

*In the Consistory Court of the Diocese of Gloucester*

*In the Matter of* EMMANUEL CHURCH, LECKHAMPTON,  
PARISH OF EMMANUEL, CHELTENHAM

B E T W E E N:

*The Rev'd. Jacqueline Rodwell, [Priest in Charge]*

*Janet Crompton-Allison*

*Richard Welch [Church Wardens]*

*Petitioners*

*and*

*Alden Bennett*

*Interested Party*

## **JUDGMENT**

**Chancellor June Rodgers**

1. Emmanuel Church is situated in Fairfield Parade in the suburbs of Cheltenham. It was built in 1936, but merits a short mention in Pevsner as being designed by H. Rainger, and as having some good stained glass. It is a listed Grade 11 church. Its predecessor was an iron church, which burned down in 1916. A rebuilding scheme in the Gothic style was abandoned as being too expensive, and the church was rebuilt in a more economical design. However, many of the fittings from the older building were re-used in the rebuilt church. For

the avoidance of doubt the painting, which is the subject of this Faculty Petition, did not come from the former church, but was a post war gift. This painting is not mentioned in the English Heritage Listed Building Entry for Emmanuel Church.

2. The current church is a light and bright building, rather proud of describing itself as being “art deco” in style. Its churchmanship appears to have varied over the years, judging from the exhibited photographs, which range from a robed choir to the instruments for more modern musical accompaniment to services. For some time the style of worship appears to have developed to a more evangelical style, though that has not always have been the case. It is an active church, rightly priding itself on its outreach into the community, and the Diocese, to which it pays its quota. Under its current Priest in Charge, the Rev’d. Mrs Rodwell, every opportunity is being taken to advance its mission, and to try to meet its financial burdens, with a view to extending/altering its structure to enable yet more missionary and social activity to be offered to the parish. It is a church, as I saw on my visits to it, which has extensive facilities, meeting rooms, a kitchen and space to host numerous meetings for all ages of potential parishioners and local residents and does so with enthusiasm. I have not before had to fight my way into a Consistory Court Directions’ hearing through a children’s party disco, but that gave a very favourable impression of an active church, trying to build up parochial participation. The average congregation is some 40 adults, with 12 under 18s, and with some 50-60 on the Church

Roll. In evidence, the Priest in Charge said that her predecessor in the parish had been of an Anglo Catholic background, not, as at present, Evangelical. She had been able to attract more families, and lower the age range of those attending.

3. It is this enthusiasm which has resulted in the present problems, which, I say, at the outset, could all have been avoided, and, possibly, a better financial outcome achieved for the parish, had they taken time to make proper, or any, enquiries of the relevant Diocesan Authorities, which exist to assist a parish in this situation. What follows in this judgment should be a lesson, not only to clerics, but also to Church Wardens and parishioners, let alone auctioneers or antique dealers, when the sale of something from a Church is being contemplated. This has been re-iterated time and again in various judgments of the Ecclesiastical Courts, let alone in the annual charges of Archdeacons, but, it appears to be being consistently ignored, both by Churches and the Antique trade, so in this judgment I spell out the legal position in as straightforward, non legal terms as I can.

**Any purchaser from a Church of England Church should ensure that the item can be accompanied by the appropriate paper work: namely a Faculty from the Diocesan Chancellor authorising sale of the particular object in question. No other “paper work” from the selling church, its Church Wardens, or its cleric**

**purporting to give permission to sell, is worth the paper it is written on. Again I say, verbal assurances as to the parish's "right" to sell (or give away) what they think is "their" property is totally worthless, and conveys no rights of ownership to any prospective purchaser. "Purchasers" of items from a church, if consecrated in the Church of England, waste their money. They have no legal title to what they have obtained, nor have any subsequent purchasers. Without a Faculty authorising sale, the property which they purport to have bought, still belongs to the church from which it came. One of the Directions I shall give at the conclusion of this judgment is to direct that the various auctioneer trade bodies are circulated with it. That may not cover the free lance purchasers, but "the trade" will, once again be put on notice.**

4. I cannot make this point more clear, as have other Diocesan Chancellors. No item a consecrated building is to be sold or given away or disposed of without a Faculty. No private purchaser or trade purchaser, whether by private sale or auction, on e-bay or the like, obtains good title to any church property without having a Faculty authorising its disposal to the secular world. "Word of mouth", purporting to give permission for any disposal is totally useless. The relevant paper work must be provided by any Church seeking to dispose of something, and that is obtained by applying a Faculty, properly authorising such a disposal. Disposal of any such item without a Faculty is akin to theft of Church

property, and I, as Chancellor of this Diocese, will not hesitate to involve the Police, were it to be necessary, to ensure that any such item is recovered. Indeed, in this particular case, I was on the point of so doing, when its whereabouts of this item became known, and the current “purchaser” was prepared to behave with common sense and decency, having taken, as I understand it, legal advice, by undertaking to hold the painting safe and not to dispose of it until proper investigation, and a decision as to its future could be made. Given what had happened to the painting in the parish, and their attitude to it as set out below, I was of the view that it was safer and better looked after in the hands of a London art dealer pending the outcome of this Faculty application, so that I did not require its immediate return pending the outcome of this Consistory Court. It gives me no pleasure to have had to come to that conclusion.

5. I have no doubt at all that all involved in the attempted disposal of this painting considered that they were acting properly and (in a variety of ways) for the good of Emmanuel Church. They were not in any way being dishonest. Their behaviour was more akin to a driver who causes a crash by driving through a red light, but whose excuse is: ‘I had never bothered to read the Highway Code, and I forgot what I had been told about it, and so I did not know what was the purpose of a red light’.

6. The legal position regarding sale has, clearly and in extensive detail, been set out by Chancellor Bursell in the case of *St Ebbe with Holy Trinity and St Peter Le Bailey, Oxford* (30 June 2011, approved transcript). The Church Wardens sold by auction a rare mediaeval chest and a 17<sup>th</sup> century chest without a Faculty. In that case the Chancellor made it abundantly clear that there is a duty under Canon Law F 13 Paragraph 3 on “the minister and church wardens if any ...removals ...are proposed to be made in the fabric, ornaments or furniture of the church to obtain a faculty before proceeding to execute the same”, and, Paragraph 4 of the same Canon states...“a record of all...removals so executed shall be kept in a book to be provided for the purpose”. Each Church Warden on their admission to office makes a declaration that they will “faithfully and diligently perform the duties of his office”: see Canon E2 Paragraph 2(i). Even the change in location within the Church of this painting should have been recorded.

7. “Why?” I can hear PCCs ask.

8. As Chancellor Bursell made clear: “It is aimed at ensuring that items of church furniture etc are not mislaid out of general sight, and therefore out of mind and appreciation.” He goes on to stress that failure to comply lays “the incumbent open to a complaint under Sections 8 and 10 of the *Clergy Discipline Measure 2003*” (as it then was). The duties on Church Wardens are clearly set out in detail in Paragraph 7 (i)-(viii) of that judgment, which I do not rehearse here again in extenso.

9. There have been various legal authorities which I must and have considered in respect of the sale of church goods. I refer below to them, and the authorities cited therein, which can be read on-line by PCCs, Church Wardens or incumbents who are considering trying to sell an item in their Church. I well appreciate that few members of a struggling PCC of a small parish somewhere in England may not, of a winter evening, choose to read back volumes of the Ecclesiastical Law Journal. So, in desperation, I try in this judgment to set out in non-legal language the position for non lawyers, the rules which bind us (and try to give some help and guidance as to how and what such a PCC should do when faced with this situation). They should remember that they are “plugged in” to the whole Diocesan and national structures of the Church of England for help, guidance and advice. Why pay your quota if you don't get the benefit?

