Neutral Citation: [2018] EACC 1

IN THE ARCHES COURT OF CANTERBURY

RE BATH ABBEY

ON AN APPLICATION BY THE VICTORIAN SOCIETY FOR PERMISSION TO APPEAL

CONSISTORY COURT OF THE DIOCESE OF BATH AND WELLS
(CHANCELLOR TIMOTHY BRIDEN)

DECISION

1. As the chancellor said at the outset of his judgment, "Bath Abbey…occupies a commanding position in the centre of the City of Bath, a UNESCO World Heritage site. The Abbey is a Grade I listed building, and …. one of the architectural gems of England. It is also a focal point for worship and community activity in and beyond the City boundaries". Following a hearing which attracted considerable news coverage, the chancellor allowed, subject to conditions, a petition for the removal of the nave pews and their replacement by chairs of a particular design, notwithstanding the objection of the Victorian Society as party opponent. The Victorian Society now renews its application for permission to appeal (permission having been refused by the chancellor).

2. I gave directions under rule 23.4(2)(a) of the Faculty Jurisdiction Rules 2015 for the purpose of determining the application on consideration of written representations, and in reaching my determination I have had regard to the Victorian Society's Grounds of Appeal ("the Grounds") and Reasons in Support of the renewed application ("the Reasons"), to the petitioners' Response to Grounds of Appeal ("the Response"), and to the Victorian Society's Reply thereto ("the Reply"). The factual background was very fully set out in the judgment itself, and I have not been supplied with, nor considered it appropriate or necessary to obtain, either the "Evidence Bundle" or the closing submissions of the parties (though reference was made to these in both the Grounds and the Response).

3. Under rule 22.2 permission to appeal may be granted only where:

> "(a) the appeal would have a real prospect of success; or
> (b) there is some other compelling reason why the appeal should be heard".

Under rule 23.4(3) the determination of an application for permission to appeal "must state the Dean's reasons".

4. Under rule 27.11(2) if the appeal were to proceed to a substantive hearing, the appeal court can only allow an appeal where the decision was –

> "(a) wrong; or
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court",

As the Court of Arches said in In re St John the Baptist, Penshurst [2015] PTSR D40 para 33 :

> "……when challenges are made to a judge's reasoning and to the adequacy of the reasons he gave:
>
> > 'the essential test is: does the judgment sufficiently explain what the judge has found and what he has concluded as well as the process of reasoning by which he has arrived at his findings" (Re B (Appeal: Lack of Reasons) [2003] 2 FLR 1035 para 11).'
>
> Allied to this is the need not to adopt too narrow a textual analysis of a judgment when approaching the question of whether a judge has misdirected himself."

5. The Response kindly describes the Grounds and the Reasons as "extensive". The former runs to 15 pages (18 paras and many sub-paras), the latter to 4 pages (14 paras) (by contrast its Reply is commendably brief). In the Reasons the Victorian Society summarises its criticisms of the judgment under six headings, and I shall follow the approach taken in the Response "that these are advanced as the VS's 'best' points", whilst bearing in mind the claim in the Reply that "the Victorian Society will (presumably if the matter comes to a substantive hearing) comment on the Petitioners' omission to deal in their Response with many points relied upon by the Victorian Society in its Grounds and Reasons".

(1) Alleged bias

6. The allegation is that the chancellor "revealed bias against the Victorian Society" in his treatment of the evidence, because he accepted as evidence of support for the scheme the letters attached to the Rector's witness statement, whereas in respect of the signatures to a Memorial opposing the scheme, the chancellor commented upon "the notable absence of any objection from parishioners (or others having proper interest) in response to the public notice…." (his para 26). This is said to have been "quite unfair", and it is claimed that "it is even unclear what "public notice" he was referring to". It is entirely clear that the public notice was that to which the chancellor had referred in the first sentence of his para 9, and which had "elicited no objection to this or any other feature of the works". As the chancellor said (para 26), "The response of others having a proper interest ought to have been in the form of letters submtted after public notice". He noted that these replies were to an online petition which had been "couched in terms of protest" ("…we ask you to sign our petition to urge Bath Abbey to halt their destructive scheme"), and that "the objectivity of the signatories is obviously open to question". That was a view he was entitled to take, and in any event he observed that "Wisely Mr Blackett-Ord [counsel for the Victorian Society] did not put the online petition at the forefront of its case", which makes it the more surprising that the chancellor's treatment of the online petition should now rank foremost in the Victorian Society's Grounds and Reasons. So far as concerns the chancellor's treatment of the letters in support of the scheme, which in the Victorian Society's view were less than objective, the chancellor's reliance on them was limited to the observation that they "lend support to the practical grounds which have been advanced by way of justification" (para 31). I share the view expressed in para 3 of the Response that the chancellor's judgment, both on this aspect and taken as a whole, was "scrupulously fair and balanced", and I do not consider that there is the slightest chance of an appeal succeeding on the ground of bias.

