

**Neutral citation number: [2022] ECC Ely 1**

***Faculty – Grade I listed Cambridge College Chapel – Temporary removal of the Rustat Memorial on the west wall – DAC not objecting to the proposal – Many objectors becoming parties opponent – Hearing fixed for 2-4 February 2022 – Parties opponent seeking permission to call expert evidence from a historian as to the extent of Rustat’s involvement in the slave trade and applying for adjournment of hearing for at least four months – Adjournment refused***

**Application Ref: 2020-056751**

**IN THE CONSISTORY COURT OF  
THE DIOCESE OF ELY**

Date: Tuesday, 18 January 2022

**Before:**

**THE WORSHIPFUL DAVID HODGE QC, DEPUTY CHANCELLOR**

**In the matter of:**

**THE RUSTAT MEMORIAL, JESUS COLLEGE, CAMBRIDGE**

Hearing Date: Saturday, 8 January 2022

Hearing conducted remotely by Zoom

**Mr Justin Gau** represented the Parties Opponent

**Professor Lawrence Goldman**, one of the Parties Opponent, also addressed the court

**Mr Stuart Jones (Mr Mark Hill QC with him)** represented the Petitioners

No cases are referred to in the judgment

## JUDGMENT

### Introduction and background

1. On Saturday 8 January 2022 I heard (remotely by Zoom) an application by the parties opponent to this petition for permission to call the expert evidence of an historian and to adjourn the hearing of this petition which is presently fixed for three days commencing on 2 February 2022. At the end of the hearing I announced that I would allow the application to call expert evidence but that I would not adjourn the substantive hearing. I also refused an informal application by the petitioners for permission to rely upon the evidence of an eighth witness, Professor Shepherd. I said that I would give my reasons in a written judgment that I would hand down by email. This is that judgment.

2. On 17 May 2021, Dr Richard Anthony, the College Bursar, applied on behalf of Jesus College, Cambridge for a faculty authorising the “Removal and inspection of and conservation works to the memorial dedicated to Tobias Rustat currently on the west wall of the College Chapel. Safe temporary storage or display of the monument on college premises.” The entry for the College Chapel in the 2014 volume of *The Buildings of England for Cambridgeshire* (edited by Simon Bradley and Nikolaus Pevsner) describes the Rustat Memorial (at page 117) as follows: “w wall, Tobias Rustat + 1693/4, an excellent monument with the courtier’s portrait in an oval medallion, two asymmetrically posed putti holding up draperies, and garlands below the inscription. Made c. 1686, almost certainly by the studio of Grinling Gibbons, from whom Rustat commissioned royal statues for Windsor and elsewhere; probably carved by A. Quellin.” I attach relevant photographic images at the end of this judgment.

3. The entry for Tobias Rustat (bap. 1608, d. 1694) in *The Dictionary of National Biography* (created by Philip Lewin on 9 December 2021) describes him as a “courtier and benefactor”. It notes that: “Two years into the Restoration he was lending money to other courtiers, using the king’s authority to ensure priority repayment. As Rustat’s wealth increased he invested in the slave trade. His name appears on both the 1663 charter of the Company of Royal Adventurers Trading into Africa, and the later 1672 charter of the reconstituted Royal African Company, where he served on the board as a director (‘assistant’) in the years 1676 and 1679–80. He also appears to have had an interest in the Gambian Adventurers. The record of his banking transactions with Edward Backwell still survives. … Rustat commissioned three royal statues from Grinling Gibbons, all in Roman costume—Charles II, at Chelsea; Charles II on a horse, in Windsor Castle; and James II, now in Trafalgar Square. In Jesus College, where Rustat is buried, is a marble memorial, probably by Gibbons, which Rustat stored in his house for eight years. In 2020 the college decided to replace this memorial with a plaque acknowledging Rustat’s involvement in the slave trade. The college also has a portrait painted by [Sir Godfrey] Kneller, dated 1682. In the British Museum is a rare engraving, apparently based on this portrait, but incorporating a charity motif.” The previous version of this entry (also created by Philip Lewin on 3 January 2008) noted that: “Two years into the Restoration he was lending money to other courtiers, using the King’s authority to ensure priority repayment. He became a director of the Royal African Company and the record of his banking transactions with Edward Backwell still survives.”