These rules can be summarised simply as follows:-

- The legal possession or custody in the plate, ornaments and other movable goods of the church is vested in the Church Wardens, although the ownership of such goods technically belongs to the parishioners, who temporarily entrust the Church Wardens with these goods
- The Church Wardens cannot dispose of such goods in their custody without a Faculty from their Diocesan Chancellor. This is the golden rule which should be pinned to the wall of every vestry in England

- If the Church Wardens try to dispose of any such item without a Faculty, the property, i.e. the legal title, does not pass to any new purported owner, but remains with the Church Wardens on behalf of the parishioners.
- This is the situation however many subsequent disposals to other “purchasers” there might have been, and whatever the purported terms of each subsequent disposal. Ownership of the property will remain with the parish unless there has been a Faculty authorising sale or other disposal
- The Incumbent and/or the Church Wardens cannot legally sell, for example, this painting (or any other church item) by auction or otherwise, and any “purchaser” acquired nothing by that purported sale. He would not buy a church item with good title, and anyone he tried to sell it on to (without having the security of the original Faculty allowing sale) would be in the same position. Subsequent purchasers, without an authorising Faculty, do not own whatever they have purported to have “bought”.
- Put as simplistically as I can, so that Church Wardens (for whom a number of straight forward inexpensive guide books are available to assist them in their duties, were they to be read) can be under no doubt or illusion, they cannot sell anything without a Faculty (save for trivial



replacements or repairs e.g. hassocks as covered by any de minimis list a particular Diocese might have) In passing here, I note that that some *de minimis* lists which use a financial figure below which a Faculty need not be sought (say, of example, £5,000- £10,000) might well have allowed this painting to slip through the net. One Church Warden's rubbish may be another art dealer's treasure. *De minimis* means just that, little worthless items long past their 'sell by' date; for example, disintegrating moth eaten hassocks or thread bare carpets.

- If in doubt, check before getting rid of an item. At very least the Archdeacon's views should be sought

I have above merely re-stated the very clear legal guidelines from the *St Ebbe's* case. Any second hand car dealer, familiar with car registration documents, would have no difficulty in appreciating this situation. Why should the antique trade, or auction houses, apparently, find this concept so difficult to grasp? **No Faculty allowing sale in the hands of a prospective purchaser means no ownership to that purchaser.** There are, moreover, potentially serious consequences for any Church Warden who ignores or acts in ignorance of his duties. Their Diocesan insurance may not cover acts of misfeasance or negligence in the carrying out of their office. They should pick up a telephone and consult their

Archdeacon or DAC secretary before any sale or permanent removal of an item from a church.

There may be good reasons for the disposal of an item; for example, dire financial need of a parish; inability to afford insurance, or to provide care or security for an item to protect such an item from vandalism. There may be other reasons, but such a need has to be properly scrutinised on behalf of the Diocese by the Chancellor of that Diocese, having heard argument. Dislike of an item, irritation at its presence in a church, or similar feelings are not, in themselves sufficient grounds for disposal. Congregations may change, but some degree of respect towards previous, generous generations, is the least any worshipping congregation should demonstrate; otherwise why should any benefactor give anything to a church, if within a generation, an item, apparently once gratefully received, is considered as to be a candidate for throwing out in a skip.

There is also another important consideration. If a parish have succeeded in making out a case for sale of an item, it is incumbent upon the Parish and the Chancellor, with the assistance of the DAC, to ensure that the best possible price is obtained for such an item, and, if necessary, for the Chancellor to insure that any conditions as to how the proceeds of any such sale are to be applied. In the current case, the Priest in Charge and the Church Wardens of Emmanuel, Cheltenham, did not even make a gesture towards obtaining advice as to what they might do. A telephone call to their Archdeacon or

to the DAC secretary would have put everyone on notice, and a great deal of trouble, expense and (potential) financial loss would have been saved. The parish could have been directed to consult a specialist in the field to advise as to potential value/marketing etc so that a) the Chancellor could gauge just what the item might raise, and, b) whether that potential value was sufficient/too little/too much to justify the reasons for the request to sell it.

Unlike the *St Ebbe's* situation, I have not heard formally here in a Consistory Court from either of the Wardens, for the reasons I set out below, but each has filed a statement. At the Directions' hearing, at which both Church Wardens did attend, I made it clear that they had to be, or to become, clearly aware of their duties. I felt it necessary to provide them with some written guidance for their perusal. I will return to their actions below when I set out the history of this matter

10. The reasons for these rules can be seen below, although it is right to say that at least one of the Church Wardens of Emmanuel, at the Directions' hearing appeared to find it totally inexplicable as to why the PCC could not just get rid of a painting which was completely and utterly unacceptable to the body of worshippers whom they, as Church Wardens, represented. It was made clear to me at the Directions' Hearing that had it been what some Victorians would have doubtless described as a heathen idol, it could not have been less welcome in the current worshipping climate of Emmanuel Church than this 19<sup>th</sup> century painting of the Virgin and Child.

I print out below in this judgment a colour reproduction of the painting so that what was being objected to can be clearly seen.

11. However, any Diocese has to oversee all the items within its overall care. These items, often the gift of benefactors from previous generations, form part of the parish life, the heritage of a local community and may be of national heritage importance. This point has been stressed by the Church Buildings Council (and I will refer to their stance as to “Church Treasures” in greater detail later in this judgment). Does that mean that all contents of a Church are to be retained for ever, and never sold? Must this include the worn out carpet? The moth-eaten hassocks? The irrevocably bat-stained altar cloths? But what of something of far greater value which a Church may have in its possession?
  
12. Once a PCC has decided that they would wish to apply properly for a Faculty to sell an item, they then, I am afraid, face further legal hurdles to surmount. These have been clearly set out in the recent Court of Arches decision of *In Re St Lawrence, Oakley with Wooton St Lawrence* [14<sup>th</sup> April 2014, approved transcript]. I shall refer to the test set out in that authority below, when I consider Emmanuel’s reasons for a sale, now that they have got round to making this application for a Faculty.
  
13. What happened in Emmanuel Church is a text book example of how not to go about trying to sell an item from a Church.

It has been disastrous, and the parish may have lost far more than they might have gained, before even considering the costs of a Consistory Court. Yet this is a parish whose Church Wardens, the Archdeacon informed me in evidence, had regularly attended the annual visitation charge to Church Wardens by the Archdeacons on their duties and responsibilities. All they would then have heard appears to have gone in one ear and out the other. I repeat, Church Wardens must be aware that such insurance cover they have for their actions in caring for Church property may not be valid for their acts of misfeasance and dereliction of duty. They might be individually financially at risk for their actions. Again, a little common sense and thought would remove them from risk. A telephone call to the Archdeacon or to the DAC secretary would have stopped them going off on a frolic of their own. I set out below what appears to have happened, which stems, at least initially, less from a pressing need for money, as from a vituperative dislike of the object in question. All parishes, in my experience, can suddenly find very pressing use for a large cheque to be spent, once it is in hand. However, here the money followed the visceral desire to get rid of what the Priest in Charge designated in e-mail traffic as “that picture” or “she”. This was a painting by the German 19th century Nazarene painter, Franz Ittenbach. I turn now to the facts of this particular case.

#### **14. THE HISTORY OF THE MATTER.**

In the light of an emergency Directions’ hearing I held on 15<sup>th</sup> February 2014, following an initial enquiry by the Archdeacon

of Cheltenham on 15<sup>th</sup> January 2014, to ascertain just where the picture was, and, how it had got there, which was attended, on behalf of the Parish, by the Priest in Charge and the two Church Wardens. In the light of the evidence I heard then, and from subsequent documents later produced, and because of the position held by the “purchaser”, and, following the Parish’s formal application for a Faculty made on 27<sup>th</sup> January 2014, I held a Consistory Court on 20<sup>th</sup> June 2014. By then, the DAC had agreed to recommend that the sale of the painting be allowed. At this Court, neither Church Warden attended. One was on holiday with a sick wife, and the other found herself unable to attend by reason of work. The Parties were offered alternative dates, and the working Church Warden was offered an opportunity to be given a “timed slot” to appear. This was not taken up. Also, I was informed that the absent Church Wardens were to be represented by a fully informed member of the PCC. No such member appeared, and the heat and burden of the day fell on the Priest in Charge. The working Church Warden did subsequently file a four line statement:-

***“...although it is now clear that we did not follow the appropriate course of action, for which we are truly sorry, this is not how the situation started. We genuinely believed that we were following the correct procedure and thought we were acting responsibly on behalf of the church”***

That is all.

