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# IN THE ARCHES COURT OF CANTERBURY

Charles George QC, Dean of the Arches

Chancellor McClean QC and Chancellor Briden

On appeal from the Consistory Court of the Diocese of Winchester

***In re* ST LAWRENCE, OAKLEY WITH WOOTTON ST LAWRENCE**

**Judgment**
**(as approved)**

Appearances:

Alexander McGregor of Counsel, for the Appellant/Party Opponent, instructed by Stephen Slack, The Legal Office, Church House, Westminster SW1P 3AZ

Peter Smith of Counsel, for the Respondents/Petitioners, instructed by Brutton & Co, Solicitors, West End House, 288 West Street, Fareham PO16 OAJ

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## INTRODUCTION

1. This case concerns the Wootton St Lawrence Armet ("the armet"). An armet is a type of helmet, worn by knights and men-at-arms during the fifteenth and sixteenth centuries, and characterised by a rounded skull, with an extended tail-piece at the back and hinged cheek-pieces which opened to accept the wearer's head and which when locked closed around the face at the chin. This armet is a good example of a rare type, probably of Flemish origin, and dating from about 1500. There are in England only fourteen other surviving continental armets, all of which at some stage were displayed in English churches. No English armour dating from around 1500 and before survives apart from this group. Apart from its historic interest, it is also an article of intrinsic beauty and fine craftsmanship, unusually retaining its later, seventeenth century painted decoration.

2. Church treasures, as such articles are sometimes described, are rightly prized. As was said in *Treasures on Earth* (a report by a working party of the Council for Places of Worship, 1973, para 2):

> "[O]ne of the most excellent ambitions of Christians…has been to express their faith in the language of the arts – in architecture, sculpture, painting, mosaic, music and poetry – and thus to build houses of God which are symbols of that faith, thereafter furnishing them with objects as nearly worthy of the worship of God as human skill can make them. The triumphant realisation of that godly ambition by men in every age from that of the early Christian church down to the present day has been instrumental in creating the great store of treasures owned by the churches…"

Church treasures include secular objects deposited in churches for devotional or other reasons.

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3. Various matters, including financial exigency, security issues, and perceived mission imperatives, have over the past half century led to an increasing number of petitions seeking to dispose by sale of church treasures. In this court alone, since the seminal judgment in *Re St Gregory's, Tredington* [1972] Fam 236, the issue has been considered on four occasions: *In re St Helen's, Brant Broughton* [1974] Fam 16; *Re St Martin-in-the-Fields* (unreported, 31 October 1972); *Re St Mary the Virgin, Burton Latimer* (unreported, 26 October 1995); and *Re St Peter's, Draycott* [2009] Fam 93. There have been numerous consistory court judgments. Yet this remains a controversial area of the law. Despite re-iteration by this Court that the jurisdiction to grant faculties for the sale of treasures is be "sparingly exercised", the consistory court judgments, whilst repeating these words, show a growing readiness to sanction sales, including sales not to museums but on the open market. One recent case, *Re St James, Welland* [2013] PTSR 91 (Worcester consistory court), to which we return at para 35 below, contains the dictum:

> "[T]he Church was not founded to perform the role of guardian of art treasures for their own sake; nor is there any rule of law requiring that it should fulfil such a role".

4. The facts of the present appeal are decidedly unusual, and most unlikely to be repeated. Nevertheless, its determination has involved the court in going back to first principles, and it is to be hoped that further hearings can be saved the plethora of citations which we were called upon to consider.

## BACKGROUND

### (a) The 2013 faculty

5. This appeal is brought, with leave of this court, by the Church Buildings Council ("CBC") against the judgment of the consistory court of the Diocese of Winchester (Chancellor Clark

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QC), of 22 August 2013. Having considered written representations from the petitioners and from the CBC (as party opponent), the chancellor allowed, subject to conditions, a petition by the churchwardens and assistant minister of the parish of Oakley with Wootton St Lawrence, of 11 July 2010, for "Sale of Wootton Helmet, a 15th century Flemish Armet currently on loan to the Royal Armouries" ("the 2013 faculty").

(b) St Lawrence, Wootton

6. There were until recently three churches in what is now the united Parish of Oakley with Wootton St Lawrence. One, St John, Oakley, was demolished in 2012 and the site has been laid out as additional burial space and as a garden of remembrance. Of the remaining two churches, the principal one is St Leonard's, Oakley. St Lawrence, Wootton ("the church"), plays very much the minor role, its services being limited to about fifteen a year, including a recently instituted monthly evening service of Parish Praise.

7. Notwithstanding its legal duty to maintain both churches, the Parochial Church Council ("PCC") now only takes responsibility for funding utilities and insurance at the church. There is a Wootton St Lawrence Repair Fund ("the Repair Fund"), which had a balance of £17,098 at the end of 2012. The Repair Fund has its own stewards, and is principally supported by subscriptions from some of the residents of the village of Wootton St Lawrence. According to a note to the united parish accounts for 2012, "the PCC has no authority over the running or organisation of the fund". The parish's Annual Report 2012, under the heading Wootton St Lawrence, refers to the recent restoration and painting of all the faces of the clock and the installation of an automatic winding system. This presumably accounted for a major part of the £7,707 expenditure from the Repair Fund in 2012.

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8. The income and expenditure account of the combined parish for 2012 showed a surplus income of £5,788, following payment of diocesan parish share of £65,000. The net assets of the united parish stood at £780,581 at the end of 2012. Of the fixed assets, £25,000 is attributed to a parcel of unconsecrated land, which the accounts record would have a current market value as building land in excess of £700,000.

(c) The armet

9. In a recess in the south wall of the chancel of the church there is a white marble monument to Sir Thomas Hooke, baronet, who died in 1677, having built and lived in a local manor house called Tangier House. His effigy is of a reclining gentleman wearing plate armour. He is resting on one arm with one hand on a helmet. About five feet above the monument is an ornate bracket coming down from the top of the wall. On the bracket are the initials “T.H.” and the date “1677”. Until 1969 the armet hung from the bracket, together with a pair of gauntlets, a pair of spurs and a dagger. In 1969 the gauntlets, spurs and dagger were stolen. Because of its potential value and the evident lack of security, the armet was placed in a bank vault in Basingstoke. The deposit fee proved expensive and in 1974 a faculty (“the 1974 faculty”) was granted by Chancellor Phillips to permit the indefinite loan of the armet to the Armouries of the Tower of London. At that time, as the present chancellor records in his judgment, no thought seems to have been given to the implications of whether the armet was part of a funerary monument to Sir Thomas Hooke, and, if it were so, whether his descendants approved of the loan. Early in 1975 the armet was taken to the Tower of London, where it remained for some fifteen years. In 1996 much of the collection of armour at the Tower, including the armet, was transferred to the Royal Armouries Museum in Leeds (“RAM”). There it stayed, in a storeroom but viewable by arrangement, until 2010.

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10. Under the terms of the original loan agreement, the agreement could be determined on one month's notice by either party. The agreement, however, was varied in 2001 when the insurance arrangements were altered. The loan became subject to yearly renewal. The agreement expressly provided that "If at any time during the period of the loan it becomes necessary to sell the object(s) lent, the lender agrees to give the Board [of Trustees of RAM] first refusal and to allow it reasonable time in which to complete the purchase".

(d) The proposal to sell the armet

11. In early 2010 the parish became aware of the value of the armet (then valued at significantly in excess of £25,000) and conceived the idea of selling it. RAM was prepared to shorten the notice period. On 10 April 2010 the PCC unanimously approved its sale. The chancellor refers to the PCC being "short of funds" at that time. The relevant PCC Minutes record that:

> "Should the sale be approved it is suggested that 10% of the value be given to the Wootton Fund [presumably a reference to the Repair Fund] with the remaining funds being used to cover the cost of the demolition of St. John's church (if and when approved) and the provision of a seating area in the central part of the graveyard where visitors have an opportunity to sit and reflect, with any remaining balance being used for the [St Leonard's] Centre".

12. On 2 June 2010 the Diocesan Advisory Committee ("DAC") recommended sale, but with the provisos that independent valuations of the helmet be sought and submitted as part of the faculty application and that a facsimile of the helmet should be made and displayed in the church with an explanation of its association to [sic] the church and which organisation now owns it. The DAC added a comment it would be desirable for the item to be sold to RAM or another museum

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in the United Kingdom rather than on the open market. This followed the view expressed by the Historic Environment Manager of Winchester City Council that "The least the church could do would be to try to ensure that the helmet stayed in Hampshire preferably, or at least in England". On 12 July 2010 the specialist London valuers and auctioneers, Thomas Del Mar, gave a "conservative pre-sale estimate" of £30-40,000, whilst proposing an insurance figure in the region of £80,000 to reflect the armet's possible value on a sale by private treaty.