4. This faculty application has provoked a mass of objections; and many of the objectors have become parties opponent to the petition. Most of them are represented by Mr Justin Gau (of Counsel) who appeared for them on the present application. The College is to be represented by Mark Hill QC at the substantive hearing. Although Mr Hill has produced a four-page document setting out the College's objections to the present application, it was Mr Stuart Jones, Mr Hill's instructing solicitor, who represented the College at the hearing of this application. I also heard briefly from Professor Lawrence Goldman, one of the parties opponent, who is representing himself.

5. The Notification of Advice (**the NoA**) issued by the Diocesan Advisory Committee (**the DAC**) on 29 January 2021 states that the Committee does not object to the works or proposals being approved by the court, subject to the following provisos:

- (1) The DAC recommends that temporary storage of the monument should be limited to one year, after which time it should be reinstalled in the chapel in its current location.
- (2) If during the period of temporary removal the college identifies a long-term new home for the memorial outside the chapel, proposals for such should be submitted to the DAC for recommendation, together with a further statement detailing all the options appraised, and giving theological, pastoral and practical reasons against the monument's reinstatement in the chapel.
- (3) Any disposal of the monument should be on the basis of a long-term loan rather than a donation or sale.
- (4) A new memorial should be placed on the wall of the chapel noting the burial of Tobias Rustat and his dates, together with separate interpretative material.
- (5) Further details concerning any conservation works found to be necessary should be submitted to the DAC for recommendation.

6. The NoA records that in the opinion of the Committee the work proposed is likely to affect the character of the Chapel as a building of special architectural or historic interest. It notes that Historic England, the local planning authority, the Society for the Protection of Ancient Buildings, the Ancient Monuments Society (since 1 October 2021 re-named as Historic Buildings & Places), and the Church Buildings Council have all been consulted about the proposals; and that all the responding consultees have raised objections which have not been withdrawn. The Committee's principal reasons for not objecting to the proposals being approved despite those objections were as follows:

“Following the advice of the casework group and the further submissions from the College during the summer and autumn of 2020, formal statutory consultations were undertaken with: The Ancient Monuments Society, The Society for the Protection of Ancient Buildings, The Church Buildings Council, Historic England and the City of Cambridge. At the end of the 42-day consultation period, responses had been received from all but the City of Cambridge.

The casework group members reviewed the responses of the consultees and noted they broadly shared the DAC's reluctance to support permanent removal of the memorial from the chapel at the present time, particularly when there is no clear end

destination for it. A proposal for permanent removal of the memorial would be more complete if its final destination were known and fitting.

However, while the DAC remains unable to recommend permanent removal of the memorial from the chapel based on the case presented so far, it notes the concerns of the Dean and others about the impact its presence has on the current pastoral work of the chapel. Therefore the DAC is persuaded to not object to temporary removal of the monument from the chapel as proposed in this petition.”

7. On 6 August 2021 the Chancellor of the Diocese of Ely, Chancellor Leonard QC, heard an application by Mr Gau on behalf of the parties opponent to recuse himself from the case on the grounds of an appearance of bias. The petitioners adopted a neutral stance. On 13 August 2021 Chancellor Leonard QC handed down a written judgment. He concluded (at paragraph 30 and following) that he should not recuse himself on the grounds advanced by Mr Gau in his skeleton argument; but there were other aspects of the faculty hearing that he felt he needed to consider:

“In my judgment the Parties Opponent have displayed a distrust of the Petitioners which, on the face of the papers I have seen, I find difficult to fully comprehend. Whilst they may be justified in their view, it seems to me that there is a reluctance to look for alternative and less sinister explanations for emails and letters written by the Master and others involved in the issues that have arisen as to ‘this complex time in history’ and in relation to the application more generally.

I am concerned that the way in which the application for a faculty is being opposed may lead to proceedings which focus more on process than substance. What is most important is that the proceedings allow for a proper examination of what is the right approach to be taken to this memorial in 2021 and against an accurate history in respect of Tobias Rustat.

