

Neutral citation no [2017] ECC Bla 6

In the Consistory Court of the Diocese of Blackburn

West Burnley, All Saints with St John's

Petition No 4 of 2016 dated 22nd November 2015, presented by Rev Charles Hill, incumbent, and Keith Guy and Wayne Simpson, churchwardens.

JUDGMENT

- 1) **Introduction:** The issues raised by this petition centre round the question of replacement seating for a listed building. I have not found them easy to resolve. Partly this is because the parish has taken a long time to consider the advice of the Victorian Society as encapsulated in the Church Buildings Council Guidance on Seating, and to come to a clear and final preference on its choice of chair, but even more because of concerns about the legal effect of such Guidance on the proper approach to the parish's choice. Gone, it seems to me, is the time when such questions are essentially matters of judgement for petitioners and the Diocesan Advisory Committee (hereafter, 'DAC').
- 2) **The church:** This petition, which is dated 22nd November 2015, relates to a church built in 1849, and listed as Grade II. The architects were Weightman and Hadfield. It was substantially funded by two local families, the Dugdales and Shuttleworths, on land just off the Padiham Road Burnley, also provided by the latter. Both families are commemorated in the building, by separate chapels.
- 3) **The petition** is said to fall into two parts, although there are in reality three aspects to it. *First*, in order of importance, the petitioners wish to remove the pews from the central area of the nave, and replace them with chairs. This is described as *phase 2* of the proposals. *Second*, they wish to replace the chairs in the side aisles, where pews were apparently removed in or around 2008, in order for new heating to be installed. This is *phase 1*. *Third*, they want to fit blanking plates under various heating grilles, which are no longer required for their original purpose, but which are a source of potential danger, particularly for ladies wearing high heels. They have the advice of the DAC heating adviser, Mr J R Book, on this aspect.
- 4) Plainly, this is a large building, capable of seating a substantial congregation, even using only the central pews. It is difficult to see how the seating is '*y short*' without seating in the side aisles, as the **Statement of Need** asserts. The present chairs in use in the side aisles are shown on photographs as being of white moulded plastic on tubular metal frames, and were previously in the church's possession prior to 2008. Under this present petition the petitioners originally wished to introduce chairs manufactured by Aspire, shown on a leaflet and illustrated on one of the photos, described as the *Canterbury Side Chair*, with a metal frame and upholstered seat and back, in an amethyst colour, a fairly soft and gentle reddish-mauve shade, as shown on the firm's website. A sample chair is shown on one photograph. It was priced at about £60 an item including VAT.
- 5) The **Public Notices** are not very informative, saying only '*To remove existing pews and replace with stacking chairs*'. There is no mention of the grilles at all, or indication that the petitioners want to replace the stacking, movable chairs already in use in the side aisles, or indeed some ancillary work to the floor which is mentioned in some of the documentation. The issue about the grilles is minor, and the Notices set out the most important aspect of the application. Without undermining the important principle that the public notices should be clear and accurate, and set out in a comprehensible way what is proposed, I do not think the failure to mention replacement of the chairs in the side aisles requires any specific amendment. If objection to introducing chairs were to be made, then it would be triggered by the proposals to replace the existing central pews with chairs, rather than to replace one set

of chairs with another. It is impossible to believe someone would object to the latter but not object to the former.

- 6) **Grilles:** I first saw these proposals in January 2016, and I gave various directions at that time, but I also addressed the question of alteration to the heating grilles. This was plainly of minor overall importance, but addressed a question of health and safety. ***I gave permission at that stage for work to be undertaken to the grilles only, if the petitioners wished to go ahead with that, before any formal faculty was issued by the Registry.***
- 7) I have a plan of the church, but it is not up to date, and must reflect the position before the changes made in 2008, principally the removal of pews in the side aisles. There were then rows of pews shown in both side aisles, 16 to the north and 17 on the south side. There is a largish space at the west end behind the pews across the body of the church. The central pews on both sides of the central aisle are in 18/19 rows, the back one on each side apparently facing west. I also have been provided with a number of helpful photographs. The side aisles and central area are boarded. The central aisle is carpeted, and the side aisles are made up of stone slabs into which the grilles are set.
- 8) The PCC minutes of 4th August 2015 indicate that removing the central pews was a suggestion from Fr. Hill, to which the PCC agreed. The DAC was due to visit the following day, and presumably the principle of the proposals as they now stand was discussed with the representatives of that body at that time. Fr. Hill said to the PCC that removing the central pews would not need to be done immediately, and when one member of the PCC asked why the removal was being proposed, he was told by Fr. Hill that the diocese preferred churches to have one thing or the other, not a 'mixture', and (chairs) would help 'sell' the building as a concert venue as it would improve comfort and versatility. I make it clear that urging removal of the central pews because those at the side have already been removed, gets nowhere. I do not believe it is part of any DAC policy. It is not a sufficient reason as a matter of law. The church must rely on more substantial reasons than that (see below).
- 9) The parish's formal reasons for the proposals are set out in the **Statement of Needs** as follows: they provide '*an appropriate and necessary seating solution to replace the already removed side pews. (The earlier faculty made no specific reference to replacement chairs). The removal of the central pews is 'to create a more holistic and architecturally unified seating arrangement ...(which) would afford us (sic) better comfort to worshippers and a more flexible space in the Nave'. The Statement further explains that the stacking chairs presently used at the sides, following the earlier faculty, are no longer in good condition; they need to be replaced with comfortable new chairs. Removing the central pews would allow for the creation of 'a unified seating arrangement and style across the whole worship space. In its current state with the side pews already removed, the church looks half finished.'* The petitioners stress the need for greater comfort, although regretting the loss of the historic seating, and they want their church to become more attractive by hosting more events and activities and to use their space more creatively for fundraising and social activities and creative worship. They hope to increase the number of concerts and performances they have, and so boost income.
- 10) The pews are not mentioned in the listing particulars. They appear to me to be of rather better quality than many Victorian pews, and I assume they are original. They are dark in colour, with a modest amount of crenellation and brass coloured brackets on the pew ends.
- 11) '*As a church facing challenges on a financial and mission front we feel the flexibility to meet the challenges in a new and changing world would be invaluable and may be imperative for our future wellbeing and as such these changes are necessary to meet our call in serving the Lord in this part of Burnley.*'
- 12) There are indications in the documentation the petitioners wish to sand and varnish the wooden boarding in the side aisles and replace the red carpet in the centre aisle. Again, these issues have not been specifically addressed in the petition, and I cannot stress too much the importance of setting out in the petition a full and comprehensive list of the proposals for