Apart from a PCC resolution purporting to authorise sale, I can see no thought had been given at all, save by the other Church Warden, to even considering what “correct procedure” should have been followed, let alone the effect of non-compliance with those duties, whatever they might be. So concerned was I that, at the Directions’ hearing, I gave the Church Wardens a short written guide as to their duties.

Nevertheless, from all these hearings I have tried to piece together what appears to have happened.

15. In or about 1949 the relatives of a local couple, then deceased, appear to have been clearing their family home. Among the items they had was a painting. This was a work by Franz Ittenbach, a 19<sup>th</sup> century German Nazarene painter; of a Madonna and Child. Ittenbach (1813-1879) was a painter associated with the Dusseldorf school, which school had an influence on the Hudson River School in the United States of America and the English Pre-Raphaelites. He travelled to Italy and became a member of the Nazarene movement. Exceedingly religious, he refused to paint mythological or pagan subjects, but required his religious work to be preceded by devout religious exercises. Much of his work is to be found in churches in Germany, in the palace of Prince of Liechtenstein in Vienna, and in other private collections, including the Royal Collection at Windsor. His work can be found in the Boston Museum of Fine Art, and one of his religious paintings was purchased by the Minneapolis of Arts. A painting by him of “The Holy Family” was sold in 2000 at

Sotheby's New York for \$64,000. Mr Bennett, the "purchaser", provided the Court with more recent prices obtained for the work of this artist.; one sold from a private collection in 2009 for €43,750, and another in 2010 for €27,500. Without further details of condition etc, it is difficult to make any accurate or fair comparison with the Emmanuel Church painting. However, a ten minute search on Google would have shown the Church Wardens just what they potentially had. The painter was openly and clearly identified so that some enquiries could have been made. Emmanuel Church, Cheltenham, however, placed their Ittenbach painting in the choir vestry lumber room, preparatory to throwing it out.

It is not without interest that by the time the purported sale by Emmanuel had come to light, Wikipedia had included a note "*one (of his paintings), depicting Mary Queen of Heaven (of unknown date) was sold by a Cheltenham (England) Anglican Church in 2013.*"

The family of the deceased Mr. & Mrs. Bolland gave this painting to the church. The plaque which accompanied the painting reads: "***This painting by Ittenbach, 1872, was given to the Glory of God in memory of Thomas Bolland, 24<sup>th</sup> November 1946 and Emily Farquhar Bolland, 19<sup>th</sup> November 1949 R.I.P.***" One of the Church Wardens has made efforts to trace descendants of that family, not for reasons of a Faculty application, but because of the purchaser's request for "provenance". None can be found locally, but they appear to have had American/Argentinean connections, but nothing more can be found. In any event, it appears that the



painting was given, and accepted, as an outright gift to the Church. No evidence of a Faculty for its introduction to the church has been produced. However, I am satisfied that this painting was an outright gift to the Church, and does not belong to the donating family or their heirs. It was given away as an outright gift, and so accepted by the church. It is unclear as to where it was first hung, but for a considerable time it had been hung on the west wall of a side chapel to the south of the chancel arch, visible only to the presiding priest, and invisible to the congregation. To quote the Priest in Charge to the Archdeacon on being questioned in January 2014 about what had occurred:-

***“The only information I have about the history of this painting comes from two sources, one, the plaque on the wall of which you have a transcription, and the other a vague memory in someone’s mind that they heard it was given and put on the wall that it is.... it was put on the wall because it was deemed to be theologically inappropriate for the church, so it was placed in a position where nobody in the church would see it, apart from the presiding priest in the side chapel”....“Nobody remembers the family at all ...there is no local recollection, there is nobody local with that name [i.e. the donors’ name] ...any attempt to find anyone came up with nothing”***

It then was moved in or about 2013 from that wall to accommodate a junction box, to leaning against a wall the

vestry, and, then to the choir vestry, a room described as being the “*clutter gathering space*”, and then into the vestry. There was some confusion as to just where it had been moved to and when and there were differing versions; all indicative of the carelessness and lack of interest shown to it. Again, this kind of internal movement should have been documented to avoid just this situation developing. This was done because new wiring was necessary for an AV system. The original Faculty was altered by the DAC, as asbestos had necessitated a minor re-routing of trunking. The Parish appears not to have mentioned the position, let alone the existence of the painting when the new trunking was being discussed. The space where the picture had hung was thereafter taken up by a new junction box. The painting could not be returned to its former position. The painting’s move to the former choir vestry junk store was not mentioned, nor noticed. No-one appeared to realise what the painting was, nor did anyone do any research on the painter.

To quote again from the Rev’d. Mrs Rodwell: “*...the person who likes to do blitzing was complaining about the mess, and the bits left over from the trunking, and all the rest of it, and the picture was in the way*”. There then followed some conversations between the Priest in Charge and, apparently other PCC members, about what to do with the painting. “*The proposal was that we just chuck it out with all the rest of the junk and then bright ideas here thought, {by which I think she means herself} well we might get some money for it*”.

No-one appeared to have considered whether the local museum/art gallery, with its special interest in the Cotswold Arts and Crafts movement, might be prepared to display it on loan. No-one saw fit to enquire as to whether another church in the Diocese might have given it a good home. No-one appeared to think it could have been at least used as a teaching tool for children as an introduction to their European art heritage, or, as to the history of religious observance. Nothing like that appeared to have entered the consideration of this parish. It did not seem to them to be modern, relevant or related in any way to their own current religious practices. No-one showed it any interest at all. In fact, it was actively disliked. I was told that it was antipathetic to the worship in this church; it seemed to them to be a “Roman Catholic” item. They wanted rid of it. They decided it had to go.

The Priest in Charge said that she knew about faculties regarding church building, but that: “ *At no time in my experience as an ordinand, curate, or vicar have I ever been aware of anyone telling me that I need a Faculty to sell an item of church property.*”

The news items, for instance on the sale of mediaeval chest by St Ebbe’s in Oxford, which have appeared in the ecclesiastical, not to mention secular, newspapers appeared to have passed her by.

She did not know where her Church’s terrier (inventory) was kept. To the Archdeacon, the Priest in Charge was muddled and, at times, mistaken in her evidence of events, as was later seen from a reading of contemporary e-mails and documents.

It appears, as I have said, that the painting may actually have been put on a skip. The Priest in Charge admitted to the Archdeacon that the proposal initially was “*to just put it on a skip*”...“*yes get rid of it*”. This was denied, somewhat evasively, when I asked the Priest in Charge and the Church Wardens at the Directions’ hearing. In the event, someone, when it was on the point of being thrown out into a skip, did question as to whether it might have a few pounds value. Given the plethora of television programmes about auctions and treasures in the attic, I suppose I must be grateful that some kind of warning bell was rung.

However, worse was to come.

16. On 1<sup>st</sup> July 2013 the Priest in Charge wrote, in terms I quote, to the Church Wardens as follows:-

*“Elaine {a member of the PCC Standing Committee} reliably informs me that the Madonna and child was hung ‘out of sight’ on the wall of the chapel because it shows Mary as ‘Queen of Heaven’ and would have offended many in the church had she been on plain view. She suggests (hoorah!) that we sell the picture to someone who thinks that Mary is the Queen of Heaven (my words not hers) and who would appreciate having it.”*

With a rare moment of sense in this history, Mr Welch, one of the Church Wardens, replied: “Personally I’m in favour:

1. Is it one of the many items in the building given in memory of someone? If so, is there a family to consider?
2. Might we need a Faculty to dispose of it? ( I suspect not, but a word with Archdeacon Robert might be appropriate)
3. Should it be valued independently, or, indeed, be put up for auction? I have no idea of its value. Perhaps every female citizen is a Queen of Heaven, without any distinction of status?”

