

**IN THE COMMISSARY COURT OF THE DIOCESE OF CANTERBURY
IN RE ST. MARY THE BLESSED VIRGIN, EASTRY**

JUDGMENT

INTRODUCTION

1. The Petitioners,¹ by a petition for a confirmatory faculty, seek authorisation of the following matters:
 - (1) Replacement of lead stolen on 5th June 2011 and 9th July 2011 with artificial non-metal roofing material known as “*Ubiflex*”
 - (2) Further stripping of remaining lead from roofs and replacement of the same with “*Ubiflex*”
 - (3) Sale of the lead removed from the roofs as a result of (2) above to a registered metal dealer.

2. The background to this case is the all too familiar tale of the theft of lead from the Church roof. Sometime in around 2008-9 four bays of lead were stolen from the

¹ The Revd Canon Mark Roberts, Mr Peter Franklin and Mr Robert Barwick. Mr Barwick was substituted as a Petitioner with the leave of the Court on 12th September 2012.

north aisle of the Church. These bays were replaced by the Parish with lead, having received settlement in full from Ecclesiastical Insurance.

3. Mark Hill QC Ch observed in the conjoined cases of St Michael and All Angels, Bexhill, All Saints, Danehill, St Matthew, St Leonards-on-Sea, St Mary, Balcombe and St John the Evangelist, Upper St Leonards (16th November 2011- 'The Chichester cases'): "*As the First Epistle of Paul to the Thessalonians reminds us (Ch.5 v.2), thieves tend to come in the night, or at least when they are not expected.*"² Thieves apparently came on the night of 4th-5th June 2011 and they were followed by a downpour of rain. One of the Petitioners, Mr Peter Franklin, who was and remains a Churchwarden, was the first to arrive at church on Sunday 5th June and found water pouring through the south aisle roof. In the afternoon Mr Franklin discovered that the north aisle roof was leaking too. The police were informed and attended on Monday 6th. Mr Robert Barwick, the substituted Petitioner, said that Mr Franklin obtained the name of Mr Jay Cross, a builder based in Folkestone, out of the telephone directory. Mr Cross, assisted by PCC members, took emergency measures to cover the roof with tarpaulin and to protect the organ. Damage had occurred inside the church due to water penetration. Some of this damage remains visible and I observed staining and "*bubbling*" of plaster in south and north aisles. Ecclesiastical Insurance was informed but advised the Parish that because St Mary's had suffered the previous theft of lead, the maximum which they could claim would be £5,000 in respect of metal loss and £5,000 in respect of collateral damage.

² Judgment, paragraph 2

4. Mr Barwick had not been in the Parish on 5th June but returned on the next day. He is a retired builder and was and remains chairman of the Fabric Committee. At 10.53am on 6th June, Mr Barwick sent an email to Mr Ian Dodd, Secretary of the Diocesan Advisory Committee (“DAC”), in the following terms:

"We have suffered a 2nd theft of lead covering, this time from both North and South aisles.

We have a contractor on hand, he has covered the Organ to prevent further damage.

18 Bays have been stripped from the South Aisle, somewhat less on the North.

Can you put in place an emergency procedure to allow some speedy recovering of the stripped areas.

The contractor is suggesting an alternative to Lead.

UBiFLEX Roofing which has no value to thieves."

Mr Dodd consulted his Chairman, Dr Richard Morrice, saying:

"I am forwarding this email as a matter of urgency since you will see that the PCC at Eastry would like to replace their stolen lead with Ubiflex. I know from recent discussions in the DAC that we may have concerns about recommending non metal roof materials, but Bob Barwick has pointed out that we recommended a similar solution at Woodnesborough³.

Can you advise me please how the DAC should proceed?... Time is obviously of the essence."

5. As it happened, a PCC meeting was scheduled for the evening of 6th June. The meeting was chaired by the Revd Canon Mark Roberts, who took over as temporary Priest-in-Charge of the Parish on 1st December 2010 after the departure of the priest-in-charge. Canon Roberts stated that *"the parishioners were in a state of anguish and shock at what had happened, not least because of*

³ There appears to have been some confusion on this point. It emerged in evidence that repairs at Woodnesborough consisted of replacing lead with lead

the large penetration of water into the church following the removal of the lead. It was agreed that the parish faced an emergency and I was content with the decision that the Council made that the PCC Fabric Committee should act quickly on behalf of the PCC.”⁴

6. Evidently there had been a meeting between the three members of the Fabric Committee and Mr Cross, the builder, at some point during the day on 6th June. There were some differences in the accounts of this meeting from Messrs Barwick and Cross, particularly with regard to the source of the suggestion of using Ubiflex and as to whether a decision in its favour was taken on that day or later. It is apparent to me from the evidence of both of those witnesses, as clarified through cross examination by Mr Hopkins, Counsel for the Archdeacon of Ashford, that Ubiflex was decided upon as the replacement material for the stolen lead bays on 6th June at that meeting but I think it unlikely that the suggestion came from the builder out of the blue; it seems more probable to me that Mr Barwick raised the question of what else they could do in the face of a second theft and limited insurance and Mr Cross then recommended Ubiflex. This conclusion on the oral evidence is corroborated by Mr Barwick’s email to Mr Dodd on the morning of 6th June, reproduced above, which expressly states: *“the contractor is suggesting an alternative to Lead UBIFLEX Roofing, which has no value to thieves”*. Mr Cross’ Written Statement was silent on the subject of Ubiflex until he came to deal with a later meeting with the Fabric Committee on 22nd June. In cross examination, he accepted that he had discussed Ubiflex

⁴ Statement by the Revd Canon Mark Roberts, Court Bundle p.C32 ff

before 22nd June and that he “*might have suggested it*” and that it was “*more than likely that I mentioned non lead replacement*”. Mr Barwick agreed, also under cross examination, that the decision to use Ubiflex was taken in principle on 6th June and he said that Mr Cross had suggested it. I find that the decision in favour of Ubiflex was made by the Fabric Committee during the day on 6th June and ratified or confirmed by the PCC that evening.

7. Mr Dodd replied to Mr Barwick’s email on 14th June, saying:

"I have spoken to the Chairman and I am pleased to say that the Standing Committee of the DAC would be willing to consider authorising Ubiflex as a roof covering at St Mary’s church to replace the areas where lead has been stolen. We would be willing to grant permission for a period of up to five years.

We will need an architect’s specification which will need to address in particular the way in which the new material will join the remaining areas of lead roof covering. You are also reminded that planning permission may be required for this change in materials and I recommend that you contact Clive Alexander, the local authority conservation officer, and Tom Foxall from English Heritage at the earliest opportunity. For simplicity I am copying them both in on this email so they are aware of the DAC’s decision."

The context for the email was a recently issued amended general faculty to which I shall return later in this Judgment. Mr Dodd also sent his email to the following people: Mr Clive Alexander (Conservation Officer at Dover District Council, the Local Planning Authority ('LPA')), to Canon Mark Roberts, the Ven. Philip Down, Archdeacon of Ashford, Dr Richard Morrice (Chairman of the DAC and an officer of English Heritage ('EH')), Mr Tom Foxall of EH and Mr Philip Graham of the Duncan + Graham Partnership. Mr Graham was, at that time, the

appointed inspecting architect for St Mary the Virgin Eastry. He replied to Mr Dodd and all the other recipients of the original email on the same day:

"Many thanks for the quick response on this matter, I am sure the church will appreciate this and the helpful comments made. We would be pleased to offer advice and prepare any necessary specification documents and assist the church in this repair work if they so wish, currently though we have not been engaged to do so."

Mr Alexander also replied. He said:

"Planning permission would only be required if there was going to be a material change to the appearance of the area covered by the lead or its substitute."

Despite Mr Dodd's requirement for an architect's specification and his advice about consulting the LPA and EH, neither Mr Barwick nor any other representative of the Parish contacted the relevant people. There was evidently no reply from the Parish to Mr Dodd's email and that was the last that any of the church or secular officers heard of the matter until after completion of the works at issue. The reason why the Parish did not contact Mr Graham was because, in Mr Barwick's words, there was a *"longstanding dispute"* with him. He did not elaborate on the nature of this dispute. Mr Barwick said, in answer to my question, that they chose not to use an architect because *"it was felt that there were enough in-house skills"*. No other members of the Fabric Committee had a background or expertise in building, nor did PCC members, save, possibly, for one who Mr Barwick thought might have had some relevant experience. Mr Barwick agreed in cross examination, however, that they decided on their course of action without the benefit of any expert advice.

8. The bad weather continued in June, high winds compounding the difficulties caused by rain. Mr Cross described the problems which ensued, with two types of temporary tarpaulin or membrane ripping in storms, even when dressed under the lead flashings to hold them in place. There was further water penetration inside the church, via the north as well as the south aisle roof. Photographs taken in June⁵ show damage to the lead on the north as well as the south aisle and Mr Cross propounded in evidence the reasonable theory that lead on the north aisle had been cut and left in a prepared state ready for a subsequent assault on the church by the thieves. The Parish led some evidence of rainfall from the period which might confirm this idea.

9. It is not easy, due to the lapse of time and the stress which this episode has produced in the minds of all who were involved, precisely to determine the facts relating to the decision making process. My task has, however, been simplified by means of Mr Hopkins' illuminating cross examination of Messrs Barwick and Cross and the helpfully frank evidence of Canon Roberts. Canon Roberts emphasised the sense of urgency felt by PCC members on the evening of 6th June. He accepted that, with the benefit of hindsight, he and others in the Parish recognised that the proper procedures were not followed and that there had not been adequate investigation of options. He thought it "*unfortunate*" and "*regrettable*" that the inspecting architect had not been involved. Asked to explain the absence of debate about the use of Ubiflex, he answered that it had

⁵ Court Bundle pp. A25-A26, C27

been clear to him on his arrival in the parish that the PCC placed a great deal of trust in the Fabric Committee, in particular its Chairman (Mr Barwick) and was used to delegating matters to that Committee. He added that the “*stress, anger, sense of hurt and despair*” following the thefts should not be underestimated. The perception of many people, he said, “*is that we have been going through a situation in which there has been an epidemic of metal theft and that replacement with metal is an invitation to thieves*”. This attitude was not a “*justification but a clue to the mindset*”

10. The result of the meeting was that the PCC authorised the Fabric Committee to proceed with the use of Ubiflex. The minute records:

"Due to the urgency the matter was discussed before the regular meeting. During the night of 4/5th June the Church suffered an extensive theft of lead from the roof over both the North and South aisles (18 bays stripped from the South aisle and somewhat less from the North) and the rain has subsequently considerably damaged the interior walls. A contractor (Cross of Folkestone) had covered the organ to prevent further damage and a temporary underlay now covers the roof area.