which permission is sought. It makes it so much easier for DAC, the Registrar and Chancellor to understand what is in contemplation, and ensures that the proposals are fully drawn to the attention of parishioners in the Public Notices. That is a necessary and important part of the procedures under the faculty jurisdiction.

- 13) The DAC initially **Recommended** removal of the remaining pews and their replacement with chairs, and the work to the heating grilles, on 13 November 2015.
- 14) Schedule 1 of the **Faculty Jurisdiction Rules 2013** governs this petition, including the extent of consultation with amenity bodies. (New petitions are dealt with under the 2015 Rules, operative from 1st January 2016). On reading the Schedule to the 2013 Rules, I am satisfied that both **Historic England** and **The Victorian Society** needed to be consulted about these proposals. I have copies of the correspondence with the latter body, which is clearly of the view the central pews should not be removed, for the reasons they give, and are also critical of the particular chairs suggested for the replacement seating. They recommend the use of non-upholstered chairs.
- 15) There has been no substantive response from **Historic England**.
- 16) On 16th January 2016 I gave various directions, seeking information and clarification, and stated: *'The petitioners will inevitably be disappointed by the above, and concerned about the delay involved. They may console themselves by considering the pews have been there for 100 years and more, and the side aisles have been much in their present state since 2008. The cost of new chairs is far from being raised at the moment. All in all, however much they want a decision, this is not a case demanding an urgent judgment.'* Unhappily, matters have proceeded all too slowly since then; the latest documentation sent to me is dated 9th May 2017.
- 17) I have reviewed the file relating to the earlier work carried out in 2008 when the side pews were all removed under faculty to allow changes to the heating system to be made. The question whether the pews had to be removed permanently caused understandable concern with English Heritage (as it then was) as well as with me. It seemed extraordinary that removal had to take place for this purpose and also that a large number of chairs had to be introduced to replace the removed pews. English Heritage was not prepared to give evidence, and the then DAC recommended the proposals. I felt there was really no alternative to granting permission, however reluctantly. The legal background at that time was of course significantly different, being pre-*Duffield*, and any procedural matters were to be resolved under the FJR 2000 and not either of the two later sets of Rules of 2013 and 2015. However, whatever the legal context at that time, there would also have been something very unsatisfactory about insisting on a hearing, where one was not faced with purely legal questions, but on an evaluation of practical and aesthetic considerations, where the chancellor would have been the only opposition, and also the judge. With all the clarity of hindsight, however, it is apparent that I should have insisted on knowing the parish's proposals for replacement seating and not leaving the issue unresolved.
- 18) Whether more could have been done back then is beside the point in 2017. What happened then is all water under the bridge. The petitioners at the time, including one of the present petitioners, Mr Guy, acted perfectly properly in seeking a faculty for those changes, and one cannot revisit the matter now as if the side aisles had not been cleared of pews.
- 19) **The Victorian Society**, having voiced its initial opposition to the present petition, elected to become a formal party opponent by completing Form 5 on 15 March 2016. In essence the Society stated: *'The upholstered chairs are not appropriate replacements for the pews'*. It also relied on the points raised in earlier letters from Mrs Sophie Laird to the parish of 24 Sept and 14 November 2015. Mrs Laird asserted in the first letter: *'the pews in the nave make a positive contribution to the interior of the church. Beyond providing order and structure to the space, the pews are handsome and appear to be of good quality and in fairly good condition from the photograph provided. While your desire for comfortable seating is understandable, there are ways in which pews can be made more comfortable. Removable cushions can be*

provided for extra comfort and these can be easily replaced when they wear out. Padded chairs should not be thought of as the only comfortable option.