It follows that there is an identifiable risk that my visit [to the Chapel] on 13 July 2020 will continue to be thought to be relevant to the proceedings and will lead to the impossible position of having to listen to submissions as to what took place about which I have personal knowledge. Further, whilst I have no doubt that a fair-minded and informed observer would not consider that I had shown any bias, it requires that fair-minded observer to be fully informed. I do not consider that as things stand the notional fair-minded observer is properly informed about what happened.

For these reasons rather than any perception of bias I will take no further part in the proceedings. Their outcome is too important in respect of the Rustat Memorial itself and any influence the decision may have on applications elsewhere, to allow these proceedings to be affected by any side issues.

I have asked my Deputy Chancellor, the Worshipful David Etherington QC, to take the proceedings forward. I have not consulted him on this application. He knows of the faculty application but I have not discussed its merits with him, or with anyone else.”

8. Sadly, the Chancellor’s expectation that his Deputy would take the proceedings forward has not been fulfilled because Deputy Chancellor Etherington QC felt that he should

withdraw from the proceedings due to a perceived conflict of interest. I have therefore been appointed as a Deputy Chancellor of the Diocese of Ely solely for the purpose of determining this petition and all related matters. I have made it clear that I have no connections with the University of Cambridge, still less this College; and I cannot recall ever having met the present Bishop of Ely (who has submitted a short witness statement in support of the College's petition).

*Previous directions orders*

9. A directions hearing took place before me remotely by Zoom on Monday 15 November 2021 attended by Mr Jones (for the petitioners) and Mr Gau (for the parties opponent) at which, so far as material to the present application, the following was ordered:

- (1) By paragraph 3, the names, addresses and fields of expertise of the witnesses to be called by the parties were to be filed in the court and served upon the parties as follows: (a) The parties opponent – up to four witnesses comprising two experts and two witnesses of fact. Details were to be served by 4.00 p.m. on 26 November 2021. (b) The petitioners – up to six witnesses comprising one or two experts, the remainder of fact. Details were to be served by 4.00 p.m. on 1 December 2021 (or earlier if possible). Permission to apply if required.
- (2) By paragraph 4, the petitioners' finalised witness statements and expert reports were to be filed and served by 4.00 p.m. on 6 December 2021; and the parties opponents' finalised witness statements and expert reports were to be filed and served by 4.00 pm on 10 January 2022.
- (3) By paragraph 5, a meeting of the expert witnesses was to be arranged and a joint statement of agreed and non-agreed matters (with a summary of their reasons for disagreeing) was to be filed by 4.00 p.m. on 17 January 2022.
- (4) By paragraph 12, the hearing of the petition was to take place in the College Chapel and was to start on Wednesday 2 February 2022, commencing at 10.00 a.m. (or such other time as should be advised), with an hour for lunch at 1.00 p.m., and rising at 4.30 p.m., and continuing on Thursday 3 and Friday 4 February 2022.

10. With the consent of the parties, paragraph 3 of that order was varied on 8 December 2021:

- (1) To permit the petitioners to call seven witnesses as follows:
  - (a) The Master of Jesus College, Ms Sonita Alleyne OBE.
  - (b) The Dean of Jesus College Chapel, the Revd James Crockford.
  - (c) Dr Michael Edwards, a senior lecturer in History and a Fellow of Jesus College. He is to give evidence as the College's only expert witness, speaking to research which he has undertaken into Rustat's life and his involvement with companies engaged in the slave trade.
  - (d) Mr Paul Vonberg, the College's architect.
  - (e) Professor Véronique Mottier, a Fellow at Jesus College, who chaired the Legacy of Slavery Working Party (**the LSWP**).

(f) The Right Reverend Stephen Conway, the Bishop of Ely, who is to give evidence in his capacity as the Visitor to the College.

(g) Mr Amatey Doku, an alumnus of Jesus College. He was the President of the Junior Common Room, and he is to speak as an alumnus himself and on behalf of those alumni supporting the College's petition.

(2) To permit the parties opponent to call the following four witnesses and (if so advised) Mr John Neale (of Historic England):

(a) Dr Roger Bowdler, a Historic Buildings Consultant.