(2) Approach to the status and value of the pews

7. The allegation is that the chancellor "played down the status of the pews, and their value as part of the whole church interior". Complaint is made that it was "perverse" of the chancellor to have concluded that the nave pews form "the subsidiary part of a coherent seating system" (para 47) and are not a "distinguished element" (para 62) of Sir George Gilbert Scott's scheme of restoration. The difficulty for the Victorian Society is that, as is admitted in the Reasons, the chancellor accepted (para 49) that the nave pews were unique in that they are "the best set of their type attributable to Scott". Nevertheless, on the basis of the evidence before him, it was open to him to reach the conclusion (not, I think, disputed) that the nave pews were of lesser distinction than the choir and corporation pews (which are to be retained), and also of lesser distinction than much else of the Scott's restoration scheme. His conclusions, if seeming perverse to the Victorian Society, fall far short of perversity as understood by lawyers.

8. The nub of the complaint is the chancellor's finding (para 51) that "the significance of the nave pews, put in the context of the perpendicular interior of the Abbey, is moderate". However, the chancellor listed his reasons for this finding in the final sentence of that paragraph, and adverts to corroborating evidence in the subsequent paragraph of his judgment. This then led on to his finding, under the third Duffield question, that "the harm arising from loss would also be moderate", in the sense of being "less than serious but greater than insubstantial" (para 56). There was no error of law in the chancellor's conclusion, though others could rationally have concluded that the harm was more serious, as the Victorian Society contended. Whether the chancellor in that paragraph wrongly telescoped Dr Brandwood's answer to the chancellor's own question (para 50) is immaterial, nor do I consider it to be properly arguable that the chancellor misunderstood or failed to have regard to the evidence of Dr Miele, quoted in para 3 of the Grounds, that "the interior…is wholly a product of the Victorian period". In this context I deliberately ignore the observation of the chancellor in refusing permission to appeal that his conclusion under the fifth Duffield question would have been the same, even had he found the harm to be serious, rather than moderate.

(3) and (4) Conclusion on public benefit

9. The allegations are that the chancellor's conclusion on public benefit is confused and not clear; that he failed to analyse the various heads of justification individually; and that if he had done so, "he would have perceived that each amounts to almost nothing, even if it actually exists". The Response looks carefully at the chancellor's approach, and robustly concludes that "there is accordingly no lack of clarity in the Chancellor's consideration and the VS attempt to manufacture confusion in this regard…is simply a cover for a disagreement with his clear conclusions". I need only set out one sentence from para 61 of the judgment:

"In terms of public benefit the advantages of innovative liturgical use of the nave, the availability of comfortable seating adaptable to the requirements of the disabled or very young, the ability to put the nave to multiple community purposes, and the opportunity to appreciate the original architectural form of the nave and the collection of ledger stones make a formidable combination".

There is no confusion, lack of clarity or irrationality, nor is the chancellor properly to be criticised for having addressed the petitioners' justification in the way he did, concisely,

albeit in two different sections of his judgment. There was no failure to address the Duffield questions "in the right order". In particular, whilst the Victorian Society assert (para 5 of the Grounds) that the chancellor's reference (in para 36) to an improvement in appreciating the nave's perpendicular style involved several "errors of fact", his conclusions on the various matters were within the bounds of what was properly open to him. The same applies to a related assertion in para 10 of the Grounds. Nor can the chancellor's alleged failure "to take into account the visual mess that would be made by the presence of up to 600 loose modern lightweight chairs in the nave" be properly categorised as an error of law, in circumstances where the chancellor plainly had regard to the evidence about the visual aspect of the proposed chairs (paras 36-41).

(5) Erroneous approach to the fifth Duffield Question

10. The allegation is that the chancellor:

> "did no more than pay lip service to the requirement of the fifth Duffield Question, which requires not a simple balance between the actual harm and the perceived future social benefit, but a strong presumption against the harm being allowed. The petitioners get nowhere near satisfying such a presumption even if they were right on all the factual "justifications" that the Chancellor found in their favour. The trivial or illusory hoped-for benefits go nowhere against the harm to the splendour and utility of the building that would be suffered….".

