IN THE ARCHES COURT OF CANTERBURY

Charles George QC, Dean of the Arches

Chancellor Briden and Chancellor Box

On appeal from the Consistory Court of the Diocese of Lichfield

***IN RE* HOLY TRINITY, ECCLESHALL**

Judgment (incorporating minor textual amendments)

Appearances:

Mr Mark Hill QC for the Appellants, instructed by Lee Bolton Monier Williams, 1 The Sanctuary, Westminster, London SW1P 3JT

Mr Charles Mynors of Counsel, as *amicus curiae*, instructed by Winckworth Sherwood, 16 Beaumont Street, Oxford OX1 2LZ

JUDGMENT

Introduction

1. This is an appeal against the judgment of Chancellor Coates given on 5 November 2009 in the Consistory Court of the diocese of Lichfield in which he refused to grant a faculty. The Appellants are the Vicar and churchwardens, whose petition of 27 February 2009 sought a faculty (i) to introduce a raised area at the east end of the nave; (ii) to move four pews from the south aisle to the north aisle to allow space for a ramp to the raised area, and (iii) to dispose of fifty wooden chairs currently in the north aisle to make space for the pews moved from the south aisle. The Chancellor granted a faculty in respect of item (iii), so that the appeal is confined to items (i) and (ii). In respect of item (ii) we were informed at the opening of the appeal by Mr Mark Hill QC, representing the Appellants, that the reference to four pews was erroneous, and that proposal is limited to two pews only. This accords with what the Vicar had explained to the Chancellor on his third visit to the church on 20 October 2009 and what was shown on the submitted drawings.

2. We shall consider later the details of the procedure followed in connection with this petition. At this stage it is sufficient to record that the petition was formally unopposed. Objections were raised by nine individuals (including two couples), but none of these chose to submit formal written particulars of objection so as to become parties to the proceedings under rule 16(3)(b) of the Faculty Jurisdiction Rules 2000 (S.I. 2000 No

2047) ("the 2000 Rules"). Therefore their objections were merely matters for the Chancellor to take into account under rule 16(6). By letter to the Vicar of 9 September 2009 the Chancellor indicated his intention to proceed by way of written representations (under rule 26), whilst offering the option of "a hearing, in Chambers, if the Petitioners would prefer to proceed in that way". On 25 September the petitioners confirmed that they were happy to proceed by the former procedure. Though nothing turns on this, we are unhappy about the reference to hearing "in Chambers", since substantive hearings in the Consistory Court should be held in open court (see, for example, the reference to "any hearing of the matter in open court in the Consistory Court" in rule 16(4)(i)).

3. As recognized by the Chancellor at the outset of his judgment, Holy Trinity Church is a Grade I listed building, once owned by the Bishops of Lichfield who resided nearby in a castle. He referred to the church as "'generous' in size and…described by Pevsner as one of the most perfect 13th century churches in Staffordshire". Mr Charles Mynors, who has assisted us greatly as *amicus curiae*, attached to his Supplementary Skeleton a copy of the text of the description of the building accompanying the notice of its statutory listing, which includes the following:

> "One of the most important churches in Staffordshire….Chancel, arcades and tower largely C13…The church contains the tombs of 4 Bishops of Lichfield, including in the chancel a fine memorial to Bishop Overton, 1609, with recumbent effigy and those of his 2 wives kneeling….Grade I for architectural importance".

4. In his judgment the Chancellor recorded that the petition had the support of the Parochial Church Council ("PCC"), the Diocesan Advisory Committee ("DAC") and English Heritage ("EH"), and that he had visited the church three times in order to decide the petition, including "an evidence gathering visit" on 23 July 2009 to which we shall return. He set out the history whereby a faculty had been granted in 2002 for removal of four pews from the south aisle and the installation of a nave altar. At that time, the PCC had entertained the idea that there could be a raised area for the new space being created but had concluded that the president at the eucharist could both see and be seen as things currently stood. It had then been indicated that sometime in the future the question of a raised area might be re-visited "so as to make Holy Trinity more suitable for concerts and the like". The Chancellor continued:

> "That time has come with the lodging of the current petition and the petitioners have presented their case this way: In general they say that a *raised area at the East end of the nave would provide an improved space in which acts of worship could be better presented and seen, The same is true with regard to concerts and school events (there are two schools in Eccleshall parish). It would also permit an experiment concerning the way Eucharists are celebrated to be conducted".*

Having then expanded on these three matters, and referred again to the support of the DAC for the proposals, the Chancellor said that he had to consider the proposals "in a different light, namely from a legal point of view, this church being a Grade 1 listed building", that he should have in mind not only religious interests but also aesthetic, architectural and community interests and "he must consider carefully any proposed

reordering which would result in a substantial material alteration to the internal appearance of a church".

5. Having referred to the three questions identified in *Re St Luke the Evangelist, Maidstone* [1995] Fam 1, he concluded that the proposals failed at the first hurdle, because (so far as items (i) and (ii)) the petitioners had not proved a necessity for the proposed works. We set out most of the concluding three paragraphs of the Chancellor's judgment, which encapsulate his reasoning:

> "As to the first question, that of necessity, I am satisfied that the petitioners have discharged the burden and made a good case for there to be a raised area at the chancel steps…The current dais is unsightly and probably not high enough and its replacement with a properly designed…and furnished dais would enhance the beauty of this church. I find the parish's argument on this point to be compelling and I am sure that such an addition will be to the pastoral benefit of the worshipping congregation. I am also satisfied that there would then be a need for disabled access to be provided to such a raised area (which in turn might then provide disabled access to the chancel) but what I am not satisfied about is the extent of the proposed reordering. On my first visit to the church I was immediately struck by the enormity of the project. The proposed 'raised area' would, according to measurements supplied to me by the architect for the purpose of this judgement, be over 16m wide (about 53 feet) and 4.7 meters deep (over 15 feet). A total area of just over 75 square meters (about 800 square feet). The proposed raised area is too great. The petitioners have not, in my judgement,

satisfied the Court that there is a need for a platform of this size and I decline to issue a faculty for it.

It inevitably follows that I am not satisfied that there is therefore a need to remove any pews in order to provide disabled access as planned…Of the two sides in any church the south is more preferred by the congregation because of the light which comes naturally into the church through the windows on that side. That contrasts with the darker north side which appears here to be little used and would appear to be the obvious place for a disabled access to be positioned. The north aisle has poor seating and no fixed pews. I was told on one of my visits that this too was the first thought of the parish but it was 'discovered' that such a scheme could not work because it would create difficult floor levels. Is this because of the width of the proposed raised area?

I have born in mind not only the religious interests of the worshipping congregation but also the aesthetic, architectural and community interests. In my judgement the proposals before me would result in a substantial material alteration in the internal appearance of this beautiful church. The totality of the proposed reordering scheme is immense. I therefore decline to grant the faculty as sought but the chairs in the north aisle may be removed…."

6. The Chancellor gave the appropriate certificate and also leave to appeal under rule 4(a) and (b) of the Faculty (Appeals) Rules 1998 (S.I. 1998/1713) ("the 1998 Rules").

The issues in the appeal

7. Mr Hill's Grounds of Appeal identified two issues, the first "Procedural", the second "Substantive". This separation mirrors that in CPR 52.11(3), which provides that the Court of Appeal will allow an appeal where the decision of the lower court was:

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

In *In re St Edburga's, Abberton* [1962] P 10, 15 the Dean of the Arches accepted as correct the agreed position of Counsel in that case that "the attitude of this court should correspond with that adopted by the Court of Appeal".

8. The Procedural Issue was expressed in this way, that "the chancellor imposed an unorthodox approach upon the determination of this petition at variance with the procedure prescribed by the [2000 Rules]". Four procedural matters were relied upon:

(i) the holding of what the Chancellor described in his decision as an "evidence gathering visit" on 23 July 2009, in the course of which he heard oral evidence and submissions from those who had written letters of objection;

(ii) the adoption by the Chancellor of an inquisitorial approach (before, during and after the 23 July Hearing);

(iii) the carrying out of two visits to the church by the Chancellor on 4 June and 20 October 2009, in the course of which the Chancellor expressed views to the Vicar, instead of confining himself to site inspection;

(iv) rather than determining the petition himself, the Chancellor ought to have recused himself from determining the matter, because he had prematurely made his views known and had become too personally involved.