The chairs suggested are completely incongruous in the interior of the church. Padded, upholstered chairs are not appropriate in a historic church as they are at odds with the historic character of the building. A solid wooden chair should be selected for the side aisles, which are already clear. The desire to have a more cohesive arrangement is mentioned, and this would be more easily achieved with the provision of solid wooden chairs. These can be stained to match the pews and this can create a more unified seating arrangement'.

Mrs Laird felt that justification for removal had not been shown, and complained about the **Statement of Significance** provided.

- 20) This failure had been remedied by the time of her second letter in November, although Mrs Laird was still not persuaded by the arguments for removing the pews. She indicated that the petitioners had not explained why the current space could not accommodate the events they wanted to host, and they had not responded to the suggestions about cushions to improve comfort. Disabled access could be improved by shortening some pews. She also met an objection raised by the parish by saying that the Society did not put aesthetics before utility, but was seeking to protect a nationally recognised church.
- 21) The **Form 5** is dated 15th March 2016 and signed by the Society's Director, Mr Christopher Costelloe. On 14 April I asked for clarification, which the Society provided on the same day. They made clear they did not want formally to oppose removal of the remaining pews, but objected to the choice of replacement seating, relying on the CBC Guidance. They had drawn the parish's attention to this previously and clearly hoped some compromise could be reached. Mrs Laird also wrote to the DAC asking that they provide me with specific comments on the parish's choice of chair. As at 8th June when I prepared a Further Note seeking to summarise the position reached and the issues to be resolved, (should the petitioners be allowed to remove the remaining pews? was the proposed replacement seating suitable? and if so, could it be funded?), and gave further directions, the DAC had not responded. I also enquired whether the parish wanted this matter to proceed to an oral hearing. I expressed the hope that prompt responses from the petitioners would lead to more urgent progress. Unhappily it is on the anniversary of that Note of 8th June, that I am writing this judgment.
- 22) In November 2016, a meeting was held between parish representatives and Mrs Laird and consideration given to a number of other chairs from a variety of manufacturers. Unhappily no progress towards agreement was made. I asked for an update on the outcome of the meeting on 21st November but received no response.
- 23) On 2nd February 2017, Mr Hill provided 'final submissions' about the choice of chair, and enclosed photos of the wide variety of chairs the parish had been considering. In the end, the parish were seeking approval for the Alpha LAM lightweight chair with an upholstered seat. This was more costly than their original choice, but gave flexibility, and they were satisfied it was durable, and they felt it was *'visibly pleasing, functional and in keeping with the character of the building'*.
- 24) On 17th March I asked how many of these were to be introduced, what the colour of the finish on the wooden frame was to be, confirmation that the seating colour was to be oatmeal as illustrated (*'sympathetic'* being open to various interpretations) and sought assurances that the cost could be met. I also asked that the DAC provide comments on this choice, and that the Victorian Society give any further comments they wished.
- 25) Mr Hill responded on 7th April, apologising for delay caused by ill-health. 160 chairs would be needed in the central area, and more at the sides. The wooden frames would be stained to a dark shade in keeping with other woodwork in the church; the seat covering would indeed be oatmeal. However he also made clear that the parish wanted the covering on the back as well as the seat, as shown on a further photograph provided. How this had not been clear earlier, I cannot understand. The cost of the original choice of chair would have been met from a legacy; the balance would now be met from a development fund.

- 26) The DAC subsequently '*agreed this model of chair for this church*'.
- 27) On 9th May Mrs Laird said on behalf of the Society: '*While we maintain that a well-designed un-upholstered chair – and she instanced one such in the choices that had been considered – 'would be a less harmful choice for the church we acknowledge that the parish have made efforts to improve their choice of seating. We no longer wish to be party opponents to the application and we leave the Chancellor to take our responses into account when deciding the case. For clarity this is not a withdrawal of our objections to upholstered seating*'.
- 28) Both parties had earlier indicated their wish that the case be decided on the documentation and they did not require a hearing. I considered that was appropriate but had made no order to that effect. In the light of the Society's application to cease to be a party opponent – for which permission has to be obtained – that is no longer necessary.

I ORDER THAT

The Victorian Society cease to be a party opponent as from 5th June 2017 at their own request, subject to any Order for costs.

The proviso is very unlikely to have any effect, but it is proper to add it.

I make clear that I shall of course take the Society's comments and arguments into effect in reaching my decision.

- 29) The **legal framework** within which the decision about removal of the central pews will need to be made is set out in the following.
- 30) The test (or framework or guidelines) within which the court is **required** to come to decisions about proposed alterations to listed buildings is set out principally in paragraph 87 of the decision of the Court of Arches (subject to refinements in two later cases) in the case of **Duffield, St Alkmund**, the ecclesiastical Court of Appeal, in 2013 in a series of questions:
- 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 assumption 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 (see **Peek v Trower** (1881) 7 PD 21, 26-8, and the review of the case-law by Chancellor Bursell QC in **In re St Mary's, White Waltham (No 2)** [2010] PTSR 1689 at para 11). 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 special character of a listed building (see **St Luke, Maidstone** at p.8), 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 is to a building which is listed Grade 1 or 2*, where serious harm should only be exceptionally be allowed.*

This provides a structured and logical method of coming to a conclusion.

