Aston Cantlow . . . called Clanacre combining (containing) . . . 52 acres two roods and 21 perches". Details of its boundaries were given so that there could be no doubt as to the identity of what had been allotted. G

112 It is unclear from the extract of the Award contained in the papers before your Lordships on account of what rectorial rights Clanacre was allotted. It may have been allotted on account of Lord Brooke's tithes or it may have been allotted on account of glebe comprised in the common lands that were being enclosed. But it is not in dispute that one way or another Clanacre became, by substitution, rectorial property. Certainly all Lord Brooke's tithes over the common lands were extinguished by the Act and the Award. H

A **113** At some time between 1743 and 1875 Lord Brooke, or his successors, sold Clanacre together with the rest of what later became Glebe Farm. Whether the sale was of all Lord Brooke's impropriated property or of only part of it is not apparent from the papers in evidence in the case.

114 The first readable conveyance dealing with Clanacre is a conveyance of 21 October 1918 under which the vendor, Thomas Wood, conveyed to two purchasers, both with the surname Terry, Glebe Farm and
B its 179 odd acres including the 52-odd Clanacre acres. The habendum to the Conveyance says that the purchasers were to hold the land "in fee simple in equal shares as tenants in common subject primarily and in priority to the other hereditaments charged therewith to the repairs of the Chancel of Aston Church". The "subject to" provision indicates the strong likelihood that the vendor, Thomas Wood, who must have been a lay impropriator, was selling
C part of the rectorial property but retaining other parts. It seems to me unlikely, given the content of this provision, that Mr and Mrs Wallbank could succeed in claiming from Thomas Wood or his successors a contribution towards any chancel repairing liability that rests on them by virtue of their ownership of Clanacre.

115 In 1970 Mr and Mrs Coulton, Mrs Wallbank's parents, purchased Glebe Farm and the 179 acres from Herbert Terry & Sons Ltd, no doubt the
D successors of the 1918 Terry purchasers. Clause 2 of the Conveyance to the Coultons said that the property was conveyed "subject to the liability for the repair of the Chancel of Aston Church . . . so far as the same affects the property hereby conveyed and is still subsisting and capable of being enforced". And under two deeds of gift dated respectively 21 March 1974 and 1 May 1986 Glebe Farm and the bulk of the 179 acres, including all the
E Clanacre fields, were conveyed to Mrs Wallbank by her parents. Mrs Wallbank later placed the property in the joint names of herself and her husband.

116 It is plain from this conveyancing history that Mr and Mrs Wallbank acquired Glebe Farm, including Clanacre, with the knowledge that ownership might carry with it a liability to pay for repairs to the chancel of the parish church.

F

The Chancel Repairs Act 1932

117 The Chancel Repairs Act 1932 was passed in consequence of the inadequacies of enforcement procedure revealed by litigation between Hauxton PCC and a Mr Stevens. Pre 1932 the enforcement of chancel repair liability was primarily a matter for ecclesiastical courts. Proceedings for the
G issue of an admonition requiring the alleged lay rector to carry out the repairs had to be issued in the consistory court. It had been established by dicta in, if not by the ratio of, *Walwyn v Awberry* 2 Mod 254 that ordinary civil law enforcement procedures were not available. If the consistory court issued the admonition and it was not obeyed, the next step would be either a decree of excommunication or a transfer of the proceedings to the High Court in order for proceedings for committal for contempt of court to be
H brought, or both. The unfortunate Mr Stevens, having unsuccessfully disputed his liability, ignored the admonition issued by the consistory court. He ended up in prison for contempt under a committal order made in the King's Bench Division. He obtained his release only on undertaking to carry out the requisite repairs.

118 Such a disproportionate remedy was obviously unsatisfactory and section 2 of the 1932 Act authorised PCCs to serve notices to repair on individuals alleged to be liable for chancel repairs. If such a notice is not complied with, the PCC can commence proceedings in the ordinary courts to recover the sum required to put the chancel in proper repair. The court, if satisfied that the defendant would, but for the 1932 Act, "have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court", can give judgment against the defendant for the sum representing the cost of the necessary repairs. The judgment would be enforceable like any other money judgment. Hence the notices served by the PCC on Mr and Mrs Wallbank and the litigation that followed Mr and Mrs Wallbank's denial of liability.

The litigation

119 The pleadings in the case confirmed that there was a dispute as to Mr and Mrs Wallbank's liability to bear the cost of the chancel repairs. On 29 September 1999 the case came before Master Bragge on what I take to have been a summons for directions. On this summons Master Bragge directed that two preliminary issues be tried. Each related to contentions by Mr and Mrs Wallbank as to why they were not liable. One of these contentions was abandoned at trial. The other is the issue that has found its way to your Lordships' House. But before reciting its terms it is important to notice an important concession made by Mr Wallbank, who appeared in person, and on the basis of which the master directed the trial of the preliminary issues. The concession is recorded in the order in the following terms:

> "And upon the second defendant on his own behalf and on that of the first defendant stating that he agreed and accepted that the defendants (and each of them) as the joint freeholders of Glebe Farm Aston Cantlow Warwickshire are and at all material times have been the lay rector and are personally liable for the repair of the chancel of the church of St John the Baptist Aston Cantlow Warwickshire ('the church') if and to the extent that the liability is enforceable and/or exists by reason of the preliminary issues particularised below."

This concession very greatly reduced the number of issues relating to chancel repair liability that Mr and Mrs Wallbank could raise.

120 The preliminary issue that was, and is, persisted in was subsequently amended and in its amended form is as follows:

> "Whether having regard to the provisions of the European Convention on Human Rights, a co-rector is liable to repair the chancel of the church or otherwise to meet the costs of the said repairs by reason of the provisions of the Chancel Repairs Act 1932 and the common law."

