IN THE ARCHES COURT OF CANTERBURY

Charles George QC, Dean of the Arches

Chancellor Bursell QC and Chancellor Eyre QC

On appeal from the Consistory Court of the Diocese of Winchester

In re St Peter, Shipton Bellinger

JUDGMENT
(approved)

Appearances:

Gregory Jones QC and Jeremy Pike of Counsel (instructed pro bono under the Bar Direct Access Scheme) for the appellant/party opponent

The respondents/petitioners did not appear at the hearing of the appeal

1. This is an appeal by the Victorian Society against the judgment of the chancellor of Winchester Diocese (Chancellor Clark) of 12 March 2015, granting a faculty to replace the existing, Victorian, font in the church of St Peter, Shipton Bellinger, with a new font made of Purbeck stone. The new font would be smaller than the Victorian font and would be installed on the south eastern, as opposed to south western, side of the nave. The faculty was granted subject to the proviso that every reasonable attempt be made to transfer the font to another church or chapel, failing which museums should be contacted, failing which sale on the open market should be considered. Whatever form of disposal was contemplated, the chancellor required that his prior consent be obtained.

The Victorian font

2. St Peter's church is listed Grade II. The List Entry Description (to which the Victorian Society expressly referred in its letter of 19 December 2014) refers to "a massive restoration of 1879 by R.J.Withers", to the "Victorian interior" and to an "elaborate font". This font was also designed by Withers. In the judgment the chancellor describes the font in this way:

> "It rises to about four feet above floor level and is approximately three feet square. Each corner is rounded and rests on a short column. The font sits on a plinth approximately six feet by four feet. By any standards it is a large font for a small parish church."

In the fourth edition (2010) of Pevsner's "Buildings of England" Hampshire volume (edited by Michael Bullen), the font is mentioned as:

> "Outsize, showy High Victorian…by Withers in top gear".

3. We have not visited the church, and therefore have not seen the font, save in photographs. Nor do we have before us any expert reports (see rule 10.5 of the Faculty Jurisdiction Rules 2013 ("the FJR 2013"), though the Victorian Society described the font in its letter of objection of 28 November 2014 as "a handsome fixture". Whilst the chancellor only obliquely addressed the question whether the font is "an article of special architectural…or artistic interest" (the phrase in rule 8.6(1) of the FJR 2013), his view seems to have been that it was not ("the font is not an artistic treasure", para 20 of his judgment; "there is no particular artistic merit in the design of the font", para 19). However, his proviso relating to its disposal reflects the guidance on such articles (sometimes termed Church Treasures) in *In re St Lawrence, Oakley with Wootton St Lawrence* [2015] Fam 27.

Background

4. As the following factual summary indicates, in the handling and determination of this case at every level almost everything that could go wrong did go wrong.

The DAC advice

5. Prior to submission of the petition, The Diocesan Advisory Committee ("DAC") recommended the works for approval, subject to provisos. The DAC recommended

that the Victorian Society and the Church Buildings Council ("CBC") be consulted because the works involved alteration to a listed building to such an extent as would be likely to affect its character as a building of special architectural or historic interest. Curiously on the same page of the DAC advice it was stated to be the opinion of the DAC that the work "is not likely to affect the character of the church…as a building of special architectural or historic interest". We assume this part of the form should have been deleted. Apart from the fact that the DAC advised that the CBC be consulted, there is nothing to indicate that the DAC addressed the question whether this was a proposal "affecting articles of particular historic…or artistic interest", as might have been expected: see rule 3.6(8). (In the replacement rule 4.5(8) of the Faculty Jurisdiction Rules 2015 ("the FJR 2015"), the word "special" has replaced the word "particular" in the interests of consistency).

The petition

6. The petition was submitted by the incumbent (the Revd Canon Dr Ian James Tomlinson), and two churchwardens (Mr Frank Clench and Mrs Wendy Woodcock). Since St Peter is a listed church, both a statement of significance and a statement of need were required: see rules 3.3(1)(a) and (b).

7. The purpose of a statement of significance is to describe the significance of the church in terms of its special architectural and historic interest (including any contribution made by its setting) and any significant features of artistic or archaeological interest that the church has "so as to enable the potential impact of the proposals on its significance, and on any such features, to be understood": rule 3.3(1)(a). The statement of significance in this case did none of these things. In particular it did not even describe the Victorian font, much less address the question whether it was a significant feature of artistic interest. Consequently it was of no assistance whatever in enabling anyone, including the chancellor, to understand the potential impact of its removal.

8. The statement from the incumbent of 22 January 2014, which accompanied the petitioners' application to the Diocesan Advisory Committee for its advice of the same date, included the following:

> "This relocation of a simpler font, as proposed, would also be within the context of the removal of a certain number of pews (referred to in the PCC minutes) and the lowering of the nave floor for ease of accessibility, with the option of making the pews movable and securable, to afford different configurations of the pews, and flexible spaces for both liturgical and communal gatherings".

This statement was repeated in the statement of need which accompanied the petition, and indeed formed the first item under the heading "The Need". Yet the petition itself made no provision for the removal of pews, merely providing for the replacement of the font, repair of the floor underneath its plinth with new carpet, and the digging of a drain hole for the new font. We find great difficulty in understanding how it could have been thought right to consider the font proposal without incorporation of the matters said to constitute its "context" within the same, or at least

in an associated, petition. Unfortunately, as we shall see, the chancellor in his judgment assumed that the removal of a number of pews and the lowering of part of the nave floor would "go hand in hand" with the removal of the font. There might be objections to the removal of pews from those who did not object to the moving of the font. It should not have been assumed that such removal was bound to take place.

The Church Buildings Council

9. Correspondence ensued between the petitioners and the Church Buildings Council ("CBC"), in which the petitioners gave details about the church and the font (both old and new), and expressed the view that R.J.Withers was a "little known church architect", apparently quoting from an unidentified source. This appears to be the origin of the statement in para 5 of the chancellor's judgment that R.J.Withers was an architect "about whom little is known", and that "He is certainly not regarded as a distinguished architect of his period". A possible source of the first quotation is publicity material relating to St Mary, Bourne Street.

10. We now have considerably more information about the architect of the restoration of St Peter's, and designer of its font, than did the chancellor. Robert Jewell Withers (1823-94) commenced practice in Sherborne in 1848, moving to London in 1851, where he worked in partnership with his brother F.C.Withers (see *F.R.Kowsky* The architecture of Frederick Clarke Withers and the progress of the Gothic revival in America after 1850 (Wesleyan University Press, 1980)). Whilst not one of the best known Victorian architects, R.J.Withers's ecclesiastical works include the Anglican Church of the Resurrection in Brussels (1862-5) and St Mary, Bourne Street in London (1873-4), as well as alterations to St Mary le Strand and St Paul's, Knightsbridge.

11. The CBC's final position on the petition, set out in its letter of 22 December 2014, was that:

> "Based on the additional material provided on the history and significance of the existing font and the details of the proposed new font, we feel that the proposals will have a low impact on the interior of this Grade II listed church. We are therefore content that this is not a case on which the Church Buildings Council will wish to comment in detail, and are content to defer to the DAC's advice on the consideration of these proposals".

We have before us an unchallenged witness statement of 1 May 2015 from Mr Ashley, then the Victorian Society's Senior Conservation Adviser (Churches). This states (and we accept) that:

> "The first time [the Victorian Society] learned of what the Church Buildings Council (CBC) had said was when it read the judgment."