(e) The 2010 faculty

13. On 11 August 2010 the chancellor granted the unopposed faculty ("the 2010 faculty"). He imposed several conditions of which the first was that:

> "Subject to the possibility of a prior satisfactory and acceptable offer being made by the Royal Armouries or some other British museum or institution, the helmet shall be sold on the open market for the best possible price".

The same conditions were imposed on the 2013 faculty under appeal.

(f) The auction

14. RAM had indicated to the petitioners in May 2010 that it was interested in acquiring the armet. In September it said that it needed the vendors to state a price, which would enable it to approach possible funders to assemble the necessary sum. Unfortunately, but perhaps understandably, the petitioners merely informed RAM of the alternative £80,000 valuation, and at this point no offer was received from RAM. On 8 December 2010 the armet was sold at public auction in London to an American collector, the successful bid being £45,000 (slightly in excess of Thomas Del Mar's auction estimate), the under-bidder being RAM.

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(g) The intervention of the CBC

15. The sale of the armet generated expressions of concern by conservation interests, including RAM. The CBC, which had not been consulted (as it should have been) under rule 15(2) of the Faculty Jurisdiction Rules 2000, requested the chancellor to set aside the faculty under rule 33. The CBC indicated that it sought to raise three specific issues which went to the merits. First, that the armet was part of the funerary monument to Sir Thomas Hooke. Second, that as such, it was necessary to obtain the consent of any living heirs of Sir Thomas before good title could pass to any buyer. Third, that in any event, the court should not order the sale of the armet. The chancellor very properly decided on 31 May 2011 that it was just and expedient under rule 33 to set aside the faculty he had issued, so that the whole matter could be reviewed. This meant that the result of the auction was left in limbo.

(h) Tracing the living heirs of Sir Thomas Hooke

16. With the help of two genealogists, the petitioners traced two living heirs, Sir John Hamilton Spencer-Smith and Mr James Lee. By a deed of gift of 28 February 2012, the former transferred the whole of his ownership in the armet to the churchwardens of the parish, with intent to give effect to the sale of the armet in exchange for the PCC undertaking to maintain and repair the tomb of Sir Thomas. Mr James Lee also agreed to the sale, but on condition he received half the price obtained thereby.

(i) Adoption of written representations procedure

17. Meanwhile, the CBC became a party opponent to the petition; the petitioners continued the task of tracing the heirs to Sir Thomas Hooke; and the chancellor fell seriously ill. Finally, with the consent of both parties, the chancellor directed under

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rule 26 that it was expedient to determine the proceedings on the basis of written representations.

18. In *Draycott* at para 36-37 the Court of Arches said that:

> "Whilst the [written representations] procedure has the advantage of limiting the costs of contested faculty proceedings, this should not be the sole criterion for using the procedure….The circumstances of each case will differ, and the chancellor will have to consider all relevant factors in deciding whether or not to use the written representations procedure instead of an oral hearing.
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> In this case we think it would have been better if the chancellor had not offered to use the written representations procedure in view of the serious issues which arose and those canvassed in this appeal. In our judgment this was a case more suitable for hearing in court. However, we recognise that it is easier for this court, with the benefit of hindsight, to reach such a conclusion".

19. The same is true of the present case. The lesson of these two cases is that the dictum in *Tredington* at 246F that "Faculties of this kind should seldom if ever be granted without a hearing in open court", perhaps modified to omit the words "if ever", should be borne in mind by chancellors in disposal cases, whether or not the petition is formally opposed.

## THE JUDGMENT UNDER APPEAL

20. The chancellor dealt in considerable detail with the three issues raised by the CBC. He was satisfied on the balance of probabilities that the armet formed part of a funerary monument set up after his death to the memory of Sir Thomas Hooke. In para 11 of his judgment the chancellor concluded:

> "It follows that, even though it was in a sense attached to the building, it never became part of the freehold of the

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> Church. It remained the property of the person by whom it was erected during his or her lifetime. On the death of the person placing it in position it became the property of the heirs of Sir Thomas Hooke. This has long been established at common law, and it has been enshrined in statute in Section 3 of the Faculty Jurisdiction Measure 1963".

There is no cross-appeal on that finding.

21. On the question whether the consent of all living heirs to Sir Thomas Hooke had been obtained, the chancellor stated in para 13 that:

> "the parties in this case agree that the armet is owned jointly by the churchwardens of St. Lawrence and Mr James Lee in equal shares. It follows that there is now no issue relating to the ownership of the armet, or, subject to Mr Lee's interest, the right of the churchwardens to give good title under a sale. By virtue of this agreement, the Court may, in the exercise of its discretion, grant a faculty".

There is no challenge to that conclusion.

22. The chancellor proceeded to consider what he described in para 13 as "the crucial, but contentious, issue, namely whether or not the sale of the armet should be permitted".

23. He accurately summarised the written representations of the parties. He directed himself that it was for the petitioners to prove their case by proving good and sufficient grounds to warrant the sale of the armet in circumstances where the court's jurisdiction should be exercised sparingly. He said that he had borne in mind the principle, confirmed in *Draycott*, that the more valuable the article, the weightier will need to be the reasons to justify the sale. His conclusion was that the petitioners had proved their case and justified an order for sale and "have crossed this high threshold" (para 34).

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24. He said that he had in particular taken into account the factors set out in sub-paragraphs 33 (c), (d), (e) and (i) of his judgment. In para 33 (c) he found that the armet was "a valuable piece of armour dating from the first half of the sixteenth century", although there were finer examples in existence of helmets/armets dating from the same period. In para 33 (d) he found that the connection between the armet and Sir Thomas Hooke was tenuous, since it had probably been acquired after his death as part of a funerary monument, and there was no aesthetic or artistic link between the armet and the monument. He found that the connection between the Hooke family and Wootton St Lawrence had been short-lived, there being no evidence to suggest that Sir Thomas or his son (who sold the property in Wootton St Lawrence) were individuals of local or national distinction. In his view:

> "the possible link between the armet and the present and future inhabitants of the parish is very limited. It does not play a significant part in the history or heritage of the village".

In para 33(e) he noted that the armet had not been on display in the church since 1969 and for security reasons there was no prospect of its ever being returned there:

> "Since the armet never had a function within the Church, it logically cannot be said to have been "redundant" in the normal sense of the word…..[T]he fact remains that the connection between the armet and the Church has been severed, and there is no prospect of the severance ever being reversed".

In para 33(i) he said:

> "I am satisfied that the Petitioners have now proved good financial reasons for seeking the sale. Those reasons are probably not far short of a financial emergency in themselves, but…it is unnecessary for the Court to reach that conclusion. The fact that one half of the net proceeds would go to Mr Lee is of no significance."

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25. The chancellor said that he had taken into account the historic significance of the armet and the CBC's suggestion that it should remain in RAM or a museum, but that these concerns "were outweighed by the factors in support of a sale" (para 34).

## JURISDICTION

The issue

26. The armet is an entirely secular object. Whilst it remained in the church it was undoubtedly subject to the faculty jurisdiction, regardless of its ownership by the heirs of Sir Thomas Hooke. As was said in *In re Escot Church* [1979] Fam 125,127 (Exeter consistory court), in relation to a painting which was claimed to have been loaned to a church:

> "The consistory court alone has jurisdiction over the introduction of moveable items into and their removal out of a church…Authority is now sought to remove the painting out of the custody of the church. Had Sir John brought proceedings to establish title in a temporal court, and had he succeeded in making out his claim, he would still have required a faculty (which would no doubt have been granted) to enable him lawfully to remove the painting from the custody of the church".

If before 1969 the heirs had wanted to recover the armet, they would have needed a faculty, and, given its role as part of the funerary monument, the outcome would have been a great deal less certain than appeared to the chancellor, on different facts, in *Escot*.

27. Since 1969 it has not been in any church. When the 1974 and 2010 faculties were granted it was still owned by the heirs of Sir Thomas Hooke. But was it in law still subject to the faculty jurisdiction? And if not, does the obtaining by the churchwardens of a half-share in its ownership in 2012-13 (and prior to the 2013 faculty) change matters?

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28. A faculty should have been sought in 1969 before the armet's removal to the bank vault. Therefore a faculty was undoubtedly needed to approve retrospectively the removal from the church and the loan to a museum. The position after the 1974 faculty is much less clear. If the co-heirs had sought to terminate the bailment to the museum, could the bailees lawfully have refused to release the armet to its owners? Had the matter been referred to a secular court, would the court have refused jurisdiction in the absence of a faculty authorising the release of the armet to the co-heirs? These are difficult questions, it being irrelevant to their determination that if the co-heirs had indeed applied for a faculty for return of the armet, we consider that the faculty would inevitably have been granted (assuming that the consistory court did retain jurisdiction). In a museum the armet was no longer fulfilling the purpose for which it had originally been bailed to the churchwardens, and we can see no grounds on which the co-heirs' petition could have been refused.