As this is the second theft of lead which the Church has suffered the contractor has proposed, as an alternative to lead, the use of Ubiflex roofing which has no value to thieves and is said to last approximately 30 years. Bob Barwick has been in contact with Ian Dodd of the DAC requesting an early reply to the request to use a non-metal roofing material.

It was appreciated St Mary's, Eastry, has a fairly isolated position and in spite of all the necessary theft-prevention measures having been taken, if the lead was replaced it would be vulnerable. Also lead of the thickness needed (code 8) is at present unavailable. The Chairman asked the meeting how

they felt about the use of an alternative material and all presented voted unanimously in favour of its use.”

This contemporaneous note further corroborates the facts as I have found them concerning the source of the suggestion and the date of its adoption. What is less clear from the minute is whether the PCC authorised total replacement of lead on the two aisle roofs or just replacement of the bays from which total removal had already occurred. Interestingly, Dr Knight on behalf of the Church Buildings Council (“CBC”, now known as “Church Care”), drew to my attention to the fact that Code 8 lead was and is available.

11. On 22nd June, Mr Cross met the Fabric Committee again, bringing samples of roofing materials with him. According to Mr Cross, the selection consisted of Code 6 lead, a non-lead product by Easylead, Code 5 lead and a section of lead coloured Ubiflex. He also said that they discussed the possibility of providing a corrugated iron temporary scaffolding based covering (a “*tin hat*”) but this was rejected as too expensive. Mr Barwick described the process on 22nd June as “*confirming the decision to use Ubiflex*”. Mr Cross said that he offered advice to the effect that the lead should be replaced with lead but then responded to the Fabric Committee’s concerns about cost, given the limited insurance payments available, as well as their fear that replacing with lead would simply encourage further theft. In cross examination, he accepted that he must have advised the Parish to use Ubiflex before 22nd June because on that date, the Fabric Committee brought a contract for him to sign which required the use of that product. Neither witness clearly explained how the contact price was arrived at

though Mr Barwick said that the Fabric Committee told Mr Cross what funds they could raise after discussing the question with the Treasurer. Mr Cross said that he would have provided a breakdown in writing but was unable to produce any evidence of this. There was no tender process, formal or informal. Mr Cross offered no oral breakdown of the contract figure and did not subsequently account to the Parish for its expenditure but Mr Barwick's written statement was to the effect that an estimate in the sum of £78,112 + VAT (total £97,640) was obtained on 13th June. This is the figure which was subsequently charged. As Dr Knight put to Mr Cross, he does not show a VAT number on his letter heading. Mr Cross replied that he only included his number when invoicing for work. The Parish had not, at the date of the hearing, attempted to recover the VAT on the basis of the building's listed status. After the hearing Mr Cross apparently investigated the possibility of recovering the VAT but was advised that it is only authorised works which are exempt.

12. On the night of 8th/9th July, there was a further theft of lead, this time from the roof of the north aisle. Mr Cross stated that when he first examined the roofs he found that the remaining lead had been cut, apparently to facilitate later removal by thieves. Whatever the physical state of affairs at 22nd June, when the contract was entered into, it was evidently the case that a decision had been taken to have the remaining lead removed. This is what Mr Barwick's written statement says⁶ and the contract Schedule of Works includes the removal of "*remaining lead bays to north and south aisles*". The contract was dated 22nd June 2011

⁶ Bundle p. A22

and signed by “Mr R Barwick, Project Manager” and “J Cross, Contractor”. Therefore, whilst the further theft on 8th/9th July was as despicable as the initial one, it was not a factor in Mr Cross’ advice or the Parish’s decision. By that date, a firm commitment had been made to remove the remaining lead. Perhaps surprisingly, the contract does not specify Ubiflex, or, indeed, the details of re-covering at all. The Schedule of Works simply specifies “Roof Preparations” and “Lead Work”. This omission presumably reflects the fact that, whilst the decision to re-cover the affected areas in Ubiflex had been taken in principle on 6th June, there evidently remained some element of contingency about the details until 22nd June.

13. An email sent at 7.17pm on 22nd June by Mrs Chris Jones “to the Chairman and all Eastry PCC Members” reads as follows:

"This e-mail refers to the Minute contained in the Minutes of the Meeting of the Eastry Parochial Church Council dated 6th June 2011 which stated:

'The Chairman proposed and the PCC unanimously agreed that the Fabric Committee, under the direction of Bob Barwick, take full responsibility for the negotiations (for replacing remaining lead with an alternative roofing material), reporting back to the Chairman and keeping all members of the PCC informed via e-mails.'

The Fabric Committee (Bob Barwick, Peter Franklin, Michael Snarey, Christine Jones), together with Gill Hughes-Wilson and Derek Pilcher (acting as consultant at the request of Bob Barwick) met on Wednesday 22nd June with Jay Cross, the Contractor for the work. Clive Alexander, Conservation Officer for Dover District Council had been informed of our intention and he had no objection to our using an alternative roofing material and the Diocesan Advisory Committee had also been advised of the situation.

Mr Cross brought samples of various types of material with him and the options regarding all of these were discussed in detail. Mr Cross advised the meeting of his experience working with these materials and it was the view of the committee that the 'Ubiflex' material would be the most appropriate and cost effective product for this project.

Costs

The sum of £2127.20 (inc. VAT) has already been paid in relation to first aid repairs in the immediate aftermath of the theft.

The cost of removing the remaining lead from the roof and replacing with Ubiflex and all associated costs is £95,000 (inc. VAT). It is envisaged that the 20% VAT will be reclaimed (under our Charity status) and that we will receive £5,000 from Ecclesiastical Insurance in settlement of our claim. We will also receive the proceeds from the sale of the remaining lead, although it is impossible at this time to determine what that figure will be.

The above does not cover the costs involved in internal repairs, the claim for which at the moment is in the hands of the Loss Adjuster.

In view of the urgency of the situation, particularly in respect of the further likelihood of water damage, the Fabric Committee have, on behalf of the PCC, agreed a Contract with Cross Builders based on the above. The work will commence as soon as materials have been obtained and you will be advised of the start date as soon as it is known.

If you have any comments or queries regarding the above, please contact Bob Barwick."

There are several inaccuracies or, at best, oversimplifications, contained in this email. Firstly, the passage in single quotation marks, said to come from the PCC's Minute of 6th June, is not reflected in the contemporaneous minute which was produced in evidence and which I set out in full at paragraph 10 above. Nevertheless, if this was regarded as being the sense of that meeting, it answers

the question which I posed above about the scope of authorisation. Certainly the general delegation to the Fabric Committee is consistent with Canon Roberts' understanding of the position. Secondly, Mr Alexander's email of 14th June could not properly be said to constitute non objection. All it did was to state the general position in secular planning law; he could do nothing more since he did not have a firm proposal to consider. Lastly, the full extent of the DAC's information was Mr Barwick's email of 6th June; they certainly had not been advised of the intention to remove all the remaining lead, nor had they been shown samples of the proposed material and the contract, nor were they told that a contract had been signed and that works were about to start. Mr Dodd's express caveats about architect, LPA and EH involvement had not been observed. The reference to Derek Pilcher "*acting as consultant at the request of Bob Barwick*" certainly did not meet Mr Dodd's condition. One of the PCC members to whom the email was addressed was a Jennifer Pilcher and presumably Mr Pilcher was merely offering some amateur assistance. As noted above, Mr Barwick was clear that a deliberate decision was made not to involve any architect and that no expert had been involved in the decision-making on 6th or 22nd June.

14. The works were undertaken, commencing on 11th July. There was a PCC meeting on 27th July and the relevant extract from the minutes recorded:

"At a meeting on the 27th July 2011 the PCC of St Mary the Blessed Virgin, Eastry agreed unanimously to replace the Lead on the North and South Aisle roofs with grey UBIFLEX".

If Mrs Jones's understanding of the position as set out in her email of 22nd June was correct then, strictly speaking, this later resolution was unnecessary; if not, then it was a purported ratification of the unlawful acts.

15. The work was completed within the 30 day period stipulated in the contract. According to Mr Cross, when cross examined by Dr Knight, the breakdown was c.£37,000, including VAT, for materials and c.£50,000 for labour. He said that 146 man hours of work were undertaken by five to seven men each day during the 30 days. This calculation leaves some £8,000 unaccounted for but it may be that this amount should be notionally attributed to the initial emergency work that was undertaken in the immediate aftermath of the first thefts. These rationalisations do not entirely tally with the Parish's breakdown of debits and credits. Mr Cross disposed of the lead which he removed to a recycling company. That company produced a series of invoices each of which included the following pro forma declaration:

"I certify that the material above is my property or that I have full authority to sell it to you and that it does not contain any Asbestos, Radioactive Material, Pressurised Cylinders or Toxic Waste."

On four of the eight invoices, Mr Cross signed this declaration. The others were left blank. I have no reason to conclude, however, that the recycling company acted otherwise than in good faith in purchasing the lead. Mr Cross had not discovered by the date of the hearing whether or not the company had re-sold the lead.

16. On 10th October 2011, Mr Barwick wrote to Mr Dodd the following letter:

"We are pleased to note that the standing committee have approved the use of UBIFLEX as an alternative to Lead roof covering.

However as not all the lead had been taken, the PCC took the advice of the Fabric sub committee that it did not make sense both literally or financially to leave the remaining lead on both the North and South Aisle roofs.

To leave any lead on the aisle roofs would leave the church open to further theft, and consequently further internal damage. Our insurers (ecclesiastical) capped the amounts we could claim, (because of a previous claim for lead theft some 3 years ago) to £10,000. £5,000 loss of metal and £5,000 collateral damage.

In this matter speed was of the essence! Therefore we needed to get permanent repairs and renewals carried out as quickly as possible.

The integrity of the church building was our utmost thought.

From past experience the Duncan Graham Partnership we have found that speed is not their priority! Therefore we did not approach them to produce a specification.

Contractors Cross builders had been engaged to carry out first aid temporary roof covering after the theft on the 4th June 2011. It was further decided by the fabric committee to engage Cross Builders to remove the remaining lead and install ubiflex roofing.

A contract was drawn up and signed by Jay Cross representing Cross builders and Bob Barwick (acting as project manager for the PCC) on the 22nd June 2011. (see copy of specifications and contract document attached).

Work commenced on the roof contract on Monday 11th July 2011 and was completed within the 30 days as stipulated in the contract.

The PCC members have been distraught and shocked by what has happened to our historic building, but now with the church

once again watertight and the worry of further theft of lead removed we can now turn our attention to the internal damage to plaster and decorations.”