9. The Substantive Issue was that the decision was perverse and against the weight of the evidence before him. Five particular matters were relied upon:

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(i) the Chancellor's failure to engage with the reasons for the size and location of the platform;

(ii) his failure to engage with the expert evidence, that the proposals would not compromise the special architectural and historic qualities of the listed building;

(iii) his failure to consider the fact that the proposals were entirely reversible, so that if needs were to change in the future, the interior could be returned to the *status quo ante* with ease and with no detriment to the fabric or furnishings of the interior;

(iv) the failure to consider the statutory duties of the incumbent, churchwardens and PCC pursuant to the provisions of the Disability Discrimination Act 1995 ("the 1995 Act"), manifested by refusal of the ramp element within the proposals.

(v) the Chancellor allowed his personal and idiosyncratic perception of 'aesthetic, architectural and community interests' to override the role of the church as a local centre of worship and mission.

10. In his Skeleton Argument and oral submissions Mr Hill reversed the order in which he addressed these two issues, from which we inferred a rather greater enthusiasm for the substantive, as opposed to the procedural, arguments. Nonetheless, we consider it logical ourselves to proceed chronologically, taking procedural issues first.

The Procedural Complaints

11. As set out above, the procedural challenge is made on four grounds, which we will consider in turn.

(i) the holding of what the Chancellor described in his decision as an "evidence gathering visit" on 23 July 2009, in the course of which he heard oral evidence and submissions from those who had written letters of objection

12. Following his visit to the church on 4 June 2009, the Chancellor requested the Diocesan Registry to e-mail the Vicar asking why the south aisle has been chosen rather

than the north aisle for the ramp, why carpet was chosen as the floor covering and why a ramp was chosen rather than a lift. This led to a detailed response from the petitioners, dated10 June, and also from the Chairman of the DAC of the same date. The Chancellor then suggested to the Registry on 11 June that he hold "a chambers hearing at the church on Thursday 23rd July". This was communicated by e-mail to the Vicar the following day by the Registry Assistant, when the proposal was described as "a chambers meeting", to consist of "a fairly informal discussion with the petitioners, the DAC, the architect etc". Later the same day, the Registry e-mailed the Vicar asking that tables be set out, one each for the Chancellor, the Registrar and his Assistant, the DAC, and the petitioners. The e-mail continued that:

> "The 'objecting' parties will be invited to attend, although they have no formal interest in the proceedings, so seating will be required for them…"

Letters inviting the objectors to attend were sent out on 17 June. In the light of the contents of this e-mail we reject the suggestion of the Vicar in his witness statement that it was not until the end of June or in early July that he was informed that those who had written letters of concern were being invited to the hearing. However nothing turns on this discrepancy.

13. If such a procedure as the Chancellor was envisaging was to take place, we see no reason to exclude the public from being present, and the reference to a "chambers hearing" was unfortunate. We have considered whether the Chancellor had any power to invite representations from objectors. Having opted under rule 16(3)(a) not to submit formal written particulars of objection and become parties, the objectors were "not

entitled to be heard at any hearing of the matter in open court in the consistory court which the chancellor may decide to hold, nor to make written representations if the proceedings are to be dealt with under rule 26": rule 16(4)(i). But lack of entitlement to be heard or to submit written representations would not prevent the chancellor (in an appropriate case) from directing the attendance of such an objector to give evidence at a substantive hearing if it appeared to the chancellor that the objector "may be able to give relevant evidence and is willing to give it": rule 25(1); and if the Chancellor considered that he needed further written representations from an objector who had not become a party, for example to clarify something in a letter of objection which he had to take into account under rule 16(6), such a request could be made, subject to disclosure of the reply to the petitioners and giving them an opportunity to comment before any decision adverse to the petitioners was made. If the chancellor had power to hold the sort of informal hearing planned for 23 July, then we do not consider it had to exclude the participation of objectors, particularly since refinements to the proposals were under active consideration to mitigate the impact, and, unless the notification procedure was to start again, it was fair that the objectors have the opportunity to express their views. In an e-mail to the Registry of 7 July the Archdeacon of Stoke-on-Trent ("the Archdeacon") commended the re-ordering, whilst accepting that "there may be detailed objections that need further attention".

14. Also the same day, 12 June, the Registrar sent a lengthy letter to the Vicar, again referring to "a chambers hearing". Having explained the background, and particularly

that, whilst no formal objections had been lodged, there had been letters "commenting on the wisdom of the proposals", the letter continued:

> "Chambers hearings are not common, but are certainly more common than full hearings. Chambers hearings are less formal than the full Consistory Court procedure, where the matter is presented in open court on an adversarial basis, with the petitioning [sic] formally presenting evidence and submissions and with witnesses being cross-examined. With the Chambers hearing, there is not normally any need for parties appearing to be represented by lawyers; there is no need for a formal presentation of a case – the format is conducive to a discussion led by the Chancellor; there is no cross-examination of witnesses. In this instance, the purpose of the hearing is to explore the petition, the DAC advice and the incumbent's comments, in order for the Chancellor to determine whether the petition should be granted or not. The burden of proving case for the faculty rests on the petitioners throughout the petition process. The Chancellor will obviously wish to explore the alternatives that have been considered during the pre-petition discussions with the DAC, which led to the DAC giving their advice to him, as well as the possibilities discussed by him with the petitioning incumbent at the site visit….
>
> There will not be a formal agenda for the hearing. The discussion will be led by the Chancellor who will no doubt expect the incumbent and DAC representatives to respond to the issues which are of concern to him. The parties attending should bring the documents lodged with the petition and the items mentioned above [i.e. recently submitted documents] to the hearing"

15. At that stage, the petition being formally unopposed, the Chancellor could have granted the faculty without either holding a hearing in open court or following the written representations procedure: see rule 17. But he could not refuse to grant a faculty without either an oral hearing under rule 21 or use (by consent) of the written representations procedure under rule 26. It seems that the Chancellor was seeking to clarify his mind about the nature and implications of the proposal, so that, thereafter, he could decide whether to grant the faculty under rule 17, or (because of the possibility that he might eventually refuse the faculty) reach a decision whether to offer the written representations procedure as an alternative to holding a hearing in open court.

16. Unfortunately the Registrar's phrase "to determine whether the petition should be granted or not" implied that the immediate result of the "chambers hearing" might be refusal of the faculty. The same implication could be drawn from the notice of hearing which accompanied the Registrar's letter. The first paragraph of this read:

> "TAKE NOTICE that the Chancellor will hear the above Petition in Chambers and determine the same, or give directions, as the case may be".

We presume that in context "determine the same" was meant to mean "grant the faculty under rule 17"; whereas directions would be given if the possibility remained that the Chancellor might refuse the faculty. The notice continued:

> "TAKE FURTHER NOTICE that you should attend the hearing (or appear by a solicitor of [sic] counsel instructed on your behalf) and if you do not so appear the Court may determine the matter".

Again the phrase "may determine the matter" implied that the determination might be either way.

17. It seems that the Chancellor realized, at a late stage, that the precise nature of the forthcoming hearing needed further clarification. Therefore on 7 July a further e-mail was sent to the Vicar, the DAC Secretary and Chairman, and to the Archdeacon. This stated:

> "…the Chancellor has asked me to reassure everyone that this is to be a fact finding discussion in chambers, and is not a Consistory Court hearing.
>
> The object of the meeting is for him to be told why this particular scheme has been chosen, with the opportunity for those who have concerns about the proposals to be put in the picture. It is sensible to have the meeting at the church rather than to refer to photographs and plans".

Mr Hill criticized the description "fact finding discussion", which differed only marginally from that used by the Chancellor in his judgment ("evidence gathering visit"). The only way, he says, that facts can be found or evidence gathered is at the substantive oral hearing in open court or through the written representations procedure. But that is to ignore the role of site visits in fact finding and evidence gathering. As Denning LJ said in *Goold v Evans* [1951] 2 TLR 1189, 1991:

> "Speaking for myself, I think that a view is part of the evidence, just as much as an exhibit. It is real evidence. The tribunal sees the real thing instead of having a drawing or a photograph of it."