Mr Ashley's witness statement continues:

> "The CBC is recorded as stating that the impacts of the development these would be 'low impact' works (as quoted by the Chancellor in paragraph 2 of his judgment). The Chancellor plainly did not correctly understand what the CBC meant by this statement and as a result took into account an immaterial consideration. CBC was not saying that the proposals would not be

> harmful (and certainly not that it had applied the ***Duffield*** guidelines [a reference to para 87 of this court's judgment in *In re Alkmund, Duffield* [2013] Fam 158], or undertaken any other balancing exercise to weigh significance against need, but rather that it had considered the application against their rubric for consultation and determined that it was not one on which they would comment (see exhibit)".

Mr Ashley exhibited ChurchCare's guidance "When to consult the Church Buildings Council" (8 January 2015), which states that in the case of a Grade II listed church the CBC will only wish to be consulted where the impact is "high" (rather than "moderate" or "low"), and then only in the case of major liturgical reordering, entirely new extensions, or proposals affecting ancient trees, protected species and wildlife. Assuming, as we do, that Mr Ashley's interpretation is correct, the CBC may wish to consider whether, when they use phrases such as "low impact" in consultation responses, they should be more expansive, to prevent the sort of misunderstanding which took place in this case.

The procedure for determination of the petition

12. The only party opponent was the Victorian Society, although there was also an objection from Mrs Turner, a member of the congregation and on the electoral roll. In his letter of 19 December 2014 Mr Ashley indicated that the Victorian Society wished to be made a party opponent and consented to the matter being determined on written representations if the chancellor so decided. Mr Ashley also stated that he had not visited the church in person "as I intend to do in the New Year".

13. On 21 January 2015 Mrs Hart of the Winchester Diocesan Registry wrote to the Victorian Society to say that the petitioners had indicated that they did not wish to make further formal comments following Mr Ashley's letter of 19 December, but rather to rely on papers already submitted (copies of which Mrs Hart enclosed). Her letter concluded:

> "I will now send the papers to the Chancellor for his consideration. Both parties have agreed in writing, as required by Rule 13.1 2(b) of the Faculty Jurisdiction Rules 2013, to this matter being dealt with by way of Written Representations but it will be for the Chancellor to decide whether an oral hearing will be required. I will let you know as soon as I hear from him. Please do not hesitate to contact me should you have any queries."

14. In Mr Ashley's unchallenged witness statement, he records:

> "8. Mrs Hart's letter was received at our offices on 23 January. Based on my previous experience of faculty applications being dealt with by written representations I expected to have the opportunity to make further representations setting out the grounds (and in particular the legal grounds, which had not been set out in my original letters) for our objection. On the same day or shortly afterwards I therefore called the Registry to enquire as to the timetable for making further written representations. I believe the person I spoke to was Mrs Hart, though I cannot be absolutely certain

> of this as I did not make a note of the conversation at the time. I am however certain that I was advised by the person whom I believe to have been Mrs Hart that further directions would be forthcoming from the Chancellor in due course. I had no reason to believe that Mrs Hart's representation could not be relied upon and that is what I did. There was never any indication that the Chancellor would be conducting a site visit. It was, however, my intention to visit the church before making our own final written representations, as I had indicated I would do in my letter to the Winchester Diocesan Registry of 19 December 2014, and as I have now done.
>
> 9. No further directions were, however, received. Having become concerned that some time had passed without further instructions having been received, I telephoned the Registry (in the week beginning 16 March) and was informed that the Chancellor had come to his decision and that a judgment would shortly issue. The Chancellor's decision, dated 12 March 2015, was received by the Society on 23 March 2015. An opportunity for further written representations, which the Society was expecting and wished to avail itself of, was not in fact provided".

15. We have before us also an email from the present diocesan registrar, dated 15 October 2015, which states:

> "…Unfortunately, my Registry Clerks are unable to recall the telephone conversation you mentioned on or around January 23rd, but as this was only one week after the sudden death of my predecessor, Andrew Johnson, this is perhaps unsurprising. In the circumstances, we can only reiterate that the advice given in Mrs Hart's letter of 21st January would have been repeated, as she was setting out the terms of rule 13.1 of the Faculty Jurisdiction Rules. As you will have seen the full Registry file relating to the application, we can add nothing further".

16. When the Victorian Society initially sought from the chancellor leave to appeal, this was refused by a ruling of 17 April 2015 ("the chancellor's ruling"). In this the chancellor referred to a letter dated 22 January 2015 by which the diocesan registry had informed him that both parties were content for the matter to be dealt with under rule 26. The chancellor continues:

> "I felt it appropriate for the matter to be resolved in this way. I assumed both parties were content with my considering what they had each set out in considerable detail. Indeed, no further written representations was received by me in the seven weeks before I started writing my judgment in the second week of March. If I erred in making this assumption, I apologise. It is, however, difficult to see what more Mr Ashley could have said in furtherance of his case".

As we explain later in this judgment there should have been no final determination of the proceedings unless and until the chancellor had made an order that the determination should be by written representations: see rules 13.1(1) and 13.5(1) of the FJR 2013.

The chancellor's site visit

17. As the Victorian Society learned for the first time from para 3 of the chancellor's judgment:

> "…in the light of the issues raised in the representations, I considered it crucial to pay my own private visit to the Church. This I did on the morning of the 21st February 2015. As will become clear in the course of this Judgment, my visit proved invaluable. Indeed I would go so far as to say that, without visiting the Church, it would have been very difficult to understand and assess the issues in this case".

Further material relating to the site visit is contained in para 2 of the chancellor's ruling:

> "A private, unaccompanied visit to a church the subject of a faculty application is something I have often undertaken in the course of 22 years as a Diocesan Chancellor……My visit to St. Peter's Church on the morning of the 21st February was a private, unaccompanied visit, but I did ask the Registry to ensure that the Church was unlocked. In the event, two representatives of the congregation were present for the purpose. We exchanged pleasantries, but there was no conversation whatsoever concerning the merits of the case. In visiting the Church my objective was to form a personal view about the building and its font, and, in particular, to assess the appearance, size and scale of the font in the context of the church interior. This seemed to me to be the crucial issue. To achieve this purpose I did not see the need for either party to accompany me or to make further representations. Whilst at the Church I picked up and kept a visitor leaflet about the building and its history. One or two of the historical matters summarised in Paragraph 5 of my Judgment were derived from this leaflet (e.g. the reference to the building being "probably17th century")…".

As we explain later in our judgment, no site visit should have taken place until there had been an order under rule 13.1(1) of the FJR 2015: see rule 13.4.

The judgment

18. The chancellor's detailed judgment of 12 March 2015 carefully set out the cases of the Petitioners, the Victorian Society (as then particularised) and Mrs Turner, together with the responses of the DAC and the petitioners. Under a heading "The Law" the chancellor referred to what he termed "the principles set out in *In re St. Alkmund's Church, Duffield"* which he correctly set out; and distinguished the facts and issues of the petition from those in *In re St. Peter's Church, Draycott* [2009] Fam 93 (proposed disposal of a Victorian font by Burges) and in *Wootton* (proposed disposal of an armet). Under the heading "The Decision", the chancellor identified four features which had become clear from his site visit: (a) the church was "essentially mediaeval in appearance", with "all the hallmarks of being a simple, little country church which has been in existence for centuries", despite the renovation in 1879; (b) the building was small and space was very limited; (c) the font was "large and out of proportion to the small scale of the Church"; and (d) "there is no particular artistic merit in the design of the font" and "in terms of its contribution to the

significance of the architectural or historic interest of the building, it is at best modest and at worst negligible". He then went on to reject Mr Ashley's arguments, including Mr Ashley's description of the church as a "nationally-important" building and the font as being an artistic treasure.