Mr Dodd replied on 13th October in the following terms, copying in the Archdeacon:

"Many thanks for your letter of 10 October and attachments. Unfortunately since the work has been carried out in advance of the Archdeacon issuing a letter of authority and also, since the project involved the removal of lead which had not been stolen, approval cannot be given under the terms of the emergency lead theft procedure. The PCC will, therefore, need to apply for a retrospective faculty from the Commissary General and, as part of the process, the PCC will need to explain to her why approval was not obtained before the work commenced.

I note that your letter included a copy of the specification for the work but, since the work has now been carried out, we are going to need a report by your architect on the finished job and also an assessment of the amount of lead which was removed during the repair process since this will need to form part of the retrospective faculty application. You will also need to obtain the formal comments of English Heritage and the local planning authority and it would be helpful if these could be submitted at the same time as the report from your architect.”

The Archdeacon responded on the same day, expressing his distress at what had happened and immediately pointing out *“the extreme national sensitivity of the issue”*. He also took advice from the Diocesan Registrar. Following discussions between himself and the Parish, the Archdeacon decided not to seek a Restoration Order from the Commissary Court but instead set out a clear timetable in a letter of 5th December to ensure that a confirmatory Faculty Petition would be made by the end of January 2012. There was a glancing suggestion by

Mr Barwick in oral evidence that the Archdeacon had accused the PCC of theft but, upon clarification by Mr Hopkins and me, the suggestion was withdrawn. Canon Roberts, on behalf of the Petitioners, willingly concurred in my indication that I proposed, in the absence of any evidence to the contrary, to approach my decision on the basis that the Archdeacon has behaved entirely properly throughout. Elsewhere, while giving his sworn evidence, Canon Roberts spoke warmly of the good pastoral relationship which the Parish enjoys with the Archdeacon. I shall return to this important matter in due course but must here record that I find that the Archdeacon has behaved impeccably throughout this matter, delicately balancing the functions of enforcement and pastoral care for the people of the Parish which his office requires. He also properly recognised at once the legitimate interests of the Church's secular heritage partners and has worked productively with them in the period leading up to the Hearing.

17. The Faculty Petition was submitted on 23rd January 2012. It was accompanied by a Statement of Significance, a PCC resolution dated 18th January 2012 and a Statement of Need. The latter document, in common with other documents prepared by Mr Barwick, referred to the PCC's having "*in principle got permission to use UBIFLEX from the DAC*". Mr Hopkins put to Mr Barwick that the DAC email of 14th June 2011 did not constitute the "*go-ahead*" for the works. Mr Barwick unequivocally agreed and accepted that the Parish "*should have gone through the procedures*". Canon Roberts similarly volunteered that the right procedures had not been followed and that the absence of considered debate and expert advice were regrettable. He made the same concession about the

14th June email. He accepted that, with hindsight and with the caveat of his many other duties in the Diocese, he should have been more attentive to the proper procedures.

THE PETITION AND EVENTS LEADING TO THE HEARING

18. Despite Mr Dodd's advice of 13th October 2011, no architect's report was submitted with the Faculty Petition. I therefore gave Directions on 10th February 2012 that, amongst other matters, the PCC should obtain a report on the state of the roof and adequacy of the works from an architect approved by the DAC. I also directed that the views of EH, the LPA, the relevant Amenity Societies and the DAC be sought.
19. James Ford RIBA of Clague was, accordingly, instructed and he inspected the roof on 23rd February. His report contains the following helpful summary:
 - "5.1 *At the time of inspection, the replacement roof covering had only been in place for seven months, and therefore conclusions regarding its longer term performance can only be based upon an assessment of the claims made for it by the manufacturer.*
 - 5.2 *The roof covering has been adequately laid in terms of the manufacturer's recommendations, and the abutments secured. Efforts have been made to 'mimic' the characteristic bay arrangements and colour of the original lead roof. Certainly, from the only distant viewpoint available from the south, the material could be mistaken for lead.*
 - 5.3 *Concerns over its long term performance should be balanced against its advantage over lead due to its relatively low cost and lightness and its unattractiveness to thieves due to its lack of any re-sale value.*

- 5.4 *Lead is the historically and aesthetically correct material for this location, and with its resistance to corrosion has a proven longevity, and is eventually recyclable. Correctly detailed lead sheets on low pitched roofs carry less risk of water penetration and are more resistant to extreme weather. 'Theft of Metal from Church Buildings' – an English Heritage Guidance Note September 2011 – covers all aspects of this issue, and attempts to balance the ideal and the pragmatic.*
- 5.5 *In conclusion, the removal of the lead has undoubtedly resulted in a loss of significance of the building. However, the replacement covering is likely to be effective in keeping the building wind and water tight in the short to medium term, say 10-15 years, and is unlikely to have a detrimental effect on the fabric in the medium term. The change in material has had a minimal effect on the aesthetic qualities of the church, being largely unseen from ground level.*
- 5.6 *The recommendation is to consider the re-covering as a temporary measure which should be renewed in lead, or another form of appropriate metal sheeting, when the risk of theft has reduced and further security measures have been installed. In the meantime, the roof covering itself and the interior of the aisles should be inspected on an annual basis by the church architect to ensure that the covering remains effective.”*

20. All the citation bodies responded to my Direction with substantive comments, except the Victorian Society. To summarise, they expressed heartfelt sympathy for the parish as the victim of repeated lead thefts, especially given the financial implications. Nevertheless, they all regretted and disapproved of the decision to use Ubiflex and of the pre-emptive stripping of lead. The Society for the Protection of Ancient Buildings (“SPAB”) went so far as to say that *“the case has implications for the continuing ecclesiastical exemption”*. The Ancient

Monuments Society (“AMS”) described the pre-emptive action here as “*an alarming precedent*”. EH and the LPA commended EH’s recently updated guidance note “*Theft of Metal from Church Buildings*” (September 2011, replacing its 2008 predecessor) and the CBC included a copy of their Advice on “*Materials for Roofing that are used or considered as Alternatives to Lead*”. Both of these documents are well drafted, pragmatic pieces of work which contain informed discussion of materials and a great deal of practical advice, for example where to seek further guidance, as well as recommendations for good security measures. In view of the joint representation of EH, the LPA and SPAB by Mr Foxall and Dr Knight’s participation at the hearing, I do not need to set out further details of these representations.

21. On 29th March, two architect members of the DAC inspected the new roofs. The material part of their report states:

"The material used for the recovering (Ubbink Ubiflex) is marketed for use as flashings and damp proof courses. The widest dimension obtainable is 1000mm, and this width has been used in combination with wood-cored rolls to produce bays running with the roof fall in the same manner as that of a lead sheet covering. A sample detail in the possession of the church suggests that the Ubiflex covering was laid over an underlay. The lead sheet remaining on the roofs after the thefts had been removed by the PCC to allow the whole of the Aisle roof areas to be recovered in this new material.

On the day of the inspection, the covering to the bays and rolls did not exhibit the same crispness as the sample detail. Despite the manufacturer’s claim that the material is not susceptible to thermal movement, evidence of this was suggested by a marked flattening of the angle at the Nave abutments and significant distortion at the eaves. This situation appeared more pronounced on the South Aisle, adding further

to the thermal movement theory. Angles produced by the dressing of the material over the wood-cored rolls also appeared flatter when compared to the sample.

On both Aisles, dents and the beginnings of holes can be seen in the new covering which may be due to fallen tiles – although as the Nave roofslope above the South Aisle has a stout snowguard another agent may be involved. Walking on the new material left visible impressions. It is noted that the parish's condition report states that the roof covering has been adequately laid and notes no defects; it can only be suggested that the lapse in time between the two inspections and the unseasonably warm weather during March – assuming all was satisfactory at the first inspection – had a detrimental effect on an unsuitable material.

Conclusions

Although there seems to be a possibility the new material may have originally been marketed for use as a flat roof covering, it is not so now. The use of wood-cored rolls to both mimic lead bays and make a virtue of the width limitations of the material is somewhat inspired, but the material does not have the stiffness of lead and appears not to hold its shape sufficiently for this use. The presence of an underlay – which may have been introduced to prevent the bitumen content of the material contaminating the roof boarding beneath – has combined with this lack of stiffness to allow the finish to creep down the slopes, particularly on the South Aisle where it is exposed to the sun, and pull away from the Nave abutment and distort at the eaves. In view of the Inspecting Architects' report noting no such problems, this movement of the finish must have occurred over the period of a month (albeit a month of dry and sunny weather), which suggests the material may migrate further in Summer.

The above shortcomings, together with the apparent susceptibility of the material to mechanical damage, render it quite unsuitable for the use to which it has been put. If reports of the cost are accurate, it also appears to be a very expensive alternative to lead or some other more robust covering. If it had been proposed as part of a Faculty application, we should have refused to recommend it.”

The DAC discussed the report and the Petition in general at its meeting on 13th April and in due course the relevant minute was submitted to the Registry. It recorded the following:

"The Commissary General had asked for the DAC's advice on an application for a confirmatory faculty after the PCC had removed all of the lead from the two aisle roofs and provided an alternative roof covering. This action was taken following earlier incidences of lead theft.

The two architect members who were nominated by the DAC at its last meeting to advise on this case reported to the Committee.

During discussion it was noted that Ubiflex was a variant of roofing felt which was inappropriate as a permanent roof covering on a medieval church building. Variants of roofing felt have been approved under the Emergency lead Theft Faculty, but only on a temporary basis for up to five years. It can, however, be successfully used for a longer period for flashings and gutters.

When the roof was inspected the covering appeared to have not been well laid and there was evidence of damage which was likely to lead to perforation of the material.

It was agreed that the Chairman, in consultation with the Archdeacon of Ashford, would submit a report to the Commissary General which would include the recommendation that, should the covering be allowed to remain for the foreseeable future, it must be inspected by the inspecting architect every six months. Such a regular inspection would allow for this case to be used to provide hard evidence on the way in which roofing felt deteriorates over a large expanse of church roofing. The Chairman would also stress that the Committee is against the removal by a PCC of any lead remaining on a roof following incidents of metal theft and it is regrettable that the PCC removed the remaining lead at Eastry."