121 The preliminary issue was tried before Ferris J. It was tried after the Human Rights Act 1998 had been passed but before 2 October 2000, the date on which the Act was to come into effect. In paragraph 9 of his judgment Ferris J described the argument addressed to him by counsel for Mr and Mrs Wallbank as having two main elements, namely,

A "(i) that English law is not yet settled in deciding that a lay rector is liable for chancel repairs, at any rate where the rectorial property owned by that lay rector consists of part only of a larger parcel of land allotted under an inclosure award in lieu of tithes or other rectorial property; and (ii) that it should be decided that such a lay rector is not liable because to hold to the contrary would involve a contravention of one or more of the rights declared by the Convention."
B

122 I find some difficulty in reconciling the first argument with Mr Wallbank's concession as recited in Master Bragge's order. That, perhaps, does not matter because Ferris J, following *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417 and *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585 held that it was settled law that an
C individual who had come into ownership of part only of the rectorial property became liable to the full burden of the chancel repair liability. In the Court of Appeal [2002] Ch 51, 58, para 15, Sir Andrew Morritt V-C, relying on the same authorities, agreed and held, in addition, that the liability "is not limited or proportioned to the value or fruits of the benefice: its sole measure is the cost of necessary repairs". This was what had been held in the *Wickhambrook* case, a case by which the Court of Appeal in the
D present case was bound. This is not a point which has been argued before your Lordships in the present appeal nor, in my opinion, is it a point which arises under the preliminary issue. It is a point that may re-emerge if the quantum of the cost of repairs for which the Wallbanks are liable has to be litigated. For the present I want to say no more about it than Viscount Simon LC said in the "Welsh Commissioners" case, namely, that it is a
E difficult question and that whether the *Wickhambrook* case was rightly decided is open to debate at least in this House.

123 As to the *Chivers & Sons Ltd v Air Ministry* point (see paragraph 16 of Sir Andrew Morritt V-C's judgment) it cannot avail the Wallbanks. The 1918 Conveyance plainly intended to make the Terrys, the transferees, co-rectors. Otherwise there would have been no mention of the chancel repair liability.

F **124** As to the second argument for the Wallbanks to which Ferris J referred, the argument based on the 1998 Act, the judge held that there was no breach of article 1 of the First Protocol. The Wallbanks' liability to repair the chancel was an incident of their ownership of the Clanacre fields and the enforcement of that liability by those entitled to enforce it could not be regarded as a deprivation of their possessions. Their
G possessions, he pointed out, were always liable to such enforcement. Ferris J, therefore, answered in the negative the question posed in the preliminary issue.

125 The Court of Appeal disagreed with Ferris J on the 1998 Act point. They held, first, that the PCC was a core "public authority" within the meaning of that expression in section 6 of the Act. Section 6(1) provides that "It is unlawful for a public authority to act in a way which is incompatible
H with a Convention right." They held, alternatively, that the PCC's function in enforcing against the Wallbanks their chancel repair liability was a function "of a public nature". Section 6(3)(b) provides that the expression "public authority" includes "any person certain of whose functions are functions of a public nature" and section 6(5) says that "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". A

126 Having reached conclusions under which the PCC's attempts to enforce the chancel repair liability against the Wallbanks were acts of a public authority for section 6 purposes, the question was whether the enforcement was incompatible with a Convention right. The Court of Appeal first addressed itself to article 1 of the First Protocol and held that the liability to defray the cost of chancel repairs was "inescapably" a form of taxation. The reasoning was that "a private individual who has no necessary connection with the church [was being] required by law to pay money to a public authority for its upkeep": para 40. The Court of Appeal identified in Strasbourg jurisprudence 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" (paragraph 44), held that the liability for chancel repair was a tax which operated entirely arbitrarily "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 . . . in almost any amount" (para 45), and held that the "tax" accordingly violated article 1 of the First Protocol. B C D

127 The Court of Appeal held, also, that the way in which the chancel repair liability operated discriminated, impermissibly and in breach of article 14, between the Wallbanks, who were subject to the liability, and other landowners in the parish who were not.

128 The following issues therefore arise for decision on this appeal. (1) Is the PCC a "core" public authority for the purposes of section 6 of the 1998 Act? (2) If the PCC is not a core public authority, is its function in enforcing chancel repair liability a function "of a public nature"? (3) If the PCC's enforcement of chancel repair liability is a function of a public nature, does the enforcement infringe article 1 of the First Protocol to the Convention? (4) Or does it infringe article 14 of the Convention? E

Is the PCC a core public authority? F

129 I have had the advantage of reading in advance the opinions of my noble and learned friends, Lord Hope of Craighead and Lord Rodger of Earlsferry. Each has concluded that a PCC is not a core public authority. I am in complete agreement with their reasons for coming to that conclusion and cannot usefully add to them. I, too, would hold that a PCC is not a core public authority. G

Is the enforcement of chancel repair liability a function of a public nature?

130 On this issue my noble and learned friends have come to the conclusion that the nature of enforcement of chancel repair liability is private. I have found this a difficult question but at the end have come to the opposite conclusion. I agree with Lord Hope that the answer to the question, whether an authority, not being a "core" public authority, is, when exercising a particular function, exercising a function of a public nature, must depend upon the facts of the particular case (paragraph 63 of his opinion). The important facts and matters relevant to the question in the present case seem to me, in no particular order of importance, to be the H

following. (1) The parish church is a church of the Church of England, a church by law established. (2) It is a church to which the Anglican public are entitled to have recourse, regardless of whether they are practising members of the church, for marriage, for baptism of their children, for weddings, for funerals and burial, and perhaps for other purposes as well. (3) Members of other denominations, or even other religions, are, if parishioners, entitled to burial in the parish churchyard. (4) The church is, therefore, a public building. It is not a private building from which the public can lawfully be excluded at the whim of the owner. (5) The PCC is corporate and its functions are charitable. Its members have the status of charity trustees. Charitable trusts are public trusts, not private ones. (6) A decision by a PCC to enforce a chancel repairing liability is a decision taken in the interests of the parishioners as a whole. It is not taken in pursuit of any private interests. If it were so taken, it would I think be impeachable by judicial review.