Submissions on jurisdiction

29. Counsel before us approached this issue very differently. For the CBC, Mr McGregor reminded us of the terms of section 11(1) of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 ("CCM") that:

> "For the avoidance of doubt and without prejudice to the jurisdiction of consistory courts under any enactment or rule of law, it is hereby declared that the jurisdiction of the consistory court of a diocese applies to all parish churches in the diocese and the churchyards *and articles appertaining thereto"* (emphasis added).

He argued (and this is not in doubt) that the armet was at all material times an "article" and that on removal from the church for the purpose of lending to a museum the article continued to "appertain" to the church. This was because "appertaining" implied the existence of a relationship between the article and

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the church, and did not imply ownership by any particular person. He correctly points out that an article which is unlawfully removed from a church continues to appertain to the church and to remain subject to the faculty jurisdiction. To which we would add that an article removed from a church for repair or for a temporary exhibition elsewhere would undoubtedly remain under the faculty jurisdiction, and regardless of ownership. He referred to *Re St Nicholas, Chislehurst* (unreported, 1999) (Rochester consistory court), where the chancellor granted a faculty for the loan of a helm and sword to RAM, saying that:

> "The faculty will further provide for the helm and sword to remain apart from the tomb to which they relate and until further Order, there being liberty to apply for further directions".

This, he submitted, was only consistent with the helm and sword continuing to be subject to the faculty jurisdiction, notwithstanding that they were to be removed from the church and that property in them was not in the churchwardens. We agree. Similarly, we have no doubt that the intention of Chancellor Phillips in granting the 1974 faculty was that the armet would remain under the faculty jurisdiction. But did that intention have effect in law to preserve the faculty jurisdiction?

30. For the petitioners, Mr Smith contended that by introducing an article into a church, the owner at law placed it into the custody of the churchwardens for its safety and protection. The relationship of the churchwardens to the article was therefore one of custody or bailment, and in this respect the legal relationship with the heirs-at-law was not greatly different from that between the churchwardens and the parishioners with respect to the ornaments and utensils of the church. Once, however, the article was removed from the church, albeit under faculty, it could no longer be said to be in the custody of the churchwardens, since it was then in the custody of the person or organisation into whose care it had been placed. Unless the legal owner had been a party to the

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loan arrangement or had agreed to the terms upon which the article had been removed from the church (which had not been the case here), he submitted that the consistory court would have no jurisdiction to interfere thereafter in the legal title of the article's owner. That was also the view of the chancellor in *Re St Bartholomew's, Aldborough* [1990] 3 All ER 440, 445a (York consistory court), who was considering a petition to sell a fourteenth century helmet, which had been on loan to the Tower of London. In the present case what Mr Smith contended to be crucial was that the heirs-at-law had now agreed to the sale. Therefore the sale for which a faculty was sought was effectively a sale by the churchwardens for the benefit of the parish. This, he argued, effectively brought the matter back by a form of reversion within the faculty jurisdiction.

Conclusions on jurisdiction

31. Mr Smith's approach to reversion receives support from *Aldbrough*, where by the time of the hearing the heirs-at-law had reached an agreement with the parish very similar to that reached in this case with Sir John Hamilton Spencer-Smith, which was held (at 445b):

> "to give a sufficient interest in the helmet to [the church representatives] to bring it within the faculty jurisdiction".

We find the argument on reversion wholly unpersuasive. If the armet ceased to be subject to the faculty jurisdiction in 1974, we do not consider that any subsequent acquisition of title by the churchwardens can revive the faculty jurisdiction, unless the article were to be re-introduced to a church (for which a separate faculty would in any event be required).

32. We readily accept that the word "appertaining" in section 11(1) of the CCM does not imply ownership by any particular person; otherwise, there would have been no jurisdiction over the article even when it was in the church (as to which see *Escot*). We are doubtful whether the historical link between the armet and the church is itself enough to constitute a continued

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"appertaining thereto". If this were the case, then there would be a continuing duty of annual inspection of the armet, pursuant to section 5 of the CCM.

33. On the other hand, it would be anomalous (as well as highly regrettable) if the jurisdictional consequence of a faculty sanctioning a loan to a museum depended on ownership of the article loaned. The flaw we perceive in Mr Smith's analysis is its assumption that the role of the churchwardens in relation to the armet terminated in 1974. It did not. The loan was the subject of a contractual agreement under which both parties had rights and responsibilities. Further, whatever the position under section 5 of the CCM, it remained the responsibility of the churchwardens from time to time to check that the bailee was honouring its responsibilities under the loan agreement and whether alternative arrangements needed to be made for the armet, whether by way of different terms for the loan, or loan elsewhere, or even disposal by sale (whether open or restricted). It is this element of continuing custodianship which had the legal effect of retaining the armet within the faculty jurisdiction. For the future, and whilst such wording will not of itself determine the jurisdiction issue, we strongly recommend that chancellors sanctioning loans, regardless of ownership of the articles concerned, contain clear, express provisions relating to the continuance of the faculty jurisdiction in respect of the article loaned.

## CATEGORIES OF DISPOSAL CASES

<u>The three categories</u>

34. There are three types of disposal of treasures, each of which requires a faculty:

(a) The first, which does not involve any change of ownership, is where the item is placed on long term loan to a museum, art

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gallery or diocesan treasury ("disposal by loan"). Such loan arrangements have the advantage that the item is held securely, at no or minimal cost to the church of origin, and normally placed on display, or at any rate made available for public view and scholarly examination. This court held in *Brant Broughton* (at 22A-B and 23 A-B) that parishes should not seek disposal of valuable articles merely because of the cost of obtaining full cover insurance; if limited insurance cover could be obtained at an affordable premium, and the article was not redundant, then that strengthened the case for retention of the item within the church. Where, however, there are compelling reasons why the treasure can no longer be retained in the church, such a loan will normally be a sensible solution, greatly preferable to long-term deposit in a bank vault, unlikely to excite objection, and likely to be sanctioned by faculty. Where the treasure is owned by a third party who (or whose successor in title) has retained ownership, the owner should, if traceable without undue expense or delay, receive special notification of what is proposed. The owner may wish to petition for return of the treasure, because (as mentioned above) the original purpose of the bailment to the church in question will cease on the treasure's removal from the church.

(b) The second is where the item is to be sold to a museum, art gallery or (more rarely) diocesan treasury ("disposal by limited sale"). Since the church will lose ownership, such sales are not lightly allowed and require special justification. In *Re St Martin-in-the-Fields* (unreported, 21 January 1988) (London consistory court), (referred to below as *St Martin-in-the Fields (1988)*, to avoid confusion with the Court of Arches case concerning the same church), the chancellor permitted the sale of a bust by Michael Rysbrack to a suitable national institution because "an emergency exists in respect of the vicarage", which urgently required expenditure of about £350,000, of which £200,000 would have to be met by the petitioners, even assuming a contribution from the Parsonages Board of £150,000. In these circumstances it was held "impossible to

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see where the money would come from except by a sale of the bust, the one remaining realisable asset of this church".

(c) The third is where the item is to be sold, regardless of who the purchaser is, to whoever will pay the highest price ("disposal by outright sale"). Outright sales were sanctioned by this court, subject to stringent criteria, in *Tredington* and *St Martin-in-the-Fields;* and refused in *Brant Broughton*, *Burton Latimer* and *Draycott.*

35. Disposal by loan and disposal by limited sale both safeguard the security and (to some extent) visibility of the article. The former has the advantage of retaining control (and usually ownership – the exception being where the church does not have ownership, as here), whereas ownership and any form of control are lost entirely in both forms of disposal by sale. From the point of view of petitioners, the disadvantage of disposal by loan is that it does not release a sum of money which can be deployed to other church purposes. We consider that the dictum in *Welland*, quoted at para 3 above, adopted too narrow a role for the church as a guardian of art treasures. We do not accept the chancellor's view in that case that churchwardens' powers are limited to acquiring and dealing with property for purposes which are principally concerned with worship and mission; or its corollary that the churchwardens ought therefore to dispose of property that is not capable of being applied for such purposes.