22. Meanwhile, the Archdeacon and the Diocesan Registrar had been attempting to explore matters with Mr Cross. The Registrar wrote on 7th November 2011

pointing out that the works constituted unlawful alterations to a Grade I listed building. He drew to Mr Cross's attention caselaw to the effect that an architect is under a duty to satisfy himself that there is due authority for the execution of works before they are begun.⁷ The Registrar suggested that the same principle would apply to a builder and also cited the case of Re St Michael and All Angels, South Westoe (Durham Consistory Court) where an architect was held personally liable for legal fees in respect of a court hearing relating to a confirmatory faculty. Moreover, the Registrar explained that Mr Cross could not have given good title to the lead to the third party purchaser. No reply was received and the Registrar wrote again to Mr Cross on 10th February, at my direction, seeking a full statement of his involvement and reiterating the seriousness of the matter. Mr Cross replied on 24th February, stating that he was enclosing a reply to the 7th November letter. This latter document did not arrive at the Registry until 29th February. The messages of both letters were:

- (1) that Mr Cross had, throughout, acted on the instructions of the Parish;
- (2) that he was not party to the choice of roofing material;
- (3) that the question of authority for the works was nothing to do with him;
- (4) that, accordingly, he was not liable for any failure on the part of Church representatives;
- (5) that he disagreed with the Registrar's interpretation of caselaw;
- (6) that he took a dim view of the Registrar and the Church and intended to complain to the Archbishop of Canterbury and the Law Society and/or to

⁷ Re St Thomas à Becket, Framfield [1989] 1 WLR 689

issue proceedings against the Diocese and the Registrar personally “*in the real courts*”.

Points 5 and 6 were conveyed in wholly intemperate terms. They were insulting to the Church, the Registrar and the Commissary Court and I am satisfied that the insults were calculated. What the letters did not communicate was any suggestion that the Ubiflex roofing was intended as a temporary measure. When Mr Cross eventually began to engage with the process and, specifically, in his Written Statement of 30th August 2012, the suggestion emerged that Ubiflex was only intended as a “*temporary repair*”. Mr Hopkins asked Mr Cross why he had not said this when the Registrar wrote to him at the outset of investigations. He gave no clear answer on this point to Counsel or to me. Nevertheless, he did acknowledge the authority of the Commissary Court and expressed his regret about the terms in which he had written to the Registrar; I gather that he followed this up with a personal apology to the Registrar for which he and I are grateful.

23. Pausing there, it was against the background of uncertainty about the details of the decision making process, objections to the product of the works from all the most relevant citation bodies and the DAC, somewhat differing architects’ reports as to the suitability of the roof and Mr Cross’ unwillingness to co-operate with the Court that I considered it necessary to add Mr Cross as a party to the proceedings and directed the holding of a Directions hearing for the purpose of considering the details of procedure to be followed in the determination of the Petition. On 1st August, after the Directions hearing, I further directed that the

Archdeacon should intervene, be added as a Party, be represented by Counsel and put the Petitioners to proof at an Open Hearing.

24. By my Directions of 4th July 2012, I had invited all those involved to give consideration to their proposals for the disposal of the matter. Immediately after the Directions Hearing, taking up my further request at that Hearing that the Parties address the question of relief and endeavour to reach as much agreement as possible, the Archdeacon convened a meeting of those present and *“began to explore the bones”*⁸ of an idea which evolved into a draft Restoration Order.⁹ At the outset of the hearing, Canon Roberts on behalf of the Petitioners and Mr Tom Foxall on behalf of EH, SPAB and the LPA, confirmed their agreement to the terms of the draft Order. I shall return to the detailed provisions later in this Judgment. Nevertheless, it is right to record the debt which the parties and I owe to the Archdeacon for initiating and leading this work of mediation and to his Solicitor and Counsel for giving legal expression to the consensus of the parties. On a practical level in these proceedings, it has saved time which might otherwise have been occupied in multiple submissions at the Hearing; on a spiritual and pastoral level for the future, the Archdeacon’s work will have laid the ground for the Parish and their secular partners to move on in a spirit of mutual trust and shared purpose. Another useful initiative after the Directions Hearing was the production of a ‘Joint Statement regarding the unauthorised work to the roof of the north and south aisles of the Church’ by Mr Ford and the two DAC architects. The key points were:

⁸ Archdeacon: evidence in Chief
⁹ Court Bundle p. E28

- (1) the current state of the coverings should be determined by further inspection;
- (2) the defects noted by the DAC architects may have been due to poor workmanship or may have developed over time through the unsuitability of the material;
- (3) if it is found that the coverings remain watertight, then it may be practicable to maintain them thus for up to 5 years;
- (4) the coverings are unfit for purpose in the longer term;
- (5) the threat is that leakage may develop and not manifest itself internally until after damage has been done to the structure; this threat could be allayed in the short term by regular inspection and maintenance;
- (6) Mr Ford's report considered the technical and aesthetic suitability of a bituminous roof in the short term whereas the DAC architects addressed a different question, namely whether the works might have received a DAC Certificate had they been processed in the proper manner.

THE CHURCH OF ST MARY THE VIRGIN AND THE ROOF WORKS

25. The Church is a Grade I listed building. The listing description states:

"Parish church, C12 in origin, largely C13. Restored 1847 to 1902 and particularly 1853. Flint with plain tiled roof. Chancel, nave with aisles, south porch, western tower with lean-to annexes. Four stage tower with clasping buttresses thickened at base to octagonal shape and pierced with pointed arches (possibly over the processional path). Blank almond and circular shaped panels in buttress upper stages. Three lancets on main stage in trefoiled arcading with attached shafts.

Corbelled top stage. North-eastern rectangular stair turret. C12 Romanesque doorway behind C19 pentice with hollow and roll-moulded orders and attached shafts. Lintel and tympanum altered 1853. Romanesque windows also in north and south walls of tower. Lean-to aisles with quatrefoil west windows. Fine C18 clock face on west wall of tower with egg and tongue circular surround. Largely C19 renewed fenestration, trefoiled clerestorey windows. Lancets survive in chancel, 5 on each side, with buttresses (one on south side with mutilated Sheilana gig carving). North aisle with two C15 three light windows with square label heads. Single chamfered south doorway with hoodmould in small south porch. Interior; tower arch and nave arcades on same C13 pattern, with round piers or responds on moulded bases w beaded capitals and double chamfered arches. Similar arches in tower to side annexes with flying buttresses to tower, that to north finely moulded and of late C13 date. Five bay nave arcade (the eastern arch pinched). Central southern pier a later insertion, octagonal but with similar mouldings to rest of arcade, with additional stylised foliation on abacus. Continuous hood mould carried over arches. Two string courses at clerestorey level, one forming base of clerestorey windows, the other raised over to form drips. Roof of 6 renewed slender crown posts. Lean-to aisles. Double chamfered chancel arch, the inner order carried on polygonal corbels with still-leaf sprig. Pierced quatrefoils to left and right, and upper stage of nave east wall stepped back. The quatrefoils pass through to trefoil headed arched reveals in chancel. Five bay chancel, with 2 string courses, the upper raised over windows to form drips as in nave clerestorey. The south eastern window has a discontinuous string with the reveal carried down to the lower string, the other window reveals are all splayed. Triple lancet west window with trilobed heads and detached, ringed shafts. Small roundel in gable head. Braced rafter roof. Fittings: piscina in chancel and large moulded and cusped piscina in north aisle; another in south aisle. Aumbry with arched head in north wall of chancel. Altar rails, reredos, candelabra, font box-pews all C19. C18 chandelier in tower of 2 tiers of 5 branches over 10. The octagonal inserted pier in the nave bears a Dominical Circle to compute Holy Days, carved in 1327 and very rare. Wall Paintings: over chancel arch, 4 tiers of roundels, C13, 26 of them in all with devices of a trefoil flower, doves, lion and dragon, associated with the rood (corbels survive for a rood loft). Two C18 painted text cartouches nave wall, dated 1721. Two hatchments of the Bargrave family and sculptured Royal Arms over tower arch, dated 1821 and given by Thomas Moulden of Statenborough

House. Monuments: brass in the chancel to Thomas Nevynson d.1590. Figures of ruffed Knight and his Lady, almost 3 feet long with inscription and arms, reset before the altar iron tilting helm hanging on wall above surmounted by Nevison crest. Wall monument to John Broadle, d.1784, signed J. Bacon, London, 1785. Medallion portrait bust with oak leaf wreath, the staff and snake of the medical profession and obelisk shaped background. Edward George Bays, d.1801, wall plaque of an urn in half relief signed Coade and Sealy, Lambeth. Monuments in south aisle to Thomas Pettman, d.1791, wall plaque with urn on reeded column with a shield in relief leaning against its base. Thomas Boteler, d.1788 (erected 1774), black and white marble plaque with enriched scrolled sides and segmental head. John Paramout, d.1737, large white marble architectural wall monument, with ionic columns supporting broken pediment with achievement on base of 3 cherubs heads. Removed from the chancel in 1865, Reverend Drue Astley Cressener, d.1746, a pair to the last described monument. Facing each other and set into two of the piers of the south arcade are 2 identical black marble plaques with scrolled sides and achievements and gold lettering, to Reverend Richard Harvey, d.1772 and Catherine Springette, d.1762. Robert Bargrave, d.1779. Wall plaque in nave with obelisk on enriched neo-classical style base with cameo portrait and urn. In the north aisle, monuments to Sarah Boteler, d.1777, by William Tyler. Black obelisk surround with figure of a woman leaning on draped urn, pointing towards her infant son, who reaches up to her. She died in childbirth. Richard Kelly, d.1768. White marble hanging cartouche with cherubs heads. Quite coarse. Captain John Harvey, d.1794, signed J. Bacon, London. Inscription on a large black obelisk, below it a circular relief of the battle of Ushant, the "Memorable First of June", with an angel holding scales and a victor's palm. Said to be from the monument in Westminster Abbey commemorating the battle. (See B.O.E. Kent. II, pp.307-6)"

The aisles are mentioned in the description but their covering is not and no particular significance is ascribed to the Church roofs in general. This summary gives an indication, not only of the interest of the structure but also of the many cultural treasures which the building contains. EH pointed out that the church's

Grade I listing places it among c.2% of the most significant listed buildings in the country.

26. Aside from the specialist historic and architectural interest of the building, it is also necessary to record its aesthetic beauty internally and externally. It sits in an immaculately kept churchyard including old and modern tombstones and a War Memorial. An attractive public footpath runs through the churchyard and joins the road (Church Street) at the church gate. On entering the building, I was struck at once by the restrained splendour conferred by its height and length, an impression which was intensified when starting to look in greater detail at the many liturgical and historic objects which the church houses. I am in no doubt about the extremely high standard of care which the church enjoys. The building and those who use and look after it between them achieve the significant feat of combining the sense of a place which is simultaneously "lived in" and numinous.
27. Mr Ford stated in his report that, prior to the thefts, there were 22 bays of Code 7 lead on each aisle roof. He described the works as follows:

"4.10 Limited replacement of timber boarding where rotted. Repair carried out in 19mm thick softwood boards laid with penny joints to match existing sound substrate.

4.11 UBIFLEX B3 grey coloured roof covering laid to existing dimensions of 22 bays on each roof, to an approximate pitch of 10°, with edges dressed over ex 50 x 38mm softwood rolls. Each bay comprising one sheet of roofing material to match dimensions of lead bays; approximately 2650mm long x 900mm wide.