- 31) **Conclusion on removal of remaining pews:** I am satisfied that removal of the remaining central pews will cause some harm to the significance of this listed building in relation to the layout of the interior. However the overall significance of the pews is lessened by the fact that in 2008, under a different legal dispensation, those in the side aisles were removed. The pews themselves are I think rather better than average in quality, but are not of special importance. I consider that the removal proposed will be of low moderate seriousness.
- 32) The parish have justified the removal by reference to the need for greater comfort and flexibility, opening up a greater range of possibilities for use of the building, not only for the congregation, but others in the community. The overall desire to improve this aspect of their facilities is required by the overall difficult financial situation they are in, (referred to below), and the need to increase usage and income. In conclusion, I am satisfied that any harm is outweighed by the benefits that will accrue for worship and wider use.

That then brings me to the most difficult issue: the question of the **replacement seating**.

- 33) Until recently, the wishes of the congregation as presented through the petitioners, would have a large, or even the largest, part to play in the choice of any replacement seating. The advice of the DAC would be sought, and might be given in strong terms, and of course the chancellor would make the final decision. Nonetheless, the preferences and choices of the congregation would play a very large part, despite any hesitations and criticisms from the DAC, the Victorian Society or even the CBC itself, in the relatively rare case it would be consulted. I mention the Society and the CBC, as my impression is that other amenity bodies, (or the local authority in its role as one of the statutory consultative bodies), would be much less likely to make comments or object to specific proposals about replacement seating, but would often 'defer' to the views of those particular named bodies.
- 34) However, the legal landscape appears to have changed in the most recent period, and that has to be addressed. In my experience over many years, petitioners have frequently sought permission to introduce *upholstered* seating of some kind, whereas recent guidance from the Church Buildings Council (CBC), adopted enthusiastically by the Victorian Society (VS), suggests, if that is not too weak a word, that generally *un-upholstered* furniture should be introduced into our listed buildings, as being more appropriate aesthetically alongside other historic wooden fixtures and fittings already there, and that it is less likely to deteriorate over time and become worn and shabby, (and so itself need replacement at further expense). The view is espoused that if it is well-made and designed, such furniture is just as comfortable as upholstered items. It may be at least some parts of this viewpoint are not entirely new, but the CBC **Guidance Note** on the subject, which I believe was first promulgated about 2013, has now been re-issued, doubtless with some minor modifications, but enshrining the same approach, as recently as January 2017. This is therefore not a view formed in and carried over from a different time, but is right up to date. When printed out, it covers over 4 pages of text.
- 35) The core of the Council's views in the *current* Guidance Note is set out in Part 6 and appears to be in exactly the same terms as it was in the earlier Guidance, judging from the extract quoted *verbatim* in one of the cases I refer to below.
- 36) Before considering this Guidance Note further, I need to refer to two particular decisions where the earlier Guidance was considered, although there are obviously many other decisions that have done so.
- 37) The first is the decision of Chancellor Eyre QC at *Long Itchington, Holy Trinity* (Coventry) neutral citation [2016] ECC Cov 7, dating from July that year, a decision that attracted some attention in the national and Church press. This was a Grade II* building, its nave dating from about 1300. The central proposals were for the removal of the pews dating from 1866 from the south aisle and nave, and the introduction of Alpha A1LSE chairs, which are upholstered wooden items designed for use in churches. The proposals sought approval of wine coloured upholstery, presumably a darkish red. The DAC recommended approval, but considered the proposals would affect the character of the church as a building of special architectural or

historic interest. The DAC was also *'far from enthusiastic about the choice of chairs'*, but did not feel strongly enough to object. There was no objection raised when the Public Notices were exhibited.

- 38) Both Historic England (HE) and the VS however objected to upholstered furniture, and the Society for the Protection of Ancient Buildings deferred to VS's views. Neither HE nor VS became a party opponent. Both regretted the loss of the pews. The choice of upholstered chairs was sought by the parish on the basis of their being easier to move, that they allowed more flexibility for *'messy church'* services, would make the church *'warm and welcoming'* (unlike un-upholstered seating), and they took the view they did not need to be readily stackable. They had seen similar chairs elsewhere and believed their choice to be both hardwearing and comfortable.

- 39) The chancellor considered in the light of the *Duffield* criteria that the removal of the pews would result in no more than *'modest'* harm, and was persuaded there were real and substantial benefits to be gained by the removal.

However the chancellor referred to the *'powerful and considered advice'* from the CBC, and quoted extracts from it, as follows:

With many years of experience and having seen a range of completed schemes, the Church Buildings Council generally advocates the use of high quality wooden (i.e. un-upholstered) chairs and pews where seating is necessary.

The Council's experience is that wooden chairs have the greatest sympathy with historic church environments, present the best value for money with long lifespans, and that a well-designed, ergonomic wooden chair can provide as much comfort as an upholstered design.

