Neutral Citation Number: [2016] ECCY 1.

IN THE CHANCERY COURT OF YORK

**APPLICATION FOR PERMISSION TO APPEAL
FROM THE CONSISTORY COURT OF THE DIOCESE
OF CHESTER (HIS HONOUR JUDGE DAVID TURNER QC)**

**APPLICATION FOR AN EXTENSION OF TIME FOR
SUCH APPLICATION**

UPTON (or OVERCHURCH), ST MARY

(1) Mr Keith RYAN
(2) Ms Carole RAINFORD
(3) Mrs Margaret TESTO
(4) Mr Paul BROADHURST **Applicants/Parties Opponent**

- **and –**

(1) The Reverend Graeme SKINNER
(2) Mr Peter HINTON
(3) Mrs Alison ELLIOT **Respondents/Petitioners**

On consideration of the chancellor's Judgment, the chancellor's reasons for refusing permission to appeal, the Applicants' renewed application for permission to appeal, the Applicants' Response to Directions, the letter from the First Applicant dated 9 December 2016, the Representations of the Petitioners, and the Objectors' comments on Petitioners' submissions

ORDER of THE RIGHT WORSHIPFUL CHARLES GEORGE QC, Auditor of the Court

1. Permission is given for the application for permission to appeal to be served out of time.

Reason:

The application was wrongly made, within time, to the Provincial Registry of the Province of Canterbury. It was promptly forwarded thence to the correct destination, the Provincial Registry of the Province of York, and no prejudice is alleged to the Respondents as a result of the slight delay.

2. Permission is given for the appeal to proceed, limited to whether the chancellor acted wrongly or unjustly (see rule 27.11(2) of the FJR 2015) in allowing (at the hearing) late amendments to the scheme the subject of the petition (see para 253(iii) of the Judgment), without scaled elevation drawings and without an adjournment to allow public notice/advertisement of those amendments, in particular to the Victorian Society and the Church Buildings Council, and/or affording the

Parties Opponent the opportunity to lead evidence limited to the effect of those later amendments on the proposals the subject of the petition. Save as aforesaid, permission to appeal on Ground 1 is refused.

Reasons:

Frequently petitions are amended, but there is, so far as the Auditor is aware, no ecclesiastical jurisprudence as to the circumstances in which this is permissible. It may be that the relevant approach is that which applies to the amendment of planning applications, in which case "the interests of the public must also be fully protected when an amendment is under consideration": see *BT plc v Gloucester City Council* [20011] EWHC (Admin) 1001 para 34). Whether or not on the facts of this case "the appeal would have a real prospect of success", which may be questionable given the chancellor's description of the amendments as "relatively minor" (Judgment para 235), the issue is an important one, such as to constitute "some other compelling reason why the appeal should be heard" (rule 22.2(b) of the FJR 2015). In the light of the chancellor's reasons for refusing permission to appeal in respect of the site visit, that aspect of the Applicants' Ground 1 (para 8 of the renewed application) does not have a real prospect of success.

3. Permission to appeal on Ground 2 in the renewed application is refused.

Reasons:

For the reasons set out in para 84 of the chancellor's Judgment, it is not properly arguable that Holmleigh was itself a listed building. None of the other reasons advanced in Ground 2 are such as to have a real prospect of success. In particular the chancellor was not bound to grapple with the advice in the NPPF in relation to non-designated assets, nor to determine whether in that respect the local planning authority had failed to apply the right test under paras 129, 131 and 135 of the NPPF.

4. Permission to appeal on Ground 3 in the renewed application is refused.

Reasons:

If the local planning authority "plainly [made] an error of law" in relation to cumulative impact and/or parking (paras 24 and 25 of the renewed application), those were matters the parties opponent could have pursued by way of judicial review. To use the faculty procedure to direct an oblique attack on the planning permission was inappropriate. Even if the chancellor failed to address the parking recommendations in the local planning authority's Supplementary Planning Document or erred in accepting the Petitioners' evidence that parking provision would be increased (instead of being reduced by two spaces, from 48 to 46) (paras 25 and 26 of the renewed application), neither matter would give the appeal a real prospect of success.