4.12 *The existing stepped lead parapet gutters were found to be in sound condition and were retained.*

Lead flashings at the abutments with clerestory walls were redressed over the junction with new covering, and the joints repointed in lime mortar.

4.13 *Internally, repairs were carried out to water damaged plaster ceilings using lime/hair plaster.”*

28. Immediately before the hearing, I climbed onto both aisle roofs and inspected them in company with Messrs Ford, Dodd and Cross. We also ascended the tower of the Church and were able to obtain clear views down onto the roofs in question. The tower is still covered in lead which, Mr Barwick told me, is similar in appearance to the lead which covered the south aisle. He believed that the south aisle lead dated from the early 1950s and that it had replaced some other, unsatisfactory, product. The north aisle lead, he said, was much older, probably about a hundred years old. It had not been dressed over mopstick rolls, rather it had been laid in the bays with intervening hollows. He thought that there was one plumber's mark where a workman had drawn round his foot. Mr Foxall calculated, using the evidence of the photographs and the recycling company's invoices, that about 92m² of lead must have been removed. Mr Cross eventually agreed in cross examination that this was an accurate estimate. He put forward no other figure.

29. Before discussing the details of the works, I should record that Mr Cross told me that his firm had been trading for 27 years. He holds no building qualifications but has an “*unrelated postgraduate qualification*”. He lived in the parish between

1997 and 2001 and said that he had loved St Mary's Church and still does. When asked about his experience of historic church work, he said that he had worked on three Anglican churches which he thought were probably listed Grade 2. In addition, he had converted his own home, an unlisted former United Reformed Church in a Conservation Area. One of the Anglican churches where he had worked was at nearby Woodnesborough after a theft of lead but he could not remember whether or not that, or indeed the other works which he had undertaken to Church of England Churches, had been pursuant to faculty. At Woodnesborough, he said, he had replaced lead with lead. He accepted in cross examination that he had not used Ubiflex on a church roof before in the quantities applied here.

30. I witnessed some "*bunching*" of the Ubiflex, particularly above the gutters on the north aisle and where the roof joined the wall. Mr Cross attributed this bunching to pre-existing slippage of the roof frame due to the weight of the lead; he also pointed, in this connection, to what he perceived as bowing of the south aisle wall. Mr Ford had not seen the lead and did not feel able to offer an opinion on the bowing. Mr Foxall, who is an experienced Historic Buildings Inspector employed by EH, said in his Written Statement that it was unclear to EH "*whether the undulation of the material along the parapet gutter on the north side is due to poor workmanship or subsequent distortion*". He had seen no evidence to suggest that the bowing of the south aisle wall was a cause for concern, nor did he discern any evidence of bowing of timbers in either aisle. The roof timbers of

both aisles are exposed inside the building. My own observations accorded with Mr Foxall's and I prefer his expert evidence on this point.

31. The significance of this issue was set out by Mr Foxall. Whilst he could not be conclusive about the cause of the bunching, this very uncertainty is one of the reasons for EH's concerns (and those of the other citation bodies). The point is that Ubiflex is untried as a total roof covering. Mr Ford appended the manufacturer's specification to his report. Ubiflex B3 is the relevant product. The booklet says that *"Ubiflex is a non-lead waterproof flashing material which can be used in all applications where lead is traditionally used to provide a weatherproof junction at features such as changes of direction and materials".* (Emphasis added). Ubiflex B3 is recommended as suitable in the following applications: *"Sharp corners, valley gutters, cover flashings, step flashings, rooflight flashings, conservatory flashings, damp proof course and cavity tray in masonry walls."* It has been subjected to testing in a wind tunnel at high speeds and is certificated *"for general use"* by the British Board of Agrément and guaranteed for 25 years. Life expectancy is said to be 30 years. Nowhere in the document is it suggested that Ubiflex 3 is suitable for application over whole roofs in general, let alone historic roofs. I take the natural sense of the booklet to be that life expectancy, certification and guarantee apply to the specified applications and not to other purposes. When I asked Mr Cross if he had studied this booklet, he thought that he had read *"bits of it"* but was unclear about which bits. Returning to the common concerns of the citation bodies, Mr Foxall states:

" *The replacement material selected in this case was Ubiflex, a synthetic material in some ways reminiscent of roofing felt, but with aluminium mesh reinforcement. English Heritage has had only limited experience of Ubiflex because it is a relatively new product. However, it is evident from the list of its possible applications (C19), that it is designed – and presumably only tested and guaranteed – as a flashing system. It is not intended to be used as a general roof covering and the contractor involved has employed an uncertified and unproven system for laying the 1m wide strips of material so that the joints lap over timber rolls, intended presumably as a weathering detail and to imitate the method of laying lead.*

The problem with a new product, or one used for the first time where it has not been tried-and-tested, is estimating its long-term performance and its likely success of fulfilling the technical requirements of historic buildings, for example in relation to differential thermal movement, condensation and ventilation. We have considerable experience of new products that have not reached their advertised performance, or which do not provide a comparable level of performance and protection as longstanding sheet metals, such as lead and terne coated stainless steel.

In the case of the Ubiflex used inappropriately as a general roof covering at Eastry, there can be no certainty about its likely lifespan and we would be concerned about its ability to withstand the process of weathering on a shallow-pitched medieval roof. Of particular concern is any unseen deterioration of the underlying substrate, which will in turn result in water ingress and damage to the historic structure and its fittings.

The lapped joints and abutments are likely to be the greatest areas of weakness. There is a smaller overlap at the joints on the south aisle than on the north aisle, but in either case water may be allowed into the roof through capillary action. Water ingress may also be possible if the roof covering creeps down the roof slope or is affected by thermal movement and distorts around its fixings.

The Ubiflex system requires the installer to ensure a complete coverage of adhesive and, even if this has been done in accordance with the manufacturer's guidelines, it is not certain how the adhesives will perform over time with regular changes in temperature and moisture.

In terms of its thermal performance, and in particular the possibility that the bitumen will start to melt, we note that Ubiflex is claimed to withstand temperatures up to 90°C (C20). However, it is not clear how long that capability will last, especially if the materials is not used in the same way as under test conditions or becomes damaged. Equally, the Ubiflex has been wind-tested by the British Board of Agrément up to 110mpt, but for a small element like flashing the effects of wind will be very different to a sheet material once the wind gets under it.

It is not clear to us whether the undulation of the material along the parapet gutter on the north side is due to poor workmanship or subsequent distortion, nor is it exactly clear what has caused the denting and breaking-down of the surface in various areas on both roof slopes. This evidence nonetheless suggests that the material is not particularly robust and calls into question the ability of this roofing work to fulfil its primary function of keeping the weather out.”

None of the experts expressed any concern about the masonry repairs which Mr Cross had carried out to the north and south elevations at the junctions of walls and roofs.

32. Messrs Barwick and Cross point out that the roofs have been in place for well over a year, in a variety of weathers, with no problems. Mr Ford reported no perceptible change in condition between his first visit in February, his second in late July and his third on the first day of the hearing in early October. I therefore conclude that the answer to the question about current condition which was left

open in the Architects' Joint Statement is that there has been no apparent deterioration since last winter.

33. Mr Ford has now been appointed as the Parish's inspecting architect. I was impressed with Mr Ford's evident experience of historic churches and I am aware of the high standard of his firm's work elsewhere in the Diocese. He assured me that six monthly inspections would enable him to track the performance of the roofs. He would be able to detect any incipient dampness with a moisture meter and keep records so as to detect any developing trend. There was no challenge to his evidence by the citation bodies.

34. My impressions of the roofs close-up and looking down on them from the tower were that the Ubiflex resembled the type of roofing that one might see on a building of low significance or utilitarian nature such as an old fashioned community hall or sports pavilion. The work appeared tidy in the main, though the "*bunching*" was evident, especially on the northern side. The northern roof was not visible from any part of the Churchyard but the upper reaches of the southern one, including the lead flashings at the top, could be seen from parts of the southern side of the Churchyard, several metres away from the public footpath. Additional public views of the southern aisle roof were possible on both sides of Church Street leading towards the church gate and from a small area of public open space opposite the west end of the church. Views from the street were partly screened by deciduous trees planted, avenue-style, in the highway verge and by the parapet around the roof but in a few parts of the open space

there were unobstructed views along the whole of the southern aisle roof. The Ubiflex is considerably darker than lead and has a matt finish. Paradoxically, since one of the advantages which Mr Cross claimed for it was its undoubted physical lightness over the old timbers, the covering appears dead and heavy in comparison to lead, which is lighter in colour and has an element of natural sheen. Viewed from the tower the northern Ubiflex in particular appears to be greening, presumably because conditions there are darker and cooler than on the south. Mr Foxall agreed with my assessment.

35. Commenting on the significance of the works for the listed building, Mr Foxall said that they were undoubtedly harmful: historically such shallow roofs could only be covered in lead and there are the technical concerns outlined above arising from the untried nature of the material in such circumstances. Nevertheless, allowing for mitigation of the structural risks by six monthly inspections, he described the harm as “*less than substantial*” in terms of secular policy recently reissued in the National Planning Policy Framework (“NPPF”). Whilst the faculty system is separate from secular planning and listed building control, national planning policy can be an aid to deliberation, not least because of the desirability of achieving general equivalence in the treatment of listed buildings across the two systems. The principle of equivalence was considered recently by the Court of Arches in Duffield, St Alkmund, paragraphs 36-39. Paragraph 134 of the NPPF provides for harm falling short of substantial harm to the significance of a designated heritage asset to be weighed against the public benefit of a proposal affecting a designated heritage asset; that paragraph is

drafted in the context of prospective planning applications and therefore I do not regard it as directly transferable but the principle is helpful. Mr Foxall advised that in this case a balance needs to be struck between harm to significance and the necessity of protecting the building. He suggested that there is a need for realism and that as the ongoing harm will be, in his opinion, less than significant, EH and the other bodies for whom he was speaking would wish the Parish to be able to make use of the covering which is now in place. Nevertheless all the bodies also wanted to arrive at a satisfactory long term solution.

