

Reverend Edward Gatherer

Appellant

v.

The Right Reverend Drexel Wellington Gomez

Respondent

FROM

THE COURT OF APPEAL OF BARBADOS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
18TH JUNE 1992

Present at the hearing:-

LORD GRIFFITHS
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY
LORD MUSTILL
LORD SLYNN OF HADLEY

[Delivered by Lord Slynn of Hadley]

This appeal raises the question as to whether the appellant, the Reverend Edward Gatherer, was obliged to retire from his appointment as Rector of St. Andrew's Church, Belleplaine in the diocese of Barbados on the last day of the month in which he attained the age of 65 years. The trial judge held that he was not; the Court of Appeal held that he was but granted him leave to appeal to Her Majesty in Council.

The appellant was ordained priest in the Anglican Church in 1951 and, after an appointment as Vicar of St. Anne's Church in 1953, he became the Rector of St. Andrew's Church on 1st May 1957. He was instituted and inducted into the living and given possession of the rectory with 15 acres of land, the benefit of being able to use which was an important part of his remuneration. His 65th birthday fell on 22nd January 1987 and on 15th January 1987 the Bishop of Barbados required him to vacate his office of Rector on 31st January 1987, but asked him to continue as Priest-in-Charge. The appellant replied that he was not required to resign. He remained in the rectory and conducted services in the church, in his view as Rector, in the view of the Bishop as Priest-in-Charge. On 16th January 1989 the Bishop terminated his appointment as Priest-in-Charge and required him to vacate the rectory and to cease holding services in the church with effect from 31st January 1989.

The appellant began proceedings by writ of summons dated 27th January 1989 for a declaration that he was entitled to serve as Rector and to receive all the benefits of the office. He also asked for an order that the Bishop be restrained from disturbing him in the performance of his office as Rector. On 20th December 1989 the trial judge declared that he was entitled to the occupation of the rectory and that he continue as the holder of the office of Rector of the Church of St. Andrew. The Court of Appeal on 5th April 1990 required the appellant to deliver up possession of the rectory and leave and on 11th April 1990 granted an injunction restraining the appellant from holding himself out as such Rector or performing any of the duties of such Rector until the application for leave to appeal to the Judicial Committee of the Privy Council had been determined.

Although conditional leave to appeal was granted on 25th April 1990 the Court of Appeal's order that the appellant deliver up possession was directed to be executed. The appellant moved out of the rectory.

The appellant's first contention is that, following institution and induction as Rector, he acquired a "freehold office"; in other words he had a life tenure of the appointment unless he himself chose to resign. He says that, leaving aside recent statutory provisions in England, this was the position under English Ecclesiastical law as is shown in Halsbury's Laws of England, (4th Edition) Volume 14 "Ecclesiastical Law" at e.g. paragraph 689. This law, he says, applied in Barbados. By section 2 of "An Act for establishing spiritual and ecclesiastical Jurisdiction over the Clergy of this Island" (i.e. Barbados) dated 7th June 1825 (No. 52) "all laws, ordinances, and canons, ecclesiastical which are now issued and in force in that part of the United Kingdom called England, so far as the same relate to the due ordering and ecclesiastical regimen and jurisdiction over the Clergy therein, and all rules and regulations for carrying the same into effect shall be esteemed accepted, and taken to be in full force and virtue within this Island".

That provision was repeated in section 54 of the Anglican Church (Barbados) Act of 1891 (Barbados Legislation C.79) and in section 47 of the Anglican Church Act 1911 (c.10).

The Anglican Church Act of 1911, like that of 1891, contained detailed provisions *inter alia* as to the appointment of Bishops and Clergy. Thus in section 9 of the 1911 Act:-

"Whenever any Rector, Vicar, or Curate of the Anglican Church holding office in this Island shall resign or die or be removed from office or any Rectory, Vicarage or Curacy shall from any cause become vacant the appointment to the vacant office

shall be made as soon as possible by a Board comprised of the following persons and in accordance with the provisions hereinafter contained:- ..."