5. Permission to appeal on Ground 4 in the renewed application is refused.

Reasons:

As the chancellor said in his reasons for refusing permission to appeal on Ground 4, "I recorded in a section of the judgment headed 'The views and positions of other interested parties', without further comment, the views expressed by the Bishops in documents in the papers, I did not purport to 'place weight' upon those views". Accordingly there is no real prospect of the appeal succeeding on this ground. Insofar as the Applicants may seek in the alternative to raise "an important issue as to the extent to which bishops should pass statements in respect of petitions which are objected to and sub judice" (para 29 of the renewed application), this is not a "compelling reason why the appeal should be heard" (rule 22.2(b) of the FJR 2015). In the Province of Canterbury, a suffragan bishop has been called to give evidence in support of the petition (see *Re St John the Evangelist, Blackheath* (1998) 17 CCCC 25).

6. The application for a Costs Protection Order is refused.

Reasons:

As stated in the Representations of the Petitioners, "this is not an 'Aarhus Convention claim' as defined by CPR 45.41(2)", which is confined to challenges brought by way of judicial review. If and insofar as the Applicants may intend to rely on article 9 of the Aarhus Convention, "those articles are concerned with those who wish to "challenge acts and omissions…which contravene provisions of [the] national law which relate to the environment"": *Coventry and ors v Lawrence and anr (No 2)* [2014] UKSC 46; [2015] 1 AC 106 para 48. It is doubtful whether the refined version of Ground 1, for which permission to appeal has been given, raises contravention of such provisions. A Costs Protection Order on any other basis has not been claimed or substantiated in the renewed application. The Auditor expresses the earnest hope that the party and party costs of neither party in what is likely to be an appeal lasting less than a full day will be as much as £10,000, the limit of costs protection sought, whilst recognising that, unusually, in all faculty proceedings the parties bear also the court costs.

7. The Respondents' costs of the applications for permission to appeal and for an extension of time (to be taxed by the Provincial Registrar if not agreed), and the court costs thereof, shall be paid by the Applicants in any event. Within 21 days of this Order, (1) the Respondents shall notify the Applicants and the Provincial Registrar of their costs of the applications, and (2) the Provincial Registrar shall notify the Applicants of the court costs; and such costs shall be paid within 21 days thereafter (or in the case of the Respondents' costs if not agreed, within 21 days of taxation).

Reasons:

A discretion is conferred on the Auditor under rule 23.5(1)(b) of the FJR 2015 in relation to costs. On most of the matters contained in the renewed application,

permission has been refused, and it was entirely the Applicants' fault that the appeal was lodged initially in the wrong Provincial Registry. Furthermore time has been wasted not least by the court as a result of absence of concision in the drafting of the Grounds, by the submission of an excessively long and argumentative letter of 9 December 2016, and by the unnecessary submission of the Objectors' comments.

DIRECTIONS

Without prejudice to the requirements of rules 24.2(1b) and (2), 27.1, and 27.2 of the FJR 2015:

1. If they intend to proceed with the appeal, the Applicants (hereafter the Appellants) shall give notice to the Provincial Registry and to the Respondents within 14 days of issue of this Order, accompanied by a revised Notice of Appeal, limited to the matter identified in para 2 of the above Order.

2. Any Respondent's Notice shall be filed within 7 days of receipt of a revised Notice of Appeal under direction 1 (rather than the time-scale in rule 24.4(3) of the FJR 2015).

3. Any application for permission to intervene in the appeal under rule 27.2 shall be made to the Provincial Registrar within 35 days of issue of this Order, and if permission is given, further directions will also be given.

4. Within 28 days of issue of this Order, the Appellants shall file an agreed, indexed and paginated, trial bundle (limited to a maximum of 100 pages, excluding the Judgment).

5. Within 42 days of issue of this Order the Appellants shall file a Skeleton Argument (limited to the matter identified in para 2 of the above Order).

6. Within 49 days of issue of this Order the Respondents the Respondents shall file a Skeleton Argument (similarly limited).

7. Within 56 days of this Order the Appellants shall file an agreed, indexed bundle of authorities (from the law reports, wherever possible).

8. Subject to compliance with direction 1 above, the matter will be set down for hearing (time estimate 4 hours, excluding judgment) at a place, and at a date and time, to be notified to the parties (and any interveners) by the Provincial Registrar.

20 December 2016 CHARLES GEORGE QC, Auditor