(b) Professor Nigel Biggar, Professor of Moral and Pastoral Theology at the University of Oxford.

(c) Mr Andrew Sutton.

(d) Mr Martin Emmison.

Permission was expressly given to apply for further directions. It will be noted, first, that the number of the College's witnesses had increased from a maximum of six to seven since the directions hearing; and, secondly, that the College's witnesses outnumber those to be called by the parties opponent.

11. The College served their witness statements on the parties' opponent on 6 December 2021. This included an eighth witness statement from Professor Verene Albertha Shepherd; and at the same time the College sought leave from the parties opponent to call her as an eighth witness even though the College were one day late in identifying her as a potential witness. Professor Shepherd's signed witness statement, which I have read, is dated 5 December 2021 and extends to eight pages. Amongst other distinguished appointments, Professor Shepherd is the Professor Emerita of Social History at the University of the West Indies (in Kingston, Jamaica), Consultant Director of the Centre for Reparation Research, an Honorary Fellow of Jesus College, Cambridge and a Vice-Chair of the United Nations Committee for the Elimination of Racial Discrimination. Professor Shepherd is an expert in the fields of women's history, human rights, reparative justice and Caribbean economic history. She is a descendant of an African born into slavery in the British-colonised island of Jamaica in 1829 who was later freed when the slaves in that former colony were emancipated. The purpose of Professor Shepherd's statement is to explain why, based on the history of colonialism, historic figures associated with slavery and the trade in Africans as part of British colonialism, in the specific case of the Caribbean, should not be celebrated or memorialized, especially in public, and specifically in church, spaces.

#### *The application by the parties opponent*

12. In a document dated 14 December 2021 and headed 'Application to break fixture and serve further evidence' Mr Gau (for the parties opponent) objects to the late service of the expert witness statement of Dr Edwards on the basis that he relies on documents and sources not hitherto disclosed to the parties opponent even though, for almost a year, they have been asking for sight of the evidence on which the LSWP had based its conclusions, and also for any evidence to challenge statements supplied by one of the parties opponent, Mr Andrew

Sutton. Mr Gau submits that it is abundantly clear that this evidence had been available to the petitioners for many months and that they had taken a deliberate decision not to share it with the parties opponent, who now need time to instruct an expert to deal with the issues raised in Dr Edwards's statement. Had there been the sort of co-operation and exchange of information that the overriding objective intends, then this application would not have been necessary. Indeed, there is a chance that expert evidence could have been agreed, as would be normal in this sort of case. Dr Edwards's refusal to disclose documents is portrayed as a deliberate attempt by the petitioners to frustrate the parties opponent's ability to conduct their own research, in direct contravention of the duty owed by the petitioners to the court under the overriding objective. It is going to cause the parties opponent unnecessary costs, and it will delay the hearing of the case because it is impossible for them to obtain an expert witness statement in time for the listed trial dates and to comply with disclosure protocols. The parties opponent therefore seek permission to obtain further expert evidence and for the existing trial dates to be vacated.

13. The parties opponent also object to the admission of Professor Shepherd's statement. Whilst acknowledging her expertise in her field, they submit that she does not address the *Duffield* issues that I have to consider in relation to this particular memorial. From the outset the parties' opponent have agreed that slavery, in any form, is repugnant. That is all that Professor Shepherd is saying, and her statement does not take the petitioners' case any further forward.

14. The application of the parties opponent also receives support from an email from Professor Goldman dated 13 December 2021 and a witness statement, dated 17 December 2021, from Mr Edward Perrott, another of the parties opponent, who is an alumnus of the College, and a solicitor formerly practising in Cambridge. This relates Mr Perrott's concerns that the College has been ignoring the overriding objective by failing to give prior warning of any contentious issues contained within Mr. Sutton's reports. Mr Perrott considers that the College's disclosure of Mr Edwards's expert evidence, at the very last minute, having been in possession of it for many months, betrays the fact that they are aware of the weakness of their own case in the face of opposition from the amenity bodies, their complete failure to address the *Duffield* questions, and their reluctance to have their expert evidence explored by another expert. Mr Perrott points out that the parties opponent have got nowhere near the resources available to the College but he says that they will do all they can to instruct an expert to deal with the matters that the College have raised at the eleventh hour.