This ground is entirely hopeless for two reasons. First, it assumes that the benefits were "trivial and illusory", whereas the chancellor found them to constitute "a formidable combination" (para 61). As the Response pithily points out, "the VS assertion… relies on circular logic which assumes the truth of what it sets out to prove". Second, the chancellor expressly referred (para 63) to "the listing of Bath Abbey and the strong presumption against change", as matters "properly brought into account". There is no warrant for the allegation that this was mere "lip service", and the chancellor has adequately indicated that the desirability of preserving the listed church and any features of special architectural interest which it possesses "is a consideration of considerable importance or weight" (see In re St Peter, Shipton Bellinger [2016] Fam 193 para 48).

(6) Failure to consider the Victorian Society's alternative

11. The allegation is that the chancellor "failed to give any consideration to the Victorian Society's proposal that three rows of nave pews at the front and four at the back might be removed to allow ample space around the nave altar and for manoeuvrability at the back whilst retaining three-quarters of the pews". This allegation is entirely without merit. I need merely set out para 59 of the judgment:

> "It has been necessary to consider with care whether the Petitioners' objectives are compatible with the retention of some or all of the Scott nave seating. The Victorian Society propose that the pew platforms be abandoned so as to enable the pews to be moved. This suggestion was properly investigated by the Petitioners, but I accept the evidence of Mr Rich [the petitioners' architect] that the weight of the pews and their unsuitability for stacking renders this arrangement impracticable. I have also concluded that the preservation of an isolated block of pews in the nave would serve no useful purpose, especially as the Corporation pews with their benches behind

them preserve a visible example of Scott's work as well as providing a suitable area for traditional services."

I am at a loss to see how it could be argued that the chancellor failed to give any consideration to the matter. Moreover, in respect of the chancellor's phrase "isolated block of pews", that description is not to be challenged as "an error of law", merely because three-quarters of the nave pews would have remained.

(7) Other matters

12. A fusillade of alleged errors of fact and law is contained in paras 3-10 of the Grounds, some only of which were specifically relied upon in the Reasons, without any being formally abandoned. Most of these I have already addressed. Of these the only one of which I need say more relates to the chancellor's holding (para 35 of the judgment) that "Mr Rich has given satisfactory evidence that the future risk of erosion [to the ledger-stones] may be addressed by a combination of strategies including the placement of vulnerable stones in protected areas, the careful levelling of the floor and the creation of appropriate visitor routes". The Victorian Society relies on answers by Mr Rich said to have been given under cross-examination that he had not concluded that there would be no damage to the ledger stones; and that no investigation or report had been commissioned to investigate the effect of 450,000 persons walking over the stones, but he was making investigations which "still had some way to go". Even assuming that, in the overall assessment which had to be made in this case, the possibility of some damage to the Georgian ledger stones (which appears to have been a matter initially raised by the SPAB rather than by the Victorian Society, see para 4 of the Grounds) was an issue of more than relatively minor importance, the chancellor's careful wording "satisfactory evidence"/"may be addressed" falls some way short of a finding that there would be no damage whatsoever to them. Accordingly the alleged error of fact does not appear to have been made.

Overall conclusion

13. In several recent cases the Victorian Society has successfully identified errors of law in first-instance faculty decision-making (Penshurst and Shipton Bellinger, both cited above); and in Re St Botolph's, Longthorpe [2017] EACC 4 it was granted permission to appeal, although the proceedings resulted in a consent order. But in the present instance, whilst its initial objection was entirely understandable and the issues deserved the close scrutiny which a consistory court hearing involves (and did involve in this case), I am satisfied that its application for permission to appeal does not meet the test of having a real prospect of success. Nor do I consider that the undoubted importance of Bath Abbey (or any other matter) is such as to provide "some other compelling reason why the appeal should be heard", nor does the Victorian Society so contend.

Costs

14. Under rule 23.5(1)(b) of the Faculty Jurisdiction Rules 2015, I have a discretion in relation to costs. The Victorian Society shall bear the petitioners' reasonable costs of submitting the Response (to be taxed by the Provincial Registrar if not agreed), and the court costs of considering and determining the application. Such costs shall be paid within 14 days of receiving notification from the Provincial Registrar of the amounts concerned. Although rule 23.5(1)(b), unlike rules 19(2) and (3) which (by virtue of rule 2.1(2)) apply to substantive appeals, make no provision for representations on costs to be made, I shall

allow the Victorian Society 7 days to submit (if so minded) any representations as to why it considers a different order for costs should be made.

1 March 2018

CHARLES GEORGE QC
Dean of the Arches