Neutral Citation Number: [2017] EACC 3

IN THE ARCHES COURT OF CANTERBURY

**APPLICATION FOR PERMISSION TO APPEAL
FROM THE CONSISTORY COURT OF THE DIOCESE
OF SOUTHWARK (CHANCELLOR PHILIP PETCHEY)**

WATERLOO, ST JOHN'S

Between:

(1) The Reverend Canon Giles GODDARD
(2) Ms Belinda TAYLOR
(3) Mr David CLARSON
Applicants/Petitioners

- **and –**

THE TWENTIETH CENTURY SOCIETY
Respondent/Party Opponent

On consideration of the chancellor's Judgment, the chancellor's reasons for refusing permission to appeal, the Applicants' renewed application for permission to appeal and the Respondent's Response thereto

ORDER OF THE RIGHT WORSHIPFUL CHARLES GEORGE QC, Dean of the Arches

1. Permission is given for the appeal to proceed, limited to Ground 1 (the Chancellor erred by applying a different and higher test to that set out in *In re St Alkmund, Duffield*) and Ground 5 (the Chancellor erred in his assessment of public benefit by applying a test of necessity and/or reaching a finding of fact for which there was no evidence).

Reasons:

Permission might not have been given on either of these two Grounds if the sole test were that the appeal would have a real prospect of success. In respect of Ground 1 it appears doubtful whether on the basis of the facts as found by the Chancellor, the outcome would or should have been different if a test of "exceptional" rather than "wholly exceptional" had been applied by the chancellor. In respect of Ground 5, it is strongly arguable, as the Respondent contends, that it was relevant to consider (as the Chancellor did) whether there were (or might be) other less harmful ways of achieving the same objectives. However, both Grounds raise important issues relating to the proper approach in consistory courts to the consideration of serious harm in relation to buildings listed as Grade I or Grade II* which constitute compelling reasons why the appeal should be heard (see rule 22.2(b) of the Faculty Jurisdiction Rules 2015).

2. Permission to appeal on Ground 2 (the Chancellor erred by considering only one element of the architectural and historic interest of the building) is refused.

Reasons:

As is normally the case with a re-ordering scheme, the Petitioners' proposals did not involve any material alterations to the exterior of the church; and no objection was made to the proposed alterations to the Georgian staircases to the crypt, or to the crypt itself. What was in issue was the extent of the harm to principal parts of the interior, namely the Thomas Ford scheme (1951). This was the principal matter addressed by the evidence before the Chancellor, and there is no realistic prospect of showing that he erred in law in the focus of his consideration (see particularly paras 217 and 224 of his judgment); nor is this issue considered to raise an issue falling within rule 22(2)(b) of the Faculty Jurisdiction Rules 2015.

3. Permission to appeal on Ground 3 (the Chancellor erred by failing to treat functionality as relevant when assessing the 'architectural interest' of the Thomas Ford scheme) is refused.

Reasons:

Notwithstanding the observation by the Chancellor in para 239 of the judgment ("It was not suggested that there was anything in the Thomas Ford restoration that was positively detrimental to that scheme or generally to the interior"), it is clear from para 114 ("the Petitioners advanced an argument that the architectural interest of the building was less because, at the time it was listed, it lacked functionality") that he was well aware of such argument, which he returned to at para 251 ("I understand the defects of the current arrangements from the point of view of the worshipping congregation and how they would like to worship in a space that is less barn-like"). The Chancellor found that the church could be used successfully for worship (see para 251). He expressly referred in para 119 of his judgment to the case of *R (Bancroft) v Secretary of State for Culture, Media and Sport*, then and now relied upon by the Applicants, but, properly analysed, that decision solely concerns the stage at which a decision is taken whether or not to list a building (and arguably only certain limited types of building), rather than the subsequent assessment of the heritage significance of such a building and whether proposed alterations to it would be harmful. In any event, as the Respondent submits in its Response, there is no suggestion here that this church cannot be, or will not be, used for worship in the future (a significant factual difference from the position in *Bancroft*). Accordingly this Ground is not considered to stand a realistic prospect of success, nor to raise an issue falling within rule 22(2)(b) of the Faculty Jurisdiction Rules 2015.

4. Permission to appeal on Ground 4 (the Chancellor erred in his approach to the view of the DAC) is refused.

Reasons:

There is no arguable error of law in the Chancellor's statement at para 190 of the judgment that the views of the DAC had "intrinsically less weight than the evidence of individual experts which was subject to cross-examination", nor did or does that approach "undermine the role of the DAC", as now claimed by the Applicants. The approach of the Chancellor to written evidence was entirely consistent with (and the approach of the Applicant entirely inconsistent with) what was said by this Court in *In re St John the Baptist, Penshurst* (9 March 2015, unreported but noted at [2015] PTSR D40) para 78 ("…the weight which can be afforded to such views (be they from bodies such as the DAC and CBC, or from objectors who have not become parties opponent) is necessarily diminished by the absence of opportunity for cross-examination"). In the final sentence of the same paragraph in *Penshurst*, reference was made to the possibility of seeking a direction that the DAC make a qualified witness available for cross-examination by the party opponent. Accordingly Ground 4 meets neither of the tests for grant of permission to appeal in rule 22.2 of the Faculty Jurisdiction Rules 2015.

5. Each party shall bear its own costs of the application for permission to appeal, and the court costs thereof shall be paid by the Applicants in any event. Within 21 days of this Order, the Provincial Registrar shall notify the Applicants of the court costs; and such costs shall be paid within 21 days thereafter

Reasons:

A discretion is conferred on the Dean of the Arches under rule 23.5(1)(b) of the Faculty Jurisdiction Rules 2015 in relation to costs. On most of the matters contained in the renewed application, permission has been refused; the Respondent is a charity with very limited funds; and the Dean has been greatly assisted by its Response.

6. It shall be a condition of the grant of permission to appeal that if this appeal proceeds to a hearing, then whatever the outcome of the appeal (and absent any unreasonableness hereafter by the Respondent in its participation in the appeal), each party shall bear its own costs of the appeal (and of the hearing below), and the court costs of the appeal (and of the hearing below) shall be paid by the Applicants in any event.

Reasons:

The reasonable and reasoned participation of bodies such as the Respondent in consistory court and appellate proceedings is generally beneficial; and it would be unfortunate if such bodies were deterred by the risk of adverse costs awards (see para 18 of the Respondent's Response to which no response has been received from the Applicants). The above order is also consistent with the approach of this Court in *In re St John the Baptist, Penshurst (No.2)* (30 March 2015, unreported).

DIRECTIONS

Without prejudice to the requirements of rules 24.2(1)(b) and (2), and 27.2 of the Faculty Jurisdiction Rules 2015:

1. If they intend to proceed with the appeal, the Applicants (hereafter the Appellants) shall give notice to the Provincial Registry and to the Respondent within 14 days of issue of this Order, accompanied by a revised Notice of Appeal, limited to the two Grounds for which permission to appeal has been granted in para 1 of the above Order.

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

3. Any application for permission to intervene in the appeal under rule 27.7 shall be made to the Provincial Registrar within 35 days of issue of this Order, and if permission is given, further directions will also be given.

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

5. Within 42 days of issue of this Order the Appellants shall file a Skeleton Argument (limited to the two Grounds for which permission to appeal has been granted).

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

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

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

9 May 2017 **CHARLES GEORGE QC, Dean of the Arches**