A sequential approach

36. There are of course many articles whose disposal by loan or limited sale is not an option, because the article lacks the prerequisite artistic value or interest. But where disposal of Church treasures is contemplated, then would-be petitioners and chancellors should apply a sequential approach, considering first disposal by loan, and only where that is inapposite, disposal by limited sale; and only where that is inapposite, disposal by outright sale. This is not a novel

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approach. In *Burton Latimer* this court rejected an appeal against a refusal to permit the sale of items of silver, which, following ten years in a bank, had been on loan to the Peterborough Cathedral Treasury for fifteen years, where they had been from time to time displayed (p.2). The petition was held to be premature, there being no pressing need for sale. Before authorising the sale of the bust in *St Martin-in-the-Fields (1988)*, the chancellor stated that he would have rejected the petition for limited sale if the petition had merely been based on the problems to the petitioners of keeping it safe and the advantages of public display in such an institution. This was because "the problem could readily be solved by lending the bust to some public museum, art gallery or other like institution where it could be exhibited to the public with all necessary security" (p.4). Similarly, in *Re St Nicholas, Porton* (unreported, 2002) (Salisbury consistory court), the deputy chancellor, in refusing a petition for the outright sale of two seventeenth century joint stools, said that:

> "The ideal solution would be their placement on long term loan in a museum or similar institution, where the need for conservation…might also be addressed. Under such an arrangement the stools would remain subject to the faculty jurisdiction and sale might be authorised by the court at some time in the future if there were good reasons for it".

As between disposal by limited sale and disposal by outright sale, the balance lies between the greater sum which can usually be obtained by the latter, as against the public visibility which can only be assured by the former.

37. With one exception which we examine below, decisions have generally recognised that the interests of public visibility should normally prevail, when the court is considering proposed disposal by sale of articles of local or national distinction. Thus in *St Martin-in-the-Fields (1988)*, the chancellor recorded that the petitioners' statement of case had been amended to seek only "a restricted power to sell the bust to a suitable national institution as distinct from a power to sell by public auction"

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(p.2-3); and later he stated that he accepted the evidence of several specialist and artistic witnesses that "it is most undesirable that the bust should leave this country" (p.3). He made it plain that "if [the] petitioners were to [seek authority for the sale by public auction] they must make a separate case for it". In *Re St Mary, Barton upon Humber* [1987] Fam 41, 55E (Lincoln consistory court) the chancellor rejected a submission that a restored coat of arms should be sold at auction rather than go to a museum:

> "…[O]ur churches and their contents are part of our national heritage and there is much to be said for such items being displayed where they can be of benefit to all rather than sold to a private collector".

In *Aldbrough*, where disposal by limited sale was permitted of a helmet currently on loan to the Tower of London, the chancellor said that (at 454h):

> "A chancellor would presumably not grant a faculty for sale [of such a loaned article] unless he was satisfied on the evidence that there was at least a probability that the item would be purchased by a museum or other body where it could be kept in England and would be on show to the public".

The chancellor directed that:

> "The sale must be to the Royal Armouries or to some other museum which will agree to keep the helm in England and keep it on display to the public. I set the price at £20,000 with liberty to apply to review this."

In *Re Holy Trinity, Batley Carr* (unreported, 6 August 1997) (Wakefield consistory court), the chancellor said that he would approve a sale of certain screens and furniture:

> "either to another church or museum, and that if any other sale is to be sought I should need to be satisfied that proper efforts had been made to achieve a sale to a church or museum".

In *Draycott* the petitioners originally proposed sale of a Burges font to a private collector. This was regarded by the chancellor as unacceptable, but he went on to consider (and allow) an

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alternative, not raised in the petitioners' submissions, namely sale to a public museum or collection, or failing that, sale by public auction (paras 8 to 10). When the chancellor's decision was appealed to this court, there was no cross-appeal against the rejection of the petitioners' case for sale to a private collector (para 11). In *Re St Columba, Warcop* (unreported, 21 December 2010) (Carlisle consistory court), the court permitted the sale of an oil painting of St Andrew, currently on loan to the Bowes Museum at Barnard Castle, but only subject to two conditions:

> "(a) the painting shall first be offered for sale to the Bowes Museum at Barnard Castle at a price to be agreed which is not less than £30000
>
> (b) if no sale can be achieved before 20th December 2011 [12 months from the date of judgment] the painting shall be sold by auction at Sotheby's" (para 50).

Such a condition was intended to achieve the like effect as condition 1 attached to the 2010 and 2013 faculties, to which we referred at para 13 above, although the wording in *Warcop* is considerably more precise.

38. Although disposal by outright sale was permitted by this court in both *Tredington* and *St Martin-in-the-Fields*, there is no indication in either of those cases, both of which concerned the sale of redundant silver in circumstances of financial emergency, that disposal by limited sale was an option. True, in *Tredington* the deputy dean said at 244F that if the case were an application to sell the flagons to the county museum at an undervalue "that would be a matter for sympathetic consideration"; but that was not being sought by the advisory bodies nor (so it would seem) being suggested by anyone as a viable prospect.

39. A recent exception to the general approach is *Re St Michael and All Angels, Withyham* [2011] PTSR 1446 (Chichester consistory court). There the chancellor permitted the sale of a set of four 14th century Italian paintings, which had

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been on loan to the Leeds Castle Foundation since 1997. He considered, and rejected, a representation by the CBC that the sale should be restricted to a public institution in Great Britain. The chancellor said at para 39:

> "I am satisfied, for the reasons given by Sotheby's, that this might well result in the paintings not achieving the best price possible. As charity trustees, the parochial church council are obliged to realise the full value of any assets to be sold".

We invited submissions from Counsel in relation to the proposition in the second sentence, which is inconsistent with the dictum in *Tredington* about possible sale to a museum at an undervalue. Both Counsel drew attention to the inherent misconception in *Withyham* that the court was concerned with the powers of the PCC. It is the churchwardens who have the legal title to the goods of the church. The churchwardens, however, are not charity trustees. Counsel were agreed that if the faculty authorised a sale only to a museum for the best price that could be obtained from such a museum, that lawfully limited the duty of churchwardens. We agree, and would only add that were it otherwise churchwardens would not be able, pursuant to faculty, to give or sell at an undervalue articles to other churches.

## LEGAL PRINCIPLES IN DISPOSAL CASES

Previous decisions of the Court of Arches

40. In *Tredington* this court was concerned with the proposed sale of two silver flagons, used in the past as communion vessels, but "far too valuable to be used in the service of the church" (at 244D-E) and which had "been kept, for many years…, in a bank or museum" (at 245A). The court cited from legal textbooks which recognised that (at 240G-241A):

> "while church goods are not in the ordinary way in commerce or available for sale and purchase, yet the

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> churchwardens with the consent of the vestry (now the parochial church council) and the authority of a faculty may sell them or even give them away…To obtain a faculty some good and sufficient ground must be proved…some special reason is required if goods which were given to be used in specie are to be converted into money".

At 246G-247A, the deputy dean summarised his reasoning for permitting sale, and the approach which should be followed in such cases:

> "As to the grounds for granting the faculty, I have granted it in this present case because the flagons are redundant and because there is an emergency in the finances of the parochial church council, due to the state of the fabric and the small congregation of the church. I have also stated that faculties can be granted to enable churchwardens to make a gift to religious and charitable purposes. I must not be understood to say that those are the only grounds for exercising the discretion in favour of a sale; other kinds of cases must be considered as and when they arise, but the jurisdiction should be sparingly exercised".

41. In *St Martin-in-the-Fields* this court was again concerned with redundant silver, which was either in the custody of the London Museum or in the bank (p.1). The evidence showed that necessary and urgent items of repair to the church and crypt would cost more than £70,000 with architect's fees; and that if this cost was met from the capital funds of the parish, the work of St Martin's, "including the great work of social service based on the church and the crypt, would suffer" (p.4). It was not in dispute that there was "a financial emergency for the parish, which would be a good and sufficient ground for granting a faculty", and the only reason the chancellor had refused the faculty was because he considered that a public appeal for funds should first be sought (p.4). However, this court held that in circumstances where there were good reasons for not making a public appeal which (on the evidence)

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was likely to fail unless it were preceded by the sale of the silver, the faculty should issue (p.7-8). The judgment emphasised (p.9) that:

> "St. Martin's is a special case, because of the special character of its ministry. In other cases where parishes have redundant silver, it may well be that the possibility of raising money by an appeal to the public will be a relevant factor in considering whether there is a good and sufficient ground for granting a faculty to sell the silver".