Where the written representations procedure is used, rule 26(6) provides that the chancellor may, whether or not an application is made to the court by any party, inspect the church or any article or thing the subject of the petition or concerning which any question arises in the proceedings. There is no similar express provision made in respect of hearings in open court, whether in rule 21 (Evidence) or rule 19 (Directions). Normally such hearings will take place in the church the subject of the petition, so that there is no need for a separate site visit.

18. We can see no reason why a chancellor should not be able to give directions for a site visit at any stage of the consideration of a petition. This can probably be done by directions under rule 19(1), and, if not, by a procedural direction under rule 34, given "in order that the proceedings may expeditiously and justly be disposed of". It is the shared experience of the court that site visits are frequently made by chancellors in connection with unopposed petitions (which constitute the vast majority of petitions), and that these regularly involve the soliciting of information and opinion from those invited to attend. We are satisfied that all the chancellor was envisaging here was a further site visit where he could clarify the nature of the proposals and their implications, with a view to later deciding what procedure should be followed for the eventual resolution of the petition. Indeed during the course of the appeal, and in response to a question from the court, Mr Hill conceded that directions could have been given under rule 34 for the sort of investigative site visit planned by the Chancellor (which accorded with the submission of the *amicus*), although we doubt this would be appropriate in the case of a formally opposed petition.

19. On or about 21 June the Vicar contacted the Registry to ask who could and should attend the hearing. According to his witness statement, he was informed that only those asked to attend should come, to include the petitioners and their architect. At a PCC meeting on 16 July the Vicar was asked if PCC members could attend the hearing, and, acting on the advice he had received, the Vicar replied that members should not. We cannot see any reason for the advice apparently given by the Registry, though it was consistent with the description of the hearing as being a "chambers hearing". Later it appears that some of the objectors telephoned the Registry to ask if friends could attend, and the answer had been 'yes'. We regret the inconsistency of approach. On the other hand we cannot see that any prejudice was thereby occasioned to the petitioners.

20. The court had before it a formal record of what took place on 23 July, prepared by the Registrar (or his Assistant); as well as a handwritten note prepared by the Chancellor, and another prepared probably by the Registrar's Assistant. We also have a version in the Vicar's witness statement and exhibits which only marginally differs. Those present included the petitioners (represented by the Vicar and several churchwardens, together with their architect), the Archdeacon, representatives of the DAC, some of the objectors and other members of the public (supportive, so it would seem, of the objectors). The Chancellor stated that he wanted to find out why the plan had been decided upon, and what plans had been rejected. He listed his concerns as:

1. The sheer size of the platform. According to the petitioners' version, his opening words were: "Can anyone explain to me why this huge construction needs to be brought into this beautiful church?"
2. How it would be covered.
3. Access for the disabled.

The architect then explained how there had been five different versions of the plans, and how it came about that the final version with the ramp further to the south and as much open aspect as possible and a set gradient had been accepted. The precise position of the platform in relation to the pillars was then explained to the chancellor, and why access could not be from the north aisle, rather than the south aisle, because there were too many different floor levels in the area and it would restrict access to the Lady Chapel and the view of the fine screen of the Lady Chapel. It was also explained that the final version of the plan was influenced by EH who wanted access from the south aisle. The Chancellor then spoke to members of the parish who told him what their objections were to the scheme, and complaints of inadequate publication were recorded by the Registry Assistant. The Chancellor then summed up that he had made clear his views, that he needed to be satisfied that there was a need for a platform of the size proposed, and would need to give further thought about the covering (i.e. whether it should be carpeted as proposed, or bare wood as the Chancellor seemed to favour) and the ramp. According to the Vicar, "it seemed he wished the scheme to be amended", although it is not suggested that he expressly said so. The meeting lasted exactly one hour.

21. Given that this was formally an unopposed petition, we see nothing unfair in the Chancellor raising his concerns openly with the petitioners and in the presence of some members of the public, and we have not seen anything to suggest that at that stage his mind was already closed to the possibility of granting the petition. Nor do we consider that the petitioners were disadvantaged by the absence of opportunity to cross-examine objectors. We accept that there would probably be no further opportunity to conduct such cross-examination, even had the matter finally been resolved at a hearing in open court, because the likelihood is that at such a hearing the objectors would not have given evidence (unless specifically requested to do so by the Chancellor under rule 25(1), in which case cross-examination is provided for by rule 25(3)). It seems to us that the petitioners were no more disadvantaged by this procedure than if the non-party objectors had been invited to respond in writing to the Chancellor's three concerns, which would, as it seems to us, have been a permissible procedure (subject, as mentioned above, to the petitioners being able to respond in due course to whatever the objectors replied, a course open to the petitioners under the procedures followed in this case).

22. The day after the visit, the Vicar e-mailed the Registry Assistant, describing it as having been "quite a strenuous occasion for the churchwardens and me", but saying that

> "we felt it an honour to meet the Chancellor in person, and his coming emphasised what a great church Holy Trinity is.
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> We made sure we got him to sign the church register because of this.
>
> Since yesterday, two of the concerned people who came here have made positive comments, and to me that is a very helpful thing. I was also able to speak to each

person, and I now hope people can express conflicting views without personalizing the issue".

This e-mail is not referred to in the Vicar's witness statement, and suggests that there was at that stage no sense of unfairness at the way the visit had been handled by the Chancellor.

23. This case demonstrates the need for sensitivity and restraint if investigative site visits of this sort are to be used in connection with formally unopposed petitions. In particular they must not be used so as to circumvent the normal procedures for taking evidence and reaching factual conclusions, and the chancellor should make it clear that the site visit is only one step on the way to making his decision, as to which he has not yet rejected any particular outcome. The present case was on the border-line of what is acceptable, but it did not quite cross it. To the extent that what occurred went beyond what is permitted by the 2000 Rules, rule 33 provides that such non-compliance does not automatically render void the proceedings, and in oral argument Mr Hill did not pursue the submission in his Skeleton Argument that the petitioners had been disadvantaged by the procedure adopted by the Chancellor on that occasion.

(ii) the adoption by the Chancellor of an inquisitorial approach (before, during and after the 23 July Hearing)

24. Where a petition is unopposed, we see nothing improper in the Chancellor raising concerns with the petitioners at any stage of the proceedings. Whilst a chancellor is a

judge adjudicating in the Consistory Court, many of his functions are akin to those of a one-man planning committee determining a planning or listed building application, even though the statutory framework and the material considerations are different. It would be regrettable if an excessive rigorous approach precluded interplay between petitioners and the Chancellor, designed to help understanding of the proposals and sometimes to achieve modifications designed to improve the proposals in the public interest, including (but not confined to) the church's role as a local centre of worship and mission.

25. As explained above, we see no reason why the Chancellor should not have asked the questions he did on 23 July. Thereafter, the architect looked at the possibility of slightly altering the design of the wall-ramp to see whether it was possible to leave as much of the south aisle as possible untouched. On 3 August, two plans were submitted to the Registry, one showing a 'centre ramp' and another showing the wall-ramp "tucked up further eastwards". The petitioners said that they would be prepared to adjust the petition to reflect the latter design, and asked whether they should send the design to the DAC for its consideration. On 12 August the Diocesan Registrar replied that

> "The Chancellor does not feel able to direct you as to what to do, and asks that you make the decision".

The e-mail explained that the Chancellor remained open minded about the proposal and had not and would not come to a judgment on the matter until he had had the benefit of "full argument from you and others", most likely at a "formal hearing", following a directions hearing, to include the role of the DAC and Archdeacon in the hearing. The e-mail explained in clear terms the advantages and disadvantages of presenting another

option as an amendment, substituted for the present proposal, or as a fall back position promoted in the event that the original proposal failed. We regard that letter as impeccable.

26. On 21 August the Vicar e-mailed the petitioners' decision to adhere to the original proposals. This led to the Chancellor's decision to propose proceeding by way of written representation rather than a hearing. This option was offered to the petitioners in an e-mail of 4 September, which emphasised that the petitioners were "of course entitled to a hearing if you would prefer to do that". This e-mail was followed up by a letter of 9 September repeating the offer, inviting a general summary of the case from the petitioners, particularly in relation to the points discussed on 3 July. If, however, the petitioners sought a hearing, it was suggested that this could be held in October and that there would be no need for any evidence other than from the parish and the architect, unless the petitioners wished to call other evidence.