36. Dr Knight spoke separately on behalf of Church Care. He generally supported the draft Restoration Order. Nevertheless, he expressed his organisation's concern at the retrospective nature of these proceedings and the role that the general faculty might play in distracting parishes from the good sources of advice which are available to them in the Diocesan Registry and the DAC. He considered that in this particular case there had been confusion as to whether or not the DAC had "*given permission*". Dr Knight also described the significant advances during the last twelve months in combating metal theft. Joint working on the part of the Police, local authorities and Ecclesiastical Insurance has helped. In particular, Ecclesiastical Insurance is running a "*Hands Off our Roof*" campaign involving the installation by parishes of a free roof alarm. I have already granted a faculty in the Diocese for one such alarm.
37. The lead which was stolen had been protected by means of Smartwater but Mr Barwick, perhaps unsurprisingly, was sceptical about its effectiveness. It is

unfortunate that the CCTV camera which the church shares with one of the neighbouring houses had, at some point before the theft last year, been rendered effectively useless by removal of the electric cable which fed the light above the church gate. Presumably this step was a preparatory act of criminal damage. Apparently the Parish, instead of replacing it, sought to get the local authority to do so, although it is quite obvious that the light is part of the church gate and not within the highway. The church and yard are overlooked, albeit obliquely, by two neighbouring houses.

38. I raised the question of finance with Mr Barwick, Mr Foxall and Dr Knight. Details of the church's funds were submitted after the hearing. The parish regularly pays its share and has unrestricted savings of around £95,000. Mr Foxall explained that EH grant funding is being taken over by the Heritage Lottery from 2013 although the details of how it will operate are not yet clear. He expected that, if the criteria remained the same, EH would be likely to support an application in respect of re-roofing but naturally the parish would be in competition with others for limited funds. Dr Knight said that Church Care has some access to funds and would not use a parish's past bad behaviour to block an application. He pointed out that properly authorised new works would qualify for VAT relief. Neither witness could provide an estimate for the cost of re-roofing, whether in lead or one of the alternative materials countenanced in the EH guide.

DISCUSSION

39. The legal principles relevant to this determination are quite clear. The church falls within the faculty jurisdiction of the Commissary Court. Canon F13 paragraph 3 provides that it is the duty of the minister and churchwardens to obtain a faculty before executing any alterations, additions, removals or repairs to the fabric of the church. Carrying out works in the absence of an appropriate faculty is illegal, though certain actions may be legalised for the future by means of a confirmatory faculty: In Re St Mary's, Balham [1978] 1 AER 993, 995-6. As Bursell QC Ch observed In re St Ebbe, Oxford [2012] PTSR, "*It is often forgotten that 'ecclesiastical law ... is as much part of the law of the land as any other part of the law.'* see *Halsbury's Laws of England*", (now 5th edn, para 4). All citizens are therefore subject to this branch of the law, whether or not they hold office in the Church of England.
40. On 27th May 2011, I issued an amended general faculty which reproduced, subject to some alterations, a similar faculty issued by my predecessor. The current faculty is in the following terms:

"In the Commissary Court of the Diocese of Canterbury

General Faculty following the theft of lead from a Church within the Canterbury Diocese

Rosalind Morag Ellis QC, Commissary General of the City and Diocese of Canterbury and Official Principal of the Right Reverend Trevor by Divine Permission Bishop of Dover

Upon the Petition of the Archdeacon of Canterbury and the Archdeacon of Maidstone and the Archdeacon of Ashford, permission is given to the Incumbent and Churchwardens of

Churches which suffer the theft of lead or other metals from their buildings, without the need for further Faculty, subject to the following conditions (all of which must be fully complied with):-

1. *The works permitted are limited to the replacement of the metal:-
 - (a) *on a like-for-like basis, or*
 - (b) *replacement with an appropriate substitute material approved in advance by the Diocesan Advisory Committee and/or the appropriate Archdeacon.**
2. *No works may be undertaken without prior consultation of and written approval by the Diocesan Advisory Committee and/or the appropriate Archdeacon,*
3. *No works may be undertaken without the prior written consent of the Church's insurers.*
4. *The DAC shall maintain a written record of all such approvals given and shall supply copies of these to the Diocesan Registry.*
5. *Any repair carried out using alternative materials is approved only for the period until the next Quinquennial Inspection or such further period as the DAC recommends.*
6. *This Faculty does not cover replacement of lead by stainless steel or zinc.*

By Our direction leave was granted to dispense with the display of a Public Notice.

This Faculty is granted for a period of Twenty Five years, subject to such subsequent revision or revocation as the Court may deem appropriate.

Any works falling outside the strict terms of this General Faculty must be the subject of a separate Faculty Petition.

This Faculty is duly authenticated by the seal of this Court.”

I inherited the draft when I was licensed to my office a few days earlier but it was issued by my authority. It was my understanding that the DAC had approved the suggested form of words. A representative of the heritage bodies sits on the DAC. Nevertheless, it is now clear that the citation bodies, in particular, Church Care, have concerns about the terms of the document. I intend to review that Faculty in the light of those observations, the subsequent procedural and other guidance set out in the recent judgments of Hill QC Ch and Mynors Ch respectively in the Chichester Cases and St John the Baptist Bromsgrove as well as the facts of this case, but that exercise will be separate from the determination of this petition for a specific faculty. What is absolutely clear is that the actions of the Parish and Mr Cross did not fall within the scope of the General Faculty and could never have been properly regarded as so doing. Canon Roberts volunteered the admission that he was not as familiar with the General Faculty as he should have been. I accept that admission and so find, yet the fact that he referred to the point shows that he believed, albeit wrongly, that authorisation for the works existed. Mr Dodd's email, read properly, conveyed no such message but the reference within it to the DAC's being prepared to grant permission in certain circumstances can be seen, with the benefit of hindsight, perhaps to have been something of an oversimplification. It is vital that the DAC maintains the good reputation which it enjoys as an approachable, friendly and helpful first port of call for parishes but Dr Knight is also right to expect that advice be given on such important matters in the clearest possible terms.

41. Because a confirmatory faculty is not retrospective, it is not possible to regularise the transfer of the lead to the recycling company. Although such a faculty was granted to auctioneers in the case of In re St John's with Holy Trinity, Deptford [1995] 1 WLR 721, the appropriateness of this course was doubted by Bursell QC Ch in St Ebbe, agreeing with the following statement of the law in Judge Goodman Ch's decision, In re St Mary's, Barton-upon-Humber [1987] Fam 41:

*"as Garth Moore Ch pointed out **In re St Mary's, Balham** [1978] 1 All ER 993, 995-996: 'There is no such thing as a retrospective faculty. Work done without the permission of a faculty is illegal and remains illegal for all time. If, however, a confirmatory faculty is granted, it means that from that point in time onwards the situation is legalised, but it does not retrospectively legalise what has been done ...' See also **In re St Agnes's, Toxteth Park** [1985] 1 WLR 641. Applying this statement of the law to the disposal of items from a church, I can grant a confirmatory faculty, if I am so minded, to authorise as from now the removal of the chest and coat of arms from the church, but I consider ... that the petitioners will require a further faculty authorising them to enter into a deed with Aspreys to recognise that from this moment the coat of arms is deemed to be the property of Aspreys. This would I think also have the effect of regularising the position as between the various purchasers through whose hands the coat of arms has passed. So far as the chest is concerned no one knows who has it now and I suppose the petitioners may need to enter into a similar deed with the original purchaser recognising that they no longer have any claim to the chest: compare the course taken by Newsom Ch in respect of the bells in **In re West Camel Church** [1979] Fam 79. An appropriate amendment would be required to the petition."*

Bursell QC Ch, however, continued (at 248 E-F):

"I respectfully agree with the chancellor (Judge Goodman Ch) as to the effect of a retrospective (or confirmatory) faculty but I am not convinced that a deed entered into with the auctioneers would of itself regularise the position of the subsequent purported purchasers. I can see that a deed would, in effect, be

a deed of gift in the light of what had previously transpired but such a deed would not automatically cause a previous purported purchaser to receive ownership that he did not otherwise have, although I appreciate that further deeds might regularise the situation down the line of possession. However, in the event the chancellor declined to exercise his discretion to grant a faculty either for the coat of arms or the chest.”

42. In this case, possession of the lead stripped from the church roof by Mr Cross acting on the purported instructions of Mr Barwick and the PCC, was transferred to the recycling company. These actions were unlawful because they were not authorised by faculty, so title was not transferred. There is no information before the Court as to the current whereabouts of that lead but Mr Cross accounted to the Parish for the proceeds of sale. In the case of St Ebbe the petitioners sought to withdraw their petition seeking retrospective authorisation of a sale of church chattels to auctioneers on the basis that the Court would be unlikely to make an order which it could not enforce, such as the return of the goods. The value of the goods in that case was substantial and they were items which were, in their own right, historically significant. In this instance, whilst it was thoroughly irresponsible of the church representatives and Mr Cross to pass goods illegally to a third party in exchange for money, I am satisfied that the retrieval of the lead now would be of no practical use and, in any event, no evidence has been adduced to persuade me that I could or should legitimise the situation now.
43. The other elements of the Petition are much more finely balanced. On any view, the facts which I have related above, deliberately in considerable detail, reveal very serious lapses of judgment, inattention to detail, deliberate refusal to seek

proper expert advice, recklessness as to the law, church fabric and funds and, in some measure, downright arrogance. If anyone is in any doubt about the seriousness of this state of affairs, then the judgment of Bursell QC Ch in St Ebbe will make salutary reading. In that case, unlike this, no damage was done to the fabric of the church although valuable chattels of considerable historic significance had been unlawfully sold. The Chancellor gave serious consideration to taking the steps of reporting the churchwardens to the Bishop, with potential consequences under the Charities Act 2006, and to laying a complaint against the incumbent under the Clergy Discipline Measure 2003. I have neither invited nor heard argument on whether or not such steps might be open to me in this case but I mention them to underline the gravity of the circumstances here. The seemingly deliberate disregard of proper procedures, authority and professional advice by Mr Barwick and the Fabric Committee were particularly reprehensible. Whilst doubtless they thought that they were acting for the best, they cut themselves off from helpful and experienced people who would have had the advantage of not being caught up in the shock and drama of the situation. The Church of England does not require parishioners to “*go it alone*” and one of the distinctive features of Anglicanism is the appeal to reason and order.

44. These events and the reactions to them demonstrate that there are many parties with legitimate interests in historic church buildings or, to put it colloquially, many people who are “*stakeholders*” in them. The act of consecration sets aside the building for sacred use and thus recognises in a special sense that it is God’s

place. The worshipping community who are generally the ones who take the lead in caring for the church physically naturally feel a great sense of responsibility and affection for it and, in this case, undoubtedly did. The Commissary Court, via its faculty jurisdiction, shares in the responsibility and care of the church, assisted by the Registry, the DAC and the Archdeacons. Lastly, the general public, whether or not they are Christian believers and whether or not they live in the parish, have an interest in a building such as St Mary's which is an outstanding part of the national built heritage. Previous custodians of St Mary's perhaps recognised some or all of these aspects when they inscribed in the nave of the Church:

"How dreadfull is this place. This is none other but ye house of God and this is the gate of heaven. 1721."