15. On 6 January 2022, Dr Aaron Graham produced a preliminary estimate that he would require at least four months to examine and analyse all the relevant documentary materials and produce a report as an expert witness into the nature, extent and context of Tobias Rustat's participation, between 1663 and the sale of his stock in 1691, in three companies that were engaged in the transatlantic slave trade. At the hearing, Professor Goldman clarified that Dr Graham was heavily involved in university teaching, mainly online, until at least the middle of March, and that it was unlikely that he would be able to produce anything more before the hearing presently scheduled for early February.

#### *The College's response to the application*

16. The College's response to the parties opponent's application is contained in a document prepared by Mr Hill and dated 16 December 2021. He invites the court to dismiss the application. Mr Hill notes that the parties opponent rely solely on counsel's written representations. There is no formal application as such, nor is it accompanied by any witness statement in support. Mr Hill finds it difficult to understand the precise basis upon which the parties opponent claim to be entitled to vacate the hearing date, which has been fixed since notification from the Registry on 24 September 2021 and was confirmed, both at the directions hearing on 15 November 2021 and again in a further consent order dated 8 December 2021. There was no objection to the proposed hearing date at the directions hearing. The parties opponent, through their counsel, argued for the early delivery of the College's evidence; and their argument prevailed, with the College being required to lodge their evidence by 6 December (which it did). The parties opponent well knew that they had to deliver their evidence in reply by 10 January 2022. They had no objections to this date at the directions hearing. Indeed, it is the date they had invited the court to adopt. The order of 8 December 2021 (the terms of which had been agreed earlier) affirmed: (1) the date of 10 January 2022 for the service of their own witness statements and expert reports; (2) the date of 17 January 2022 for the joint meeting of experts; and (3) the hearing dates of 2 to 4 February 2022. Mr Hill invites the court to conclude that this late application to break the fixture is a tactic, or a ploy, simply to delay the expeditious determination of the matter in accordance with the overriding objective of the Faculty Jurisdiction Rules 2015, as amended (**the FJR**), prompted by a realisation by the parties opponent, perhaps for the first time, of the strength of the College's case. He characterises it as being without merit, and as demonstrating a distrust of the petitioners, for reasons which the College and their advisers cannot understand. The terms and tenor of the application impute bad faith and impropriety to the petitioners, with repeated, but wholly unjustified, references to breaches of the overriding objective. Mr Hills submits that "the language and rhetoric of the application is regrettable". The directions clearly envisaged the service of witness statements of evidence of fact and expert reports. The petitioners cannot be criticised for their conduct of this case. They have abided by every order of the court. The parties opponent made no mention of any so-called failures of disclosure at the directions hearing; and they agreed to the terms of a consent order expressly affirming the matters previously outlined, agreeing the suite of directions from which they now seek to resile.

17. Mr Hill submits that the FJR make no provision for voluntary disclosure; and there is no conceivable basis for the suggestion that the petitioners are in some way in breach. They have given the parties opponent everything to which they were entitled. If there were concerns over documentation, the time for raising that was at the directions hearing, but nothing was said. Instead, the timeline of directions was agreed; and the hearing date was affirmed.

18. Mr Hill submits that the expert evidence of Dr Edwards is clear. He sets out his credentials, and the nature of the independent research he has undertaken as a historian. He recites his understanding of the duties of an expert to the court. His report deals with his conclusions, based on his professional expertise and his independent research, which he sets out in appropriate detail. All the material on which he bases his report is said to be in the public domain and will have been available to any other expert historian whom the parties opponent might have chosen to instruct. They have had ample time to instruct their own