Upholstered seats are not considered to be appropriate for the following reasons:

- *They have a significant impact in terms of colour, texture and character which is not consonant with the quality of a highly listed church;*
- *Experience demonstrates that upholstered seating needs more regular refurbishment (wear and tear, staining) than seating without upholstery.*
- *They are heavy and therefore more difficult to arrange and stack;*
- *The addition of soft furnishings can alter existing acoustics;*
- *Wood tones and textures fit well within church buildings and have been used for centuries in this context, whilst some colours have associations with other types of buildings such as offices.*

- 40) He noted that Holy Trinity is Grade II* and the parts most affected were medieval. *'The clear preference for those who have expertise in these matters (including expertise of different kinds of seating in different churches) is for un-upholstered seating'*.
- 41) He set out at length the petitioners' reasons for preferring upholstered seating, and after due consideration, dismissed them. He stated *'an overly casual appearance can be incompatible with a house of God and can be as unattractive to newcomers as an appearance of excessive rigour. An emphasis on quality and seamliness is not only appropriate in buildings dedicated the Glory of God but is also part of what attracts those new to the Church.'* He noted the agreement of the evidence of various expert bodies before him that un-upholstered chairs can be as comfortable. He felt such items could help the petitioners achieve their objectives. *'The preferences of the petitioners and PCC cannot prevail over the consensus of expert opinion in circumstances where the objectives justifying the reordering can be achieved without upholstered chairs'*. He therefore permitted removal of the pews but refused permission for that particular style of chair.
- 42) (Chancellor Eyre QC reached a similar conclusion in the case of *Salford Priors St Matthew* [2016] ECC Cov 4, a Grade 1 building, in that he allowed removal of the relevant pews, but rejected the petitioners' choice of replacement seating.)

- 43) As far as I can see, the chancellor's refusal of permission for the particular choice of chair, was that it was simply upholstered, rather than on a more narrowly focussed objection, as for instance, that other aspects of the style, such as the colour of the covering material, the weight, its ease of stacking, or the colour of the wooden frame, were unsuitable for that church and its needs – it was simply that the items were upholstered. It appears to follow that each and every upholstered chair that *might* have been offered for approval, would have been rejected. That decision by the chancellor was based on the '*expert evidence*' of the CBC, (although to be fair, that was supported by the other amenity bodies involved), to the effect only un-upholstered seating was acceptable.
- 44) It would appear to me to be a logical conclusion of this approach, that where in the past upholstered seating had been introduced under faculty, and obviously in many cases where there had been prior consultation with the relevant amenity bodies as required by the then current Faculty Jurisdiction Rules of 2000 or 2013, and advice from the relevant Diocesan Advisory Committee, that, *judging by current standards as set out in the CBC Guidance on Seating*, such permissions would now have been, or indeed ought to have been, generally refused (whatever 'generally' means in this context).
- 45) That must appear to many to be a startling conclusion, because I suspect that most chancellors, and all those who have occasion to visit churches, either as casual visitors, or in some more professional capacity, (or indeed those who are members of the congregation of the particular church) will be aware of re-orderings of listed buildings over the years where new upholstered seating has been introduced, which appear extremely successful, and have avoided the dangers or the potential problems highlighted in the Guidance, of creating clashes with the earlier furnishings or woodwork, or introducing unsuitable colours. Of course I accept there are schemes that have not been so successful, or have failed to avoid some of the dangers highlighted in the Guidance.
- 46) In the case of *Ashton upon Mersey, St Mary Magdalene* [2016] ECC Chr 1, Chancellor Turner QC dealt with a petition relating to the Grade II church, in the Chester diocese, in which a large scale re-ordering was proposed, including removal of all the pews and the introduction of chairs. The DAC was unenthusiastic about the choice of chair proposed. The CBC was opposed to the seating, which risked creating an '*overly domestic, utilitarian character, rather than distinguishing it as a place of worship*'. Seating with a '*plain timber finish, as per our usual guidance*' was recommended. Objection was also made to the blue covering proposed, and the wall-to-wall carpet, with its pattern and colour. It appears that the parish subsequently chose a timber-framed chair with damson fabric, but (at para. 31), the Chancellor noted the '*DAC's general preference however (in line with the bodies I have already mentioned) remained where practical a non-upholstered chair.*' The DAC, or at least some of its members, apparently remained critical of the appearance and durability of the chosen chair.
- 47) Chancellor Turner voiced his own concerns as follows at para. 73ff: '*I have struggled more with the choice of chair. I am, I confess, reluctant to contemplate a position where the undoubtedly wise and authoritative advice and published guidance of the amenity societies and CBC on this subject somehow necessarily confines parishes (or chancellors) to a small list of 'approved' chairs for use in re-ordered buildings – irrespective of the reasonably held and conscientiously researched views of petitioners, the very people who are custodians of the church contending for the details of the re-ordering in order to enhance the church's mission and witness. Of course even a firmly held preference for any particular chair cannot of itself cause the suspension of a proper Duffield appraisal. But when essentially subjective issues such as 'comfort', or indeed the quantum or colour of upholstery, are in issue, dogmatic insistence on an alternative becomes more problematic.*'
- 48) Whatever the outcome in these individual cases, it is apparent that both Chancellor Eyre QC, and Chancellor Turner QC, treated the CBC Guidance as such, that is, as guidance, and sought to evaluate the parish's proposals in each case against the views set out in the Guidance. In short, the latter did not *automatically* 'trump' the views and wishes of the petitioners, so that the latter were forced to have un-upholstered seating. Chancellor Eyre spoke with approval of the Guidance, whereas Chancellor Turner raised some real concerns about it.