45. Mention was made in the SPAB submission of the ecclesiastical exemption and Dr Knight referred in his oral evidence to the very recent consideration of this matter by the Court of Arches in Duffield, St Alkmund, paragraphs 35-39. I do not need to repeat the authoritative summary of law and policy set out in that passage. The central points to stress are the reminder *"that the Church of England does not have the faculty jurisdiction in order to benefit from the ecclesiastical exemption; it only has the ecclesiastical exemption because the Government's understanding is that the faculty jurisdiction does, and will continue to, provide a system of control that meets the criteria set out in guidance issued by the relevant department of state in relation to the ecclesiastical*

exemption. That exemption is of importance to the Church as it permits it to retain control of any alteration that may affect its worship and liturgy.” The essence of the criteria, according to the guidance is *“equivalence with secular listed building consent in terms of due process, rigour, consultation, openness, transparency and accountability”*. The Court concluded:

“It is apparent from this guidance that 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.”

46. Mr Cross was apparently unaware that, but for the fact that St Mary the Virgin is subject to the ecclesiastical exemption, he would have committed a criminal offence by carrying out unauthorised works to a listed building.¹⁰ The offence is punishable by a fine not exceeding £20,000 or up to six months’ imprisonment or both. In most cases it would be normal to require a convicted defendant to pay the Prosecution’s costs and the criminal courts have powers of confiscation in relation to the proceeds of crime. He said that he did not usually concern himself with listed building consent when working on a secular listed building or with faculties in the church sphere. Such an approach is reckless and inexcusable in a builder of 27 years’ experience. If the Parish had taken up the offer of help from their inspecting architect as required by the DAC, then doubtless there would have been a proper tendering process which would have protected them

¹⁰ S.9 Planning (Listed Buildings and Conservation Areas) Act 1990.

from their own and Mr Cross's recklessness. They would also have been assisted in negotiating a proper price and possibly gaining the significant advantage of VAT relief afforded by the State in the case of lawful listed building works.

47. The faculty jurisdiction has failed in this case to prevent actions which, in the secular sphere, would be regarded most gravely. What does the principle of equivalence require? In seeking to answer this question, I turn to the evidence of Mr Foxall. Fortunately, he explained, for the reasons set out above, the harm to significance need not be substantial provided that the faculty jurisdiction is exercised now in such a fashion as to secure the preservation of the building. Secular national planning policy would therefore permit me to balance the undoubted harm against any public benefits including securing the optimum viable use of the building.
48. The Court of Arches in Duffield, St Alkmund, having considered carefully the principle of equivalence as well as previous ecclesiastical caselaw, set out a new framework or guidelines for chancellors when exercising the faculty jurisdiction in relation to listed buildings. I shall adopt this framework as a guide to my decision making and therefore do not rehearse the previous authorities. The guidelines are as follows:

- "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 (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 (No2)** [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 exceptionally be allowed."*

Whilst these questions are framed for prospective proposals, there is no indication in the judgment that they are not intended to apply generally and, by mentally adjusting the tenses, I have found them to be a great help in reaching and explaining my decision.

49. In view of the evidence of the DAC and all the citation bodies, I conclude that the answer to Question 1 is: "Yes". I therefore bypass Question 2 and go to Question 3. Mr Foxall's evidence is that the harm is less than substantial, subject to caveats. In accepting his opinion, I bear in mind the consensus amongst the experts that, properly supervised, no structural damage is likely to occur if the material remains in place for up to five years. My impression is that

the visual splendour of the building externally is diminished to a limited extent in a few close public views; I also particularly regret the loss of the old lead on the north aisle, enhanced as it was by at least one workman's mark. I nevertheless take into account the fact that the baseline for consideration of this petition is the desecrated and damaged state in which the building was left by thieves after the two attacks. Question 4 has to be considered on several different levels. Plainly, the justification for putting the church into a weatherproof state was compelling; damage had already been sustained inside as well as out and the PCC and Fabric Committee were rightly concerned to protect the many beautiful treasures mentioned in the listing description as well as to maintain the use of the church for public worship. There was, however, no justification for the way in which they went about doing that; as Canon Roberts said, their reaction to the prospect of further thefts was not a justification, but helps to explain the mindset. Coming to Question 5, I reiterate the conclusions of the experts that serious harm can be avoided by the careful use of the faculty jurisdiction and I do not therefore consider that I need to seek exceptional reasons for permitting the harm in this case. Whilst the circumstances are extremely regrettable, for all the reasons I have given, nevertheless I do find that permitting the roof covering to remain for a limited period, upon very strict terms which I shall set out, would result in public benefits. Firstly, it would enable the building and its contents to continue to be protected from the elements and permit the continued use of the church for its historic and lawful purpose. A moratorium would facilitate the proper exploration of alternatives in a calm, considered and prayerful fashion with the benefit of

expert advice and consultation with the relevant Church and secular partners; this period would also allow the necessary fundraising for a long term solution to be undertaken. Caselaw¹¹ recognises that in the exercise of my jurisdiction I should have regard to the role of the church as a local centre of worship and mission. This church community has suffered a major blow to its self-confidence. Canon Roberts spoke of the trust which he felt it right to ask me to place in the parishioners now to put things right. An essential part of the Christian gospel is the conviction that when people have made mistakes and gone wrong, they can seek and receive God's forgiveness. As a Christian church, we believe that the proclamation of that message in word and deed is of immense public benefit. The journey towards an agreed order in this case has involved repentance for mistakes as well as a commendable willingness by the church's partners to give the Parish another chance. Mr Ford has been appointed as inspecting architect and that is a significant step forward. On the second day of the hearing a Pastoral Scheme for the creation of the new benefice of Eastry and Woodnesborough came into effect; the Archdeacon explained that recruitment of a priest has commenced for the new benefice. Canon Roberts, whilst remaining a firm friend of the Parish, has now been able to relinquish his pastoral responsibility. The Parish is therefore at a turning point and in my judgment public benefit would undoubtedly result from allowing them to achieve resolution and direction now, albeit firmly within the framework of a Court Order. They need to take up their mission within the new benefice against a background of clear objectives for the church building. The Archdeacon agreed with Canon Roberts's

¹¹ Re St Luke the Evangelist, Maidstone [1995] Fam 1 at 7A-C; [1995] 1 AER 321 at 326.

pastoral assessment that the parishioners have learned important lessons and can be trusted to work well in the future. They are both very experienced and wise pastors and I give considerable weight to their views on this point. I also give weight to the scrupulous love and care for the church building which were apparent during the two days which I spent there for the Hearing.

CONCLUSIONS

50. In deciding about the disposal of this matter, the draft order to which I have referred was of great assistance. I was also much helped by Mr Hopkins' submissions on behalf of the Archdeacon which were adopted by the Petitioners and citation bodies, subject to some additional comments from Dr Knight. Discussion revolved, not so much around the practical content of the order, as its form. What was put to me was a draft Restoration Order. Part of the thinking behind a Restoration Order was the desire, particularly of the Amenity Societies, to signal publicly the seriousness with which the Court regards the circumstances of this case and to prevent the creation, or even perception, of a precedent for the use of Ubiflex or the pre-emptive removal of lead.
51. Following argument, Mr Hopkins recognised that a confirmatory faculty would enable the construction of a more straightforward order. S.13 Care of Churches and Ecclesiastical Jurisdiction Measure 1991 provides as follows:

“13 Orders against persons responsible for defaults.

(1) *Subject to subsection (7) below, if in any proceedings by any person for obtaining a faculty it appears to the court that any other person being a party to the proceedings was responsible wholly or in part for any act or default in consequence of which the proceedings were instituted the court may order the whole or any part of the costs and expenses of the proceedings or consequent thereon, including expenses incurred in carrying out any work authorised by the faculty (so far as such costs and expenses have been occasioned by that act or default), to be paid by the person responsible.*

(2) *Subject to subsection (7) below, in any such proceedings the court may by way of special citation add as a further party to the proceedings any person alleged to be so responsible or partly responsible and not already a party and notwithstanding that such person resides outside the diocese concerned.*

(3) *A special citation under subsection (2) above may require the person to whom it is issued to attend the court concerned at such time and place as may be specified in the citation.*

(4) *Where at any time (whether before or after faculty proceedings have been instituted) it appears to the consistory court of a diocese that a person intends to commit or continue to commit, or cause or permit the commission or continuance of, any act in relation to a church or churchyard in the diocese or any article appertaining to a church in the diocese, being an act which would be unlawful under ecclesiastical law, the court may issue an injunction restraining the first-mentioned person from committing or continuing to commit that act or from causing or permitting the commission or continuance of that act, as the case may be.*

(5) *Where at any time (whether before or after faculty proceedings have been instituted) it appears to the consistory court of a diocese that a person has committed, or caused or permitted the commission of, any act in relation to a church or churchyard in the diocese or any article appertaining to a church in the diocese which was unlawful under ecclesiastical law, the court may make an order (a "restoration order") requiring that person to take such steps as the court may consider necessary, within such time as the court may specify, for the purpose of restoring the position so far as possible to that which existed immediately before the act was committed.*

(6) *An injunction under subsection (4) above may be issued and a restoration order under subsection (5) above may be made on an application made by the archdeacon concerned or*

any other person appearing to the court to have a sufficient interest in the matter or on its own motion.

(7) In any proceedings for obtaining a faculty the court shall not make an order under subsection (1) above or issue a special citation under subsection (2) above in respect of any act unless the court is satisfied that the proceedings were instituted less than six years after the act was committed.

(8) The court shall not make a restoration order under subsection (5) above in respect of any act unless the court is satisfied that less than six years have elapsed since the act was committed.

(9) Where proceedings for obtaining a faculty are instituted by an archdeacon or an application for a restoration order under subsection (5) above is made by an archdeacon and any fact relevant to the institution of such proceedings or the making of such an application has been deliberately concealed from him the period of six years mentioned in subsection (7) above or, as the case may be, subsection (8) above, shall not begin to run until the archdeacon has discovered the concealment or could with reasonable diligence have discovered it.

(10) For the purpose of subsection (9) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(11) Failure to comply without reasonable excuse with any requirement of a special citation or injunction issued, or a restoration order made, under this section by any court shall be a contempt of the court.”

52. In this case, of course, the most culpable villains of the piece – the thieves – are not before the Court. The baseline for my consideration, as I said above, is the condition of the church after the second theft and immediately before Mr Cross started his works. Obviously it is not desirable to exercise my power under s.13(5) to require Mr Cross and/or the Petitioners to restore the building to that position. The words “*that person*” in the subsection, must, however, refer on each occasion when they appear to the same person (or persons), as Mr

Hopkins accepted. Therefore I could not require Mr Cross and/or the Petitioners to restore the roof to its pre-theft state. Mr Hopkins suggested, as an alternative, that by interpreting "*the position*" broadly, I could require restoration of the Parish's financial position before the works. I do not need to decide that point of construction but I must say that I think that it places a great strain on the language of the subsection which I take to be addressing itself to the physical fabric of the church, its yard or articles. Whilst the contempt provisions in subsection (11) would not be available in the event of my making a non-restorative order, I have no reason to believe that such powers will be required to secure the implementation of the order which I am going to make. In any event, my order will make provision for liberty to apply so that, in the event of unforeseen problems, I can reconsider matters.