131 Lord Hope has said that the liability of the lay rector to repair the chancel arises as a matter of private law from the ownership of glebe land: paragraph 71 of his opinion. I would respectfully question whether the adjective "private" is apt. In the *Welsh Commissioners* case [1944] AC 228 Sir Walter Monckton KC for the appellants in his submissions to their Lordships commented on the fact that the Welsh Churches Act 1914 had made no express provision for a tribunal to take the place of the consistory court in enforcing chancel repair and put to their Lordships that "Perhaps the Attorney General might have dealt with the matter as a public right": p 234. There was no recorded dissent and I respectfully suggest that Sir Walter's comment was soundly based. The liability of a lay rector is a personal liability arising from his ownership of impropriated property and is imposed by common law (see Viscount Simon LC, at p 240). But obligations imposed by common law are not necessarily private law obligations. Whether they are so or not must depend on those to whom they are owed. The chancel repair obligations are not owed to private individuals. Private individuals cannot release them. Section 52 of the Ecclesiastical Dilapidations Measure 1923 provided a procedure whereby lay rectors liable for chancel repairs could compound their liability and thereby obtain a release from it. The procedure required there to be consultation with the PCC of the parish, the obtaining of approval from the Diocesan Dilapidations Board and payment of the requisite sum to the Diocesan Authority. The sum paid becomes trust money (see subsection (5)). These provisions have an unmistakable public law flavour to them. The chancel repair obligations resting on a lay rector are not, in my opinion, private law obligations.

132 In my opinion, therefore, the question posed under this issue should be answered in the affirmative. It follows, if that is right, that in enforcing chancel repair liability, a PCC must not act in a manner incompatible with a Convention right. Is enforcement of chancel repair liability against Mr and Mrs Wallbank an infringement of their rights under article 1 of the First Protocol?

133 The terms of article 1 have been set out by Lord Hope in paragraph 66 of his opinion. I need not repeat that exercise. The question is whether the enforcement of the chancel repair liability constitutes a deprivation of the lay rector's possessions. The Court of Appeal prayed in

aid the analogy of taxation in order to justify the proposition that the relevant deprivation was of the Wallbanks' funds. It was their personal funds of which they were to be deprived, not Glebe Farm. For my part, although I disagree with the categorisation of the liability as a form of taxation (see paragraph 40 of the Court of Appeal's judgment) I would accept the analysis. The enforcement of the liability is indeed an attack on the Wallbanks' personal funds but it does not on that account infringe article 1 any more than a claim to enforce any other pecuniary liability does so. It is here, perhaps, that the taxation analogy does become relevant. Taxation is a levy imposed by a state, or perhaps by some core public authority authorized by the state to impose the levy, either on the public generally or on some identified section of the public. In *Black's Law Dictionary*, 6th ed (1990), "tax" is described as "a charge by the government", as a pecuniary burden laid upon individuals or property to support the government, and [being] a payment exacted by legislative authority" and whose "essential characteristics . . . are that it is not a voluntary payment or donation but an enforced contribution, exacted pursuant to legislative authority". It may be that the obligation imposed on parishioners by the common law to pay tithes to the rector of the parish could, although not imposed by government or by the legislature, reasonably be regarded as an obligation to pay a tax. But the obligation of the recipient of the tithes to repair the chancel of the parish church could not, in my opinion, be so described. When tithe rentcharge took the place of tithes, the obligation to pay the tithe rentcharge might similarly have been regarded as an obligation of a taxation character. But the obligation to repair the chancel of the church resting on the recipient of the tithe rentcharge could not be so described. It remained a quid pro quo for the receipt of the tithe rentcharge. The substitution under an Inclosure Award of land for tithes could no more have changed the nature of the obligation to repair the church chancel than the substitution of tithe rentcharge for tithes could have done. The taxation analogy drawn by the Court of Appeal is, in my respectful opinion, misplaced.

134 The chancel repair liability satisfies, in my opinion, the requirements of the article 1 exception: it is a liability created by the common law, it operates in the narrow public interest of the parishioners in the parish concerned and in the general public interest in the maintenance of churches. It is created by common law and is subject to the incidents attached to it by common law. And in the case of Mr and Mrs Wallbank they acquired the rectorial property and became lay rectors with full knowledge of the potential liability for chancel repair that that acquisition would carry with it. I can see no infringement of (or incompatibility with) article 1 produced by the actions of the PCC in enforcing that liability.

135 Nor, in my opinion, do Mr and Mrs Wallbank have any case of infringement of article 14. The comparators for article 14 purposes cannot possibly be persons who are not lay rectors. A person who is sued for £1,000 that he owes is not discriminated against for article 14 purposes because people who do not owe £1,000 are not similarly sued. A person who builds in breach of planning permission and has proceedings taken against him by the local planning authority is not discriminated against for article 14 purposes because a person who builds and has obtained planning permission is not sued. The comparators are not apt. The apt comparator in

the present case would be a co-lay rector who was liable for chancel repairs to the Aston Cantlow church but on whom no 1932 Act notice had been served. There is no case here of article 14 discrimination.

136 For these reasons I would allow the appeal and restore the declaration and order made by Ferris J.

137 A final point before your Lordships was whether, if the PCC's enforcement of the chancel repair liability had constituted an infringement of Mr and Mrs Wallbank's Convention rights, the PCC could have relied on section 6(2)(a) or (b) of the 1998 Act. As to (a), it was contended that, as a result of section 2 of the 1932 Act, the PCC could not have done otherwise than enforce the chancel repair liability. In my opinion, this contention could not be sustained. Section 2 confers a power. It does not impose a mandatory duty. The PCC could have decided not to enforce the repairing obligation. They could have so decided for a number of different reasons which, in particular factual situations, might have had weight. They might, for example, have recommended the deconsecration of the church and its sale for conversion into a dwelling. They might have taken into account excessive hardship to Mr and Mrs Wallbank in having to find £95,000. Trustees are not always obliged to be Scrooge. Section 2 is not, in my opinion, a provision of primary legislation capable of engaging section 6(2)(a) of the 1998 Act. As to (b), it is not section 2 of the 1932 Act that produces the alleged incompatibility with Convention rights. Section 2 merely provides enforcement machinery for the obligation created by the common law. If section 2 had never been enacted the allegedly Convention infringing obligation to pay for chancel repairs would still have been present. None the less, if the imposition by the common law of the obligation constitutes an infringement of Convention rights so, too, the use of section 2 for the purpose of enforcement would constitute an infringement. So I respectfully agree with my noble and learned friends, Lord Nicholls of Birkenhead and Lord Hobhouse of Woodborough, that the PCC would be entitled to rely on section 6(2)(b).