- 49) Although it is appropriate to acknowledge the expertise of the CBC, it is better in my view not to refer to the Guidance as '*expert evidence*'. Rule 11.5 of the Faculty Jurisdiction Rules 2015 controls the use of expert evidence *by parties* in the consistory court very closely. It may only be introduced with permission. The expert's duty is to the court and must be expressly acknowledged to be such, the report must set out the expert's qualifications, and sources relied on and so on. It must canvass the range of opinions held on the subject and give reasons for the particular view put forward. Finally there is a *pro forma* subscription to be signed and dated by the author of the report.
- 50) Expert evidence therefore looks very different from the Guidance, and is plainly focussed on the particular case in a way the Guidance cannot be. The former is attributable to an individual. The latter does not cover alternative views. Further the Guidance can canvass wider ground than an expert report is likely to do. In Rule 35 of the current Civil Procedure Rules, expert evidence may only be introduced if the court thinks it is '*reasonably required*', and doubtless the consistory court would apply a similar test if asked to permit its introduction. Also I believe the court would want to know what qualifications someone has to offer a view to the effect un-upholstered furniture can be as comfortable as upholstered. I accept that individuals' views may differ considerably on what is comfortable, or more widely on the issue which chair out of various samples the PCC should opt for. Comfort will not be the only criterion of course, although relevant and important. But one reasonable individual will think one seat more comfortable, and someone else, another. Chancellor Turner QC drew attention to this, and he is surely right. Comfort is a very personal and individual matter. It is a question of judgement, and I cannot believe it is something on which expert evidence would be receivable. I am prepared to accept that a congregation *should consider* un-upholstered furniture as a possible way of meeting its needs, and not dismiss it as bound to be less comfortable, (and the Guidance helpfully underlines that), but can the matter be pressed further than that? I am afraid the indications are that the CBC believes it can, notwithstanding the Guidance is clearly stated to be such. I will turn to that issue now.
- 51) A huge number of bodies issue guidance: government departments, local authorities, and many others, covering a huge number of different areas. Approaches to planning matters, the treatment and supervision of those compulsorily detained, the carrying into effect of searches or questioning by police and similar agencies, and so many more, are all governed by guidance statements.
- 52) A footnote on P1 of the **Guidance Note – Seating**, says: '*This guidance is issued by the Church Buildings Council under section 55(1)(d) of the Dioceses, Mission and Pastoral Measure 2007. As it is **statutory guidance**, (my emphasis) it must be considered with great care. The standards of good practice set out in the guidance should not be departed from unless the departure is justified by reasons that are spelled out clearly, logically and convincingly.*'
- 53) There is nothing in the Measure itself (which is the equivalent of an Act of Parliament or statute, as a matter of law) that spells out how or to what extent or by whom any guidance is to be followed or enforced, so what does this footnote mean? The phrase '**statutory guidance**' does not mean simply that it emanates from a body set up under a Statute or Measure. If it meant only that it would be pointless to state it. It means much more than that, and if it did not, then the footnote would appear to be without foundation under the Measure.
- 54) The leading authority appears to be *Regina (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148, a decision of the House of Lords. (*My attention was very helpfully drawn to this case by Chancellor Rupert Bursell QC, but he is not responsible for my interpretation of it.*)
- 55) This is a complex case in which the claimant was a long-term psychiatric patient compulsorily detained under the Mental Health Act 1983 at Ashworth high security hospital in Liverpool. Relying on section 118 of the 1983 Act, the Secretary of State for Health, published a Code of Practice ('the Code') containing 'guidance' for hospitals and others on the use of seclusion for such patients, aimed at containing severely disturbed behaviour

likely to cause harm to others. The Code required hospitals to have clear written guidance on the use of seclusion in their establishments; it was to be used as a last resort and for as short a time as possible; it was not to be used as a punishment or threat, or part of a treatment programme, or for specified other reasons, and the need for seclusion was a decision to be taken by the doctor or nurse in charge. The need for continued seclusion was to be reviewed by two nurses every two hours and a doctor every four. Ashworth's initial in-house guidance provided for less frequent reviews than the Code laid down, and differed in other respects as well. Mr Munjaz was kept in seclusion for continuous lengthy periods.