42. In *Burton Latimer* the petitioners sought to sell "silver on the open market so that the proceeds may be used to "kickstart"… a campaign to raise the monies necessary for an extension to the church", for which planning permission had thus far been refused (p.2). The chancellor's refusal on grounds of prematurity was endorsed (p.8 and 10). The court said of the "decision and principles" in *Tredington* that "we heartily endorse each" (p.5). In addressing the question of "good and sufficient reason for sale", the court said (p.6-7):

> "Redundancy may be such a reason although this is unlikely in the case of parish silver [because it could normally still be used in the church: see p.5)]. Changes of investment – such as the appellants have suggested – are likely not to be such a reason. Financial emergency may well be such a reason… The jurisdiction should be exercised sparingly".

43. Understanding of the decision of this court in *Draycott* is not helped by the deficient headnote to the Law Report which reads:

> "a consistory court should not exercise its jurisdiction to authorise the sale of moveable property in order to carry out repairs to a church merely on the basis of financial need but had to be satisfied that there was a "financial emergency", which meant an immediate pressing need to carry out critical work for which funds were not, or could not be made, available".

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That is certainly how the court defined “financial emergency” (para 76), but the court did not hold that a financial emergency was the only reason which could justify a sale, or was even a prerequisite for sale. As we have explained in para 37 above, the court was reviewing a decision to permit the disposal by limited sale of a Burges font, which was not redundant. Although there was a programme of repairs and improvements to be carried out over the next five years, the building was structurally sound and weather-tight (paras 67 to 69), and there had not even been an application to the diocesan parish development fund (para 73). Given the loss to the church and the community which would be involved by the sale of the font prompted by an “opportunistic offer by a collector”, the faculty should have been refused (para 76). In para 61, the court re-iterated that “a good and sufficient ground must be proved”, and that the jurisdiction should be exercised sparingly, both principles taken from *Tredington*.

A two-stage approach, involving special grounds?

44. It is clear from *Tredington*, *Burton Latimer* (p.6) and *Draycott* (paras 60 and 61) that the term “special grounds” is synonymous with grounds which are “good and sufficient”. Mr McGregor contends that a two-stage approach is implicit in *Tredington.* First, is or are the grounds “good and sufficient” or “special”? If so, and only if so, should the court proceed to consider whether the advantages of sale outweigh the disadvantages. At this stage we consider it worth spelling out the practical inconvenience of a two-stage approach, namely that, absent one or more “special” grounds a faculty must be refused, whatever the cumulative weight of “non-special” factors; whereas if there is at least one “special” factor, then the “non-special” factors enter into the balancing exercise.

45. Incantation of the “good and sufficient” ground(s) test begs the question of what constitutes “special” or “good and sufficient grounds”. Accepting, as Mr McGregor must, that the

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categories of “special” reasons are not closed (which follows from *Tredington* and *St Martin-in-the-Fields*), what is the qualification to pass the first stage test of “good and sufficient” or “special”? Mr McGregor suggests that a special reason is something which is not ordinary, and that a distinction should be drawn between a special (out of the ordinary) reason and a commonplace one.

46. In a number of consistory court cases a two-stage approach has been followed, see, for example, *St John the Baptist, Halifax* (unreported, 19 December 2000) (Wakefield consistory court), followed by the same chancellor in *Re Lincoln St Giles* (12 April 2006, unreported save at (2006) Ecc LJ 143) (Lincoln consistory court)) (paras 27 and 45), the latter decision being referred to, on another issue, in *Draycott* (para 63). In the first case (as set out in para 27 of the later case), the chancellor defined “good” grounds as:

> “amounting to “some special reason” of which “[an] example is redundancy, but that is not an essential ground nor is it the only possible ground”;

And he defined a “sufficient” ground as meaning that:

> “when considered against all the material before the court, it is of sufficient weight to persuade the Chancellor that a faculty should issue”.

Then, in a passage immediately following those definitions, the two stages were conflated:

> “This means that the Chancellor will consider all the evidence surrounding the proposed sale, he will consider the reason for sale, the proposed use of the money to be raised, the historical or artistic significance of the item, and then exercise his discretion in deciding whether a good and sufficient reason has been proved. He…will consider all the evidence and then exercise his discretion”.

However, later in *Re St Giles, Lincoln* (para 45) the chancellor reverted to the two-stage approach:

> “…I do not consider it is necessary to show that there is a “very convincing argument” that rebuts the presumption

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> against sale…In order for me to grant a faculty the Petitioners must persuade me on the balance of probabilities that some good and sufficient reason has been proved. A good ground is a "special reason". I am satisfied that the special reason here is the fact that there is no longer a meaningful relationship between the church of St Giles and the painting. I am also satisfied that in the present financial circumstances of this church, that ground is a sufficient ground, notwithstanding that the painting may be lost to Lincoln".

47. We shall return to the question of "meaningful relationship" in our consideration of "separation". We see no reason to avoid an approach requiring "a very convincing argument" for sale, which is consistent with the approach followed in *Tredington, St Martin-in-the-Fields*, *Burton Latimer* and *Draycott*, though that particular expression was not used.

48. In *Re St John the Baptist, Stainton-by-Langworth* (April 2006, unreported save in (2006) 9 Ecc LJ 144) (Lincoln consistory court), the same chancellor permitted the sale of a redundant two-handled chalice. He observed that the financial climate had changed since *Tredington*, and that a more complex balancing exercise than mere financial emergency was required to be considered, since the general public might feel aggrieved that the church was asking for funds whilst it held redundant assets, and it was important to enable a viable congregation both to remain and increase. Whilst redundancy has always been accepted to be a special reason for sale, the approach in *Stainton-by-Langworth* is not consistent with a narrow concentration on what is rare and not commonplace, nor with a distinct two-stage approach.

49. In *Withyham*, following an impeccable summary of previous case-law, the court approved disposal of paintings without prior identification of any factor or factors as "special", treating the matter as a "balancing exercise" in which "all

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relevant factors point in favour of the grant of a faculty" (para 32). In his proposed grounds of appeal Mr McGregor contended that if *Withyham* held that either a substantial degree of alienation or financial need falling short of a financial emergency amount to a special reason it was either contrary to, or unsupported by, authority and should be overruled. He did not expressly pursue this contention either in written or oral submissions to us, but it is the logical corollary of his submission on the narrow meaning of "special" and the need for a two-stage approach.

The proper approach to disposal by sale

50. We consider that an analogy can helpfully be drawn with the position which arises, in secular planning law, in relation to proposals for development within the Green Belt, save where the development falls within the category of "appropriate development". In the case of "inappropriate development", the policy requires that "very special circumstances" have to be shown, which "clearly outweigh" the harm caused by the development. Initially the lower courts applied a two-stage test of first asking whether the circumstances could reasonably be described as very special; and if, but only if, they could be described as very special, did the question arise whether the very special circumstances clearly outweighed the harm. This led to definitional concerns as to what were "very special circumstances", with a distinction drawn between the very special and the commonplace. Finally in *Wychavon District Council v Secretary of State for Communities & Local Government and Butler* [2009] PTSR 19, the Court of Appeal held (para 21) that it was:

> "wrong…to treat the words "very special" in…the guidance as simply the converse of "commonplace". Rarity may of course contribute to the "special" quality of a special factor but it is not essential, as a matter of ordinary language or policy. The word "special" in the guidance

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> …connotes a qualitative judgment as to the weight to be given to the particular factor for planning purposes".

Moreover, there was "no reason to draw a rigid division between the two parts of the question" (para 25). This was because there was (para 26):

> "no reason, in terms of policy or common sense, why the factors which make the case "very special" should not be the same as, or at least overlap with, those which justify holding that green belt considerations are "clearly outweighed"."

51. If similar reasoning is applied in respect of "special" reasons in this part of the faculty jurisdiction, then qualitative weight, including the cumulative weight of individual factors, some or all of which may not be specially rare, is all that has to be identified; and the requisite weight is that which is sufficient to outweigh the strong presumption against disposal by sale. Sales will rarely be permitted, but that is because of the strength of the presumption against sale. There is nothing in previous authorities of this court to compel a two-stage approach; and, rather than continuing to engage in the semantics of what is "special", chancellors need merely decide whether the grounds for sale are sufficiently compelling to outweigh the strong presumption against sale.

52. Although a distinction between "financial emergency" and some lesser degree of financial need featured strongly in the arguments before us, and has echoes in some of the judgments in previous cases, it is a distinction the significance of which is much reduced outside the framework of a two-stage test. Financial need falling short of financial emergency will seldom on its own outweigh the strong presumption against sale; but it can and must be weighed with any other factors favouring such sale. It follows that a critical or emergency situation will carry more weight than more normal pressures on parish finances, but it is neither possible nor desirable to

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develop criteria for an emergency situation that would put a case into a distinct category.

53. In *Draycott* (para 65) this court approved the statement of the chancellor in *Stainton-by-Langworth* that:

> "Quite clearly the more valuable the plate, particularly having regard to its artistic and historic value the weightier will need to be the reason before the court in its discretion concludes that it is a sufficient reason in all the circumstances to allow a sale".