LORD RODGER OF EARLSFERRY

138 My Lords, in 1986 Mrs Gail Wallbank became the owner of the freehold of Glebe Farm near the village of Aston Cantlow in Warwickshire. Four years later she conveyed the property into the joint names of herself and her husband. As owners of Glebe Farm Mr and Mrs Wallbank are the lay rectors or impropriators of the parish church and, as such, potentially liable to pay the cost of repairs to the chancel. By 1990 the chancel was in disrepair. At that time the Parochial Church Council ("the PCC") did not know about the conveyance into joint names and accordingly it simply asked Mrs Wallbank to pay for the repairs. She disputed the liability. In 1994 the PCC, as the responsible authority, served notice on Mrs Wallbank under section 2(1) of the Chancel Repairs Act 1936, calling on her to repair the chancel. When she still refused to do so, the PCC began these proceedings under section 2(2) of the 1936 Act to recover over £95,000, the estimated cost of the repairs. Subsequently, the PCC joined Mr Wallbank as a defendant.

139 My noble and learned friend, Lord Scott of Foscote, has described the origins and development of the liability for chancel repairs as well as the way in which that liability attaches to the owners of Glebe Farm. The law as

it applies today can scarcely be regarded as satisfactory and may well cause real hardship to lay rectors who are called on to pay the cost of repairs to the chancel. Not surprisingly, the Law Commission have made proposals for the abolition of the liability over a period of time: Liability for Chancel Repairs (Law Com No 152, (1985)). Not altogether surprisingly either, Parliament has not yet acted on those proposals since abolition without compensation would cause significant financial harm to many ancient parish churches throughout England. This case highlights both aspects of the problem.

140 Mr and Mrs Wallbank do not now dispute that, absent the Human Rights Act 1998, they would be liable to pay the reasonable cost of the necessary repairs to the chancel. They defend the proceedings, however, on the basis that the PCC is a "public authority" which has acted unlawfully in terms of section 6(1) of the 1998 Act by requiring them to pay the sum in question and so interfering with their peaceful enjoyment of their possessions in contravention of article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms.

141 The demand for payment was made and the action begun long before the 1998 Act was even thought of. And indeed Ferris J heard argument and delivered judgment at first instance some months before the Act came into force. By the time of the hearing in the Court of Appeal the 1998 Act was in force and the PCC conceded that, by virtue of sections 7(1)(b) and 22(4), Mr and Mrs Wallbank were entitled to rely on their Convention right. In their judgment delivered by Sir Andrew Morritt V-C, the Court of Appeal accepted the concession: [2002] Ch 51, 56, para 7. In its written case in this House the PCC indicated an intention to withdraw the concession. When the appeal opened, however, Mr George indicated that he did not intend to argue the point. This may have been, in part at least, because the Church authorities are anxious to have the substantial issue resolved. In these circumstances the House heard no argument on what the cases show to be a difficult area of the law. I therefore prefer to express no view on the point.

142 Differing from the decision of Ferris J, the Court of Appeal disposed of the case by holding that the liability of Mr and Mrs Wallbank, as lay rectors, to meet the cost of the chancel repairs was unenforceable by reason of the 1998 Act. In that way the Court of Appeal lifted the burden from lay rectors like Mr and Mrs Wallbank, albeit at the expense of PCCs like the one at Aston Cantlow. The question for the House is whether the Court of Appeal were right to take this momentous step on the basis of the 1998 Act.

143 In reaching their conclusion the Court of Appeal held that the PCC was indeed a "public authority" in terms of section 6 of the 1998 Act. While a number of other issues were argued in the hearing of the appeal to your Lordships' House, none of them arises unless the PCC is indeed to be regarded as a public authority for this purpose.

144 Section 6 provides, inter alia:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right."
>
> "(3) In this section 'public authority' includes . . . (b) any person certain of whose functions are functions of a public nature . . ."
>
> "(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."

The use of the word "includes" in subsection (3) shows that there are public authorities other than persons only certain of whose functions are of a public nature. So there must be persons who are public authorities because all their functions are of a public nature. These are sometimes referred to as "core" public authorities, as opposed to "hybrid" authorities, only certain of whose functions are public and some of whose acts may be private in nature. In view of my overall conclusion on the appeal I have not found it necessary on this occasion to explore the significance of the distinction between the two kinds of public authorities.

145 In deciding that the PCC was to be regarded as a public authority, the Court of Appeal first noted that in the area of judicial review the cases at present draw a conceptual line between functions of public governance and functions of mutual governance. But the Court of Appeal could detect no surviving element of mutuality or mutual governance as between the impropriator and the church in the modern liability for chancel repairs: the relationship in which the function arose was created by a rule of law and a state of fact which were independent of the volition of either of them: [2002] Ch 51, 62–63, para 34. In the hearing before the House Mr George did not argue the contrary. The Court of Appeal continued, at p 63, para 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 section 6 that its acts, to be lawful, must be compatible with the rights set out in Schedule 1 to the Human Rights Act 1998."

The Court of Appeal's main conclusion therefore was that the PCC was a core public authority. Alternatively, it was a hybrid authority, some of whose functions were public—among them enforcing the impropriators' obligation to pay for chancel repairs.

146 There is no doubt that, in terms of section 2(1) of the Chancel Repairs Act 1932, the PCC is an authority—more precisely, "the responsible authority". For present purposes, however, the question is whether the PCC should be regarded as a public authority in terms of section 6. Parliament has chosen to use a composite phrase "public authority". There are therefore distinct dangers in interpreting it by breaking it down and examining the two components separately. Be that as it may, the Court of Appeal considered each of the two elements in turn.