- 56) In 2000 he brought proceedings for judicial review, and the trial judge made a declaration that the hospital's seclusion procedure was unlawful because of its more limited review provisions. Mr Munjaz was again secluded for lengthy periods, and brought further proceedings, also raising a breach of his rights under article 3 of the Schedule to the Human Rights Act 1998, (which sets out the European Convention on Human Rights), on the basis he was being 'subjected..... to inhuman or degrading treatment or punishment'. The hospital thereafter approved a revised policy, although it still provided for less frequent reviews than the Code. The judge dismissed the claim, but the Court of Appeal allowed his appeal, although rejecting a further claim against the hospital under Article 5.
- 57) On the hospital's appeal, the House of Lords held inter alia, by a majority, that the hospital's departure from the Code about reviews of seclusion was, in its particular circumstances, lawful. Lord Bingham gave the leading speech (at page 181) and at paragraph 21 said:

It is in my view plain that the Code does not have binding effect which a statutory provision or a statutory instrument would have. It is what it purports to be, guidance and not instruction. But the matters relied on by (the claimant) show that the guidance should be given great weight. It is not instruction, but it is much more than mere advice which an addressee is free to follow or not as it chooses. It is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons for doing so.....in reviewing any challenge to a departure from the Code, the court should scrutinise the reasons given by the hospital for departure with the intensity which the importance and sensitivity of the subject matter requires.

Having reviewed the evidence relating to the hospital's departures from the code, Lord Bingham held that it had justified its position.

At paragraph 49, Lord Hope stated:

The Court of Appeal said,.....the Code is something that those to whom it is addressed are expected to follow unless they have good reason for not doing so...I would go further They must give cogent reasons if in any respect they decide not to follow it. These reasons need to be spelled out clearly, logically and convincingly. I would emphatically reject any suggestion that they have a discretion to depart from the Code as they see fit.

He also considered the hospital's chosen departures from the Code were justified in its particular circumstances.

I have underlined those particular parts in both extracts from the speeches on which the footnote in the CBC Guidance appears to be based.

- 58) If these extracts from *Munjaz* correctly set out how the Seating Guidance is to be applied, then indeed a different world has come upon us.
- 59) The Guidance is undoubtedly helpful in drawing attention to factors that need to be considered in choosing replacement seating. However I am concerned about three points. First, I do not understand the contention in Part 6 that '*upholstered seats are not considered to be appropriate....*'
- *They have a significant impact in terms of colour, texture and character which is not consonant with the quality of a **highly listed** church;* (my emphasis)

What does the highlighted phrase as used here signify? Normally '*highly listed*' would indicate Grade I or II*, but there are numerous indications throughout the Guidance that it applies to all listed buildings.

- 60) Second, it seems to me very odd that upholstery is not considered appropriate, when in the concluding paragraph of part 3, the suggestion is made that instead of putting in new seating, the parish could adapt the existing pews, for example, by '*using cushions or pew pads*'. I accept such a practice would not involve introducing upholstered back rests, but it envisages some sort of cushion or pad, left pretty continuously in place, even when the church is empty of its congregation. These items will be largely visible, and are bound to have an impact in terms of '*colour, texture and character*', and run the risk of some sort of a clash with the existing historic wood furnishings. That is the very issue that all- wooden seating is said to avoid. Frankly, I find that that suggestion undermines the general position of *no upholstered furniture*. It is inconsistent.
- 61) Third, in part 6 of the Guidance, much is made of the need for more regular refurbishment of upholstered items, and that wooden items '*present the best value for money*'. Both those things *may* be true – I concede that for the purposes of argument – but this line of argument, in my view, cuts across an important principle frequently invoked by chancellors in their rulings, namely that it is for PCC's, the democratically elected representative body in the parish, to decide how to use the funds at their disposal. All members of the PCC are (eventually) answerable at the APCM for their decisions; it is not for chancellors therefore to criticise their particular choices as such, or to engage with, let alone rule on, objections raised by others to the effect '*it is a waste of money*'. The matter is touched on helpfully in Chancellor Charles Mynors' recent volume *Changing Churches* (Bloomsbury 2016) at para. 12.5.2. As long as petitioning parishes have carefully considered issues of cost, and how the overall cost of their proposals is to be met, the possible need for more expenditure to meet refurbishment because of possible wear and tear, and such matters, are not in my view for the chancellor or CBC to second guess them about. (I would only qualify that by saying any chancellor will be careful not to give approval for schemes that will not be accomplished, because the parish will simply not be able to raise sufficient funds.)
- 62) In law, '*context is all*'. In *Munjaz*, the courts were dealing with an extremely sensitive situation, namely the conditions under which seclusion could properly be applied to those compulsorily detained. The context inevitably concerned those who were mentally unwell and may lack capacity, who were very vulnerable to executive action, and possible breaches of their human rights, or the imposition of unlawful conditions relating to their deprivation of liberty (even if in the end, a majority of the House did not consider any wrongdoing had occurred.) In addition, the Secretary of State had issued a Code of Practice containing specific and detailed provisions relating to seclusion, and required individual hospitals to give their own written guidance to their medical staff. The latter had not for instance been told simply to make provision to limit the use of seclusion, or how often it could and should be reviewed. The need to do that in principle is surely obvious without any justification being required to explain why it is needed. The (undoubted) guidance in the Code required any departures by individual hospitals to be carefully justified in the way the House spelled out, as encapsulated in the extracts from the speeches by Lord Bingham and Lord Hope.
- 63) It seems to me that there a variety of factors which make this Guidance Note on Seating a very different sort of animal, some large, some small, but which in total do not justify such a rigorous approach.
- 64) First, the guidance emanates purely from the CBC itself. It is obviously a body with a wide membership, many chosen for their expertise in relevant areas (see Schedule 4 of the *Dioceses, Pastoral and Mission Measure 2007*) and has been set up to advise on church buildings and their constituent parts. It ought to be listened to therefore. But what it chooses to issue guidance about, it decides on; there has been no obligation placed on it by Measure or anything equivalent, to give guidance on seating. If it had not done so, it could not convincingly be said to have failed in its duty. It chooses its own subjects. There must surely be some difference in kind between guidance on seating and, for instance, bells or