Although there was reference in *Draycott* (para 80) to a varying "standard of proof", strictly the standard of proof remains the same. It is simply that the less valuable or significant the article in question, the easier it will be to discharge that unchanged standard of proof; and the more valuable or significant the article, the more difficult it will be.

## APPROACH TO "SEPARATION"

The issue

54. In some of the disposal by sale cases the article has already been removed from the church and placed in a bank or on loan, sometimes for many years. Where, as in *Tredington* (at 242E and 246H) and *St Martin-in-the-Fields* (p.4), there was a financial emergency for the parish, separation does not usually have a role as a distinct factor. But where there is something less than a financial emergency, what relevance attaches to separation? There are dicta in *Tredington* (at 244D-E and 245 B) about frustration of the purpose of the donor which suggest that some weight could attach to such separation.

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Case law on separation

55. The concept of separation has been addressed in several consistory court cases. We prefer to use the term “separation” to describe the circumstances of the article having been housed for a considerable amount of time in some place other than the church; earlier judgments have spoken of “alienation” or the severance of any meaningful relationship between the article and the church. In *Aldborough* the helmet had already been on loan to the Tower of London for ten years (at 442f-g). Having found that there was a financial crisis in the church which justified disposal by limited sale of the helmet (at 451g), the chancellor considered, amongst various points of principle which had been raised against sale, “Undesirability of alienation” (at 453j-454d). Having stated that (as here) there was no realistic possibility that the helmet would ever return to the church, he said:

> “I feel it is also relevant that the tomb and the helmet do not have any artistic or aesthetic connection, as might be the case with a pair of paintings or a pair of flagons. The connection is a historical one which, though clearly important, does not include an aesthetic element…I consider it is also relevant that the helmet is basically a secular item rather than an item of spiritual significance…In many ways the Royal Armouries is a more natural place in which to display this helmet than a church. I agree…that there has already been a substantial degree of alienation between the helmet and the tomb. In terms of the argument of principle that there ought not to be an alienation except in most exceptional circumstances I cannot avoid a conclusion that a substantial degree of alienation has already occurred…By severing the ownership of the helmet from the ownership of the tomb there is, of course, a further step in the separation, but this I think can be mitigated by appropriate records being made of the provenance of both items and their historical connection.”

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The chancellor rejected, in the absence of evidence supporting it, an argument that even limited sale in such circumstances might discourage museums from accepting loans, if "the existence of a loan might be used as a springboard for a subsequent faculty [for the sale of the loaned object]" (at 454g-j).

56. In *Lincoln* the court was considering the sale of a painting of a different demolished church which had for ten years been loaned to the Cathedral Library (paras 12 and 39) and where it was "not foreseeable that the painting will ever be again be hung in St Giles church" (para 40). Having concluded (para 40) that:

> "the connexion [sic] between St Giles and the painting (apart from the legal connexion of ownership) is now and for some time past has been effectively meaningless [and that] [i]f it were an item such as a piece of silver plate it would be redundant",

the chancellor permitted its sale, subject to a condition that "in any sale every effort shall be made to find a buyer with connections to the city of Lincoln in the hope that the sketch might be loaned or ultimately bequeathed back to Lincoln". The "special reason" on which the sale was allowed was "the fact that there is no longer a meaningful relationship between the church of St Giles and the painting" (para 45). In these circumstances the chancellor said that "it is hardly necessary for me to deal with the financial arguments" (para 44), but, having also found that "there is a real financial need" (para 44), he held that that was "a sufficient ground", albeit not itself a "special reason".

57. *Lincoln* was followed in *Warcop* and *Withyham*. In *Warcop*, the limited sale of a painting which had been on loan to the Bowes Museum for over fifty years was permitted on the 'special reason' that "there is no longer a meaningful connection between the painting and the Church or the local community" (para 41). There was also 'a financial emergency',

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which would have justified the sale in any event (para 43), though that was not the main ground relied upon by the chancellor. In *Withyham* the outright sale of fourteenth century Italian paintings was permitted, absent any "dire financial emergency", primarily on the grounds that the paintings had only been given to the church in 1849, "serve no liturgical function or canonical requirement", and "have been on permanent loan to a secular historic property for nearly 15 years" (para 32).

58. This suggests that "separation" has taken on importance as a free-standing reason for disposal by sale. This is a matter of great concern to the CBC. Mr McGregor contends that "alienation" of goods means parting with title to them, and does not encompass the loan of goods to an institution with a view to their preservation or their removal to a bank vault for their protection. The purpose, he says, of such loans is to protect and preserve the article in question, in particular to protect it against loss, which he describes as "the opposite of alienation". Thus he argues that there is no true comparison with redundancy, and "separation" cannot constitute a special reason for permitting a sale. Were the position to be that "separation" could justify sales, he argues that a prima facie case could be established for the disposal of every article appertaining to a church which has been deposited in a museum or cathedral treasury for a period of time. The mere deposit of the article on loan would provide "a degree of alienation". This argument, a modified form of which was considered in *Aldbrough* (at 454g-j), retains its force, despite our rejection of the two-stage approach with its emphasis on the identification of a "special reason".

<u>The proper approach to separation</u>

59. In *Burton Latimer* (p.7), this court, in upholding the refusal to permit the sale of antique silver, emphasised the importance

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of the history of an object as part of the local heritage. The court said:

> "A relevant factor, indicating that there should be no faculty, may be that the articles are part of the heritage and history not only of the church but also of all the people, present and future, of the parish".

In our view, in the case of historic articles with a significant past connection with a church or parish, this factor will commonly outweigh any possible argument based on "separation". For the future we consider that little weight should normally attach to "separation" as a reason for disposal by sale, and we doubt that "separation" would ever, on its own, have sufficient strength to justify sale of a Church treasure.

60. If, as we have said at para 51 above, the proper approach is not a two-stage test, but rather (as in *Withyham*) looking at the matter in the round in the context of a strong presumption against disposal by sale, then there may be some circumstances in which "separation" may not be entirely incapable of supporting the case for sale. If, however, there were to be any evidence that petitions for approval of loans were being manufactured as stepping-stones towards disposal by sale, chancellors can be confidently expected to attach even less weight to such manufactured "separation" than might otherwise be the case.

## THE GROUNDS OF APPEAL

61. There were five Grounds of Appeal, most of which (against the preceding review of the applicable law) we can address quite briefly.

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**Ground 1: Financial need falling short of an emergency does not amount to a 'special reason', justifying the grant of a faculty for the sale of a valuable article, either on its own or in circumstances where the article in question has been physically separated from the church because it has been deposited in a museum**

62. We have already explained this court's decision in *Draycott*, where the claimed financial need fell short of an emergency, and there were other circumstances which caused the petition to fail. *St Martin-in-the-Fields* is, however, Court of Arches authority that mere financial need on its own will not justify disposal by sale. But, as Mr McGregor recognises, in relation to this armet the chancellor relied on financial need, coupled to "separation", following the approach in *Withyham*, which the chancellor held to be indistinguishable.

63. Therefore the question is whether this coupling represents an error of law. There are two aspects. First, for the reasons we have given above, we consider that "separation" is a factor to which usually little weight should attach, but we have not held that it is a wholly irrelevant matter. Therefore, there was no error of law in the chancellor taking it into account. The way in which he took it into account we shall return to under Ground 3. Second, we have already rejected the need for a two-stage test, and have observed at para 52 above that this reduces the absolute distinction between "financial emergency" and other forms of financial need. We have approved an approach of looking at the matter in the round, simply asking whether the reasons are sufficiently compelling to outweigh the strong presumption against disposal by sale. That is what the chancellor did. He expressly referred to the principle, approved in *Draycott*, that the more valuable the article, the weightier will need to be the reasons to justify a sale, and held that, on the facts of the case, the petitioners "have crossed this high threshold". Therefore we reject the appeal based on Ground 1.

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## Ground 2: The chancellor's approach to the financial evidence was flawed

64. The chancellor found that the petitioners have:

> "proved good financial reasons for seeking the sale. Those reasons are probably not far short of a financial emergency, but…it is unnecessary for the Court to reach that conclusion (para 33(i)).

65. This was based on what was said in a letter from the petitioners' solicitors of 17 June 2013, stating that the cost of roof repairs was expected to be £30,862, and that the cost of new heating to be installed in the re-ordering "of the Church" was likely to be about £50,000 (para 32). The chancellor went on to say:

> "I am unclear how the first figure links with the sum loaned by the Diocese. Nor am I informed how the P.C.C. is proposing to pay for the new heating. Nevertheless, these figures indicate that, at the very least, the P.C.C. is, or will be, facing substantial financial commitments".