147 They first held that the PCC was an "authority" for purposes of section 6 because it had powers which private individuals do not possess to determine how others should act—the relevant example being its power to serve a notice to repair which has statutory force. That is a somewhat imprecise criterion for identifying an authority, however. When a police officer arrests an offender, his act is that of a public "authority" irrespective

of whether or not the arrest is one that a private citizen could have effected. Moreover Parliament can, if it wishes, invest private individuals with quite remarkable powers over their fellow citizens. For instance, section 391 of the Burgh Police (Scotland) Act 1892 (55 & 56 Vict c 55), now repealed, provided:

> "It shall be lawful for any householder, personally or by his servant, or by a constable of police, to require any street musician or singer to depart from the neighbourhood of the house of such householder; and every person who shall continue to sound or play any instrument, or sing in any street, at any time after being so required to depart, shall be liable to a penalty not exceeding twenty shillings."

A paterfamilias standing in evening dress at the entrance to his New Town residence could address an order to an organ-grinder to depart from the vicinity, or his butler could issue it from the top of the area steps. In either event, the organ-grinder would commit an offence under the section if he continued to play in the street. But if, instead, they had summoned a constable who had issued the same instruction with exactly the same effect, he would unquestionably have been an "authority"—and indeed a "public authority". The existence or non-existence of the equivalent statutory power in the householder and his servant would not be germane to the constable's status. So the fact that no individual possesses the power to issue a statutory repair notice with specific effects on the lay rector cannot in itself be sufficient to show that the PCC is to be regarded as an authority for the purposes of section 6.

148 The Court of Appeal drew attention to three features which they thought pointed to the PCC being a "public" authority for purposes of section 6: the PCC is created and empowered by law; it forms part of the church by law established and its functions include the enforcement through the courts of a common law liability to maintain the chancel resting upon persons who need not be members of the Church.

149 It is necessary to look a little more closely at the Court of Appeal's observation that the PCC "is created and empowered by law". The origins of PCCs can be traced back to the movement that began in the 19th century for greater self-government and better representation of the laity in the Church of England. Part of the problem was that, while the Convocations of Canterbury and York could pass canons which were binding on the clergy, any wider legislation had to be by Act of Parliament and Parliament passed only relatively few of the Acts for which the Church asked. In 1916 a special committee set up to look into the question recommended the formation of a Church Council with power to legislate on ecclesiastical matters. Eventually, after further work by another committee, the necessary scheme was approved by the Convocations of Canterbury and York. Both Convocations adopted identical addresses which were presented to King George V on 10 May 1919. The text is to be found in the Acts of the Upper and Lower Houses, Convocation of Canterbury, 6 May 1919, Upper House, *Official Year Book of the Church of England 1920*, p 193. Attached to the addresses was an appendix (*Official Year Book of the Church of England 1921*, p 16) setting out the constitution of what was now called the National Assembly of the Church of England. Paragraph 17 of the constitution provided that, before entering on any

other legislative business, the Assembly should make further provision for the self-government of the Church by passing through the Assembly two measures, the second being to confer "upon the Parochial Church Councils constituted under the Schedule to this Constitution such powers as the Assembly may determine."

150 The necessary machinery for giving Assembly measures legal effect was created later that year when Parliament passed the Church of England Assembly (Powers) Act 1919. Under section 4, measures passed by the Assembly and submitted to the Ecclesiastical Committee of Parliament would, on being approved and receiving the Royal Assent, have the force and effect of an Act of Parliament. In accordance with that procedure, the National Assembly proceeded to pass the Parochial Church Councils (Powers) Measure 1921. The Preamble duly records that the measure was passed to fulfil a requirement of the constitution of the National Assembly to

> "make further provision for the self-government of the Church by passing through the Assembly Measures inter alia for conferring on the Parochial Church Councils constituted under the Schedule to such Constitution such powers as the Assembly may determine."

151 As the Preamble shows, just like the National Assembly itself, the PCCs were actually constituted when the scheme, comprising the constitution of the National Assembly and the schedule of rules for the representation of the laity, was approved by the Convocations of Canterbury and York. The function of the 1921 Measure was, accordingly, not to constitute or "create" the PCCs but to confer powers on them. The same division survives today. The rules for the representation of the laity, including those relating to PCCs, are to be found in Schedule 3 to the Synodical Government Measure 1969, while the powers of PCCs are now in the Parochial Church Council (Powers) Measure 1956. Like section 3 of the 1921 Measure, section 3 of the 1956 Measure provides for the PCC to be a body corporate. Section 2 of the 1921 Measure made it "the primary duty of the council in every parish to co-operate with the incumbent in the initiation and development of Church work both within the parish and outside", while section 2 of the 1956 Measure, which was inserted by section 6 of the 1969 Measure, confers rather more elaborate general functions on the council. I come back to that section shortly.

152 On closer examination, therefore, the process by which the PCCs were constituted and received their powers is really very different from the way in which a public body such as the Equal Opportunities Commission is created and given its powers by statute. In a case of that kind, the fact that the body owes both its existence and its powers to statute may well indicate that it has been called into existence to carry out some function that relates to the government of the country in a broad sense. By contrast, the PCCs were not constituted by statute but by the Church. They then became bodies corporate and received their powers not by virtue of an Act of Parliament but by virtue of an Assembly Measure, having the force and effect of an Act of Parliament. These factors suggest that, in reality, PCCs were constituted by the Church to carry out functions to be determined by the National Assembly, later the General Synod, of the Church.

153 The Court of Appeal pointed next to the PCC being part of the Church by law established. In his submissions on behalf of Mr and Mrs Wallbank Mr Beloff embellished this argument. The Church of England—with Her Majesty the Queen at its head, with bishops appointed by the Queen on the recommendation of the Prime Minister, with the legislation of General Synod receiving the Royal Assent and having the force and effect of an Act of Parliament and with the civil power being available to enforce the judgments of its courts—was so woven into the fabric of the state that it should be regarded as a core public authority for purposes of section 6. Then, since "the parish is the basic building block of the church" (*Hill, Ecclesiastical Law*, 2nd ed, p 74), the PCC too should be regarded as a core public authority—whatever might be its precise functions in terms of section 2 of the 1956 Measure.