27. By e-mail of 25 September the Vicar (who had been on holiday) confirmed that the petitioners would be happy to proceed to consideration of written evidence, and agreed a 21 day period for submission of their summary, which period commenced on 28 September. The petitioners' summary was provided on 6 October.

28. By e-mail of 6 November the Diocesan Registry, at the Chancellor's request, asked the architect for the exact measurements of the proposed platform, and the measurements were supplied later the same day. By that date the Chancellor had already

drafted his decision, which is dated 5 November. The measurements were incorporated into the decision.

29. We find nothing in this recital of events to suggest that there was any impropriety in approach adopted by the Chancellor, which Mr Hill unfairly categorises as "inquisitorial" and as constituting a level of interference beyond his judicial function. The questions the Chancellor raised were appropriate ones.

(iii) the carrying out of two visits to the church by the Chancellor on 4 June and 20 October 2009, in the course of which the Chancellor expressed views to the Vicar, instead of confining himself to site inspection

30. What happened on these two occasions is explained in the Vicar's witness statement. By prior arrangement, the Chancellor met the Vicar in the church on 4 June 2009. The Chancellor was accompanied by a friend, introduced as "John, a retired organist". The Chancellor explained that there was a very strong presumption against any change to a Grade I church. He asked whether a lift instead of a ramp had been considered and the Vicar said he would check. There was some discussion about the proposed carpeting, and the Chancellor indicated his concern that any carpet would have a bad effect on acoustics. There was some discussion as to why the north aisle had not been chosen for the ramp. On the question of reversibility, the Chancellor said that the trouble with introductions such as the proposal was that they were rarely removed. The visit was followed by the request for information to which we have referred above.

31. Following acceptance by the petitioners of the written representations procedure, a further site visit was arranged for 20 October. Again the Chancellor was accompanied by John, the retired organist. The Chancellor paced out the space at the front of the chancel steps and at the east end of the south aisle (that is, the area to be covered by the proposed platform). He again asked why a ramp could not be sited in the north aisle. As already mentioned, it was clarified that only two pews were to be removed from the south to the north aisle. There was also discussion about some other pews that appeared to have been moved without permission.

32. The holding of the 20 October site visit as part of the written representations procedure was in accordance with rule 26(6). We have explained above that, particularly where a petition is formally unopposed, preliminary site visits are frequently conducted and often lead to better understanding, and sometimes modification, of the proposals. It was not improper for the Chancellor to be accompanied; indeed it is a wise protection for Chancellors never to visit on their own in case there is later a dispute as to what was said during the visit. In our experience chancellors are usually accompanied by the Diocesan Registrar or the relevant Archdeacon.

33. There are obviously dangers if too much questioning and discussion takes place at a site visit. On the other hand we see no need for the strait-jacket that applies in the case of site visits conducted, for example, by the Technology Court (see para 15.8 (Views) of the Technology Court Guide), or by the Upper Tribunal Lands Chamber (see para 20 of

its Interim Practice Directions), or by planning inspectors (as to which see *Taylor & Sons (Farms) v Secretary of State for Environment, Transport & the Regions* [2001] EWCA Civ 1254 para 42, applied in a written representations case, *O2 (UK) Ltd v Secretary of State for Communities and Local Government and Islington London Borough Council* [2009] EWHC 522 Admin.). The *amicus* referred us also to the rules concerning site views in criminal trials set out in *M v DPP* [2009] 2 Cr App Rep 12 para 31, which he suggested were applicable also to the ecclesiastical courts. What is appropriate must, in our view, reflect the nature of the litigation. In particular, rules applicable where there is a jury will necessarily be far more rigorous than those appropriate in connection with a formally unopposed petition for a faculty. However, we accept his submission that any discussion should take place only in a carefully controlled manner and that all concerned should be absolutely clear before the start of a view as to what is to be achieved of the view, and how.

34. We have already described what took place on 23 July as on the border-line of acceptability. We are much less concerned about what took place at the first and third site visit, and in his oral submissions Mr Hill did not place any significant reliance upon them.

(iv) rather than determining the petition himself, the Chancellor ought to have recused himself from determining the matter, because he had prematurely made his views known and had become too personally involved

35. The bias challenge made here is not the one which is relatively familiar in connection in the case of tribunals, both administrative and judicial, namely apparent bias, but rather that the Chancellor was actually biased in that he had made up his mind before the close of the evidence and that there is documentary evidence that he considered himself to be too personally involved to adjudicate.

36. Mr Hill does not rely merely, or principally, on what the Chancellor said at the start and end of the 23 July hearing, and for our part we consider that (particularly when dealing with a formally unopposed petition) a Chancellor should be free to raise his concerns so as to give the petitioners every opportunity to meet them (including by modification of the proposals if they so choose). Mr Hill relies instead on statements in two documents which have come to the petitioners' knowledge in the course of the appeal proceedings, and which he says show that the Chancellor appreciated that he had compromised his position.

37. The first document consists of two pages containing the Chancellor's comments on the Grounds of Appeal, which was supplied to the Appellants' solicitors under cover of a letter from the Diocesan Registrar, dated 2 February 2010, to the contents of which we refer below. These comments adopt a highly defensive stance, commencing "The preamble to the Grounds of Appeal is wrong", and giving his own explanation of why the hearing was held on 23 July, asserting that "Whatever people expected I certainly did not hold a hearing….Apart from speaking generally to all present at the start of my visit to explain why I was there I did not speak to anyone else about the petition, only to the

architect". (This is inconsistent with the Registry's record of the meeting which states that "The Chancellor then spoke to members of the parish, who told him what their objections were to the scheme"). The Chancellor's comments then record (no doubt correctly) that the Diocesan Registrar had said to the Chancellor (presumably after the application for permission to appeal was lodged) "I really do not think the way you handled the meeting could be confused with a formal hearing at which cross-examination was called for…". What, however, led to the complaint of bias in the Grounds of Appeal was the final two paragraphs of the Chancellor's comments:

> "Because [the petitioners resolved not to amend their scheme but to pursue their original petition] I thought that there should be a Consistory Court hearing and that I should recuse myself from presiding over that because I had made my concerns known and I thought that my impartiality might be questioned. I emailed my Deputy Chancellor to that effect telling her that she would have to preside.
>
> However the Petitioners apparently told my Registrar that they did not want such a hearing but that I should reach my decision on written submissions. I therefore agreed to do that and made one more visit to the church".

The penultimate sentence is not quite accurate. As explained above, it was the Chancellor who decided to offer the written representations procedure to the petitioners, whilst (correctly) giving the petitioners the option to proceed by way of a hearing, as set out in the Registrar's letter of 9 September 2009. The point, however, taken in the Grounds of Appeal, and pressed by Mr Hill at his oral submissions, is that if the Chancellor considered it proper to recuse himself from presiding at a prospective hearing he ought similarly to have declined to determine the matter on written representations.

38. As the Grounds of Appeal explained, at that stage the Appellants knew nothing of the alleged communications between the Chancellor and the Deputy Chancellor (save what was contained in the Chancellor's comments), and it was never communicated to the petitioners that any future hearing might be conducted by the Deputy Chancellor. On the contrary, the Registrar's letter of 9 September 2009 expressly stated "If there is to be a hearing, the Chancellor would be looking to the first two or three weeks of October".

39. The second document on which Mr Hill now relies is an internal e-mail dated 13 August 2009 from the Diocesan Registry Assistant to the Diocesan Registrar, which includes the following:

> "….[The Chancellor] telephoned to say
>
> 1. Eccleshall need to make their mind up what they want to do.
> 2. he sees no reason to remove any pews for disabled access (whilst the north aisle is so untidy)
> 3. he may have to have another meeting, just with [the Vicar] and the Architect
> 4. [the Deputy Chancellor] will probably have to decide, as he feels he is too involved."

This e-mail came to the petitioners' knowledge in the following way. Rule 7(7)(b) of the 1998 Rules (Lodging of appeal) provides that the registrar shall send or deliver to the registrar of the appellate court the court file maintained by the registrar of the diocese relating to the proceedings in the consistory court. Then rule 7(8) provides:

> "Any party to the proceedings…shall be entitled on giving reasonable notice to the registrar of the appellate court to inspect the court file referred to in paragraph (7)(b) and the file maintained by the registrar of the appellate court relating to the appeal and to have copies of documents contained therein made at the expense of the party…requesting them".