66. It appears that the chancellor supposed that these were repairs to St Lawrence, Wootton, whereas Mr Smith has confirmed that both relate to St Leonard's, Oakley. It is not, however, suggested that anything turns on that mistake.

67. What is, however, plain is that the two items of proposed expenditure relied on in the solicitors' letter were not the items referred to in the PCC Minutes which authorised the lodging of the petition, and to which we referred at para 11 above.

68. The CBC's written representations of 3 June 2013 expressly complained that "there is no evidence before the court" relating to the installation of a new heating system; that

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"the necessary funds to deal with the theft of the roof lead and the demolition [of St John's church] are already available in the form of loans from the diocese [for the repayment of which] the parish is able to budget…without incurring a deficit"; that the PCC's income had grown rapidly over the past five years; and that the PCC was in "a relatively strong position", as shown by the 2013 budget.

69. Other documents, most of which were not before the chancellor but which we admitted by agreement of the parties, clarify the PCC Minute. So far as concerns the demolition of St. John's church and laying out of the garden of remembrance, the PCC had already obtained a loan of £40,000 from the diocese, repayable over 12 years. The new seating area and additional burial space for the village were formally opened in September 2012. Overall costs came in under budget and the loan is currently being paid off at a faster rate than strictly necessary. So far as concerns the St Leonard's Centre (a project for a refurbished church hall, with attached new build church office and committee rooms on land off Rectory Road, Church Oakley), work appears to have been completed before 2012. On 12 March 2012, approximately one month before the relevant PCC resolution, the Annual Parochial Church Meeting was told that:

> "at the end of February 2012 there was an outstanding loan of £50K from the diocese but with £34k in the bank and promised pledges of £16K continuing to be met the Centre should be paid for in full by the end of this year".

70. The 2012 accounts show an annual surplus of £3,300, after expenditure of £196,772. The budget for 2013, which was before the chancellor, shows that income of £143,000 was sufficient to cover payment of parish share of £65,000, loan repayments of £5000, and "Outparish giving" of £14,900 (approximately a tenth of annual income) without incurring any significant deficit. The repayment was of the diocesan loan, made in 2012 and repayable over 12 years, in respect of the

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demolition of St John's church, which the parish is in the fortunate financial position of being able to repay over a shorter period, having already paid the cost of demolition and laying out the garden of remembrance in 2012.

71. Mr McGregor's complaint is that no findings were made (or evidence submitted) as to the ability of the PCC to raise funds over and above its ordinary income; and he repeats the CBC's written representation that the parish is in a reasonably strong financial position, such that the chancellor could not properly have come to the conclusion that the petitioners had proved "good financial reasons for seeking the sale" or that those reasons "are probably not far short of a financial emergency in themselves".

72. In response Mr Smith correctly contends that the chancellor was entitled to take the overall finances of the parish into account, without having to establish that these gave rise to a financial emergency. But that is to avoid the thrust of this Ground of Appeal.

73. In the light of the new financial documentation we are in a better position than was the chancellor to evaluate the financial position in the parish. The new documents conclusively show that this is a well-managed and reasonably well-resourced parish, carrying out its Christian mission with considerable success. As the reference to "pledges" shows, there was a successful appeal of some sort in relation to the funding the St Leonard's Centre; and the Minutes of the Annual Parochial Church Meeting on 12 March 2012 refer to "some very substantial one off donations" received in 2011. The same Minutes record that "In 2013 a fund-raising appeal is planned to raise the funds needed to repair the roof and the internal damage to the church following the lead theft". Therefore at that time (and presumably at the time the petition was under consideration in 2012-13) funding of the roof repairs was not in any way dependent on sale of the armet. But even without the

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new financial material the chancellor should have seen, in the light of the 2013 budget, that the financial case for the sale of the armet was tenuous; and before reaching the conclusions which he did, and which Mr McGregor understandably criticises, he should at the very least have sought further clarification from the petitioners.

74. We are satisfied that the chancellor should not have reached the conclusion that the petitioners had a strong financial case for selling the armet. His erroneous conclusion on financial need requires his decision on sale to be quashed, it being impossible to contend that his decision would necessarily have been the same had he appreciated the true financial position.

75. Accordingly the appeal succeeds on Ground 2.

**Ground 3: The chancellor's approach to the question of a historic link between the armet and the parish was flawed**

76. It is common ground between the parties that in determining whether to grant a faculty the chancellor was required to take into account the historical value of the item when considering whether the strong presumption against sale was outweighed. This is what the chancellor purported to do, expressly stating (para 34) that:

> "I have borne in mind the principle, confirmed in the *Draycott* case, that the more valuable the article, the weightier will need to be the reasons such as to justify a sale".

77. Mr McGregor's complaint is that the chancellor adopted an incorrect approach to the historic link between the armet and the parish, when he described "the possible link between the armet and the present and future inhabitants of the parish [as] very limited", and the armet as not playing "a significant part in

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the history or heritage of the village" (para 33(d)). Irrespective, says Mr McGregor, of the original provenance of the armet and the fact that the Hooke family only lived in Wootton St Lawrence for 50 years, Sir Thomas is buried in the church and the armet, which formed part of the accoutrements of his tomb, hung in the church for approaching 300 years. Such a link, he says, was far from tenuous and could not be described as "very limited" or insignificant.

78. Mr McGregor relies particularly on what this court said in *Burton Latimer* (p.7), to which we have already referred in our consideration of separation as an issue.

79. Mr Smith draws attention to the fact that the armet has not been displayed in the church for over forty years; and that it is agreed by all the parties that it can never be returned to the church. Therefore, he says, the purpose for which the armet was introduced into the church has become wholly lost and any connection with the tomb and the church severed, so that the chancellor was right to consider that any connection the armet may have had with the tomb had been lost as a result of a substantial period of alienation.

80. We have already stated our view on the limited weight which should normally be accorded to separation. The decision in *Burton Latimer* provides some support for the CBC. There too there had been a long period of separation, a period of 25 years (p.2). The historic connection with the church and the parish was treated as an important factor.

81. We consider that the chancellor erred in his approach to the issue of separation, and that there was no basis, in law or in fact, for the conclusion he reached on this aspect of the case. Therefore the appeal also succeeds on Ground 3.

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**Ground 4: The chancellor failed to consider whether if there were to be a sale it should only be to a museum**

82. The CBC's case in its written representations was that the armet should not be sold at all; but, in the alternative, that if the court were minded to grant a faculty, it should be on condition that any sale should only be to the Royal Armouries or to another museum in this country, such a condition being "the minimum necessary to ensure that an important aspect of heritage was not permanently lost to the local community and the nation". The chancellor recorded this alternative representation in para 27 of his judgment. Then at the start of para 33(f) of his judgment he stated:

> "The Party Opponent is not suggesting the armet should return to the Church. The suggestion is that, because of its historic value, it should remain in the Royal Armouries or a museum".

In para 33(g) he said that:

> "I am prepared, despite misgivings, to take into account the matter referred to at the outset of Sub-paragraph (f) above. I bear in mind the historic significance of the armet. I shall not, however, treat this as a paramount consideration, but only as one of several factors to be weighed in the balance".

Finally in his conclusions in paragraph 34 he again said:

> "I have also taken into account the matter set out in Sub-paragraph 33(g) above, but in my judgment this is outweighed by factors in support of a sale".

83. Mr McGregor argues that the chancellor failed to consider or decide the CBC's fallback position; and that the chancellor's statement in para 34 did not address the issue of limiting permissible purchasers if a sale were to be allowed. He draws attention to the various cases referred to earlier in this judgment in which disposals by way of limited sale have been permitted. Furthermore, if, as was held by this court in *Burton*

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*Latimer*, a relevant factor was that articles were part of the heritage and history of the parish at large, then this must be the more so where the article, as here, is additionally part of the national heritage.

84. The difficulty with Mr McGregor's contention is that, though the judgment contains no reasoning at all in relation to the CBC's alternative proposal of a limited sale, the chancellor did include a condition relating to "the possibility of a prior satisfactory and acceptable offer being made by the Royal Armouries or some other British Museum" (see para 13 above). That condition was not explicitly referred to in either Mr McGregor's nor Mr Smith's Skeleton Arguments; and when we raised the matter at the outset of the hearing, Mr Smith appeared to discount the condition because of the problems it posed, given the sale at auction in December 2010, pursuant to the 2010 (later set aside) faculty.