expert who would have had access to exactly the same material as did Dr Edwards. At the time of the directions hearing, the parties opponent made no suggestion that any expert they might engage could not produce their report by the agreed date of 10 January 2022. The consent order of 8 December 2021 expressly affirmed the agreed timetable. It would appear from the list of names supplied as witnesses, and from the consent order of 8 December 2021, that the parties opponent had not intended to call an expert historian to provide a report; and it is said to be far too late now to allow them to change their litigation strategy, and to compromise the hearing date by so doing. Very powerful reasons must be shown for the vacation of the trial date of 2 to 4 February 2022, which has been fixed since September 2021. Finding another date convenient to the parties, their counsel and their witnesses will be extremely difficult, and will inevitably push the matter back by many months. The only reason advanced by the parties opponent for such an ambitious application is that their expert report will not be ready in time. That is entirely down to their own failures to manage their case preparation. A deferral of the hearing cannot be compensated in costs. What are characterised as the “delaying tactics” on the part of the parties opponent have already caused the hearing to be put off until February. Mr Hill submits that the memorial continues to cause offence to users of the Chapel and its presence in the Chapel is disruptive to the mission and witness of the Church of England in the College. No monetary sum can compensate for the harm caused by its continuing presence merely because the parties opponent have so far neglected to prepare any expert evidence.

19. Mr Hill acknowledges that it is unfortunate that Professor Shepherd’s name was omitted from the list of witnesses that had been provided on 1 December 2021 and that the petitioners now intend calling one more witness than they had originally sought, for which they formally seek leave. Mr Hill submits that the parties opponent have not been disadvantaged, as they received her evidence on the due date. There is no issue of late service. As their only complaint is that Professor Shepherd’s evidence is irrelevant, the proper course would be for the statement to be admitted unchallenged. Relevance and weight will then be a matter for counsel’s closing submissions.

20. In a further document, dated 7 January 2022, and submitted by Mr Jones, the College invites the court to refuse the parties opponent’s request to introduce evidence from Dr Aaron Graham, and to confirm both the hearing dates of 2 to 4 February and the direction that the parties opponent are to file all of their evidence with the court by 4.00 p.m. on Monday 10 January 2022. The College advances two principal reasons for their objection to Dr Graham’s evidence:

(1) The introduction of a further witness to duplicate the ground anticipated to be covered by Mr Sutton, and already covered by Dr Edwards’s report, will make it less likely that the matter will be able to be dealt with within the scope of the three day hearing listed for 2 to 4 February; and

(2) Dr Graham has indicated that it will take up to four months for him to complete his work. If the hearing does not proceed on the listed dates of 2 to 4 February, the next available date would be some time in August 2022. This would be well over a year after the petition was lodged with the court. Such a lengthy delay in dealing with the matter would be at odds with the overriding objective set out in FJR 1.1(2)(d) that, so far as practicable, the matter should be dealt with expeditiously.

21. The scope of the archive material which Dr Graham would wish to review is substantially the same as that already reviewed by Dr Edwards in his report. Whilst Dr Graham might seek to shed light on other aspects of Rustat's life, it is unlikely that he will uncover substantially different historical facts as to Rustat's involvement with corporate entities involved in the transatlantic slave trade. Dr Edwards has presented his evidence as an expert witness, whose primary duty is to assist the court. Unless his conclusions could be overturned with a persuasive degree of confidence, the understanding of the present and future Jesus College community will remain that Rustat was involved in the slave trade; and the underlying benefit derived from the proposed removal of the memorial from the Chapel for those who wish to worship there but are offended by the memorial would remain real and substantial. In their Form 5 objections, served in late June and early July 2021, the parties opponent had asserted that Rustat had had no material involvement in the slave trade. The parties opponent might reasonably have expected that the petitioners would undertake some research to test the quality of the objections, and should not have been surprised by Dr Edwards's report if they had themselves researched Rustat's life more fully before filing their objections. The objections were filed with the court some six months ago, and the parties opponent could have used the time since then to research the grounds for their objections more fully if they had wished to do so. They have not made use of the intervening time to do this work, and it would be unjust to allow them a further lengthy period to undertake this work now. The parties opponent agreed without reservation to the timetable for filing their evidence at the directions hearing in November, and they raised no suggestion at the time that they might need significant additional time to prepare further evidence.