154 I would reject that argument. In this case the House is not concerned with any theological doctrine of establishment such as gave rise to one of the issues in *General Assembly of the Free Church of Scotland v Lord Overtoun* [1904] AC 515. Mr Beloff's argument centred, rather, on the general position of the Church of England in English law. The juridical nature of the Church is, notoriously, somewhat amorphous. The Church has been described as "an organised operative institution" or as "the quasi corporate institution which carries on the religious work" of the Church of England: *In re Barnes; Simpson v Barnes (Note)* [1930] 2 Ch 80, 81. Whether or not such an institution itself could ever count as a public authority in terms of section 6, I see no basis upon which a body within the Church, which would not otherwise be regarded as a public authority, could be impliedly invested with that character simply by reason of being part of the wider institution.

155 On the other hand, the 1956 Measure passed by the National Assembly of the Church casts light on the nature of the functions of a PCC. Under section 2(1) its duty is to consult with the minister on matters of general concern and importance to the parish. By section 2(2) the PCC's general functions include:

> "(a) co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical; (b) the consideration and discussions of matters concerning the Church of England or any other matters of religious or public interest, but not the declaration of the doctrine of the Church on any question; (c) making known and putting into effect any provision made by the diocesan synod or the deanery synod, but without prejudice to the powers of the council on any particular matter; (d) giving advice to the diocesan synod and the deanery synod on any matter referred to the council; (e) raising such matters as the council consider appropriate with the diocesan synod or deanery synod."

In addition to these general functions, by virtue of section 4 the PCC is given powers, duties and liabilities which formerly vested in the churchwardens. These focus very much on the parish church and its affairs. In particular, under section 4(1)(b) the PCC has powers, duties and liabilities with respect to the care, maintenance, preservation and insurance of the fabric of the church and of its goods and ornaments. By section 7(ii) the PCC has power

A to levy and collect a voluntary church rate for any purpose connected with the affairs of the parish church.

156 The key to the role of the PCC lies in the first of its general functions: co-operation with the minister in promoting in the parish the whole mission of the Church. Its other more particular functions are to be seen as ways of carrying out this general function. The mission of the Church is a *religious* mission, distinct from the secular mission of B government, whether central or local. Founding on scriptural and other recognised authority, the Church seeks to serve the purposes of God, not those of the government carried on by the modern equivalents of Caesar and his proconsuls. This is true even though the Church of England has certain important links with the state. Those links, which do not include any funding of the Church by the government, give the Church a unique position C but they do not mean that it is a department of state: *Marshall v Graham* [1907] 2 KB 112, 126, per Phillimore LJ. In so far as the ties are intended to assist the Church, it is to accomplish the Church's own mission, not the aims and objectives of the Government of the United Kingdom. The PCC exists to carry forward the Church's mission at the local level.

157 Against that background the adjective "private" is not perhaps the one that springs most readily to mind to describe the functions of a PCC in D the Church of England either generally or as compared, for instance, with those of a church council in the Methodist Church. It might therefore be tempting to conclude that the PCC's functions must be "public" and that the PCC must itself be a "public" authority for the purposes of the 1998 Act. At this point it becomes necessary to look more closely at the meaning of the composite expression "public authority" in section 6. This in turn takes one E back behind the Act to the Convention itself.

158 The "High Contracting Parties" to the Convention were "the governments signatory" to the Convention, more particularly "the governments of European countries" having certain common characteristics. In the fourth recital to the Convention they reaffirmed their profound belief in those rights and freedoms which are the foundation of justice and peace in the world and which are best maintained by a common F understanding and observance of the human rights upon which they depend. The governments gave concrete expression to the beliefs and aspirations recorded in the recitals by undertaking in article 1 to secure to everyone within their jurisdiction the rights and freedoms set out in section 1 of the Convention. It can reasonably be inferred from the terms of the recitals and article 1 that the freedoms, and the rights on which they depend, relate to the G powers and responsibilities of the governments which are parties to the Convention.

159 That inference is confirmed by article 34 which provides that the European Court of Human Rights ("the European Court")

> "may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a H violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

I respectfully agree with the Court of Appeal [2002] Ch 51, 62, para 33, that, taken together, articles 1 and 34 assume the existence of a state which stands

distinct from persons, groups and non-governmental organisations. I would go further: the reference in article 1 to the rights and freedoms defined in section 1 of the Convention only makes sense if the state in question is exercising a range of functions which are, in a broad sense, governmental—and to which the rights and freedoms in section 1 can therefore relate. Long ago, the functions of government were usually confined to defending the realm and keeping the peace. Nowadays, in addition, they commonly cover such matters as education, health and the environment. The exact range of governmental power will vary, of course, from state to state, depending on the history of the particular state and the political philosophy of its government. Similarly, the distribution of governmental power will depend on the constitutional arrangements of the individual states. In some, the central government will retain most functions, in others power will be shared on some kind of federal system, while, in most at least, some functions will be allotted to local or community bodies. Irrespective of these and other possible permutations, under article 1 of the Convention the states parties are responsible for securing that all bodies exercising governmental power within their jurisdiction respect the relevant rights and freedoms. This approach underlies the admissibility decision of the Fourth Chamber of the European Court in *Ayuntamiento de Mula v Spain* Reports of Judgments and Decisions 2001-I, p 531.

160 The obligation under article 1 has bound the United Kingdom ever since the Convention came into force. Since 1966 individuals have been able to bring proceedings in Strasbourg to ensure that the United Kingdom complies with that obligation. Prima facie, therefore, when Parliament enacted the 1998 Act "to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights", the intention was to make provision in our domestic law to ensure that the bodies carrying out the functions of government in the United Kingdom observed the rights and freedoms set out in the Convention. Parliament chose to bring this about by enacting inter alia section 6(1), which makes it unlawful for "a public authority" to act in a way that is incompatible with a Convention right. A purposive construction of that section accordingly indicates that the essential characteristic of a public authority is that it carries out a function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs.