19. Having concluded (para 20) that:

> "I am very doubtful whether its removal would cause any harm to the significance of this Church as a building of special architectural and historic interest",

the chancellor went on (para 21) to find that the justification for removal was strong, in that more space was needed, in particular for refreshment after a service. In his view (para 22) "The present font and its plinth drastically limit the space in St Peter's for meeting and greeting after a service". Additionally positioning the new font at the front of the nave would enable baptisms to take place at the front of the congregation, which in many churches had become "the norm". In these circumstances he was:

> "satisfied that the ordinary presumption in favour of things as they stand has been rebutted in this case" (para 24).

He continued:

> "If, however, my judgment that there is here no proven or quantifiable harm to the significance of the church as a building of special architectural or historic interest is considered to be wrong, then such harm is of a modest degree. As I have indicated, I am satisfied that the justification for carrying out the proposal is clear and convincing. In my judgment, for the reasons I have already set out, the public benefit for carrying out the proposal outweighs by a wide margin the harm done."

Leave to appeal

20. Leave to appeal was granted by the Dean on only two grounds (relating to what the Victorian Society described as "legitimate expectation", and to errors of fact and law in the chancellor's judgment). At the commencement of the appeal we gave leave to the Victorian Society to argue its ground relating to the site inspection. There were additional grounds relating to irrationality and absence of reasons, where leave was refused both initially and by the full court. On being informed of the grant of leave to appeal, the petitioners promptly informed the Provincial Registrar that they took "an entirely neutral view as to the outcome of the appeal and do not propose to appear or be represented at the hearing". In their opinion it would not have been "proper to prevail upon the goodwill of counsel to act *pro bono* when there is no suggestion that the respondents were responsible for any of the errors of law alleged". In consequence this court has not had the benefit that it would otherwise no doubt have received from submissions made by the petitioners on the issues before the court.

The diocesan registry file

21. Arising from the above, there is one further matter which calls for comment. Rule 7(7)(b) and (8) of the Faculty Jurisdiction (Appeals) Rules 1998 provide for the various persons to have access to "the court file maintained by the registrar of the diocese relating to the proceedings in the consistory court". Yet again on an appeal to this court a diocesan registry file has been found deficient. In *In re Emmanuel Church, Bentley* [2006] Fam 39 para 4, it was stated:

> "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."

It was further made clear in para 5 that the court file meant:

> "the totality of the documentation relating to a petition notwithstanding that for practical reasons some of the items may be kept in separate folders….All folders form part of the "court file" generated by the petition in question and all should be sent to comply with rule 7(7)(b)…The registrar is the officer of the court for responsibility for maintaining, on behalf of the consistory court of the diocese, a full and complete file relating to the petition. This includes all documentation placed before the chancellor."

In the present case, the registry file contains no record of internal communications between the registry and the chancellor, and there is no copy of the letter of 22 January 2014 from the registry to the chancellor, referred to in the chancellor's ruling. Such internal communications can be critical to the determination of an appeal (see for example *In re Holy Trinity, Eccleshall* [2011] Fam 1 paras 39 to 42). Further there is no log of telephone calls, so that (quite apart from the sad death of the registrar) it is unsurprising that the registry clerks now have no recollection of the conversation with Mr Ashley on about 23 January 2015. We also note the absence in the file of any reference to an order by the chancellor under rule 13.1(1) of the FJR 2013, which appears to confirm that no such order was ever made.

The legal framework

The written representations procedure

22. In the case of most faculty petitions there is no party opponent and a faculty can be granted by the chancellor on consideration of the petition under rule 9.6(1) of the FJR 2013. Where the chancellor is minded not to grant the unopposed faculty, or where there is a party opponent, the matter is in most cases dealt with, not by a holding a hearing, but under the written representations procedure contained in Part 13 of the FJR 2013. The procedure was introduced by the Faculty Jurisdiction Rules 1992 "to provide an alternative procedure in a suitable case where the issues are clear-cut": *Bentley* para 34. A written representations procedure for determination of appeal will be available from 1 January 2016 when the FJR 2015 come into force: see rule 25.6.

23. There are two preconditions to the use of the written representations procedure, set out in rule 13.1(2) of the FJR 2013:

> "(a) the chancellor considers that determination of the proceedings on consideration of written representations is expedient;
>
> (b) all of the parties have agreed in writing to such a course".

The chancellor may consider that the petition raises issues of law or fact which need to be examined publicly notwithstanding that there is no party opponent, or indeed even if there is no objection to the petition. A hearing may also be required by the chancellor even when the party-opponent has consented to the use of the written representations procedure. In cases which concern the disposal of Church Treasures this court has repeatedly said that faculties should seldom be granted without a hearing in open court: see most recently *Wootton* para 19.

24. If the chancellor considers that use of the written representations procedure "is expedient", he must make an order to that effect. This follows from rule 13.1(1) which provides:

> "The chancellor may order that any proceedings to which these Rules apply are to be determined on consideration of written representations instead of by a hearing….".

Such order will follow the agreement of the parties, and the chancellor's decision on expediency, but must precede his determination of the proceedings. That is clear from the subsequent parts of rule 13, and particularly from rule 13.5(1):

> "13.3(1) Where an order is made under rule 13.1 the chancellor may give directions for the purpose of determining the proceedings on consideration of written representations.
>
> ……
>
> 13.3(1) The chancellor may at any time prior to the final determination of the proceedings revoke an order that they be determined on consideration of written representations…
>
> ……
>
> 13.4 Where an order has been made under rule 13.1, the chancellor may nevertheless inspect any church…..
>
> 13.5(1) Where an order has been made under rule 13.1 and has not been revoked, the chancellor may proceed to determine the proceedings upon consideration of the pleadings and any relevant evidence that has been submitted to the court.
>
> ……"

25. Rule 13.2(1) significantly differs from its predecessor in rule 26(2) of the Faculty Jurisdiction Rules 2000 (the rules which applied in *Bentley*). Following the chancellor's order, there used to be a requirement for notice to be given by the registrar for sequential submission and exchange of written statements, with provision for a response by the petitioners. Rule 13.2(1) of the FJR 2013 is permissive rather than mandatory ("may" rather than "shall"), and leaves the content of the chancellor's directions entirely open. Where the parties have already stated not merely their agreement to the use of the written representations procedure but also that they are content that materials already submitted by them to the registry should stand as their written representations, there may be no need for any

directions under rule 13.2(1). Where, however, that is not the case, directions will be needed to require the parties to state whether they wish to submit anything further, and set a time-table if they do. Directions may also be appropriate to ensure that all parties are in receipt of materials which have previously been submitted by others to the registry (for example correspondence from statutory amenity societies and the CBC). If any of the parties has not stated that they are content for the matter to be determined without further submissions, directions will need to be issued under rule 13(1)(2).

26. Rule 13.2(2) provides:

> "if a party fails to comply with a direction under paragraph (1) the chancellor may proceed to dispose of the proceedings without further reference to that party."

Thus, in a case where rule 13.2(1) directions are needed, it is only when they have been given and complied with, or given and not complied with, that the chancellor can proceed to determine the proceedings under rule 13.5(1). This accords with the "overriding objective" in rule 1.1(1) that the rules enable to deal with cases justly, which rule 1.1(2)(d) interprets as "ensuring that [a case] is dealt with expeditiously and fairly".