#### The hearing

22. Shortly before the hearing, the parties opponent produced a helpful preliminary assessment, covering eight pages, from Dr Graham of the expert witness statement submitted by Dr Edwards. The impression formed by Dr Graham thus far is that Dr Edwards's statement is broadly correct in points of detail, but less complete in terms of the wider context. Where Dr Graham has been able to check a specific point in the primary material, it appears to have been reported accurately; but some of the wider conclusions drawn by Dr Edwards seem to be incomplete and do not necessarily reflect their wider historical context. In the remainder of his preliminary report Dr Graham sets out how he would propose to address particular issues, and questions raised by the witness statement and his instructions from the parties opponent. Dr Graham is able to identify four main avenues for his report, where he proposes to address particular points where he believes Dr Edwards's report to be incomplete or incorrect, namely (1) the role of Rustat in the Royal Adventurers Trading into Africa (**the RA**) and the political context; (2) his function in the Gambia Adventurers (**the GA**) as an investor and director; (3) his attendance and role in the Royal African Company (**the RAC**) in 1675 and 1679-80; and (4) attitudes to slavery in late seventeenth century Britain, especially in the Church of England, and the extent of anti-slavery. Dr Graham advises that the first three areas of further research can be recovered from records at the National Archives, and several other places. He proposes to examine Rustat's correspondence to establish as much as possible about his religious and moral outlook. The last point can be addressed using published scholarship on this topic, although Dr Graham will use primary sources if this proves inadequate. It is clear that Dr Graham has already undertaken an impressive amount of research in a very short period of time. This has enabled him to

conclude that it seems to be “beyond dispute” that Rustat: (1) was involved in some capacity in the RA and the RAC, as a shareholder and director, between 1663 and 1691; and (2) was aware of what the fact of this participation involved, namely the export of “Blacks” to His Majesty’s Plantations: see paragraphs 5 and 6.

23. For the parties opponent, Mr Gau began the hearing by emphasising that this was a high profile case, involving contested heritage, and that the court would need all the possible assistance it could receive in order to put this significant memorial into its proper context so as to assess the weight of the College’s argument that its continued existence within the College Chapel was frustrating its mission and to arrive at a fully informed judgment. It is the case of the parties opponent that a full and proper understanding of Tobias Rustat and his involvement in the slave trade will serve to lower the temperature and enable the memorial to serve as an object of mission and outreach to the College community. Mr Gau contrasted the College’s almost unlimited resources, in terms of money and access to highly qualified experts, with those of the objectors, who are individuals funding themselves. They had sought to share all of their available information with the College in the hope of avoiding this litigation but the College had not reciprocated, ignoring requests for information and deliberately waiting until the eleventh hour to disclose the evidence they had gleaned about Tobias Rustat. This was said to be contrary to the overriding objective of ensuring fairness and justice by requiring parties to co-operate with each other and putting an end to “ambush litigation”. The objectors had made their position clear, disclosing the material that they held in the hope of avoiding reputational damage to the College; but the College had ignored requests to comment upon Mr Sutton’s research, or to share their own research and the work of the LSWP with the objectors until the service of Dr Edwards’s report as recently as 6 December 2021.

24. Mr Gau reiterated many of the points he had made in his written application. He professed not fully to understand Mr Jones’s submissions that unless Dr Edwards’s conclusions can be overturned with a persuasive degree of confidence, the understanding of the present and future Jesus College community will remain that Rustat was involved in the slave trade, and the underlying benefit to be derived from the proposed removal of the memorial from the Chapel for those who wish to worship there, but are offended by the memorial, will remain real and substantial, which Mr Gau described as “a bold claim”. The parties opponent had always maintained that Rustat’s involvement in the slave trade was “very minor”. The petitioners are aware that Rustat made little money out of the slave trade and did not use money derived from that source to benefit the College; yet they have allowed a contrary, and false, narrative to flourish and to gain a wide currency, thereby causing offence to undergraduate members of the College and others. Had the parties opponent known that the College had an expert historian “stuffed up their sleeve”, they could have addressed his evidence much earlier, hopefully by agreement. Any delay to the hearing lies fully at the door of the College, which has delayed, obscured and obfuscated matters. The court will be unable to reach a concluded opinion on Rustat’s involvement in the slave trade without the assistance of a second expert historian. It is unfortunate that this high profile and delicate matter has been made more contentious by the conduct of the College.