Had the PCC and Priest in Charge followed up these sensible questions raised by one of the Church Wardens, much difficulty could have been avoided. That said, the Church Wardens themselves have a duty to act and follow up their own concerns.

The Priest in Charge e-mailed in reply to say that as far as she knew there is no contact with those who donated, that only if it was on the inventory would there be need for a Faculty and “a quiet word can readily be achieved” but that a valuation was definitely a good idea.

However, at least they decided to make some enquiries as to potential valuation They had heard of a local church who **with a Faculty** had disposed of a painting. On enquiry, that Church recommended Chorley’s, a local Auctioneers firm in Prinknash, Gloucestershire. I pause here to note that these Church Wardens and the PCC Standing Committee, appear to have heard the terms “Faculty” mentioned in respect of a sale

of item from a Church, but still they did nothing to do likewise, or to make any enquiries. This Church properly pays its Diocesan quota, which *inter alia* provides the kind of service and advice through the DAC to assist and advise parishes in this kind of situation. Even from a basic approach of “getting one’s money’s worth of quota payment”, I am surprised that no enquiries were made

17. A local auctioneer was approached by the Priest in Charge and asked about the painting. Had matters paused there, all might have been well. What should have been done?

For the avoidance of doubt I set out just what a prudent incumbent, Church Wardens and PCC should have done:

- The parish should have put the diocesan authorities on notice of their potential “plans” for this painting, together with their reasons for wanting to do so e.g. financial pressure, security costs or whatever.
- A proper valuation could have been obtained from experts in the field of 19<sup>th</sup> century German painting. In evidence, it was later urged on me by the witness for the CBC that three separate valuations should have been obtained. With hindsight, that appears to me to be a sensible and prudent course of action for any PCC wishing to sell something of potential value to take. That way, its potential real worth may at least have a

sporting chance of being spotted, and the legal duties on the Church Wardens adequately covered. If the parish, then on notice as to the value of what they had got, still wanted to sell, they could then have made an application for a Faculty for sale and in accordance with the legal tests which I set out below sought to justify their “need” for the money.

- Or, they might then consider whether a local museum or another church might have been interested in their painting
- The statutory bodies would have been put on notice
- A formal hearing could have come to a decision as to whether there should have been a sale or not
- If the painting was to have been sold, expert opinion could have been taken as to how and where it should have been sold e.g. in a specialist auction for this kind of work to obtain as good a price as possible
- The Chancellor could have decided whether there should be any terms or conditions placed on the sale proceeds.

## **18. WHAT DID HAPPEN?**

As I have said this painting languished in the Church at which, by chance it had arrived in. I say, at the outset, that this

situation is a different one from many churches, which have, for example, a piece of Armour or Communion plate which has been in the Church's keeping for centuries, the gift or loan of a local family, or having national historic connections with the Church. Here, it seems, and dates are approximate, that it came to the Emmanuel church in or about 1949, so relatively recently by way of what might be described as a windfall. Within a life time, all memory of the donors' family has vanished in Emmanuel Church. Having obtained the name of a local auction house, Chorley's, the Priest in Charge contacted Mr John Harvey of that establishment to make some enquiries as to valuation of the painting. Mr Harvey visited the church for a view of the painting on 17<sup>th</sup> July 2013. He came out to see the painting, which by then: ***“had been taken out of the general junk pile and put in the [church office]”***. Again I quote from the Priest- in- Charge: ***“He looked at it and poked around and said: ‘Yes, I think there is a market for this sort of thing’. He sort of guesstimated something about £1,000 for its value, this is all a verbal conversation...he said things along the lines of ‘I think there is some sort of market, probably in Italy or Germany, so I’ll take some photographs. I’ll go and do a bit of research and then I’ll come back to you”***.

That evening the Priest in Charge e-mailed the two Church Wardens and three others of the PC as Follows:-

***“Hi folks***

***‘She’ [sic] was valued this evening by John Harvey from Chorley’s, Prinknash, at around £1,000. He says there is a***



***market for this style of painting in Germany and Italy and sees no reason why it shouldn't sell. Their commission is 15%.***

***We now need to speak to the Archdeacon to seek permission to sell her. Can I suggest this is done informally by telephone in the first instance?"***

That telephone call was never made. In January 2014 the Priest in Charge emailed the DAC secretary to explain why not: ***"None of us got round to actioning this- I think we each assumed that someone else had done it" Then the summer holidays took over and it went completely off the radar"***.

The Rev'd. Mrs. Rodwell agreed that a Church Warden had checked the terrier, which she did not know initially where it was, but the painting was not on it. It later transpired that the painting was indeed, entered in the terrier, the current 1999 terrier. An earlier inventory, now in the Diocesan archives, appears to have been typed in 1938 (when the painting was not in the Church), but the painting's existence is referred to in a later hand written note as follows:- ***" a painting given to the church by the late M\*\*(unclear) Bolland 1946"***. The accompanying plaque speaks of the late Mr. and Mrs. Bolland. He died in 1946 and she in 1949, so the entry is unclear as to details.

Mr Harvey returned to his office to do further researches as to just what the painting might fetch. Within a matter of days, 18<sup>th</sup> July 2013, he wrote formally to the Priest in Charge,

revising his valuation upwards to some £3,000 - £4,000, and setting out his firm's terms and conditions, were the painting to be auctioned through them. However, reputable this auction house may be, it would seem that they lacked the experience in the sale of this kind of specialist painting to give an accurate estimate. However, I accept that this kind of painting has a very specialist market, and the hammer price of rare sales of this artist can be notoriously difficult to predict, especially if there may be a private collector market to consider as well. All the more reason for obtaining at least two other valuations, and seeking further expert advice. Nevertheless, the amount quoted was sufficient to go to the heads of the PCC of Emmanuel. Given the ultimate sale at £20,000 being described as an "extraordinary and unexpected amount", the possibility of even £3,000 - £4,000 thrilled them. Little did they realise that had they enlisted the help of the DAC, specialist advice could have been obtained to see if better price might be potentially available.

***The Rev'd. Mrs Rodwell denied that the term "faculty" had been mentioned, and also said that she had absolutely no idea that she had ever been told that one needed a Faculty to sell an item of church property. This conflicts with the earlier e-mails and discussions I have referred to above.***

When a potential figure of £1,000 was initially mentioned, the Church's PCC Standing Committee was contacted by e-mail, and, it seems, agreed in principle to proceedings with a

potential sale. Chorleys sent their “terms and conditions document” and details of a reserve price, handling fee etc..

At a meeting held with the Archdeacon and the DAC secretary (once they had been made aware of the sale) the Rev'd. Mrs Rodwell was absolute in her denial that the auctioneer had never asked whether a Faculty was necessary. This was later contradicted by Mr Harvey. In his e-mail of 10<sup>th</sup> January 2014 he wrote :- *“I dealt with the vendor, the vicar of this church, and during our conversation I asked if their [sic] was a Faculty agreement to sell the picture I was told it was not needed in this case”*. In the Consistory Court, he could not remember if he had used the word “Faculty”, but he was sure he had asked if the Church had “permission” to sell. He had worked for a substantial period of time at Sotheby's, in the course of which employment the firm had more than once, very properly, warned its employees of the importance of this. This bears out the importance of auctioneers or other potential purchasers ensuring that they have the proper authorising Faculty in their hands before sale. On the pre -sale documents the Priest in Charge signed on behalf of the Church Wardens, below the declaration:

“I confirm I have the right to sell the items listed, either as owner or as agent for the owner. I understand commission rates and other charges detailed above and I agree to be bound by the financial conditions of sale”.

That declaration was wrong.