Again in both Acts there was laid down the procedure by which a clergyman could be removed for cause and as to the arrangements relating to glebe land which were to be followed between an incumbent and his successor where the former voluntarily resigned.

There was in neither Act any provision as to a retirement age and none was introduced by the Anglican Church (Amendment) Act 1949 (c.34).

Although the Anglican Church (Partial Suspension) Act 1955 (c.49) provided that no new appointments to any vacancy in the offices of rector, vicar or curate should be made, so long as the Act continued in force, under section 9 of the Anglican Church Act 1911, an exception was made in respect of appointments to any vacancy of any rector, vicar or curate holding office in the Island at the date of commencement of the Act. The appellant fell within this exception.

It is clear that the appellant's appointment to the Rectory of St. Andrew in 1957 was made under the 1911 Act. If this were all the relevant legislation he could thus establish that (a) English ecclesiastical law applied in Barbados; (b) under that law he had a life tenure or "freehold"; and (c) there was no provision in the Anglican Church legislation imposing a retiring date on him.

It is, however, not all the relevant legislation.

Although clergy appointed before 31st July 1868 were by an English Statute of 1825 (6 George IV c.88) paid salaries out of the consolidated fund of the United Kingdom, those appointed subsequently ceased to be so paid by virtue of an English Statute of 31st July 1868 (31 and 32 Victoria c. 120). Their salaries were paid out of the public treasury of Barbados pursuant to section 11 of the 1891 Act and section 10 of the 1911 Act hereinbefore mentioned.

Whereas the 1825 Act provided annuities for bishops who resigned after 10 years' service no annuities or pensions were included for the other clergy. The Anglican Church Acts of Barbados do not contain any provisions as to the payment of pensions or as to pensionable age.

The pensions legislation of Barbados did, however, provide pensions for public officers. For this purpose the Pension Act 1890, by section 2(1), defines public officer as:-

"every person however appointed who receives the salary or allowance attaching to his office from the public treasury."

By section 3(2):-

"Every rector, vicar and curate of the Anglican Church in this Island shall come under the operation of this Act."

Existing officers could not receive a pension unless they had attained the age of 60 and newly appointed officers were required to take out an endowment policy for a period expiring at age 60, but provision was made by section 16 as to pension rights where the officer retired after the end of the endowment period. It was thus contemplated that a rector could go on after the age of 60, the pensionable age, and there was no provision for compulsory retirement at that age.

By the 1907 Pension Act (1907 c.3) which again included rectors as coming under the operation of the Act, and which provided for the value of the rectory and the glebe lands to be taken into account for the purpose of calculating the pension, a distinction was again made between persons appointed before and after 28th October 1890. The latter were required to take out a policy of assurance for a period terminating on their 60th birthday. Although provision was again made for public officers who stayed on after age 60, section 23 of the 1907 Act introduced a new element in that it provided that:-

"Every public officer coming under the provisions of this Act ... shall be entitled to retire, or may be called on by the Governor to retire, at any time after attaining the age of sixty years."

This provision was in force when the Anglican Church Act 1911 was enacted and on the face of it applied to rectors, though it has been argued that it did not so apply in view of the existing provisions of ecclesiastical law which could not be taken away by pensions legislation. There was, however, further legislation before the appellant's appointment as Rector.

By the Pension Act of 1925 (c.2) public officer includes by section 2(1):-

"every person, lay or ecclesiastical, who receives the salary or allowance attached to his office from the Public Treasury."

It was provided by section 3(1) that a pension might be granted to an officer who had attained the age of 60 on his retirement, Section 11 of the 1925 Act, however, introduced a new provision:-

"It shall be lawful for the Governor to require any public officer to retire and any officer shall be entitled to retire from the public service at any time after he attains the age of sixty years; and retirement shall be compulsory for every officer other than a bishop, rector, vicar or curate of the Anglican church on attaining the age of sixty five years; and for every bishop, rector, vicar or curate of the Anglican church on attaining the age of seventy years."