Thus routine exchanges between Chancellor and the Diocesan Registry, and within the Registry, if recorded within the diocesan registrar's court file (as this was) become available to the parties in a way which has no parallel (so far as the members of this court are aware) in ordinary civil (or criminal) litigation. In *In re Bentley Emmanuel Church, Bentley* [2006] Fam 39 para 4 the Court of Arches said of rule 7(7)(b):

> "In the interests of justice it is important on every appeal that the appellate court has the opportunity to consider the whole file relating to the progress of a petition. It is doubly important where, as in this case, the chancellor has not held a hearing but has determined the matter on the basis of written representations alone."

At para 6 reference was made to rule 7(8) of which the Court said:

> "This demonstrates that transparency is a feature of faculty cases".

In the *Emmanuel Church, Bentley* case Lichfield Diocesan Registry was criticized for its "piecemeal approach to the provision of documents" under rule 7(7)(b) and certainly no such criticism can be made in this case.

40. The e-mail of 13 August shows that the Chancellor was then minded to recuse himself because he felt he was too involved. The contents of this telephone conversation are entirely consistent with the Chancellor's comments in the first document.

41. In the course of his oral submissions, Mr Hill invited us to treat this bias ground as a free standing ground of appeal, which should lead to the quashing of the Chancellor's judgment, regardless of all other matters. In response to a question from the Court, and after reflection, the *amicus* concurred.

42. We have found the bias ground the most difficult issue in the appeal, and as with what took place on 23 July 2009, the approach of the Chancellor is easy to criticise. On the other hand, there must be many occasions when a judge wonders whether he should recuse himself and eventually decides that it is not necessary, because he is still able to approach the matter in a fair way and reach a proper judicial decision. We do not consider that his initial hesitations should be decisive against continuing to act. Mr Hill's strongest point (with which we agree) is that the need for judicial impartiality is of equal application whether or not rule 26 is invoked, and that, judged by his comments on the Grounds of Appeal, the Chancellor did not appear to appreciate this. Fortuitous as it is that the two documents have come to the petitioners' and the court's knowledge, we consider that the appeal on the bias ground should be allowed. In their absence, and had the challenge simply rested on allegations of predetermination and apparent bias, our decision might well have been different.

Other procedural aspects

43. Before leaving procedural issues, we mention three further procedural aspects of this case, though, for understandable reasons, none was relied upon by Mr Hill, and anything we say will necessarily be *obiter*, albeit informed by the submissions of Counsel. We do so because this court sits relatively infrequently, and, as was stated by a previous Dean, Sir John Owen, in *In re St Luke the Evangelist, Maidstone* [1995] Fam 1, 4:

> "the court will continue, so far as may be proper, when deciding specific appeals, to give general guidance".

44. Before turning to the first two matters, concerning two of the 2000 Rules which include reference to the phrase "alteration to….a listed church", it is necessary to consider the bold contention of Mr Hill that the introduction of this platform did not constitute an "alteration" to the listed building, because it was removable and did not involve an alteration to the fabric of the church. We prefer the submission of the *amicus* that a structure of this size, even if held in place by its own weight and without specific fixing to the floor or walls of the church, is capable of being, and probably was on the facts of this case, an "alteration". In so concluding, we accept the *amicus'* view that the question whether a proposal constitutes an "alteration" needs to be considered with a degree of common sense. Thus to introduce a free-standing piece of furniture into a building could not be said to alter it, but to introduce a major structure into a building, which gives every appearance of forming part of the building itself, may properly be held to be an alteration. The *amicus* drew our attention to the pair of free-standing dog grates of considerable weight in *Monti v Barnes* [1901] 1 QB 205, which was held to be a fixture rather than a fitting. The whole question of fixtures in relation to listed buildings

used to be the subject of 3.30-3.32 of PPG15: Planning and the Historic Environment (1994). Although this was repealed earlier this year, it contains valuable guidance, relevant also in an ecclesiastical context.

(a) form of DAC Certificate

45. First, we draw attention to the requirement of rules 3(5) and (6) of the 2000 Rules that where the DAC reaches its decision on an application (whether it be to recommend works or proposals or to raise no objection or that the application should not be recommended), its decision shall be set out in a certificate in Form No.1 in Appendix C and sent to the intending applicants. This will normally constitute the advice of the DAC which the chancellor, pursuant to rule 14, will consider when making his final determination. Rule 3(7) requires that the DAC shall consider including a recommendation that the intending applicants consult English Heritage, or the local planning authority, or one or more of the national amenity societies, or what is now the Church Buildings Council ("CBC") or any other body or person about some or all of the works or other proposals if they have not already done so, in any case where it appears to the DAC that the works:

> "(a) involve alteration to or extension of a listed church to such an extent as is likely to affect its character as a building of special architectural or historic interest
>
> (b) …….
>
> (c) ……"

46. Form No.1 provides for the DAC to indicate whether in the opinion of the DAC some or all of the works or proposals fall within category (a). Unfortunately it became apparent at the hearing that the Form No 1 used by the Lichfield DAC in March 2009 in relation to this petition did not follow the form prescribed under the 2000 Rules, but rather the form prescribed in Appendix B to the predecessor rules, the Faculty Jurisdiction Rules 1992 S.I. No 2882 ("the 1992 Rules"). The latter addressed the question of "material alteration to the appearance of the church or its setting", but not the question of effect on the character of a building of special architectural or historic interest. Since a decade has elapsed since the 2000 Rules were introduced, we express the hope that there are no other dioceses still using the old forms. In his judgment the Chancellor expressly referred to the DAC's view "that the proposal would result in a material alteration in the appearance of the church", which correctly reflected the wording of its Certificate, but no one appears to have recognized that the wrong form was being used. It is regrettable that the form provided the Chancellor with no assistance as to whether in the DAC's view it did or did not involve alteration to the listed church "to such an extent as is likely to affect its character as a building of special architectural or historic interest".

(b) advertisement

47. A related matter concerns advertisement in a local newspaper under rule 13(4) of the 2000 Rules. This cumbrously worded provision provides that where it appears to the chancellor on a preliminary consideration of the petition that the works for which a

faculty is sought involve alteration to or extension to a listed church to such an extent as is likely to affect its character as a building of special architectural or historic interest *and* which affects a grade I or grade II* listed church or the exterior of a grade II listed church, the chancellor shall direct that a notice stating the substance of the petition registrar shall be published by the petitioners in a newspaper circulating in the locality and publication shall take place within 14 days of the giving of the direction, or within such other period as the chancellor may direct. The notice shall give a date by which any objection is to reach the Diocesan Registrar.

48. We accept the submission of the *amicus* that it would seem from the Chancellor's judgment that he considered, rightly or wrongly, that this was a petition involving "alteration to or extension of a listed church to such an extent as is likely to affect its character as a building of special architectural or historic interest". If so, then he should have directed that the proposals be advertised, so as to allow further objections.

49. When objecting to the proposals on 12 April 2009, Mr Holmes enclosed with his letter to the Diocesan Registrar a copy of a truncated notice, published at his instigation in the Staffordshire Newsletter on 9 April 2009 on the Eccleshall Community News page. But the notice simply stated that "consideration is being given by the officials of the Holy Trinity Church to introduce a raised area at the chancel steps which will involve the re-siting of several pews". As Mr Holmes specifically commented in his objection letter, the notice did not mention that people could object. Thus it was rather more deficient than the advertisement which led to the quashing of a listed building consent in *R v Lambeth*

London Borough Council Ex parte Sharp (1988) 55 P.&C.R. 32, which had merely failed to state the date by which objections could be submitted. It is unlikely that Mr Holmes specifically had in mind rule 13(4). In his letter he simply said was that he "felt that the ordinary people of Eccleshall should know about this".

50. It is disturbing that no one concerned with the handling of this petition seems to have appreciated the potential relevance of rule 13(4). If, as the *amicus* submitted, rule 13(4) is frequently ignored, then this must stop. It is an essential counter-part to regulation 5 of the Planning (Listed Buildings and Conservation Areas) Regulations 1990 S.I. 1990/1519, which operates in the secular system, and is expressly referred to in para 4(iii) of Annex A: Code of Practice to the DCMS Guidance "The Operation of the Ecclesiastical Exemption and related planning matters for places of worship in England" (July 2010) to which the *amicus* drew our attention shortly before the handing down of this judgment. For reasons which we shall be coming to, we do not ourselves consider that the proposed platform is likely to affect the character of this church as a building of special architectural or historic interest, and therefore there is no need for us to contemplate directing advertisement at this late stage.