Site visits

27. Site visits frequently take place when the written representations procedure has been ordered. Provision is made for this by rule 13.4.

28. Rule 13.4 is silent as to the procedure to be followed in respect of site visits, as is rule 19.1 in respect of site visits in connection with proceedings to be determined by way of a hearing. In particular nothing is said about notification of such site visits to the parties (whether before or after the site visit) or what is to happen at the site visit. Mr Jones QC and Mr Pike, who appeared for the Victorian Society on the appeal, contended that a chancellor was obliged to notify the parties in advance of an intention to make a site visit, and to seek to agree a date and time convenient to all the parties. We see no reason to imply such a requirement into the rules, and in particular we do not believe that such a requirement is necessary for cases to be determined justly. Moreover, we consider such a requirement would cause considerable delay to the determination of proceedings. It has to be remembered that appointment as a chancellor is only to a part-time office, and most chancellors have to fit the timing of site visits into their other commitments with such visits frequently taking place outside the normal working day. As pointed out in the chancellor's ruling, private, unaccompanied site visits are frequently undertaken, as is the experience of all the members of this court. Alternatively, counsel for the Victorian Society contended that if the presence of anyone (including one of the parties) at the church or churchyard was required for the purpose of access, then all the parties needed to be informed in advance. This was to prevent the possibility of the chancellor being influenced by anything said during the site visit. On the facts of this case, they were concerned about the presence of two representatives of the congregation to ensure the church was unlocked (see para 2 of the chancellor's ruling).

29. The procedures of the ecclesiastical courts and those of the planning inspectorate are by no means identical. In dealing with those cases where it is appropriate for the parties' representatives to be present, this court said, in *Eccleshall* para 33, that it saw no need for the "strait-jacket that applies in the case of site visits conducted [in other jurisdictions, including by planning inspectors]", whilst accepting 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 was to be achieved by it. Nevertheless, the Victorian Society's skeleton argument noted that:

> "… in the secular planning system even in the case of written representations site visits are pre-announced to the parties and are accompanied".

In addition it was said that if access is to be provided by someone, then the parties must be informed and given the opportunity to be present. However, the relevant Planning Inspectorate's "Guide to taking part in planning, listed building and conservation area consent appeals proceeding by written representations – England" (31 July 2015) states under the heading "The site visit":

> "9.1 The Inspector or his/her representative will normally visit the appeal site before a decision is made. If enough of the site can be seen from the road or a public viewpoint, the Inspector will view the site without anyone else being present.
>
> 9.2 Where necessary appellants will be required to provide the Inspector or his/her representative with access to the appeal site. The appellant's or agent's presence at the appeal site will be required solely to provide access to the site. On occasions both the appellant and the LPA's representative will need to be present during the site visit. This is most likely to be the case where site measurements are in dispute or where it is anticipated that those present will need to point out physical features that they have referred to in their evidence.
>
> 9.3 Although it may be appropriate on some occasions there is normally no need for other people to attend the site visit…".

This suggests that in the secular planning system there is no requirement of advance notification of a site visit, much less any need to negotiate an agreed date and time. It also shows that, even where one party's presence is necessary to secure access, this gives rise to no right for others to attend. Accordingly, on the limited material available to us, we do not accept the assertion made by counsel for the Victorian Society as to the approach in the secular planning system.

30. On occasions a chancellor may undertake a site visit accompanied by someone else who is not a party to the proceedings. In *Eccleshall* para 32 this court said:

> "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."

31. So far as the conduct of a site visit, in the chancellor's ruling (see para 16 above) he referred to "the golden rule that on no account should [he] either seek

evidence from one or other party to a dispute or be prepared to listen to anything material from anyone who happens to be present". That is a requirement of fairness, though in the experience of the members of this court it is often difficult to ensure that others present at a site visit abide by it. In this regard we also note what is said in the Planning Inspectorate's *Guide* in relation to site visits:

> "9.5 As everyone concerned with the appeal has to make their case in writing only, no discussion is allowed about the appeal during a site visit. The Inspector or his/her representative will be there purely to assess the effect of the proposed development on the surroundings. However, where accompanied by the appellant and the LPA representative (and where appropriate, any interested person) the Inspector or his/her representative, may ask factual questions to confirm his/her understanding of physical features of the site."

This common sense approach should be followed in the faculty jurisdiction.

32. In the case of most site visits there is no need to inform the parties after the visit that it has taken place. The exception is where something has arisen on the site visit which is new, in the sense of being something which the parties could not have otherwise have anticipated and which is potentially capable of having a material impact on the chancellor's determination. Where the result of the site visit is that a chancellor concludes that one or other party is right in their submissions as to the effect on the character of the listed building, that is not a matter which he need draw to their attention at that stage. But if, for example, he comes across new information relevant to the petition and hitherto uncanvassed by the parties, then fairness dictates that the matter be drawn to their attention, with the opportunity for written comment by them within a time-table set by the chancellor. That is a consequence of the "overriding objective" of the rules and is consistent with the principles of public law applied in the secular courts, see *R v Chelsea College of Art and Design ex parte Nash* [2000] ELR 686 para 46; The Queen on the application of London Borough of Haringey v SCLG and O.A.Kwateng (Ebenezer Community Learning Centre) [2008] EWHC 1201 (Admin) paras 12-16, which were both cases concerning "basic lack of fairness".

33. Where there is unfairness of this nature at first instance, but the appeal court is satisfied that it made no difference whatever to the result, then Mr Jones argued, and we accept, the appeal should be dismissed on the ground that the unfairness had no effect on the decision. On the other hand, if the unfairness might have made a difference to the outcome in the lower court, and where this cannot be ruled out, the appeal will be allowed and the matter would need to be re-determined.

Determining proceedings affecting listed churches

34. In assessing the special architectural and/or historic interest of a listed church, and the intrinsic worth of an article such as a screen or font, it is essential the chancellor's appraisal is done on the basis of the best evidence available to the chancellor, which will sometimes take the form of expert reports (as to which see rule 10.5 of the FJR 2013 and *In re St John the Baptist, Penshurst* [2015] WLR (D) 115 (para 58 of the transcript). But often, and especially where the matter is being

decided under the written representations procedure and concerns only a Grade II church, there will be no such expert reports. In such circumstances a chancellor must manage with the materials which are available. In this a chancellor is often much assisted by the views of the relevant statutory amenity societies. The FJR 2013 require the relevant amenity societies (including here the Victorian Society) to be consulted before the chancellor determines the faculty petition: see for example rule 8.3(1). We accept the submission of Mr Jones and Mr Pike that on ordinary common law principles the weight given to an objection may be increased by the status and expertise of the body making the objection: see, for example, *R (Weir) v Camden LBC* [2005] EWHC 1875 (Admin), where Collins J said para 13:

> "It seems to me that it is self-evident that the weight of an objection may well be affected by its authorship.
>
> ……
>
> It seems to me that the source of the objection can be a relevant consideration, depending on the circumstances and the view to be taken as to the likely expertise of and the weight to be attached to an objection coming from a particular source."

This does not of course mean that in every case an objection from a body such as the Victorian Society will prevail. It did not do so, for example, on the facts of *Penshurst*. But it does mean that a statutory amenity society's objections should never be simply brushed aside.