161 Mr Beloff accepted, of course, that, in order to achieve the government's declared aim of bringing rights home, in the legislation which it placed before Parliament the term "public authority" must have been intended to include all bodies that carry out a function of government that would engage the responsibility of the United Kingdom in Strasbourg. But, he said, that was simply a minimum. The government and, more particularly, Parliament could well have intended to go further and to include other public bodies, even though their acts would not engage the international responsibility of the United Kingdom. It would therefore be wrong to limit the scope of "public authority" in section 6 to bodies exercising a governmental function of the state, however loosely defined. Mr Beloff could not point to any authoritative statement showing that Parliament had intended the 1998 Act to have this wider effect. But he argued that, if Parliament had meant to limit the legislation to bodies carrying out a function of government, the natural thing would have been

to use some such term as "a governmental authority" or "a governmental organisation"—which would mirror the term "non-governmental organisation" to be found in article 34 of the Convention. That was how the draftsman of the Act had proceeded in section 7(7) when he provided that a person was to be a "victim" of an unlawful act for the purposes of the section only if he would have been a victim for the purposes of article 34 in proceedings before the European Court in respect of that act. Not only had the draftsman not adopted a similar approach in section 6(1): when an attempt had been made to amend the Bill so as to align the domestic test with the test adopted by the European Court in interpreting the Convention, the government had opposed it and the amendment had failed.

162 I see no proper basis for referring to Hansard as an aid to construing the term "public authority" in section 6. But it appears that, in advancing this particular argument, Mr Beloff had in mind the amendments moved by Mr Edward Leigh MP and discussed by the Home Secretary during the Commons committee stage of the Bill: Hansard (HC Debates), 7 June 1998, cols 400, 418–425 and 432–433. Since the Convention is concerned with the obligations of the governments of the states parties, it does not define the domestic bodies whose acts engage the liability of those governments. Moreover, the jurisprudence of the Strasbourg court on the point is not extensive. A definition of the relevant public bodies in the 1998 Act by reference to the approach of the Strasbourg court would therefore not have been particularly workable. Keith J made much the same point in relation to the Hong Kong Bill of Rights in *Hong Kong Polytechnic University v Next Magazine Publishing Ltd* [1996] 2 HKLR 260, 264B–F. According to the Home Secretary, because of these problems and in an attempt to replicate the situation under the Convention, the government chose the term "public authority" to indicate that the body concerned was to be sufficiently public to engage the responsibility of the United Kingdom. If—contrary to my view—the House could properly derive assistance from the fate of these amendments, it would lie in the confirmation that, in promoting the Bill, the government intended to give people rights in domestic law against the same bodies as would engage the liability of the United Kingdom before the Strasbourg court.

163 In the present case the question therefore comes to be whether a PCC is a public authority in the sense that it carries out, either generally or on the relevant occasion, the kind of public function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs. It so happens that there are two cases from Strasbourg dealing with the position of churches in this regard. They suggest that, in general, church authorities should not be treated as public authorities in this sense.

164 The first case is *Holy Monasteries v Greece* 20 EHRR 1. On the basis of various provisions of the Convention, including article 1 of the First Protocol, the applicant monasteries challenged a Greek statute which changed the rules of administration of their patrimony and provided for the transfer of a large part of their estate to the Greek state. The links between the Greek Orthodox Church and the Greek state were particularly close. In Greek law the Holy Monasteries were public law entities that could be founded, merged or dissolved by means of a decree of the President of

Greece. Another public law entity, under the supervision of the ministry of education and religious affairs, was responsible for managing the property belonging to the monasteries. In these circumstances the Greek Government stated, as a preliminary objection to the Holy Monasteries' application, that they were not a non-governmental organisation which could make an application as a victim in terms of article 25(1) (now article 34) of the Convention. Repelling that objection, the European Court held, at p 41, para 49:

> "Like the Commission in its admissibility decision, the court notes at the outset that the applicant monasteries do not exercise governmental powers. Section 39(1) of the Charter of the Greek Church describes the monasteries as ascetic religious institutions. Their objectives—essentially ecclesiastical and spiritual ones, but also cultural and social ones in some cases—are not such as to enable them to be classed with governmental organisations established for public administration purposes. From the classification as public law entities it may be inferred only that the legislature—on account of the special links between the monasteries and the state—wished to afford them the same legal protection vis-à-vis third parties as was accorded to other public law entities. Furthermore, the monastery councils' only power consists in making rules concerning the organisation and furtherance of spiritual life and the internal administration and furtherance of spiritual life and the internal administration of each monastery. The monasteries come under the spiritual supervision of the local archbishop, not under the supervision of the state, and they are accordingly entities distinct from the state, of which they are completely independent. The applicant monasteries are therefore to be regarded as non-governmental organisations within the meaning of article 25 of the Convention."

While the positions of the Holy Monasteries and of a PCC are scarcely comparable, the judgment of the European Court is important for its reasoning that the nature of the objectives of the monasteries was not such that they could be classed with "governmental organisations established for public administration purposes". The court also attached importance to the fact that the monasteries came under the spiritual supervision of the local archbishop rather than under the supervision of the state, as an indication that they were entities distinct from the state.

165 In *Hautanemi v Sweden* 22 EHRR CD 156 the applicants were members of a parish of the Church of Sweden who complained of a violation of article 9 of the Convention because the Assembly of the Church of Sweden had prohibited the use of the liturgy of the Finnish Evangelical-Lutheran Church in their parish. Under reference to the judgment in the *Holy Monasteries* case, the Commission recalled article 25(1) (now article 34) of the Convention and observed, at p 155, that

> "at the relevant time the Church of Sweden and its member parishes were to be regarded as corporations of public law. Since these religious bodies cannot be considered to have been exercising governmental powers, the Church of Sweden and notably the applicant parish can nevertheless be regarded as 'non-governmental organisations' within the meaning of article 25(1)."