The Pensions Act 1947, by section 2(1), (c.20) defined pensionable office as including an office in respect of service in which an officer would have been eligible for a pension under the Pension Act, 1925. It thus clearly includes rectors who, moreover, are specifically mentioned in the definition of "pensionable emoluments" (section 2(1)(a)(iv)) and who are included in the list of clergy for whom additional increments are to be given pursuant to Regulation 24 of the Pensions Regulations, 1947 and the Second Schedule thereto. This Act provides that a pension may be payable on or after the officer attains the age of fifty five years. By section 8 the Governor is empowered to require an officer to retire at any time after he attains the age of fifty five years and "retirement shall be compulsory for every officer on attaining the age of sixty years".

The Act was expressed to apply to every officer appointed to the service of the Island after the commencement of the Act.

The 1947 Act thus applied to the appellant when he was first appointed in 1953 and when he was appointed to the rectory in 1957. Although the earlier pensions legislation fixed an age for the receipt of pensions without fixing a compulsory retiring age, it is in their Lordships' view impossible to say that the 1947 Act was concerned only with fixing a pensionable age, the age at which a pension can be drawn. It was plainly providing, in addition to the power given earlier for the Governor to require an officer to retire at or above a specified age, a fixed retiring age.

When the appellant was appointed it was thus on the basis of an Act already in force which required him to retire at 60 and it cannot be said, as the appellant seeks to say, that this Act must be construed so as not to take away existing rights which he enjoyed under the English ecclesiastical law. He did not at any time have the benefit of those rights shorn of the provisions of the 1947 Act.

The appellant clearly believed that he was not obliged to retire at 60 and it seems to have been the practice not, or at any rate not always, to require a rector to retire at 60. In their Lordships' view the legal position on his appointment, however, was clearly that he was required to retire at 60.

Before the question of his retirement arose a number of amendments were made to the Pensions Act 1947 which are not material.

However in 1969 a major change took place in the position of the Anglican Church by reason of the Anglican Church Act (cap. 375). The short title is:-

"An Act to settle the relationship between the Anglican Church and the State, to make financial provision for the Anglican Church and for matters incidental thereto and connected therewith."

Pursuant to an order made under the 1969 Act the Anglican Church in Barbados ceased to be the established Church on 1st April 1969 and the Church had full power to manage its own affairs (section 3). The ecclesiastical law of the Church ceased to exist as such and by section 4(1)(b) of the 1969 Act:-

"The then existing ecclesiastical law and the then existing articles, doctrines, rites, rules, discipline, ordinances, canons and regulations of the Church shall, with and subject to such modification or alteration, if any, as after that date may be duly made therein in accordance with Part VI, be binding on the members for the time being of the Church."

Property of the Church vested in the Diocesan Trustees subject to "the existing interests of all persons who on the date of disestablishment held ecclesiastical offices in the Church until the cesser of such interests through the death, retirement, resignation or removal of the holder of any such office, as the case may be". (Section 6(3)).

By section 9(1):-

"Any person who at the date of disestablishment holds an ecclesiastical office affected by this Act shall continue in that office until he is appointed to another ecclesiastical office or until he retires or resigns or is removed or until he dies without having retired or resigned or without having been removed."

"Ecclesiastical office" included that of a rector.

A rector was to be regarded as retiring from the public service on 1st April 1969 in consequence of the abolition or re-organisation of his office (section 10(6)(a)) and by section 10(2) a rector who had become entitled to a pension under the pensions legislation but who was not in receipt of it was to have a payment calculated in accordance with the section. This section was applied in the case of the appellant.