35. We have referred above to the five guidelines identified and recommended to chancellors in *Duffield* para 87, which the chancellor purported to apply in his judgment. These are:

> "(1) Would the proposals, if implemented, result in harm to the significance of the church as a building of special architectural or historic interest?
>
> (2) If the answer to question (1) is "no", the ordinary presumption in faculty proceedings "in favour of things as they stand" is applicable, and can be rebutted more or less readily, depending on the particular nature of the proposals……Questions 3, 4 and 5 do not arise.
>
> (3) If the answer to question (1) is "yes", how serious would the harm be?
>
> (4) How clear and convincing is the justification for carrying out the proposals?
>
> (5) Bearing in mind that there is a strong presumption against proposals which will adversely affect the character of a listed building…., will any resulting public benefit (including matters such as liturgical freedom, pastoral well being, opportunities for mission, and putting the church to viable uses that are consistent with its role as a place of worship and mission) outweigh the harm? In answering question (5*),* the more serious the harm, the greater will be the level of benefit needed before the proposals should be permitted. This will particularly be the case if the harm to a building which is listed grade I or II*, where serious harm should only exceptionally be allowed".

36. These apply to all listed churches, and not merely to churches Listed Grades I and II*. The Planning Inspectorate's Guidance Note *"Listed building consent"* (version 3.3, undated) makes clear:

> "A listed building' is a building, object or structure that has been judged to be of national importance in terms of architectural or historic interest and included on a special register, called the List of Buildings of Special Architectural or Historic Interest."

The Foreword to the Department for Communities and Local Government's Guidance Note *"Best Practice Guidance on Listed Building Prosecutions"* (December 2006) (withdrawn in March 2014, when replaced by the National Planning Policy Framework) stated: "Listed buildings are, by definition, landmarks of national importance." The Department for Culture, Media and Sport's ("DCMS") Guidance Note *"Principles of Selection for Listing Buildings"* (March 2010) para 15 makes clear that national interest is a key consideration in listing:

> "National interest. The emphasis in [criteria for listing] is to establish consistency of selection to ensure that not only are all buildings of strong intrinsic architectural interest included on the list, but also the most significant or distinctive regional buildings that together make a major contribution to the national historic stock."

The DCMS guidance further emphasises that for a building to be listed it must be of 'special interest':

> "The statutory criteria for listing are the special architectural or historic interest of a building. Many buildings are interesting architecturally or historically, but, in order to be listed, a building must have "special" interest."

37. Faculties involving alterations to listed churches require particular attention from chancellors because listing is proof, save in the most exceptional cases and then only upon compelling expert evidence, that the building is of national importance; and because, whilst the secular control in respect of alterations to listed buildings is exercised through the medium of listed building consent, the ecclesiastical exemption provides for an equivalent starting point of respect and attention to be paid to all listed buildings through the faculty jurisdiction, albeit that the concept of equivalence is primarily concerned with procedure, and certainly not with substantive outcome: see *Duffield* paras 36-39. The court there stated that:

> "39.….the concept of "equivalence" does not necessarily require that the same result will be achieved as if the proposal were being determined through the secular system, nor that listed building considerations should necessarily prevail. What is essential, however, is that these considerations should be specifically taken into account, and in as informed and fair a manner as reasonably possible."

38. Three days before the chancellor's judgment this court decided an appeal (also by the Victorian Society) in *Penshurt.* The appeal concerned a proposal to remove a wooden chancel screen by Bodley from a Grade I listed church. The "screen was of considerable intrinsic merit, or in other words a church treasure, the alteration, removal or disposal of which would require strong justification": *Penshurst* para 52. The court clarified that on the facts of *Duffield* "no issue concerning alteration, removal or disposal of the screen arose", and said at para 26:

> "If the chancel screen constitutes a church treasure…, it is important that all relevant to this status are taken into account in the decision-making process, and not only those relating to the character of the listed building.
>
> ……
>
> There will be cases (unlike the present) where a church treasure is located within an unlisted building, so that no considerations under the *Duffield* guidelines arise, but there will still be a need to weigh carefully the inherent artistic worth of the article. Obviously some church treasures are of more interest than others, and a stronger justification will need to be made out to justify alterations, removal or disposal of those of greater interest. That accords with the approach taken in Wootton para 53 in the context of disposals by sale."

39. The *Duffield* approach, although only guidelines, for the most part does not seem to have presented difficulty to chancellors in its application. In *Penshurst* para 22, this court sought to clarify four matters relating to those guidelines:

> "(a) Question (1) cannot be answered without prior consideration of what is the special architectural and/or historic interest of the listed church. That is why each of those matters was specifically addressed in *Duffield* paras 57-58, the court having already found in para 52(i) that "the chancellor fell into a material error in failing to identify what was the special character and historic interest of the church as a whole (including the appearance of the chancel) and then to consider whether there would be an overall adverse effect by reason of the proposed change".
>
> (b) In answering questions (1) and (3), the particular grading of the listed church is highly relevant, whether or not serious harm will be occasioned. That is why in *Duffield* para 56 the court's analysis of the effect on the character of the listed building referred to "the starting point…that this is a grade I listed building".
>
> (c) In answering question (4), what matters are the elements which comprise the justification, including justification falling short of need or necessity (see *Duffield* paras 85-86). That is why the document setting out the justification for the proposals is now described in rule 3.3(1)(b) of the FJR 2013 as a document "*commonly known as* a "statement of needs" (italics added), in recognition that it is not confined to needs strictly so-called.
>
> (d) Questions (1), (3) and (5) are directed at the effect of the works on the character of the listed building, rather than the effects of alteration, removal or disposal on a particular article."

40. There is a final matter which we need to mention. Its resolution is not a matter which affects the outcome of this appeal, nor is it likely to be critical to any re-determination. In *East Northamptonshire DC v SCLG* [2014] EWCA Civ 137; [2014] 1 P&CR 357, the Court of Appeal addressed the interpretation of section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the LBA 1990"). This provides:

> "In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority ….shall

have special regard to the desirability of preserving the building or its setting or any features of special or historic interest which it possesses."

In *East Northamptonshire* para 29, Sullivan LJ said:

"….Parliament's intention in enacting section 66(1) was that decision-makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the exercise."

41. We interpose that the wording of section 16(2) of the LBA 1990 is virtually identical to that of section 66 of the LBA:

"In considering whether to grant listed building consent for any works the local planning authority….shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

Therefore what Sullivan LJ said of section 66 must also apply to section 16(2). Section 16(2) is of greater relevance to the faculty jurisdiction, and to the concept of equivalence, than section 66, because section 66 is only concerned with the grant of planning permission (which is not subject to the ecclesiastical exemption). Of course section 16(2) does not directly apply to the exercise of the faculty jurisdiction, not merely because of the effect of the ecclesiastical exemption, but also because the consistory court is not a local planning authority. Nevertheless, section 16(2) in our view encapsulates the approach which both secular and ecclesiastical systems should be following in relation to listed buildings, and thus its interpretation is of relevance to the faculty jurisdiction. As an aside, it is worth noting that that the question of "setting" could only arise as a consideration in the faculty jurisdiction when the proposal under consideration was for external works to a listed church, which might perhaps affect the setting of an another listed building. In the case of such external works, planning permission will also be needed and the local planning authority should have also itself considered "setting" by reason of section 66. We have heard no argument as to whether in the faculty jurisdiction "setting" needs to be considered, and accordingly we leave this for decision when and if the point arises.