By now having been told that the painting might be worth some £3/4,000, the matter was formally raised at a PCC meeting on 12<sup>th</sup> September 2013, and the PCC unanimously

agreed that it should be sold. The PCC formally agreed to Chorley's conditions of sale and agreed to seek advice as to any reserve price. The auctioneer's commission was said to be 10%, plus 1.5% to cover loss and damage, and a £20 fee for illustration in their sales catalogue. It was then entered into Chorley's, the auctioneer's catalogue for the October 2013 sale. The paper work in respect of this was fairly basic. An undated sale entry form notes under "personal details" that the Church Wardens are the contact point. The terms of commission and other costs were set out. In pencil appears the note "More paper work to follow". No further paper work was produced for me. The Priest in Charge and the PCC appeared to have thought that once they had agreed to selling the painting, that was all that was required. On 16th September 2013, the document authorising the sale was signed by the Rev'd. Mrs Rodwell on behalf of the Church Wardens, although the painting had been collected by the auctioneer on 15<sup>th</sup> September 2013, with a reserve of £3,000 which the auction house was permitted to lower if there was not much interest.

The painting was placed in the Chorley's catalogue of sale on 28<sup>th</sup> October 2013, a sale described as covering: "The age of Oak and Walnut, Fine Jewellery, Art and Antiques".

## 19. THE PAINTING

The description of Lot 225 in the catalogue reads:-

**"Franz Ittenbach (1813-1879) Mother of the World/the Virgin Mary and Christ Child enthroned/dome topped oil**

**on a tooled gilt ground on a panel within a fine jewelled gilt frame/oil on panel , 99cm x 57cm (39" x 22.5").**

In the pre sale advice sent to the Rev'd. Mrs. Rodwell, Chorley's had estimated £3,000-£4,000 as a possible price. These figures appeared on the catalogue, and the painting itself merited a photograph which I reproduce below (as one of the Parish's objections to the painting is that the frame is not suitable for the church).

**Monday, 28 October, 2013**

**The Age of Oak & Walnut, Fine Jewellery, Art &  
Antiques**

Sale Results



It was widely advertised by catalogue and on the internet. It was sold at that auction for a **hammer price of £20,000** to a

London dealer, Mr Alden Bennett. Having heard evidence from both the auctioneer and the “purchaser”, I am wholly satisfied that this was a *bona fide* sale, and no ring or under bidding was involved. Mr Bennett, a free lance dealer, not a current member of any of the recognised trade bodies, “purchased”. However, Mr. Bennett kept a careful eye on upcoming auctions. He had visited Messrs Chorley’s sale rooms before the sale to inspect the painting. He was impressed and thought that the catalogue estimate would allow, even after some restoration, for a profitable onward sale. He was a telephone bidder. Mr Harvey was firm in his evidence that, by the use of the internet and good marketing, local auction houses could compete on a national, or even an international market. The bidding, in person and by telephone, for this picture was brisk. Mr Bennett “bought” it, I accept, in good faith. He has since spent in excess of an initial £4,400 restoring it. It has subsequently had another £1,000 spent on reinforcing the stretch. So before any profit is made by him by onward selling, he has spent in excess of £29,000 including restoration costs and purchaser’s premium.

At their 21<sup>st</sup> November 2013 PCC meeting, the sale of the painting was reported, and it was hoped that they would receive, after deductions, some £17,234. (In fact, the final figure appears to have some £400 higher). The PCC decided to use some of that money to increasing to £2,000 each their giving to two charities already supported by them, namely the Rock and the Diocese of Tanganyika’s Women’s Empowerment Project, but that £15,000 should be ring-fenced for the flat roof repairs, and any left over should be

held for future charitable giving. After commission, the parish received £17,635 (it is right to say that there appears to be some doubt about the final figure and written/oral evidence conflicts even on this) and after the above deductions they placed the remainder of the money in the PCC Account, with a view to using that money as a designated fund towards re-roofing the flat roof over the church meeting rooms. Following my direction, the spending of those moneys was embargoed pending the outcome of this hearing. On 9<sup>th</sup> December 2013, the “purchaser” contacted Emmanuel Church, seeking further information, to provide more detailed provenance, not that the parish had much detail themselves.

20. Completely by chance, the Archdeacon of Cheltenham was visiting the Church in December 2013, and was told, for the first time of the sale of the painting, and the money the church had received from it and what the parish plans were to spend the money. This came as a total, and rather horrid, surprise to the Archdeacon. Immediate efforts were put in hand to trace where the painting was, and whether or not it had left the country. On 23<sup>rd</sup> December 2013, the Archdeacon requested from the parish full details of just what had occurred, which request was answered by e-mail just after Christmas. The Secretary of the DAC was in contact with the Auctioneers. Mr Harvey assured her, by email on 10<sup>th</sup> January 2014, as I have set out above, that he had: **“dealt with the Vendor, the vicar of this church, and, during our conversation, I asked if their [sic] was a faculty agreement to sell the picture. I was told it was not needed in this case.”**



During early January 2014, various enquiries were conducted as to the above history, and checking the insurance position. In the event, once the history of the matter became known there was little evidential dispute as to what had happened.

On 27<sup>th</sup> January 2014, the PCC at last applied for a confirmatory Faculty, in effect a retrospective Faculty, and it is that which came before me. On 7<sup>th</sup> March 2014, the DAC unanimously agreed to recommend a sale. By then, the Diocesan Registrar had been in touch with the purported purchaser, who had, of course earlier identified himself by his letter of enquiry as to the painting's provenance. The auction house had not identified him by reason of their client confidentiality code. Of that attitude, the Police, had they had to make any enquiry, might have taken a different view. However, as I have said, Mr Alden Bennett took a pragmatic and sensible approach. He gave an undertaking as to his safe keeping of the painting pending the outcome of this matter, not to sell it and to keep it safe. He had by then paid not only £20,000 to purchase the painting, but also the auctioneers' premium of £4,200 plus as I have said, in excess of £4,000 to its restoration. Given he wanted, perfectly properly to try to sell it at a profit, one begins to get some kind of idea what it might be worth. One of the reasons I was prepared to leave the painting in Mr. Bennett's care, subject to his undertaking, was the questions the Priest in Charge had asked the Archdeacon, apparently emanating from her parishioners. She made it clear that a profit motive had not been their initial reason for getting rid of the painting: "***because it would have ended up by the bins***". When the Archdeacon had

explained that irrespective of its value, 10p or a million pounds, they needed a Faculty to remove it, the Priest in Charge then said: ***“so we are allowed to leave it in the organ loft to rot....for people to find in 500 years when the church is pulled down”***. The response of one of the Church Wardens at the Direction’s hearing also caused me concern that, were it to be returned to the church, it could well be “damaged”, so intense appeared to be the apparent theological dislike of the “that painting”, under which title the Priest in Charge had filed the relevant documents in her computer file.

## **21. THE CONSISTORY COURT –evidence & submissions**

At the Consistory Court, the Petitioners, being the Rev’d. Mrs Rodwell and the Church Wardens, sought retrospective permission for sale. The “purchaser” Mr Bennett, represented by Mr Mitchell of Counsel, supported this Petition. The DAC were also in favour of the Petition. It was opposed by the Church Buildings Council, whose witness was Dr Pedro Gaspar. By this stage the CBC had become formally involved, under the *Faculty Jurisdiction Rules* 2013 s 8.6(1) and had objected.

Their Divisional Officer, Diane Coulter, had written on 11<sup>th</sup> March 2014, having had notice of the Petition for sale, and visited the Church. The written objections to a sale were as follows:-

- ***The sale price exceeding the estimate by 500%***
- ***The rarity of the artist’s work in England***

- *The parish had failed to understand their responsibilities for the items in its care and listed in its inventory. While the discovery of asbestos ...was unfortunate, the Council felt that hasty decisions to complete the upgrade of the AV system were made during the incumbent's absence; considered decisions might have resulted in the retention of the painting*

I have already explained how the original AV Faculty had been amended by the DAC because of the asbestos problem, but that the very existence of the painting had not been drawn to their attention. This point was not further relied on at the Consistory Court on behalf of the Church Buildings Council.