53. As to public messages and precedent, it should be plain from the tenor and details of this Judgment that I regard what has happened here in an extremely serious light. I have asked the Registry to circulate the Judgment to all incumbents and PCCs in the Diocese so that they will be fully aware of the grave consequences of not complying with the law and proper procedures. Whilst any future cases would, of course, be considered on their merits, I have recorded my unfavourable impressions of the visual effects of Ubiflex as a total roof covering and the fact that I am only prepared to allow it to remain for a temporary period and on very strict terms here also reflects the real doubts which responsible experts have regarding its practical suitability. Dr Knight's evidence about wider initiatives to address the problem of lead theft and the steps which parishes can

themselves take are also important. I am aware that non-lead materials were permitted in the Chichester and Bromsgrove cases but Ubiflex was not in issue there and both Chancellors were at pains to ensure that due process should be followed by parishes even after thefts. In any event, the Judgments of those Chancellors are not precedents in the legal sense; neither will this one be.

54. Bearing all these matters in mind, I am prepared to grant a faculty in the following terms:

1. Faculty to authorise the works set out in paragraphs 1 and 2 of the Petition, namely the replacement of lead stolen on 5th June 2011 and 9th July 2011 with artificial non-metal roofing material known as “Ubiflex” and further stripping of remaining lead from roofs and replacement of the same with “Ubiflex” subject to the following conditions:

- (1) the faculty shall be limited to a period of five years from the date hereof¹²
- (2) there shall be inspections every six months undertaken by the Parish’s duly appointed Architect (for the time being John Ford) and such other experts as he considers necessary and written reports of the said inspections shall be submitted to the Diocesan Registry, the Archdeacon of Ashford, the Diocesan Advisory Committee and the Amenity Societies¹³
- (3) any duly authorised member of the DAC or officer of the Amenity Societies shall be entitled, on giving reasonable notice to the Churchwardens, to inspect the church at any time
- (4) Mr Jay Cross shall not be employed or permitted to undertake any further works to the church at any time
- (5) the Venerable the Archdeacon of Ashford and the Churchwardens within three months from the date of this faculty shall obtain initial proposals (including cost estimates) from at least two suitably qualified architects or surveyors for the re-roofing of the south and north aisles of the church in either lead or a suitable long-term

¹² i.e. date of issue

¹³ To be defined as comprising EH, SPAB, AMS and CBC (now known as ‘Church Care’)

alternative sheet metal, with a view to establishing a designated restoration fund held by the PCC for the said proposals and to forward a copy of all proposals received to the DAC and the Amenity Societies for comment and advice

- (6) within six months from the date of this Faculty the Churchwardens shall establish a designated restoration fund to be held by the PCC for the proposals in Condition 5 and use their best endeavours to raise funds for the carrying out of such works and any attendant security measures which they shall think fit (in consultation with the DAC and the Amenity Societies)
- (7) the Churchwardens shall, within four years of the date of this Faculty, either by themselves or with the Incumbent/Priest-in-Charge of the Benefice, submit a Petition in respect of the roof covering of the South and North aisles.

2. No order as to paragraph 3 of the Petition.

3. Liberty to apply.

Conditions 1 and 2 reflect the unanimous expert evidence and the draft agreed order. Condition 3 acknowledges the proper concern of the Amenity Societies. Condition 4 did not give rise to objection at the hearing and is necessary, in my judgment, as part of the important message which the Court needs to send about the level of care required by contractors who are accorded the privilege of working on buildings such as St Mary the Blessed Virgin, Eastry. Conditions 5 and 6 are taken from the agreed draft order and form the basis for the Parish to move forward. The Archdeacon is included in view of the current vacancy in the Benefice and I have no doubt that his continuing pastoral care and advice will be of the greatest assistance to the PCC and the new Incumbent/Priest-in-Charge. Some gentle external help will also prevent the risk of introversion in relation to

the tasks ahead. I have inserted Condition 7 because I wish to ensure that there is plenty of time for the proper consideration of the future Petition. If Conditions 5 and 6 work as I hope and intend, then there is a good prospect that the future petition will be unopposed but I think it wise to allow a comfortable period for its consideration.

55. It remains for me to deal with ancillary, by which I mean financial, matters. S.13(1) of the 1991 Measure empowers me to *“order the whole or any part of the costs and expenses of the proceedings or consequent thereon, including expenses incurred in carrying out any work authorised by the faculty (so far as such costs and expenses have been occasioned by that act or default), to be paid by the person responsible”*. The Court of Arches also laid down general principles about costs in Re St Mary the Virgin, Sherborne [1996] 3 AER 769 at 746-756. The then Dean of the Arches pointed out that in some cases it is necessary to have a hearing in the Consistory Court and in those circumstances Court fees are fixed by Orders made under the Ecclesiastical Fees Measure 1986. Such fees, he said, are *“prima facie payable by the petitioners, because it is their petition which has necessitated a hearing in the consistory court. ... a public hearing may be appropriate even where the petition is unopposed, if the Chancellor considers that there are questions of law or fact which need to be fully examined before him.”* Alternatively, for example, where there is opposition from national amenity societies, a hearing may be necessary.

56. In this case, I decided that a Hearing was essential for reasons which should be obvious from the facts set out in the earlier sections of this Judgment. It is quite clear that the Petitioners submitted the Petition in response to the proper promptings of the Archdeacon as set out in his letter to the Churchwardens of 5th December 2011.¹⁴ At the conclusion of the Hearing, Canon Roberts asked me to clarify whether I was considering making any financial orders against him and/or the Petitioners personally. I indicated that I was not. In his case, I had regard to his means (which I took to be, effectively, his stipend), as well as the many duties which he performs in the Diocese, as set out in his Statement. He continued in his pastoral responsibility for the Parish throughout the aftermath of the problems and represented them ably at the Hearing. As I have said, he was of great assistance to the Court. With the coming into effect of the Pastoral Scheme, he has been able to lay down his responsibility for the parish of Eastry. I do not consider it appropriate to make any order against Canon Roberts, whose role in the decision making was not pivotal. Mr Barwick's role, on the other hand, was central and I have been critical of various aspects of his judgment and conduct. I am satisfied that, whilst he made mistakes, he was motivated by a desire to do what he then considered to be for the best. Mr Franklin had responsibility as a Churchwarden; again, I am satisfied that his motives were sincere and he, not being a member of the Fabric Committee, was less intimately involved. Both gentlemen are retired and although I did not seek or receive information about their means, I anticipate that the costs of this case would, for them, represent a large sum of money. Pursuant to the Ecclesiastical Fees Measure 1986, the

¹⁴ Court Bundle p.D8

statutorily assessed Registry fee is £4,818.24. I therefore make an Order in this sum against Messrs Barwick and Franklin but I do so in the expectation that, in reality, the PCC will cover the cost. If the gentlemen wish to make any personal contribution, that is a matter between themselves and the PCC. The PCC needs to understand and avoid in the future the dangers of delegating too much responsibility to one or two parishioners on a sub-committee.

57. The second set of Court costs comprises those necessarily incurred by the Archdeacon at my direction. Normally such costs are treated as Court costs to be borne by the Petitioners: see e.g. Re St Stephen Walbrook [1987] 2 AER 578. One of the difficult aspects of this case which I decided required forensic examination was the way in which the decisions concerning the roofs were reached and, in particular, the respective parts played by the Parish and Mr Cross. In the event, both the Archdeacon and his legal advisers have contributed widely and positively to my determination. Mr Cross' initial refusal to recognise the authority of the Commissary Court or to engage with the Registrar's requests for information contributed to the need to hold a Hearing and for the Archdeacon to be legally represented at it. Accordingly, notwithstanding the usual approach, I make an Order that the Archdeacon's costs of £4,560 be met as to half by the second and third Petitioners (on the understanding, set out above, that the PCC will cover the cost) and as to the other half by Mr Cross.

58. Finally, there remains the question of whether or not I should make any order under s.13(1) of the 1991 Measure in respect of expenses incurred in carrying out any work authorised by the faculty, insofar as expenses have been occasioned by the act or default of any party. The faculty which I propose to grant will authorise the works to the roofs. These proceedings were instituted as a direct result of the acts or defaults of the PCC, Mr Barwick and Mr Cross in, respectively, commissioning and undertaking the works. The parish incurred expense amounting to c.£90,000 paid to Mr Cross in respect of the unlawful works. I have already indicated my reasons for not making any costs awards against the Petitioners personally. I make no Order against them in respect of default expenses for the same reasons. A “*corporate*” expenses order against the Parish would serve no purpose. At the conclusion of the Hearing, I gave all Parties the chance to address me orally then on the questions of costs and expenses and/or to do so after the hearing in writing. Mr Cross alone has taken the opportunity to make written submissions and he and the PCC have submitted financial information. Mr Cross’ submissions rehearse aspects of his role in the history of this matter and I have taken these into account. Nevertheless I have given more weight to his sworn evidence and that of Mr Barwick, which had the advantage of being tested by cross examination. I have set out my factual findings in the earlier parts of this Judgment. Mr Cross also sent me information about his financial situation which I shall not rehearse in detail in this Judgment. Suffice it to say that he invites me to consider the matter on the basis that he is of moderate means, both with regard to capital and income. He also states that the

publicity surrounding these proceedings has had a harmful effect on his business. I accept these points. He claims to have made a profit of less than £4,000 from the contract in issue and he points to the culpability of the original thieves. I take all these matters into account as well as the fact that the parishioners were, to some extent, the authors of their own misfortunes. The PCC will, under the terms of my Order, have to take active steps to address the consequences of their default over the next few years. I consider it fair and proportionate that Mr Cross should make some financial contribution towards that effort. I am glad to say that Mr Cross evidently feels the same, in that he has offered the sum of £5,000. Taking account of the fact that the roofs have been covered as a result of Mr Cross' work for the past fifteen months and may well continue to be covered for a further five years, having regard to his financial circumstances, the absence of previous defaults and the principle of equivalence, I consider this sum to be reasonable in addition to the contribution which Mr Cross must make to the Archdeacon's costs. I shall therefore make Order that Mr Cross pay £5,000 to the PCC within two months of the date of this Judgment.

MORAG ELLIS QC

All Saints Day, 2012