42. As Lindblom J said in The Queen (on the application of The Forge Field Society) v Sevenoaks District Council and West Kent Housing Association [2014] EWHC 1895 (Admin) para 49:

"…It does not mean that the weight the authority should give to harm which it considers would be limited or less than substantial must be the same as the weight it might give to harm which would be substantial. But it is to recognize, as the Court of Appeal emphasized in *Barnwell* [as the *East Northamptonshire* case is sometimes called], that a finding of harm to the setting of a listed building or a conservation area *gives rise to a strong presumption against planning permission being granted*. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by a material consideration powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering" (emphasis added).

43. In *In the matter of All Saints with St Lawrence, Evesham* (unreported, 14 October 2015) paras 141-142, the deputy chancellor of the diocese of Worcester suggested that the *Duffield* guidelines needed alteration to reflect the interpretation in *East Northamptonshire*.

44. In this appeal Mr Jones and Mr Pike have distanced themselves from the deputy chancellor's suggestions. Our view can be stated fairly briefly.

45. As is clear from Lord Bridge's speech in *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141, 146:

> "If any proposed development would conflict with that objective [of preserving and enhancing the character or appearance of a conservation area], *there will be a strong presumption against the grant of planning permission,* though no doubt in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest. But if a development would not to conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused in the application of ordinary planning criteria" (emphasis added).

That passage was set out in full in para 20 of Sullivan LJ's judgment in *East Northamptonshire*. In para 23 he reverted to Lord Bridge's analysis, saying :

> "There is a "strong presumption" against granting planning permission for development which would harm the character or appearance of a conservation area *precisely because* the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight"" (emphasis added).

46. Accordingly, even if section 16(2) of the LBA were directly applicable to the exercise of the faculty jurisdiction (which it is not), there would be no need to change the wording of the *Duffield* guidelines. Further elaboration of Question 1 and 3 is not needed. Nor do we see any merit or need to incorporate material from Question 5 into Question 1, as suggested by the deputy chancellor. *Duffield* guideline 2 properly reflects, in the context of the faculty jurisdiction, the final quoted sentence from Lord Bridge's judgment in *Lakeland*, set out in para 45 above.

47. So far as the need alleged by the deputy chancellor to modify Question 3 and 4 "to reflect that it is a statutory requirement that particular weight should be given to the desirability of avoiding harm to the listed building", we consider that the so-called statutory requirement arises not at Questions 3 or 4, but rather in Question 5, and is already met by the express reference in Question 5 to "a strong presumption against proposals which will adversely affect the special character of a listed building", which, as we have just explained, arises precisely because "the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight"".

48. When applying the *Duffield* questions, chancellors may find it helpful at all stages to bear in mind (if they are not doing so already) that the desirability of preserving the listed church or its setting or any features of special architectural interest which it possesses is a consideration of considerable importance or weight.

Consideration of the Grounds of Appeal

49. Having set out the legal framework in some detail, we can relatively shortly address the three Grounds of Appeal, which we identified in para 20 above.

(1) unfairness in the way the written representations procedure was applied

(a) legitimate expectation

50. The Victorian Society claim that they have been unfairly treated in the way the written representations procedure has been applied to this case. They put their case on the basis of legitimate expectation, referring to what Laws J said in *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 para 68:

> "where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so".

Reliance is placed on two promises by the diocesan registry, which, as part of the consistory court system, must be taken to have been given on the chancellor's behalf. The first promise was that in Mrs Hart's letter of 21 January 2015 that "it will now be for the Chancellor to decide whether an oral hearing will be required. I will let you know as soon as I hear from him." Implicit in this was that there would be no decision by the chancellor on the merits until the Victorian Society had been informed of the chancellor's procedural decision under rule 13.1(1) of the FJR 2013; and that, if his decision was that the proceedings be determined by written representations, they would then receive directions under rule 13.2(1), including the opportunity to submit written representations. The second, according to Mr Ashley, was made by the diocesan registry, in a telephone conversation on or around 23 January 2015 and following a request as to the timetable for making further written representations. Mr Ashley says he received a specific assurance from the registry that further directions from the chancellor would be forthcoming in due course; and that, by implication, not only would the chancellor not reach his decision on the merits until those directions had been issued, but also the directions would provide a time table for the submission of written representations.

51. An important aspect of the background is that in Mr Ashley's letter of 19 December 2014, he had indicated his intention to visit the church in person in the New Year. It is clear from that mention that he was anticipating (in our view understandably) an opportunity to make written representations informed by that visit.

52. Accordingly, the Victorian Society claim that they had a legitimate expectation which was defeated when the chancellor reached his decision on the merits and

issued judgment without inviting any further representations from them. This was whether or not, absent the diocesan registry's assurances, they would have been entitled to submit further representations before the chancellor's decision was made.

53. In the petitioners' written representations opposing the grant of leave to appeal, their counsel, Mr Mark Hill QC, described this complaint as "dressed up in public law language". In our opinion the language used was equally apposite in the ecclesiastical jurisdiction to describe a particular type of unfairness. A slightly better point taken by Mr Hill was, so he claimed, the availability of an alternative remedy:

> "Assuming…that the chancellor's determination was premature in that he resolved the petition before the Victorian Society had laid before him all the material it wished to, the proper course is not to appeal the chancellor's judgment but to apply under FJR r 19.3 for him to set aside the faculty on the basis that if is 'just and expedient' for him to do so."

This was repeated in the petitioners' letter to the Provincial Registrar of 26 May 2015.

54. FJR 2013 rule 19.3(1) provides:

> "If it appears to the chancellor just and expedient to do so, the chancellor may order that any faculty, judgment, order or decree –
> (a) be set aside (either in whole or part); or
> (b) be amended.

An example of the recent exercise of this power by this same chancellor to correct an error of law is recorded in *Wootton* para 15. Where there has been a failure to comply with any provision of the FJR 2013, there is a similar power to set aside under rule 19.2(1).

55. For two reasons we consider Mr Hill's second contention also to be wrong. First, an appeal to this court is not by way of judicial review (where remedies are discretionary and availability of an alternative remedy is sometimes a reason for refusing permission to bring judicial review proceedings, or for refusing relief after a substantive hearing). In this court, if there has been an error of law or fact or an inappropriate exercise of discretion, a decision will save exceptionally be quashed (although the court may go on to re-determine the matter itself): *Penshurst* paras 29-30. Second and in any event, given the terms of the chancellor's ruling (that it was "difficult to see what more Mr Ashley could have said in furtherance of his case"), it is disingenuous to suggest that it might have appeared to the chancellor "just and expedient" to set aside the faculty or that, if he had been persuaded to set it aside, the Victorian Society might have expected a different outcome from a re-determination by the same chancellor.

56. We find this part of the Victorian Society's challenge to be justified. Given the two promises (or indeed either of them), it was plainly unfair that judgment was given on the merits without affording them an opportunity to submit further representations. Further we cannot dismiss the possibility (indeed we would consider it a likelihood) that the Victorian Society would have had more to add to what they had previously

said, and that it might have affected the outcome. This is especially so in the light of the communication from the CBC which the Victorian Society had not seen.

(b) the correspondence with the CBC and Mrs Turner

57. The chancellor specifically referred to the advice of the CBC in para 2 of his judgment. We have referred above to the fact that the existence of communications between the petitioners and the CBC was unknown to the Victorian Society until they received the chancellor's judgment; and also to the fact that it appears the chancellor may have misconstrued the CBC's letter of 22 December 2014. Similarly he referred to the contents of correspondence from the petitioners to Mrs Turner, including aesthetic judgments and why the change was needed (see judgment para 17), views which he went on to affirm in his judgment. This correspondence likewise appears not to have been disclosed to the Victorian Society.