(c) consultation with the CBC

51. Finally, we note that the Chancellor did not seek the advice of the CBC under rule 15(3) of the 2000 Rules, which provides for consultation with the CBC "where the

chancellor considers that advice from the Council would be of assistance in relation to a petition for a faculty".

52. What seems to have happened is that the Lichfield DAC Secretary contacted the CBC direct about the proposal in late July 2009. The CBC casework officer's advice of 3 August 2009 (copied also to the Diocesan Registrar) was that "the correct process would be for the Chancellor to now formally consult the [CBC] if he considers it appropriate within the Rules". One of the situations in which it may be appropriate to consult the CBC is where a chancellor (as here) is minded to depart from a recommendation made by the DAC or one of the statutory heritage bodies. The current draft version of the CBC guidance "The Church Buildings Council and DACs: forging a new partnership", 9 July 2010 (and not available when this petition was being considered by the Chancellor) refers in Stage 5 (Chancellor Referrals) to "cases where Chancellors are faced with a conflict of evidence and would welcome a second opinion drawing on the church-based expertise of the CBC". Consistory Courts are likely to be assisted in future by the terms of the CBC guidance is deciding whether to seek advice from the Council.

53. The Chancellor was certainly not obliged to seek the CBC's advice, since under rule 15(3), it was for him to decide whether advice from the CBC would be of assistance; and it is clear from the Chancellor's e-mail to the Diocesan Registrar of 3 August 2009 that he did consider, and reject, referring the matter to the CBC. However, the reason he gave (in an internal e-mail) namely that "I will make my own decision, and not be bounced by continual reference to EH", either confused the role of EH and the CBC, or

was irrelevant. No one can now know what the CBC's advice would have been, but whatever its content it would surely have assisted the Chancellor in his task.

The substantive complaints

54. We have already set out the key passages in the Chancellor's judgment, and we now turn to what was Mr Hill's principal ground of challenge, that the decision was perverse and against the weight of the evidence before the Chancellor. We consider in turn the five matters relied upon.

(i) the Chancellor's failure to engage with the reasons for the size and location of the platform

55. It is clear that throughout the Chancellor was concerned about the size of the platform and its intrusion into the south aisle, where the ramp was to be located, rather than into the north aisle, which he considered preferable.

56. Mr Hill placed particular emphasis on five matters:

(i) The size of the church itself, which he suggested enabled the reception of this very large platform without incongruity, particularly since it was located behind the first pillars either side of the central aisle. The petitioners' written representations of 6

October 2009 made this point expressly ("Holy Trinity is a church of very large dimensions; a raised area to the current height of the chancel and taking in the east end of the south aisle is proportionate in design, will thus be absorbed well into the church as a whole, and will cohere with the current fabric of the church").

(ii) The platform's relatively low height, 350mm, which would be at the same height as the chancel floor.

(iii) The need for a large (and wide) platform to accommodate musicians and school activities, to enable communicants to pass beside the front altar and to enable disabled access via the ramp beside and behind the musicians. As explained to us at the hearing, communion would continue to be provided at the high altar in the chancel. The petitioners' written comments of 19 May to the Chancellor claimed that the extensive platform "should prove liberating for [musical] productions, just as they should for concerts generally" and "should prove invaluable" for "a new expression of church worship", particularly a "more informal act of worship to be held on a week-day evening". This was consistent with the petitioners' Statement of Needs (a requirement of rule 3(3)(a) of the 2000 Rules "where significant changes to a listed church are proposed").

(iv) The advantage of locating the ramp alongside the side wall of the church (be it south or north) to minimize its visual impact.

(v) The ability to achieve level access, via the platform, from the south aisle to the existing side altar (which would stand on the platform and which functions as a focal point for flags and banners), contrasted with the impossibility of achieving level access, via the platform, from the north aisle to the Lady Chapel. A photograph, available to the

DAC and the Chancellor, showed that the bottom step of the pulpit steps and the Lady Chapel step were at different heights, making the possibility of a ramp at the north end of the proposed raised area impractical.

57. In connection with the fourth and fifth matters, the petitioners' amended reply to the Chancellor's questions, dated 15 June 2009, explained that:

> "In the first plan the architect chose the north aisle for the ramp. But because of avoiding proximity to the step to the Lady Chapel (about 4 inches high) and the first step to the pulpit (about 9 inches high) the drawing showing [sic] the ramp wrapped closely around the pillar at the north-east end of the church. Neither the DAC nor English Heritage liked this, because it would spoil the look of the pillar.
>
> The attention then moved to the south aisle for the ramp. The proposed location near the south wall was the suggested solution of Alan Taylor of English Heritage".

We have already described the architect's explanation to the Chancellor on 23 July 2009, concerning different floor levels in the north aisle and problems with access to the Lady Chapel. He had also then explained to the Chancellor that placing the ramp further to the south gave "as much open aspect as possible and set gradient", and reflected EH's wish for "as much of the platform as possible to be visible from the South aisle, and the South aisle altar table would be emphasised by the scheme".

58. Notwithstanding this, the Chancellor's judgment shows that he still considered the north aisle "to be the obvious place for a disabled access to be positioned". He found that

"the proposed raised area is too great". Having studied the drawings and photographs, and all the materials he had before him, we find difficulty in understanding what it was about "the enormity of the project" and the "substantial material alteration in the internal appearance of this beautiful church" that so troubled him.

(ii) his failure to engage with the expert evidence, that the proposals would not compromise the special architectural and historic qualities of the listed building

59. The Chancellor did not expressly state that the new platform would compromise the special architectural and historic qualities of the listed building. But it is implicit in his judgment that he did so. This was a key element of some of the objectors' letters. For example Mr and Mrs Holmes asserted that "the proposed raised platform was not in keeping with the 12th Century Church", and Ms Barclay complained that the planned platform "will deface our Beautiful Old Church".

60. The Chancellor recognized in his judgment that the proposal had the support of the DAC and EH. He made, however, no attempt to engage with the very detailed analysis contained in a two-page letter to the Vicar from Alan Taylor, Inspector of Historic Buildings at English Heritage, dated 4 July, which was forwarded to the Registry on 13 July, and expressly invoked by the petitioners in their further written representations of 6 October. This letter included the following:

> "We are very aware that your proposals have been evolved carefully and thoughtfully to ensure that introduction of a new focal point here will not diminish either the visual or liturgical significance and presence of the chancel.

For these reasons [EH] is satisfied that the current and envisaged pattern of worship will not leave the architecturally significant chancel as a "left-over" space.

We are also very aware of the careful process of exploration that has been undertaken by the parish to determine how such facilities might be arranged around the chancel step, including a very full assessment of issues of elevation above the nave floor and the extent of incursion both into the nave itself and latterly into the south aisle. [EH] accepts that a platform level with the chancel floor will create both an appropriate degree of visibility of activities on the dais for a seated congregation or audience in the nave, as well as the convenience of level transition between platform and chancel when required. [EH] has therefore no objection in principle to the introduction of dais at the chancel step.

We have shared a number of discussions with you and your architect about the extent of the dais both in terms of projection into the nave and whether or not to extend across the head of the south aisle. We consider that terminating the dais in line with the easternmost pier of the nave arcades is architecturally satisfactory in relating the new structure to existing fabric. Inclusion of the easternmost bay of the aisle will give both added space and flexibility of use as well as a visual and architectural coherence to the dais by linking nave and aisle.

Much thought has been given to the positioning of the access ramp to the dais. We agree with your final conclusion that siting it against the south wall of the aisle is

> the most appropriate in architectural and functional terms. Here it can be constructed in a simple elegant way……
>
> For all these reasons [EH] is satisfied that this is a well considered and thoughtfully designed introduction to the church. It should greatly enhance existing worship and opportunities for future development *in a way which will not compromise the special architectural and historic qualities of the grade I listed building"* (our emphasis added).