Having held that, as members of the parish, the applicants could be regarded as victims in terms of article 25(1), the Commission added, at p 156:

> "The Commission has just found that, for the purposes of article 25 of the Convention, the Church of Sweden and its member parishes are to be regarded as 'non-governmental organisations'. It follows that the respondent state cannot be held responsible for the alleged violation of the applicants' freedom of religion resulting from the decision of the Church Assembly . . . There has thus been no State interference with that freedom."

166 In the light of these decisions what matters is that the PCC's general function is to carry out the religious mission of the Church in the parish, rather than to exercise any governmental power. Moreover, the PCC is not in any sense under the supervision of the state: under section 9 of the 1956 Measure it is the bishop who has certain powers in relation to the PCC's activities. In these circumstances the fact that the PCC is constituted as a body corporate under the 1956 Measure is irrelevant. For these reasons, in respectful disagreement with the Court of Appeal, I consider that the PCC is not a core public authority for purposes of section 6 of the Act.

167 This conclusion finds further support in the treatment of certain churches in relation to article 19(4) of the German Constitution or Grundgesetz. That article provides that, if any person's rights are infringed by "public power" ("öffentliche Gewalt"), recourse to the courts is open to him. The history of relations between Church and State in Germany is, of course, very different from the history of that relationship in any part of the United Kingdom. In Germany it has culminated in a declaration that there is to be no State Church (article 137(1) of the Weimar Constitution incorporated by article 140 of the Constitution). This important difference must not be overlooked. Nevertheless, as permitted by article 137, certain churches are constituted as public law corporations. In general, domestic public law entities are regarded as exercising public power in terms of article 19(4), whereas natural persons and private law associations are not. Despite this, because of their particular (religious) mission which does not derive from the state, the churches that are public law corporations are treated differently from other public law corporations that are organically integrated into the state. "Church power is indeed public, but not state power" ("ist kirchliche Gewalt zwar öffentliche, aber nicht staatliche Gewalt"): BVerwGE 18, 385, 386–387; BVerwGE 25, 226, 228–229. So, in relation to these churches, the Administrative Court interprets the phrase "public power" in article 19(4) as being equivalent to "state power". Since within their own sphere the churches do not exercise state power, even if they exercise public power, the article 19(4) guarantee does not apply. Despite the rather different context, this interpretation of "public power" tends to confirm the interpretation of "public authority" in section 6 which I prefer. Moreover, due allowance having been made for the particular position of the Church of England, the reasoning of the Administrative Court also tends to confirm that the mere fact that section 3 of the 1956 Measure makes every PCC a body corporate does not carry with it any necessary implication that the PCC should, on that account alone, be regarded as a public authority for the purposes of section 6.

168 Of course, if the churches in Germany go outside their own unique sphere and undertake state functions, for example, in running schools, the constitutional guarantee in article 19(4) applies to them: BVerwGE 18, 385, 387–388; BVerwGE 25, 226, 229. In much the same way, for example, a Church of England body which was entrusted, as part of its responsibilities, with running a school or other educational establishment might find that it had stepped over into the sphere of governmental functions and was, in that respect, to be regarded as a public authority for purposes of section 6(1).

169 The Court of Appeal did indeed consider that, even if they were wrong in holding that PCCs are core public authorities, a PCC should be regarded as a public authority when enforcing the common law obligation of lay rectors, who need not be members of the Church, to maintain the chancel of the parish church. Mr Beloff reinforced this argument by pointing both to the duty of the minister under the relevant canons to hold certain services in the parish church and to the widespread belief, whether particularly well-founded or not, that any resident of a parish was entitled to be married in the church. These were indications of the public role of the parish church and, accordingly, of the public nature of the PCC's function in relation to the maintenance of the fabric of the church so that the minister could perform those public duties there. Enforcing the lay rectors' obligation was part of that public function.

170 For the most part, in performing his duties and conducting the prescribed services, the minister is simply carrying out part of the mission of the Church, not any governmental function of the state. On the other hand, when in the course of his pastoral duties the minister marries a couple in the parish church, he may be carrying out a governmental function in a broad sense and so may be regarded as a public authority for purposes of the 1998 Act. In performing its duties in relation to the maintenance of the fabric of the church so that services may take place there, the PCC is doing its part to help the minister discharge his pastoral and evangelistic duties. The PCC may be acting in the public interest, in a general sense, but it is still carrying out a church rather than a governmental function. That remains the case even although, from time to time, when performing one of his pastoral duties—conducting a marriage service in the church—the minister himself may act as a public authority.

171 Moreover, the fact that, as part of its responsibilities in relation to the maintenance of the church fabric, the PCC may have to enforce a common law obligation against a lay rector who happens not to be a member of the Church can hardly transform the PCC into a public authority. Indeed, the very term "lay rector" is a reminder that the common law obligation which the PCC is enforcing is the last remnant of a set of more complex rights and liabilities that were ecclesiastical in origin. As Ferris J held, at para 23 of his judgment, today the liability to repair the chancel can be regarded as one of the incidents of ownership of rectorial property:

> "It is, of course, an unusual incident because it does not amount to a charge on the land, is not limited to the value of the land and imposes a personal liability on the owner of the land. But in principle I do not find it possible to distinguish it from the liability which would attach to the

owner of land which is purchased subject to a mortgage, restrictive covenant or other incumbrance created by a predecessor in title."

I respectfully agree. There is nothing in the nature of the obligation itself, or in the means or purpose of its enforcement, that would lead to the conclusion that the PCC of Aston Cantlow is exercising a governmental function, however broadly defined, when it enforces the lay rectors' obligation to pay for chancel repairs. Therefore, even when it is enforcing that obligation, the PCC is not to be regarded as a public authority for the purposes of section 6 of the 1998 Act.

172 I should add that I agree with the observations of my noble and learned friend, Lord Nicholls of Birkenhead, in the final paragraph of his speech.

173 For these reasons I would allow the appeal and make the order proposed by Lord Scott of Foscote.

Appeal allowed.
Defendants to pay plaintiff's costs before Ferris J and the Court of Appeal.
No order as to costs in the House of Lords.

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