58. We regard it as elementary that, whether a petition is opposed or unopposed, and whether the proceedings are determined at an oral hearing or by use of the written representations procedure, the chancellor must not take into account any written material which has not been made available to the parties (see *the London Borough of Haringey* case, referred to above). Where an order has been made under rule 13.1(1), the question of disclosure will normally be the subject of rule 13.2(1) directions. But the important thing is that disclosure does take place so that no party is disadvantaged by not seeing the whole picture.

59. On this second head we would also allow the appeal

(c) failure to comply with Part 13 of the FJR 2013

60. There is a third head on which we consider that the chancellor's decision was flawed by reason of the failure to afford the Victorian Society an opportunity to submit written representations. This is entirely independent of the two promises by the diocesan registry, and the failure to disclose the CBC correspondence.

61. We have seen no indication that the chancellor made any order that this matter be determined on written representations until he announced that decision in para 3 of his judgment. It is clear from Mrs Hart's letter of 21 January 2015 that she believed the procedural decision had not yet been reached by the chancellor. Under rule 13.5 it is only when a rule 13.1(1) order has been made, that the chancellor "may proceed to determine the proceedings". What occurred was a clear breach of the requirements of rule 13.1(1) and 13.5, as we have explained them in paras 24-26 above.

62. The breach mattered, because under rule 13.5(1) the matter had to be determined "upon consideration of the *pleadings* and *any relevant evidence* that has been submitted to the court" (emphases added). In order to ensure that the parties had submitted all their "relevant evidence", it was necessary either to inquire of them whether this was the case or to give directions under rule 13.2(1), setting a time-table for the submission of any further evidence. The Victorian Society's letters of 11

November 2014 and 19 December 2014 were strictly speaking part of the pleadings, the former being a "letter of objection" under rule 9.2 of the FJR 2013, the latter constituting "particulars of objection" under rule 9.4 (we have commented above about the failure to use the prescribed form in this case). On this analysis (which formed no part of the Victorian Society's case) the Victorian Society had not yet submitted *any* written representations or *any* evidence before the chancellor's judgment. It had certainly not been asked whether it wished to submit any further evidence or written representations.

63. We have set out earlier in this judgment our conclusions as to the interpretation of Part 13 in the light of the overriding objective and the requirements of fairness, as well as the obvious meaning of the individual rules. As we have explained, a petition cannot be determined under the written representations procedure unless written representations have been received from all parties, save where a party has agreed that earlier correspondence should stand as its written representations or where a party has failed to provide its representations in accordance with the directions of the court. Neither of these exceptions applies in this case, where the chancellor determined the matter without having received written representations from the Victorian Society. Accordingly we find that the Victorian Society has been unfairly treated by these failures to follow the procedures in Part13, and the appeal should be allowed on that account as well.

(2) unfairness relating to the site visit

(a) absence of prior notification

64. This Ground of Appeal was argued under four heads. First, that there was unlawfulness in the chancellor's site visit taking place on 21 February 2015 without prior notification to the Victorian Society, and thus without opportunity for them to attend.

65. In the petitioners' written representations opposing the grant of leave to appeal, Mr Hill referred to "the routine and unobjectionable practice of chancellors having a private view of the *locus*." We have already explained our reasoning why there is no obligation on chancellors to give parties advance notice of site visits, and no right of the parties to be present at all site visits. Thus the first head of challenge is misconceived.

(b) presence of representatives of the congregation

66. Second, the Victorian Society claim that even if there were no need to give advance notification, the presence of two representatives of the congregation to unlock the church, and the exchange of pleasantries to which the chancellor referred in his ruling, made the visit unfair, a variant of the *audi alteram partem* rule.

67. We see no reason to question the chancellor's explanation in his ruling; and we can see no unfairness in this aspect of the matter. Had the chancellor been

accompanied by his registrar or an archdeacon, complaint would probably not have been made under this head.

(c) taking into account new material

68. The third head of challenge was that the chancellor wrongly took into account new material obtained by him during the site visit, namely the information in the visitor leaflet which the chancellor picked up in the church. As was explained in the chancellor's ruling, "one or two of the historical matters summarised in Paragraph 5 of my judgment were derived from this leaflet (e.g. the reference to the building being "probably 17th century"),…." We accept the evidence of Mr Ashley that had he known of the suggestion that the church was largely a seventeenth century building, the Victorian Society would have contested this (and, on the materials we have now seen, it seems likely that they would have been successful in doing so).

69. In the petitioners' letter to the Provincial Registrar of 26 May 2015 the view was expressed that:

> "The fact that the chancellor may have picked up a leaflet while making a perfectly anodyne and routine private viewing of the church is something of a make-weight."

In the petitioners' written representations opposing the grant of leave to appeal, a similar point was made:

> "There is no substance in the 'site visit' point."

70. The chancellor went on to say that "nothing in this leaflet affected my view on the merits of the case". As a post-decision observation by the decision-maker, this alone can carry little weight (see *Magill v Porter* [2001] UKHL 67; [2002] 2 AC 357 para 104). With some hesitation, however, we have concluded that the contents of the leaflet did not materially affect the decision of the chancellor or his reasoning. This is because his finding in para 19(a) of the judgment that the church was "essentially mediaeval in appearance" was not derived from his recital (in para 5) that "the present building is formed of stone and flint, dating from the seventeenth century". That recital was the new (and, in Mr Ashley's opinion, wrong) matter in the leaflet of which the Victorian Society complain they were not informed. The Victorian Society did not argue that the failure to inform them about the information relating to the dating of this stonework and the south door archway (which seems also to have been derived from the leaflet and was also referred to in para 5 of the judgment) was material to this head of challenge.

71. Accordingly, we do not consider that the Victorian Society's challenge under this head is made out.

(d) weight attached by the chancellor to the site visit

72. In his judgment the chancellor described his site visit as "invaluable in understanding the issues involved in the case" (para 19). He "would go so far as to say that without visiting the Church, it would be very difficult fairly to understand and

assess the issues in the case" (para 3). If the site visit was so important to the chancellor's assessment, say the Victorian Society, it was anomalous that they were not invited to attend, or informed prior to judgment of its significance.

73. We reject this fourth argument. If the chancellor was entitled to visit on his own and unannounced, he was also entitled to draw aesthetic conclusions on the proposals before him, based on the site visit. Such aesthetic judgments are readily distinguishable from genuinely new material which a chancellor would normally be bound to disclose to the parties.

(3) errors of fact and law in the judgment

(a) errors of fact

74. The Victorian Society point to what they allege to be a number of errors of fact in the chancellor's judgment. Most of these are matters upon which we are not in a position to say that the chancellor did get the facts wrong, for example on whether the building dates from the seventeenth century, or whether R J Withers was incorrectly described as "certainly not regarded as a distinguished architect of his period". Although the Victorian Society refer to the inclusion of his biographical details in *Dixon and Muthesius* Victorian Architecture (1978), in an appendix which the authors apparently describe as "a selection of some of the more important Victorian architects and some of their works", we have not been provided with this book, nor do we (as at present advised) consider it plainly wrong of the chancellor to describe the architect as he did.

75. Many of the matters relied on by the Victorian Society as errors of fact are no more than disagreements with the chancellor's assessment, for example the chancellor's opinion that "[the new font] would be much more in keeping with the general design of the building" and that "the [Victorian] font is large and out of proportion to the small scale of the Church. It dominates the west end of the building". That the Victorian Society should have had the opportunity to provide written representations which might have addressed some or all of these matters is a different question; and if so allowed, the chancellor might have reached different opinions. But that is altogether different from whether his judgment was flawed for errors of fact. We would refuse the appeal on this head.