85. The wording of this condition was criticised in argument before us, and we agree that, if a sale were to be permitted, it would have been better to have given a defined period for negotiations with public institutions and to have provided clarification as to the criteria and mechanism for determining whether any offer was "satisfactory and acceptable". Nevertheless, the chancellor also granted to the petitioners liberty to apply for further directions, and this should have been sufficient to resolve uncertainties.

86. Unspecific as the condition undoubtedly was, and problematic though its imposition was for the petitioners, given the sale in December 2010, the condition shows that the chancellor accepted, at least in part, the alternative argument of the CBC. This appeal has not been brought (as it might have been) on the basis of any legal flaw in the wording of the condition; and this is not a case where the absence of reasoning in the judgment discloses, or gives grounds for supposing, a legal error by the chancellor. Thus, though it

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would have been better had the chancellor explained in his judgment his rationale for imposing the condition, we reject the challenge on Ground 4.

**Ground 5: The chancellor failed to deal with the issue of whether the sale of the armet would be of sufficient financial benefit to the parish as to justify its sale**

87. We can deal with this ground extremely briefly. The chancellor expressly recognised in para 33(i) of his judgment that "one half of the net proceeds would go to Mr Lee", and that "Unless he should in due course choose to pass his share over to the Church, he would be entitled to keep his moiety, even if it comes as an unexpected windfall". He went on to say that:

> "Receipt by the P.C.C. of its share of the proceeds would go some way towards alleviating, at least to some extent, the financial problems currently experienced".

88. In our consideration of Ground 2 we have criticised the way in which the chancellor came to the conclusion that the parish was experiencing financial problems. But it is clear that he recognised that the amount of money the parish would receive was reduced by reason of the agreement reached with Mr Lee, and he must have appreciated that this thereby reduced the overall benefit which he saw as justifying the sale. We do not consider that there was any error of law in failing to say more on this subject.

**RE-DETERMINATION**

89. As recognised in the previous decisions of this court, where it is found that a chancellor has erred in law in the exercise of his discretion, the Court of Arches, on appeal has power to substitute it own discretion, without referring the matter back to the chancellor for redetermination in the light of

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its decision, see, for example, *Tredington* at 241B-D, *St Martin-in-the-Fields* (p.7) and *Burton Latimer* (p.7).

90. Whether one looks to the existence of "special reasons", or, as we have held to be preferable, one simply looks at the matter in the round to see whether the grounds for sale are sufficiently compelling to outweigh the strong presumption against disposal by any form of sale, we are satisfied that this petition should be dismissed. The armet is a national asset with historic links to the parish and there is no proven financial case for its sale. Little if any weight should attach to the fact that it has been physically out of the church, and therefore outside the parish, for many years.

91. If the grounds for sale were stronger, then, applying the sequential test, disposal by limited sale, even if necessary at an undervalue, should take precedence over outright sale.

92. With hindsight it is clear that the original proposal to sell the armet was not driven by any urgent or pressing financial situation in the parish; rather the armet was seen as a valuable asset, which could become a source of parish funds. A similar approach seems to have been pursued by the parish in 2013. This court's decisions, particularly in *Tredington* and *Burton Latimer*, show that sales should not be approved on that basis.

93. We appreciate that our decision will cause dismay to the petitioners, who may consider that they are being penalised for the commendable strength of their financial position. It may also seem surprising to many people unfamiliar with ecclesiastical law that the petitioners are not permitted to convert the armet into usable funds. It is our view, however, that the strong presumption against disposal by sale of Church treasures, which we have applied in this case, is both soundly based and generally beneficial in its consequences.

94. In its letter to the CBC of 28 April 2013 RAM stated that:

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> "[The museum] has been active in helping churches safeguard [arms and armour], partly by taking the objects considered most at risk on loan and substituting fibreglass replicas in the churches. Though displaying the objects to the public has been a consideration in taking them on loan, the safeguarding of the objects themselves has been the museum's primary concern".

If the loan to RAM is to continue, we would hope that it might be possible to secure from RAM such a fibreglass replica of the armet. This could then, subject to faculty, be hung in the church above the effigy of Sir Thomas Hooke, thus giving new life to the connection between the armet, the church and the village of Wootton St Lawrence.

## COSTS

95. The petitioners must bear the court costs in the proceedings before the chancellor; but in seeking leave to appeal the CBC undertook that if leave were granted, then whatever the outcome of the appeal, the CBC would pay the court costs of the appeal and not seek an order for its costs from the petitioners. This undertaking was reflected in the terms of the order made by the Dean in granting leave to appeal. Accordingly in these unusual circumstances the CBC will pay the court costs of the appeal, and each party will bear its own costs of the appeal, as of the consistory court proceedings. If there are any representations relating to this order, they must be made in writing to the Provincial Registrar within fourteen days of the handing-down of this judgment.

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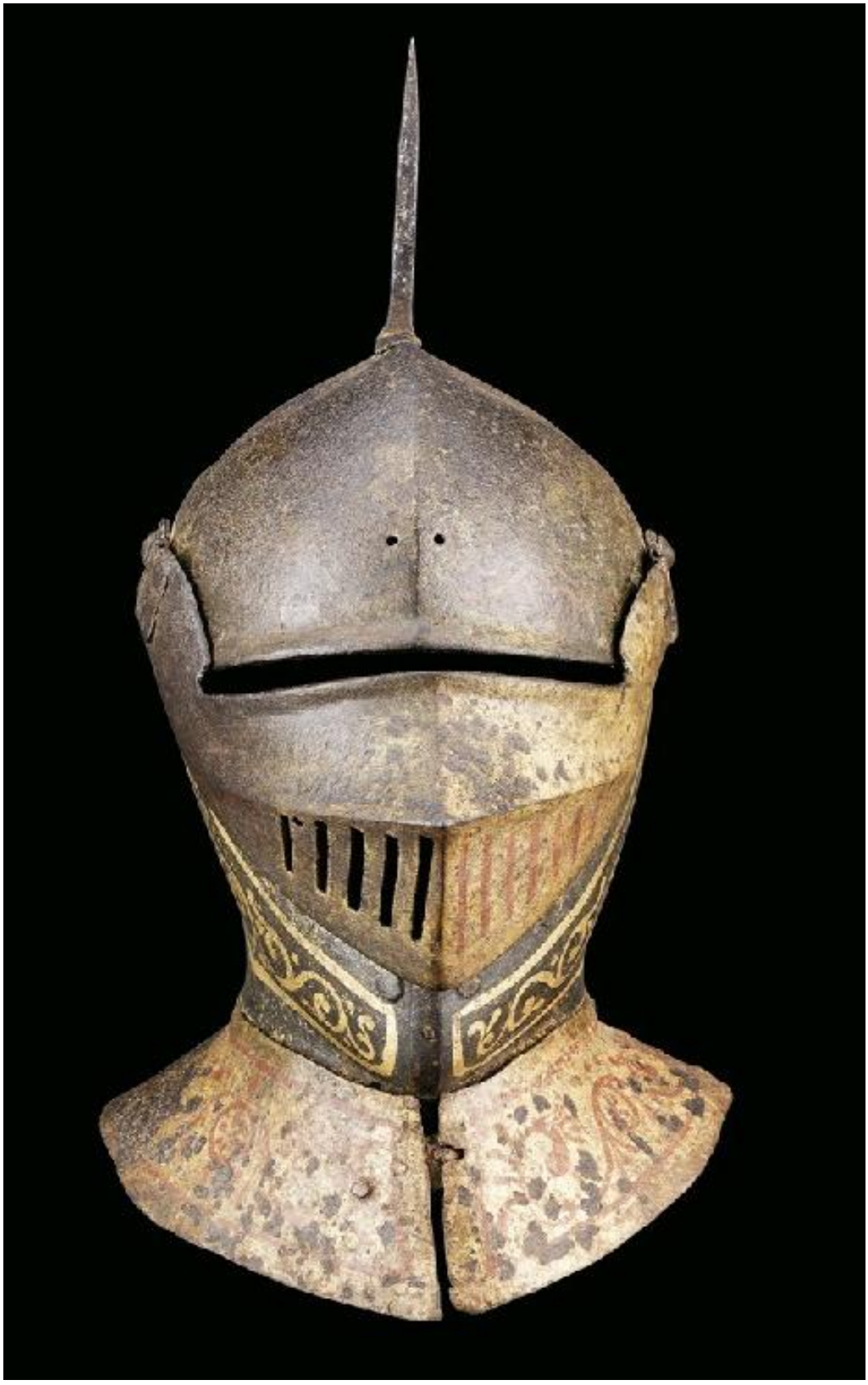
**CHARLES GEORGE QC**

**DAVID McCLEAN QC**

**TIMOTHY BRIDEN**

**14 April 2014**



**The Wootton St Lawrence Armet**

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