61. There could not have been more coherent, or enthusiastic, support for the proposal from the public body charged with the protection and conservation of listed buildings. Furthermore, as Mr Hill drew to our attention, the Society for Protection of Ancient Buildings ("SPAB"), the most relevant of the national amenity societies referred to in rules 2 and 13(3) of the 2000 Rules, in its letter to the DAC of 1 August 2009, and plainly having seen EH's letter of 4 July, did not object to the proposals and were:

> "pleased to note that, in [EH]'s view, the proposals will not "diminish either the visual or liturgical significance and presence of the chancel", which we consider to be critical".

Rule 13(3) also refers to the local planning authority, and the Conservation Officer at Staffordshire Borough Council, in an-email which was forwarded to the Diocesan Registry on 3 August, stated:

> "I note [EH]'s involvement and support for the scheme, *and can see no issues of concern."* (our emphasis added).

62. Both Counsel relied on what Bingham LJ said in *Eckersley v Binnie* (1988) 18 Con LR 1, 77-8 (a case with very different subject matter concerning an explosion following ingress of methane to a water pumping station, and with formal experts' reports):

> "If all the evidence on a point is one way, good reason needs to be shown for rejecting that conclusion. If the overwhelming weight of evidence on a point is to one effect, convincing grounds have to be shown for reaching a contrary conclusion….
>
> In conflicts of resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source: he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reasons".

Here, Mr Hill says, no reason was given by the Chancellor for departing from Mr Taylor of EH's assessment of the proposal, and the Chancellor did not deal with the substance of Mr Taylor's opinion at all. There had to be a transparent exercise of judicial function with reference to the factual and expert evidence.

63. Given that the question of adverse effect on the listed building had indeed been raised by the objectors, this was not a case, such as *Edward Ware New Homes Ltd v Secretary of State for Transport, Local Government and the Regions* [2004] 1 P.&C.R.6

para 23, where a tribunal is not entitled to form its own conclusion on a matter without giving the parties an opportunity to assist and also ask the experts to assist. Furthermore, the *amicus* helpfully drew our attention to cases where a tribunal can reach conclusions even on technical matters without the need for expert evidence, such as *R (Casey) v the First Secretary of State* [2006] EWHC 2918 (Admin) para 23 (disturbance from barking dogs) and *Winchester City Council v Secretary of State for the Environment* (1979) 39 P. &C.R.1, 6-7 (aesthetic taste), where Lord Denning MR said of the question whether dividing a house would spoil it:

> "This was not a scientific or technical point on which evidence from both sides was necessary or even desirable. It was a matter of aesthetic taste – or common sense, if you like…..It was a matter the inspector could judge perfectly well for himself…It is a matter of commonsense and aesthetic taste, on which technical or professional evidence was not necessary".

Waller LJ was of the same view, at 8, saying:

> "this is very much a matter of taste…it is not something which requires expert evidence….it is something that is very much within the confines of an inspector's ability when he goes to look at a site, sees the situation and sees exactly what the house looks like and makes his decision."

This echoed the view of Forbes J at first instance (1978) 36 P.&C.R.455, 472 who said:

> "I might go further, perhaps, and say that, when one is dealing with questions of aesthetic value, I very much doubt whether experts are necessarily of any use at all".

We accept that there is clearly some parallel in deciding a faculty petition such as this and an Inspector's role in considering whether planning permission or listed building consent should be given. Chancellors are assisted, for instance in relation to listed building matters, by the provision under rule 14 of the 2000 Rules for obtaining the advice of the DAC, which in the present case supported the proposals (as the Chancellor recognized in his judgment), and also, where appropriate, the views of EH and the national amenity societies.

64. Our conclusion is that a chancellor is not bound by expert advice on aesthetic considerations, including the effect on listed buildings, but that where a chancellor is to depart from expert opinion, and is not in the position of having to choose between experts who differ on aesthetic matters (a position which often arises in contested faculty applications), then he must specifically address the expert evidence; and, if he is to reach a different conclusion, he must give a reasoned explanation why the expert evidence has been rejected. The Chancellor did not do this in the present case. Further the court is entirely satisfied on examination of all the evidence that the proposals will not affect the character of Holy Trinity Church as a building of special architectural or historic interest, for the reasons set out in Mr Taylor's letter. We do not question the Chancellor's conclusion that the proposals "would result in a substantial material alteration in the internal appearance of this beautiful church", but we do not understand why this is a sufficient reason to refuse the petition. In the phrase of the *amicus*, to say it was very big was not enough.

(iii) his failure to consider the fact that the proposals were entirely reversible, so that if needs were to change in the future," the interior could be returned to the status quo ante with ease and with no detriment to the fabric or furnishings of the interior"

65. Taste, and in particular liturgical fashion, is subject to constant change, and what seems appropriate in a church to one generation may no longer be welcome in the future. With this in mind the faculty jurisdiction has always favoured changes which are reversible. This matter is addressed in *Newsom & Newsom* Faculty Jurisdiction of the Church of England, 2nd ed. (1993) p.128:

> "One principle that is common in all the cases [on Re-ordering] is that, since tastes have changed and will certainly change again, a re-ordering should normally be reversible. In *Re St Stephen's, Walbrook* ([1987] Fam.146) the Archdeacon of London told the court that while there had been numerous cases of re-ordering in the London diocese, all had been reversible. The consistory court held that the proposed stone altar weighing 10 tons would be removable only with great difficulty, trouble and expense. The Court of Ecclesiastical Causes Reserved, while not questioning the principle, evidently did not consider that the proposals before them would be irreversible. (A footnote records that "A lintel had been placed in the wall through which the altar had been brought so that, if the altar was to be removed, the hole in the wall could be remade with less difficulty.) The Dean of the Arches in *Re St. Mary's, Banbury* ([1987] Fam.136) dealt with this point, saying that when a re-ordering is desired by the incumbent and P.C.C. it

should normally be allowed "if it can be done without necessitating a permanent *and* irreversible change to the building".

Mr Hill drew out attention to one of his own judgments in the Consistory Court of the Diocese of Chichester, *Re St Mary, Barcombe* (24 November 2009), where he had held at para 32, that:

> "The reversibility of the proposals [for a minor re-ordering] is a significant, and arguably determinative, feature in this regard."

66. No doubt with this principle in mind, the petitioners' written representations of 6 October stated:

> "The proposed scheme reflects the high desirability that changes to the church should be capable of being reversed in the future. Current fabric will be neither damaged nor displaced by the scheme".

But apart from the Chancellor's comment during the site visit of 4 June to which we have already referred, namely that the trouble with introductions such as this was that they were very rarely removed again (which does not really grapple with the principle at issue), there is no indication that reversibility was taken into account by the Chancellor.

67. We regard this as an error, but not one which on its own would lead to allowing the appeal.

(iv) the failure to consider the statutory duties of the incumbent, churchwardens and PCC pursuant to the provisions of the Disability Discrimination Act 1995 ("the 1995 Act"), manifested by refusal of the ramp element within the proposals

68. Again, we were assisted by the *amicus* on this aspect of the case, who drew our attention to the fact that the Court of Appeal has on several occasions accepted that the purpose of the 1995 Act is that the provider of services to the public should "provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large" (*Roads v Central Trains Ltd* [2004] EWCA Civ 1451; *Ross v Ryanair Ltd.* [2005] 1 WLR 2447 para 32; both following Mynors Ch's judgment in a re-ordering case, *Re Holy Cross, Pershore* [2002] Fam. 1 para 105). We agree that that applies to any church. More recently, the Disability Discrimination Act 2005 ("the 2005 Act") imposes a duty on public authorities to have due regard to the need to eliminate discrimination that is unlawful under the 1995 Act (s.49A(1) of the 1995 Act, inserted by s.3 of the 2005 Act). Whilst that provision does not apply to a judicial act (s.49C of the 2005 Act), we accept the submission of the *amicus* that consistory courts should generally give effect to s.49A of the 1995 Act as if it did apply to them (and in due course its successor s.149(1) of the Equality Act 2010 once it is in force).