(b) errors of law

76. Under this head two matters are relied upon.

(i) The significance of the listing

77. The chancellor correctly referred to the church as a Grade II building (para 5), and he purported to apply the *Duffield* guidelines which only apply where the church in question is listed. On the other hand in a significant part of the judgment, specifically rejecting the arguments put forward by Mr Ashley relating to the deleterious effect of removing the Victorian font on the special character of the

church, the chancellor said that “this is not a “nationally-important” building” (para 20).

78. In the chancellor’s ruling, addressing this part of the Victorian Society’s proposed grounds of appeal, he said that he was “well aware of the significance of a listed building”. But it is not clear what the chancellor regarded the significance of a listed building to be. His awareness plainly did not include an understanding that all listed buildings are by definition of national significance, and that this is so because national interest is a key element in listing (see the passages in national guidance to which we have already referred). In para 18 of the chancellor’s judgment he referred to the need “to carry out a balancing process when considering a potential change to a church”. But the balancing exercise this chancellor carried out strikingly under-weighted the balance in favour of the protection of the special character of listed buildings by treating this church as not “nationally-important”. Of itself that is a reason for quashing his judgment.

*(ii) erroneous application of the **Duffield** guidelines*

79. In *Duffield* para 87 this court stressed that chancellors were not obliged to apply the new guidelines. But this chancellor has purported to apply those guidelines which he set out in para 18 of his judgment. In para 20 he was implicitly answering the first *Duffield* question when he said that he was “very doubtful whether [the font’s] removal would cause *any* harm to the significance of the Church as a building of special architectural and historic interest” (emphasis added); repeated in para 24 (“there is no proven or quantifiable harm”). It was because of this answer that, in para 24 of his judgment, the chancellor said that “the ordinary presumption in favour of things as they stand has been rebutted in this case” (a reference to item (2) in the *Duffield* guidelines).

80. As we have said above, the first *Duffield* question cannot be answered without proper analysis of what is the special architectural character and/or historic interest of the church. Nor can that analysis be done, or a sound conclusion reached on whether harm would be caused by the proposal (in this case the removal of the Victorian font), without examination of the listing description. That listing description, according to the Victorian Society, “specifically mentions the ‘elaborate font’ as part of the ‘Victorian interior’”. There is no indication in the judgment or the diocesan registry file that the chancellor had seen, or requested to see, the listing description. Therefore, apart altogether from his misunderstanding of the national importance of all listed churches, we consider that his approach to the first *Duffield* question was flawed.

81. At this stage we need to examine the chancellor’s alternative approach to harm. In para 24 of his judgment, he said that even if his judgment of no proven or identifiable harm were considered to be wrong, “then such harm is of a modest degree”. He thereby purportedly and implicitly answered the question in *Duffield* question (3) (“how serious would the harm be?”). This meant, according to the chancellor, that in view of his implicit answer to question (4) in *Duffield* (“How clear is the justification for carrying out the proposals?), he could properly find that the public

benefit outweighed the modest degree of harm, his implicit answer to question (5) in *Duffield*.

82. We do not consider that the judgment is rendered unobjectionable by reason of incorporation of the chancellor's alternative approach to harm. This is for three reasons. First, the flaws which infected his answer to the first *Duffield* question equally infect his alternative approach to both that question and to the assessment of seriousness of harm (question (3) in *Duffield*). Second, the chancellor's approach to public benefit (*Duffield* question (4)) appears to have been predicated on an erroneous basis. In para 9 of the judgment, in summarising the petitioners' case, the chancellor referred to what was said in their statement of needs, and said that:

> "In the present instance the removal of the font would go hand in hand with the removal of a number of pews and the lowering of part of the nave floor".

He then referred to the justification that this would lead to flexibility for both liturgical and communal gatherings. At the outset of our judgment we explained how unsatisfactory it was that matters not contained in the petition before the chancellor, nor, so it would seem, yet the subject of any other petition, should have been treated in the statement of needs as if they were justification for the removal of the Victorian font. Third, there is no trace in the critical part of the chancellor's judgment to the "strong presumption against proposals which will adversely affect the special character of a listed building", which is part of question (5) in *Duffield*. As we have explained above, this presumption and its application, mirroring section 16(2) of the LBA 1990, is critical to maintaining the concept of equivalence with the secular planning system. This is a further respect in which we consider the chancellor's alternative approach to have been flawed.

Conclusion

83. For the reasons set out above, we consider that the chancellor erred and acted unfairly in his purported application of the written representations procedure; and that his judgment on the merits was flawed by several errors of law. Accordingly we order that both his judgment and the resulting faculty be set aside.

Re-determination

84. Although the usual course when this court has quashed a faculty decision is that the court proceeds to an immediate re-determination (see the review of this issue in *Penshurst* paras 82 to 86), this has not been suggested by anyone to be appropriate in this case. The Victorian Society needs the opportunity to present its full case on the merits. In any event this court has too little material to be able itself at this stage to conduct a re-determination.

85. Accordingly, despite the additional delay and expense, the matter must be remitted for a complete re-determination on the merits, including reconsideration of whether the written representations procedure is "expedient", in the light of all that is now known or asserted: see rule 13.1(1).

86. The Victorian Society urge that re-determination should not be by the deputy chancellor (because he might be unduly influenced by the opinion already expressed on the merits by the chancellor), but rather by a deputy appointed by this court or by the diocesan bishop to determine the petition. We reject this submission. It is a key part of a deputy chancellor's role to adjudicate when the chancellor for whatever reason is unable to act, including instances where a chancellor has a personal interest in the petition. A deputy chancellor takes a judicial oath on appointment, which would be breached by attaching special weight, or showing special favour, to the views previously expressed by the chancellor on the matter, especially when his decision has been quashed by this court. Applying the relevant test, "whether the circumstances give rise to a reasonable apprehension of bias" (per Lord Hope of Craighead in *Magill v Porter* para 102), there should be no such reasonable apprehension if the deputy chancellor were to carry out the re-determination

87. Of course, if in the deputy chancellor's opinion there are reasons why he should recuse himself (for example if there have already been discussions on the merits between chancellor and deputy chancellor; or if the deputy chancellor has some association with either the petitioners or the Victorian Society which would prevent him acting), then the diocesan bishop will have to appoint another person, preferably a chancellor from another diocese, to carry out the re-determination. Absent such a situation, the re-determination should be by the current deputy chancellor

Costs

88. The normal cost rules suggest that the petitioners should pay the court costs of the appeal (including the application for leave), and also the costs of the successful party opponent (if sought): see *In re St Mary the Virgin, Sherborne* [1996] Fam 63, 69H-70C and 70F-71A, and this court's judgment on costs in *In re St John the Baptist, Penshurst (No.2)*, 30 March 2015, unreported Since the Victorian Society has been represented by counsel acting *pro bono*, this is likely markedly to reduce the claimable costs.

89. We give the Victorian Society 14 days from handing down of this judgment to submit to the Provincial Registrar its written representations on costs (both in relation to its own costs and the court costs) (including a detailed schedule of any costs it seeks from the petitioners), to be copied to the petitioners; and 14 days thereafter for the petitioners to respond, with a further 7 days thereafter for any further reply by the Victorian Society. Thereafter this court will make an order for costs, taking into account any submissions made to it.

19 November 2015

CHARLES GEORGE QC

RUPERT BURSELL QC

STEPHEN EYRE QC