Thus, from the date of disestablishment service in an ecclesiastical office ceased to be regarded as public service, so that as from 1st April 1969 the pensions

legislation ceased to apply to a rector in the position of the appellant. The 1911 Anglican Church Act was repealed and consequent amendments were made to the Pensions Act, 1947.

By section 24 of the 1969 Act the Diocesan Synod set up under the Act was empowered to make rules, ordinances, canons and regulations as it thinks fit for the general management, discipline and good government of the Church and to provide in the same "for the resignation and relinquishment of any benefice", benefice including a rectory with curacy and a vicarage.

Section 9 of the 1969 Act clearly envisaged that a rector might retire or resign. The Act did not however fix a retirement age or indeed a pensionable age. That was left to be done by rules, ordinances, canons or regulations made by the Diocesan Synod under section 24 of the 1969 Act.

The Synod set out to adopt a constitution and to issue a number of regulations. Paragraph 11 of Regulation C.10 "Of the Clergy Appointments Transfer Removal" in the 1979 Regulations (which replaced Regulation XXII of the 1969 Regulations under which a rector could be re-appointed after compulsorily vacating office at 65) reads:-

"A Clergyman shall vacate his office on the last day of the month in which he attains the age of sixty-five, but shall be eligible for appointment of Priest-in-Charge or Assistant Curate ..."

If this Regulation is valid then the appellant's retiring age was raised from 60 under the pensions legislation to 65 under the Regulations.

The Interpretation Act, which came into force on 16th June 1966 provides in section 16(1) that:-

"Every enactment shall be published in the Gazette and, unless the enactment otherwise provides, shall take effect and come into operation on the date of such publication."

For this purpose an enactment includes an instrument made under an Act, and an instrument includes a scheme, rule, regulation or bye-law.

It is plain that Regulation C.10, like Regulation XXII of the 1969 Regulations, was a regulation made under section 24 of the 1969 Anglican Church Act and that the requirement that it "shall be published" in section 16(1) of the Interpretation Act was imperative by virtue of section 37 of the latter Act, unless the 1969 Act otherwise provided. There is nothing in the 1969 Act which expressly excludes the requirements of section 16 of the Interpretation Act. In this there is to

be contrasted the provisions of section 8(2) of the Barbados Chamber of Commerce and Industry Act 1985 (Cap. 376B) where it is expressly provided that it is not necessary for the rules made thereunder to be published in the Official Gazette.

Nor can it be said that there is anything in the 1969 Act which by necessary implication provides that publication should be dispensed with. On the contrary it was important both to the clergy and to their congregations that notice should be given of regulations by the Synod.

Regulation C.10 paragraph 11 therefore could only take effect and come into operation on the date of its publication in the Official Gazette.

It is accepted that Regulation C.10 paragraph 11 never was published in the Gazette nor was its predecessor Regulation XXII of the 1969 Regulations. It therefore never took effect and no retiring age was prescribed as section 9 of the 1969 Act contemplated.

In the result there is no provision as to a compulsory retiring age since the age under the Pension Act has gone and no new age has validly been substituted.

It follows that the appellant was right in his contention that he could not be required to retire at the end of the month in which he attained his 65th birthday and that the order of the Court of Appeal was in error in so far as it required the appellant to deliver up possession of the rectory and glebe land to the respondent.

The appellant claimed damages. The trial judge, having decided that the appellant continued as holder of the office of Rector of St. Andrew and was entitled to do so until his death, retirement, resignation or removal, made no order as to damages.

In the light of the appellant's subsequent removal from his office and his rectory pursuant to the application of the respondent, and of the order made that he should pay \$200 per month from 1st February 1989 until the date of delivery up of possession, the claim for damages must be referred back to the trial judge.

Their Lordships will accordingly humbly advise Her Majesty that the appeal ought to be allowed, the order of the Court of Appeal set aside and the order of the trial judge restored save that the claim for damages ought to be referred back to the trial judge. The respondent must pay the appellant's costs of the appeal to the Court of Appeal and to the Board.