69. There is no mention of the duty of the petitioners under the 1995 Act, but the Chancellor specifically referred to the question of disabled access. The ramp was only a minor aspect of the platform proposal, and if the platform were held aesthetically unacceptable, it would not be saved by the fact that it accommodated a ramp. Nor was the

ramp a detachable element of the proposal. Accordingly the appeal cannot succeed on the disability issue, and Mr Hill effectively conceded this ground at the hearing. Nevertheless, the proposal's contribution to equalizing standards of access is undoubtedly a factor in the scheme's favour which this court takes into account, and, since disability considerations frequently arise in the Consistory Court, we have thought it appropriate to draw attention to the relevant statutory provisions.

(v) the Chancellor allowed his personal and idiosyncratic perception of 'aesthetic, architectural and community interests' to override the role of the church as a local centre of worship and mission

70. The Grounds of Appeal drew attention to the statutory duty on the part of the Vicar, churchwardens and PCC of Holy Trinity to have "due regard to the [church's] role …as a local centre of worship and mission" under s.1 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, to which it was said the Chancellor gave insufficient regard. We are not satisfied that the Chancellor did fail to have regard to this role. He specifically referred to the petitioners' aim to broaden and improve church use, including community use. We see no reason to categorise the Chancellor's perception of community interests as either "personal" or "idiosyncratic"; and any perception of aesthetic and architectural interests will inevitably be subjective, and to that extent personal, and sometimes idiosyncratic. On the other hand we accept Mr Hill's criticism that the Chancellor never explained what he found so objectionable about the size of the platform, nor what it was about the "substantial material alteration in the internal

appearance of this beautiful church" which overrode all the other matters. The members of this court are agreed that we would have struck the balance, on all the evidence, in a very different way than did the Chancellor.

Conclusion on the substantive complaints

71. These are not proceedings by way of judicial review of the Chancellor's exercise of discretion, but appellate proceedings in which, as provided by rule 16(1) of the 1998 Rules we may:

> "(a) draw any inference of fact which might have been drawn in the proceedings in the consistory court;
>
> (b) give any judgment or direction which could have been given in the consistory court or remit the matter for rehearing and determination in the consistory court by the chancellor or a deputy chancellor, as the court considers appropriate."

As re-stated in *In re St Peter and St Paul's Church, Chingford* [2007] Fam.67 para 52:

> "Matters of primary fact are matters for the judge of first instance. But where the decision is based on an erroneous evaluation of the facts or on a balancing exercise in which the chancellor has failed to evaluate the facts correctly such as taking into consideration matters he/she should not, or ignoring relevant

considerations which should have been taken into account, then it is well settled that this court can set the chancellor's decision aside and consider the matter anew: see *St Edburga's, Abberton* [1962] P 10 and *In re Bentley Emmanuel Church, Bentley* [2006] Fam 39."

In *In re St Edburga's, Abberton* at 15, the phrase used by the Dean of the Arches was "erroneous evaluation of the facts taken as a whole". This was derived from Lord Reid's reference to circumstances in which "an appeal court is generally in as good a position to evaluate the evidence as the trial judge" in *Benmax v Austin Motor Co. Ltd.* [1955] AC 370, 376. Mr Hill referred us in his Skeleton Argument to more recent descriptions of the appellate function in relation to judicial discretion in *Roache v News Group Newspapers Limited* [1998] EMLR 161, 172, approved, *inter alia*, in *AEI Limited v PPL* [1999] 1 WLR 1507, 1523, and in *G v G* [1985] 1 WLR 647, 652. It is not necessary for Mr Hill to persuade us that the decision was actually perverse, though the test is a demanding one.

72. We are satisfied that the Chancellor was doing his best (under considerable pressure not only from the petitioners, but also from the DAC and the Archdeacon) to apply his own objective judgment to the matters he had to decide, taking into account, as he had to under the 2000 rules, not only the DAC's advice but also the views of the non-party objectors. His decision was not perverse.

73. Nonetheless, it was an evaluation of the evidence which did not properly take into account the careful explanation he had been given for the size and location of the platform; nor did the Chancellor give any reasons for differing from the expert evidence

before him, particularly that of EH in relation to the effect on the listed building. Given the Chancellor's view, stated in his judgment (and with which we concur, having studied the photographs) that the smaller current dais, installed under an Archdeacon's licence for temporary re-ordering in 2006, is unsightly and probably not high enough, we find great difficulty in understanding his decision to reject the petition.

74. The courses open to us are threefold: to quash the Chancellor's decision, and remit the matter for re-determination, probably by the Deputy Chancellor; to grant the Faculty without more; or to defer our decision with a view to carrying out a site visit, for which provision is made by rule 13 of the 1998 rules. The first option would cause unnecessary delay, and it is difficult to see what further evidence could be forthcoming. We invited submissions in relation to whether a site visit was needed or appropriate. The position in relation to the most recent cases on re-ordering seems to be as follows. In *Re St Stephen's, Walbrook* the judgments made clear that the members of the Court of Ecclesiastical Causes Reserved had visited the church before the hearing. Similarly in *Re St Luke, Maidstone* there was a site visit (noted at page 10 of the law report). In *Re St Michael, Tettenhall Regis* [1996] Fam.44, the Court of Arches unusually held the hearing in the church itself, which acted in place of a site visit. On the other hand in *In Re All Saints Melbourn* [1990] 1 WLR 833, a faculty was granted, apparently without a site inspection by the appeal court, and in *Re St Mary the Virgin, Sherborne* [1996] Fam.63 (not a re-ordering case) the Court of Arches dismissed an appeal against the grant of a faculty for the replacement of a stained glass window in an important listed abbey, apparently without a site visit.

75. We accept the submission of the *amicus* that there is no general principle that an appeal court must inspect a church before reaching a decision in a re-ordering case, any more than there is a principle that a chancellor must do so. Further, that a site inspection should only be carried out by the appeal court where there is a genuine lack of clarity. We also share both Counsels' view that in the present case, there being a selection of good photographs and plans, there is enough material to enable the Court to re-determine the petition one way or the other without an inspection.

76. We are satisfied that on a proper evaluation of the evidence the chancellor should have granted a faculty, and that such a faculty should now issue, subject to the following conditions:

1) subject to 4) below, that the works shall be carried out in accordance with the details shown on drawing 1461/A/4/C – those being the only details for which the faculty is being granted.

2) that the platform shall be self-supporting and not affixed by screws or other materials to the structure of the church – to ensure reversibility and safeguard the existing fabric.

3) that details of the texture and colour of the new carpet for the platform and its surround, shall be as recommended by the DAC, or in default of agreement by the Chancellor - in its letter of 1 August 2009 SPAB suggested that the DAC be involved in relation to the colour of the new carpet which could have a major impact on the interior, and (as the Vicar seems to have accepted during the first site visit on 4 June 2009) the

texture of the carpet should be such as to minimize the effect on acoustics. This matter was also mentioned in the DAC certificate.

4) that provision be made for ventilating the underside of the platform, and that there be sufficient access for periodic visual inspection of the spaces beneath the platform, to be as recommended by the DAC, or in default of agreement by the Chancellor – this was a matter raised in the same letter from SPAB.

5) that details of the handrails shall be as recommended by the DAC, or in default of agreement by the Chancellor – this matter was mentioned in the DAC certificate.

6) that the works shall be completed within a period of two years, unless on application made to him the Chancellor permits a longer period – to ensure the speedy realization of the proposals.

Summary

77. The appeal is allowed on two grounds: first because, having concluded that he was too involved to determine the petition by way of a hearing in open court, the Chancellor erred in not recusing himself from determining it by way of written representations, and second because on a proper evaluation of the evidence he should have exercised his discretion so as to grant a faculty.

Costs

78. Since the appeal is unopposed, no issue arises in relation to costs save in respect of the court costs. The relevant principles are those set out in *In re St Mary, Sherborne* at 70, where it was said:

> "The hearing of an appeal in this court is part of the process of deciding whether or not a faculty should be granted, and it is appropriate that the court costs should be paid by those who seek the faculty irrespective of whether they have been successful or not on the appeal. Any question of reimbursement of any part of the court fees will be determined by the same test of unreasonable behaviour as applies in the consistory court".

No question of reimbursement here arising, it follows that the Appellants must pay the court costs, unless any written submission to the contrary is received by the Provincial Registrar within 14 days.

The Right Worshipful Charles George QC, Dean of the Arches

The Worshipful Chancellor Timothy Briden

The Worshipful Chancellor Linda Box

Dated 30 July 2010