- *They were concerned that the auction house...was not alert to potential ownership issues when the parish approached it with a view to sell and failed to appreciate that without evidence of a Faculty it should not have accepted the item*

I agree and have dealt with that point above in this judgment

- *A link with the Church has been established; despite no known connection with Emmanuel, the fact remains that the Bolland family choose to donate the painting rather than to St Peter's, the neighbouring church*

Yes, but I find that the connection is tenuous and relatively recent. This gift of the painting came to the church almost as

a windfall. It had and has absolutely no long standing historic connection with the Church or the parish. I was concerned with the insistence in Dr Gaspar's evidence that anything which came into a Church should remain there as it is part of its history. I appreciated the point he was making, but the degree of purity of his and the Church Buildings Council's views went beyond a rational analysis of the *Re St Lawrence, Oakley with Wootton St Lawrence* case, on which he much relied. It cannot be right that, as he sought to argue, anything once in a church should remain, unless there were to be firm reasons for its removal. A Victorian stove may represent decades of the history of a Church's heating, but (for proper reasons) can it not be removed?

- *The parish's primary driver appears to have been redundancy; the Council suggested that the parish should be able to accommodate items belonging to a different churchmanship.*

However irenic and idealistic that suggestion may have appeared to the Church Buildings Council in London, the approach of the Parish of Emmanuel gave me no hope or expectation that such a courtesy would be extended to this painting were it to be returned.

At the Consistory Court, the history of the matter was set out as above.

The Priest in Charge gave evidence that, apart from the ring-fenced sale money, the parish had reserves only of some

£4,500, and “had no idea” where they would get any money from to pay the additional cost which would be occasioned by having to repay Mr Bennett, let alone the costs of the Faculty. It is right to say that in evidence Mr Harvey on behalf of Chorley’s, said that his firm would refund the tax and commission to Mr Bennett if they had to, as, with hindsight, Chorley’s should have done more to ensure that the vendors had a right to sell the painting. The Rev’d. Mrs Rodwell stressed the need to repair a leaking roof, and the immense problems caused by the finding of asbestos in the roof space, which had had to be sealed because of that, thus inhibiting any further work until that can be dealt with. They had had quotes for the asbestos work alone at some £25,000 plus VAT. The total cost was estimated to be some £60,000 over the next 3 years, though it seems that this figure may have included a wish list as well as absolutely necessary expenditure. However, the meeting room roof is leaking, and will need to be repaired in the next 2/3 years. There is an estimate of £24,258 plus VAT for that. The nave chairs need to be replaced at some £30,000. Again, the financial evidence as to the church’s financial need was muddled and unclear, save that there was a very real problem about the asbestos, and the restricting effect on future work if this were not to be done. Without that being removed from the roof space, additional works could not be done. Previous work in the church had been done only because of a large one-off legacy and a loan from the Diocesan Board of Finance.

I heard in evidence from Dr Paul Gaspar, a senior conservation officer with the Church Buildings Council (CBC). On behalf of that body he expressed their concerns about the disposal of “treasures from churches”. He defined “treasures” as being “***objects in a church building which have historic significance or an artistic or social link***”. The response of the Rev’d. Mrs Rodwell to this is to state: “ ***...I believe that any consideration of retaining the painting as a church treasure (if indeed it can properly be regarded as such) are far outweighed by the pastoral and missionary needs of the church***”.

Dr Gaspar placed great stress on the *Re St Lawrence, Oakley with Wootton St Lawrence* case. He explained that following a reference to the CBC after the parish had applied for a Faculty, Diane Coulter of the CBC had visited the church, and the matter, because it involved a potential sale, had been on the agenda of the CBC meeting on 5<sup>th</sup> March 2014. Following that meeting, the CBC had written on 11<sup>th</sup> March 2014 through Diane Coulter, as I have set out above, to object to any sale, but hoping the painting might be offered to another church.

These concerns were amplified by Anne Sloman, the Chairman of the CBC, by way of an e-mail of 17<sup>th</sup> June 2014 to the Court. She re-iterated the views already expressed by Miss Coulter, but urged the Court to consider the guidance laid down by the Court of Arches in *Re St Lawrence, Oakley with Wootton St Lawrence*, namely a strong presumption against sale unless there are sufficiently compelling grounds to

**outweigh that presumption.** In his evidence, Dr Gaspar stressed that the CBC considered that this painting was a treasure, that it should have been offered to a museum on loan and that a sale should be the last resort. He was adamant that parishes “were tenacious” in fund raising, if they needed money, and that the CBC had given £500,000 in conservation grants in the last year alone. (I note that Emmanuel’s stated needs would take up a significant amount of those annual moneys, needed for all the Church of England’s church needs). On behalf of the CBC, he was not in a position to offer this Court any hard cash to help the parish, nor to indicate any museum which might buy the painting.

What concerned me in Dr Gaspar’s evidence was his insistence that there was a special link between the painting and the church. He said :-

***“The treasure has been in the church for a considerable period. There is a special link between the painting and the church”.***

I was unconvinced that merely being in a church for upwards of 60 odd years, unused and ignored, could give rise to a “special link”.

In respect of the parish’s dislike of the painting, he said:-

***“It is sad. I hope that the parish’s attitude to the painting would change in time. The painting has been in the parish for decades, and there must have been some appreciation at some time. Times change and there is no guarantee that the painting will not be appreciated in the future for its artistic merits which it certainly has ...”*** He accepted that the use of the word ‘treasure’ was subjective, which might be unconnected with its actual sale value.. ***“There could be items of huge value which could not be sold because of their significance ...whether something is a treasure is not connected to its monetary value but to whether it has historical or artistic merit”.***

In respect of any financial need of a church for a sale he said: ***“for the CBC to be persuaded that a sale is required, the need for repairs would have to be urgent and fund raising would have to be tried already”.*** I pause here to note that this Parish has had to raise substantial moneys for its kitchen and other works already, but only by a legacy and a diocesan loan. He considered that the Parish, even if they could not learn to love the painting, could ***“come to appreciate the artistic merit and churchmanship of the painting.”***

Given the evidence I had already heard on behalf of the parish, this seemed to be a totally unobtainable counsel of perfection. Dr Gaspar was, properly, pressed time and again in examination as to whether a sale could ever take place. His response was that there was a presumption against sale, and that was the position of the CBC, and that the Parish should



learn to love the painting or, if no alternative, loan/sell it to another church or museum. He was firm in the view: “***that artistic value is permanent and the parish liking the picture or not is transient***”. He then went on to say, when asked about the potentially disastrous financial effects on the parish if the painting is not sold (The Archdeacon’s evidence to the Court was that, given the costs of repayment and of the legal proceedings, the parish might well face insolvency if the sale was not allowed): “***The CBC’s remit is not to advise on the proposition***”. In answer to the question asked by the Archdeacon of Cheltenham on the financial effect of there being no sale, Dr Gaspar said that the CBC’s role was: “***not to consider the financial consequences...the impact on the parish is not within the CBC’s remit***”.

I could well understand Dr Gaspar’s formidable efforts to protect and justify the CBC’s approach, but the CBC is but an arm of the wider Church of England, and I was left with the unhappy view that the purity of their efforts to support one aspect, namely fixtures and furnishings, could be regarded as unbalanced and unrealistic to a struggling parish. The fixity of the CBC’s attitude may well discourage a struggling parish from applying to sell something which is their only financial lifeline. The financial realities of need, to any Chancellor facing an Petition for sale, have to be a major factor, and the apparent refusal of the CBC to grapple with this and advise a Chancellor as to apt degree of significance a particular item has, as distinct from appearing to support what begins to appear as almost a blanket ban, do not help and are unrealistic.