stained glass. Very few know anything about the technicalities of design or production of either of the latter, or their repair or conservation, and ought to welcome advice in these areas. Unlike seating, we do not have these things in our homes and nearly every other indoor space where we gather or congregate for work or pleasure. We must have picked up some knowledge of seating over the years, which we are entitled to bring into our thinking and decision-making.

65) I am far from suggesting every view is as good as every other, or that there is no such thing as good design or good taste or judgment in these things. But what is offered is extremely prescriptive, even if appears to leave open the possibility of many different options of seats and pews/benches – almost any, provided they are *not* upholstered. Was it not Henry Ford who told his prospective customers, ‘You can have any colour you want, as long as it is black.’

66) In its opening paragraph of part 6, the CBC indicates it “*generally*” *advocates the use of high quality wooden chairs.*’ There is no indication when it would be prepared to take a different view, and the impetus for doing so must inevitably therefore come from the parish itself. The Guidance appears to me to be couched in such broad and comprehensive terms, that if applied rigorously it would have the nature of instruction rather than guidance. If the CBC does not spell out when it would countenance a departure, then it must fall to parishes to do so. The difference with the thrust of the extracts from *Munjaz* seems to me to be clear; the essential argument there was not whether there should be reviews of seclusion, but whether it was justifiable to depart from the particular terms of the Code at this hospital, having regard to all the relevant circumstances. With an individual church, the PCC has to take the initiative in opting for upholstered furniture; that must be down to the PCC’s choice in its particular circumstances. That must include what furniture, if any, is there already, and what particular purposes or aims the PCC seeks to meet. Does the PCC want to provide community space of some kind, run conferences or training courses, where upholstered furniture will really be a *sine qua non* for potential clients or visitors and so on?

67) Until directed otherwise, I think I shall only want to be satisfied that petitioners wishing to introduce new seating, have seen and considered the Guidance and explain why, if it be the case, they want to depart from it. (I do not ignore of course the general requirements as set out in the *Duffield* guidelines, but am seeking to deal here with the CBC Guidance). It will be necessary also to make sure that in offering any advice, the DAC will if possible seek to explain why a departure from the Guidance may be justified.

68): **Conclusion on replacement seating:** After this long digression on the application of the statutory guidance, I return to the petition. It seems to me that the petitioners have taken a great deal of trouble to come to grips with the Guidance, even if they have not followed its principal thrust. They have attended to the question of the nature and colour of the chair frame, and the seating itself is a neutral shade. They have explained their clear conviction that this will best meet the needs of their congregation, and others who will use the building. They have indicated they are willing (albeit not enthusiastic) to spend considerably more, at something in excess of £78 per chair, than they intended on this replacement seating.

69) **Having granted approval for removal of the remaining pews**
I grant approval
for the introduction of 160 Alpha Lightweight Stacking Chairs with frames stained as indicated, with upholstered backs and seats in an oatmeal material, as sought.

Insofar as the introduction of any further such chairs is sought, the Archdeacon’s prior written permission is to be obtained.

The works of repair proposed to the flooring fall within paragraph A5(1) of Schedule 1 of the Faculty Jurisdiction Rules 2015 and may be undertaken without consultation or consent, save that they should be notified to the DAC, (who are monitoring the operation of the Rules).

Replacement of the carpet, requires the prior written consent of the Archdeacon under B4(3) of the Schedule.

It is a condition of this faculty that one or two sample pews be retained at some convenient location within the building.

The work authorised is subject to the matter in the next paragraph.

The work is to be completed within 24 months.

The petitioners may seek further directions by letter or email to the Registrar.

The petitioners must pay any enhanced correspondence fee sought by the Registry having regard to the work involved in dealing with this petition, the amount of which will be authorised by the chancellor.

70) I mention one further matter. The DAC as a matter of courtesy provide me with copies of their Minutes and Agendas. The Agenda for the meeting on 9th June records details of a number of Quinquennial Reports received, which follow an inspection of the church fabric and fixtures. All Saints' report is summarised there, and indicates that the inspecting architect has estimated that repairs required total just over £360000, although over what time span is not clear. **Before embarking on the work authorised by this judgment, the PCC must consider the costs involved in any necessary and urgent work indicated in the QI, and only embark on the removal of the pews and purchase of replacement chairs, when satisfied funds can be allocated thereto. I make clear that removal of the pews is not permitted unless and until the replacement chairs can be purchased and installed.**

Order accordingly.

John W. Bullimore
Chancellor
7th June 2017.