In answer to questions asked by the Archdeacon of Cheltenham, Dr Gaspar had to agree that the mission and ministry of the Church of England did apply to the CBC, ***“but it had to be balanced with protecting buildings...but there was no CBC guidance as to evangelism at present”***. He relied without deviation on the published CBC view; the CBC Note can be summarised as follows: church treasures should be removed only in the most exceptional circumstances. I have considered the Guidance Note on treasures with care, and weigh carefully in mind their recommendations. I am especially concerned about the need to try to avoid such treasures, if they are to be sold, leaving the United Kingdom; another reason why any initial Faculty can impose conditions as to where and to whom a sale can take place.

As Chancellor I was left, gloomily, listening to an argument from two valid points of views, each, unwilling or incapable, of accepting the other’s point of view. It re-enforced the difficulty that the initial failure to apply for a Faculty, where the advice of the CBC as to potential disposal by way of, for example, museum sale could have been worked through, had resulted in financial catastrophe for the parish unless a sale took place. Yet a sale might have been achieved in a way to mollify the views of the CBC, had the matter been properly presented by the parish at an early stage. This parish had “jumped the gun” by selling at auction without discussion. I do not hold that their actions were a deliberate attempt to flout the system, but their actions resulted in difficulty across

the board: for themselves, for the Diocese, for the auction house, for the CBC, and for the “purchaser”.

Mr. Bennett gave evidence as to the history of his involvement which I have set out above. He had never heard of a “Faculty” until he had had to look it up on the internet when this situation was drawn to his attention. He had been a member of a professional trade body but had given it up as being too expensive. He gave evidence as to his prospective sale plans for the now restored picture, and what had been done by way of restoration, and the potentially adverse effect of its recent history on any potential sale price. Any delay to obtain a potential sale to a museum would have to allow for the loss of profit margin which Mr Bennett would have hoped to achieve; on his evidence, he would have hoped to sell without further auction premium for at least £40,000 to a private collector.

The Archdeacon of Cheltenham gave evidence to the Court as to his involvement with the history of the matter, as I have set out above. He took strong issue with the CBC’s position as set out by Dr Gaspar and to the CBS’s application here of the *Re St Lawrence, Oakley with Wootton St Lawrence* test. He argued that there was no significant link between this church and the painting, or indeed with Cheltenham. He was very concerned that the CBC, an arm of the Church of England, appeared to be ignoring the requisite importance of mission and ministry in the church. He said: “*The CBC seems passionately committed to its church treasures campaign with a one*

***size fits all approach. I think this is too big a sledge hammer for this nut”.***

He was concerned about the costs, whether or not there was a sale. Either way Emmanuel Church lost out, but no sale would be absolutely disastrous for the parish. If they had to repay the money, notwithstanding what they had left, together with the costs of the restoration etc, this parish, whose Priest in Charge was on the point of going to a Church in the Diocese of Europe, would be bankrupt. He stressed the ongoing checks which were now being carried out to ensure that Church Wardens did attend their visitation and training sessions. He stressed the integrity of purpose of a parish church, over and above the CBC’s stress on integrity of architecture and contents, and was concerned about “the strange movement of the 20<sup>th</sup> century that churches should be frozen”.

On behalf of Mr Bennett, it was argued that: “ Dr Gaspar lost his way in his argument. It is wrong to say to a parish that does not want something in their church that they should learn to love it just because an expert tells them to. This painting seems to be an ugly duckling. Somewhere in the world this painting will be venerated or put in a museum where it can be appreciated. In this church it is hidden away unloved”.

Save for the CBC, all parties before me wish for the sale of the painting to be confirmed.

22. **THE LAW**

I have already dealt with the legal duties of Church Wardens. I turn now to the law I must apply in respect of sale.

The basic requirement for the obtaining of a Faculty is set out in the case of *St Mary's, Barton upon Humber* [1987] Fam 41. There can be no retrospective Faculty for an illegal sale. All that can be sought is a confirmatory Faculty to authorise the removal of the Painting from the Church and to authorise that the Church could enter into a deed with the auctioneers to sell. In the current case, the “purchaser” seeks a declaration that states that the Church disclaimed title under a Faculty, and that the painting’s ownership now passed to Mr Bennett. On his behalf it was argued that the alternative argument as to a return to the church in its restored form would lead to even more expense and litigation, involving the auction house as well. There is much force in this argument

23. I turn to the recent authority in the Court of Arches in *Re St Lawrence, Oakley with Wootton St Lawrence* (14<sup>th</sup> April 2014). The Court of Arches noted that there have been numerous consistory court judgments on the question of sales of church treasures. Yet, this remains a controversial area of the law. Despite the re-iteration by the Court of Arches that the jurisdiction to grant faculties for the sale of treasures is to be sparingly exercised, the consistory court judgments, whilst repeating those words, show a growing readiness to sanction sales, including sales not to museums but on the open market. The Court of Arches expressed concerns at the proposition

laid down by Mynors Ch in *Re St James Welland* [2013] PTSR 91:

“The Church was not founded to perform the role of guardian of art treasures for their own sake; nor is there any rule of law requiring that it should fulfil such a role”

In the *Re St Lawrence, Oakley with Wootton St Lawrence* at paragraph 35, the Court of Arches considered that dictum to be too narrow:

“ we do not accept that....the church wardens powers are limited to acquiring and dealing with property for purposes which are principally concerned with worship and mission, **or its corollary that the church wardens ought therefore to dispose of property that is not capable of being applied for such purposes**”

The facts in *Re St Lawrence, Oakley with Wootton St Lawrence* were described by the Court of Arches at Paragraph 4 as decidedly unusual and most unlikely to be repeated. It is also the case that the facts there are very different from the facts I am dealing with. A number of legal issues arose in that case, which do not arise here. The significance of *Re St Lawrence, Oakley with Wootton St Lawrence* is the general statements of principle laid down as to chattel disposals, by which I am bound and must apply in the present case.

First, the Court of Arches categorised disposal cases into three: (1) disposal by loan, such as to museum, art gallery or diocesan treasury; (2) disposal by limited sale, such as sale to a public

institution such as museum, etc., where the item will be likely to remain on public view; since the church will lose ownership, such sales are not lightly allowed and require special justification; and (3) disposal by outright sale to whoever will pay the highest price. At Paragraph 36, the Court of Arches stated:

“There are of course many articles whose disposal by loan or limited sale is not an option, because the article lacks the prerequisite artistic value or interest. But where the disposal of Church treasures is contemplated, then would-be petitioners and chancellors should apply a sequential approach, considering first disposal by loan, and only where that is inapposite, disposal by limited sale; and only where that is inapposite, disposal by outright sale...”

I note that on the present facts, the Priest in Charge and the Church Wardens by the present faculty application want to jump over the possibilities of disposal by loan and disposal by limited sale, and seek authorisation *ex post facto* of a disposal in category (3). They thereby have set the bar they seek to jump, at its highest.

The Court of Arches summarised at Paragraph 50 [“The proper approach to disposal by sale”] and Paragraph 51 the general principle to be applied:

“...qualitative weight, including the cumulative weight of individual factors, is all that has to be identified to outweigh the strong presumption against disposal for

sale. **Sales will rarely be permitted, but that is because of the strength of the presumption against sale...** *[my emphasis added]*.

At Paragraph 52, the Court of Arches expressed the following as to the approach to financial needs:

“Although a distinction between ‘financial emergency’ and some lesser degree of financial need featured strongly in the arguments before us, and has echoes in some of the judgments in previous cases, it is a distinction the significance of which is much reduced outside the framework of a two-stage test. Financial need falling short of financial emergency will seldom on its own outweigh the strong presumption against sale; but it can and must be weighed with any other factors favouring sale. It follows that a critical or emergency situation will carry more weight than more normal pressures on parish finances, but it is neither possible nor desirable to develop criteria for an emergency situation that would put a case into a distinct category.”

24. I ask myself accordingly: are the grounds relied on here for justifying a sale sufficiently made out, in terms of their qualitative and cumulative weight, to outweigh the strong presumption against disposal for sale?

25. I stress to the Priest in Charge, the Church Wardens and PCC of Emmanuel Church, lest they still do not grasp or refuse to accept the realities, it is very much open to me to refuse this confirmatory faculty. This wretched and lamentable history is



a textbook example of how not to do things, as I have sadly had to set out above. Monumental stupidity is involved, some degree of arrogance, and, even possibly [I make no finding as to the latter], a degree of evasiveness. This is all deeply unattractive and one view is that those involved thoroughly deserve all the consequences which would flow from my refusing this application. The financial consequences to the Church I deal with below, but I note and warn further, that if this faculty is refused, the Priest in Charge and the Church Wardens might expect to be sued personally by the auctioneers and the “buyer” for their losses, including the Priest in Charge facing a very unpleasant dispute as to what she did or did not say about permission to sell to the auctioneers. Her word and her truthfulness would be on trial in such an action. All this would be very likely to be litigated at expense in a civil court to the acute embarrassment and personal cost of those involved. The Priest in Charge is a Non-Stipendiary Minister. The Church Wardens are, as always, volunteers.

26. I consider severally and cumulatively the various grounds said to justify a sale.

27. ***Financial need.*** I find that the problem of asbestos and the leaking flat roof do provide grounds of an immediate and substantial expensive need. Some of the financial evidence provided to me, I have criticised for its want of clarity and particularity above, but the fact remains that the asbestos problem has to be resolved now and it will be a substantial expense to do so. I accept the evidence that a quotation of £25,000 has been obtained for the asbestos removal works

alone. If such works are not exactly such sum, they plainly are of that order of magnitude. The flat roof to the meeting room is leaking and I accept the evidence that an estimate for that has been made at £24,258. Again, if such works are not exactly such sum, they plainly are of that order of magnitude. That also needs doing, preferably now before more damage is done due to water penetration, or at the very least in the next 2 to 3 years. It is seldom if never prudent to delay works where water damage is on-going. Happily, due to the Listed Places of Worship Scheme, VAT should be reclaimable; asbestos removal works have been specifically included in that Scheme since October 2012. Thus, this parish faces an immediate/short term need for a sum in the region of £50,000 for its church to continue in use. The parish reserves stand at £4,500. Previous works to the building had only been funded by a one-off legacy and a loan from the Diocesan Board of Finance. I note what Dr. Gaspar said to the effect that parishes were tenacious in fund raising if need arose, but such is a generalisation. As I stated at the beginning, this is an active and vigorous church taking every opportunity to advance its mission to try and meet its financial burdens, but there is a limit to the burdens that can be placed successfully on an average congregation of some 40 adults. Even if I grant this faculty, this parish is still going to have to raise over half the funds to meet these urgent and essential works. I have to be realistic, as there are limits to what even keen groups of volunteers modest in numbers can bear.

28. What I might have ordered if this had come to me, as it should, before any disposal, is now academic and a matter of speculation. I have no doubt, nevertheless, that I would have wanted to examine thoroughly disposal by loan to a local museum and limited disposal by sale to such an institution. It may be supposed that it would have been said that disposal by loan would have released no moneys and disposal by limited sale would have not released the order of moneys required to contribute significantly to the emergency works. All that however, is not where we are today.
29. The Archdeacon of Cheltenham said in evidence, and I accept, that the brutal truth was that if this faculty is not granted this parish would be bankrupt.
30. Thus, I conclude that the financial needs of this parish are substantial and urgent, and, the financial consequences of refusing the application to the parish would be disastrous. That conclusion is significant but not alone sufficient.
31. I find that there is really no historic, local or social connection between this painting and this church. It arrived as a windfall gift, which for some time (if ever so utilised) has been redundant for any mission use in this church. This Ittenbach painting did not come from a well known local family, nor was it connected with some historic act or activity in the parish. In no way does it resemble the history and parochial link with the parish, which the armet had in *Re St Lawrence, Oakley with Wootton St Lawrence*. The Ittenbach painting's existence in Emmanuel Church was not to all obvious in the Church;

although on a public wall, it was not visible unless really sought out. Its existence appears to have been unknown and unrecognised to the outside world for many years. It has played no known part in the mission of the church, if ever it did, in recent years. There is certainly now no emotional link or meaningful connection between Emmanuel Church and the painting, even if there ever really had been. As I have said, they actively dislike it, and it has for many years, served no part in their worship, nor is it, in any ecclesiastical sense, venerated.

32. I reject accordingly the approach of Dr. Gaspar whose evidence failed to persuade me, in that (1) his blanket ban on sales without any discernment or assessment of the relative significance of this painting was un-helpful; and (2) his inability to assess from CBC guidance mission was further un-helpful and rendered his approach too limited. Although he conceded that mission did apply to the CBC, he declined to give any view as how that was to be assessed or balanced with concerns as to church treasures.

33. The conduct of the Priest in Charge and the Church Wardens in this matter has, as I have set out above, been dismal. They have been really, really stupid. But they have not been dishonest. In their misguided way, they supposed, albeit erroneously, they were acting for the good of the Church. But further, there is no evidence they have caused the church actual financial loss, in that I have held that the auction was fair and an open market price achieved and Mr. Alden Bennett, although whether he was misled or acted incautiously I make no finding, has otherwise acted honourably. I was told

Mr Bennett will seek his costs, if the painting goes back. If he can keep it, he does not seek any costs. The painting is now in a better condition than it has been in whilst in Emmanuel Church due to his restoration. The fact of the auction has made it now a matter of public knowledge. Whatever purchaser Mr. Bennett may now find, the painting's existence is now back in the public domain. One can but hope that it may even be displayed at least as publicly in practice as it has been ignored for the past 60 years.

34. If this parish was ordered to return the money, they would be in a dire financial position and just could not afford what they need to do, even with any plausible fund raising drive. The financial position of Emmanuel is totally different from that in *Re St Lawrence, Oakley with Wootton St Lawrence*. This Cheltenham church has no such capital assets to rely upon. The effect of this sale not being ratified would be out of all proportion to this parish, especially in the absence of any historic, local or particularly special connection between the painting and the parish. The value of the painting is still not so overwhelmingly high as to be out of proportion to the potential works it will go to pay for.

35. In the absence of any findings of dishonesty or evidence before me, however badly the parish dealt with the sale, of actual proven financial loss, in my judgment it would not further the mission of the Church to visit the burdens and

costs of consequent litigation upon the Priest in Charge or the Church Wardens personally.

36. I conclude that the qualitative weight and cumulative weight of the foregoing factors combined is such here on these very specific facts such as to overbear the strong presumption against sale.

Accordingly, I make the following orders:-

1. There is granted a Faculty to the Priest in Charge, Church Wardens, and PCC of Emmanuel Church Leckampton Cheltenham, confirming that they may sell the painting of the Virgin and Child by Franz Ittenbach.
2. That there is a declaration that this painting, having been sold by Messrs Chorley's of Prinknash Gloucestershire, was purchased in good faith by Mr Alden Bennett, who by reason of this Order has now good title to the said painting legally to retain or to dispose of as he may see fit.
3. That Mr Alden Bennett is hereby released from all undertakings which he has given to this Court in respect of the said painting.
4. That the Petitioners do pay the costs of and arising from this Petition (neither Mr Bennett nor Chorley's having sought any

costs in respect of nor related to the Consistory Court); such costs are payable out of PCC funds.

5. That a copy of this judgment is to be displayed publicly for 28 days following receipt in the Church of Emmanuel Leckhampton, and shall be available on line and from the Diocesan Registrar.
6. That the Diocesan Registrar sends copies of this Judgment forthwith to secretaries of trade bodies for auctioneers and fine art and antique dealers in the United Kingdom.

19<sup>th</sup> July 2014

June Rodgers, Chancellor