25. Mr Jones rejected any suggestions that the College had been guilty of any delay in presenting and pursuing the petition. They had sought to consult as widely as possible before

presenting their petition, and they had adapted it in response to the representations they had received. The College had no difficulty about the court receiving whatever evidence it might consider to be of assistance to it. The College had undertaken further research into Rustat's involvement in the slave trade during the latter part of 2021, in response to the representations and material submitted by the objectors. This research had been undertaken in publicly accessible archives which could have been consulted by the parties opponent. Recognising that their case looks weak, they now seek additional time to bolster their case. The underlying facts are likely to be largely common ground; it is their interpretation which may be susceptible to differing analyses. It is now clear that Rustat had been involved in the slave trade, both as an investor in slave trading companies and as a member of the RAC's Court of Associates. That involvement is at the root of the petition. There can be no real prospect of Dr Graham producing any material of sufficient weight to counter Dr Edwards's evidence. Opinions have become polarised; feelings on both sides of the dispute are running high; and it is imperative that the matter is disposed of sooner rather than later. The petitioners had no objection to the court being assisted by expert evidence provided that this did not derail the hearing.

26. In reply, Mr Gau made reference to paragraphs 13 to 15 of the witness statement, dated 5 December 2021, of Dr Veronique Mettier, a Fellow of Jesus College, Cambridge, its Director of Studies in Human, Social and Political Sciences, and Chair of the LSWP. She asserts that the recommendation for the relocation of Rustat's memorial was, as was clearly stated in all public communications on this topic, not based on the amount of wealth that he might have generated from the slave trade, but on the historic fact of his choice to invest, and his managerial involvement, in that trade; but that is said to misrepresent the picture painted to supporters of the removal of the memorial. Dr Mettier describes Dr Edwards, the LSWP's expert in 17th-century British history, as having carried out extensive and rigorous research into the primary sources on Rustat's investments and his involvement in slave trading companies over the previous three years. Mr Gau described Dr Mettier's assertion that it is customary for professional academics (and not only historians) to treat the results of their research with discretion until they are "protected" (from plagiarism, for example) by peer review and academic publication as "ludicrous twaddle". This is because Dr Edwards is acting as an expert witness in court proceedings and is not engaged in presenting an academic research paper. Mr Gau submits that the polarisation caused by the College in allowing a completely false narrative about Rustat to run through the College community like wildfire will only be damped down by the disclosure of the full facts about Rustat's life and business dealings.

27. Turning now to Professor Shepherd's evidence, Mr Jones submitted that this goes to the balancing exercise required under the *Duffield* guidelines. It addresses the strength of feeling felt by so many about the continued presence of the memorial in the College Chapel, and the issue of continuing injustice, both actual and perceived, felt by so many of the College community. Many people now know about Rustat's involvement in the slave trade; and that knowledge cannot now be undone. Mr Gau's response was that the College had not only allowed an entirely false narrative to take hold, but it had fostered it and allowed it to spread without making any attempt to contradict it. The College had deliberately withheld research from the objectors and the wider College and the public. The parties opponent agree with the College that slavery in all its aspects is wrong, whether in the 17<sup>th</sup> century or in

modern day countries. Professor Shepherd's evidence adds nothing to the case. In answer to the court's inquiry as to what Professor Shepherd's witness statement adds to the existing body of evidence in the case, such as the Master's evidence, Mr Jones's response was that it addresses the effects of slavery on the current generation of those who are descended from its victims. The Master was merely speaking for the governing body of the College whereas Professor Shepherd was able to speak from both a national and an international perspective.

### Conclusions

28. As previously stated, at the conclusion of the hearing I announced that I would allow the application by the parties opponent to call expert evidence from Dr Graham but I would not adjourn the substantive hearing of the petition from 2 to 4 February. I also refused the informal application by the petitioners for permission to rely upon the evidence of Professor Shepherd. These are my reasons:

29. By FJR 1.1 the court is required to further the overriding objective of those rules of enabling the court to deal with cases justly. This includes, so far as practicable:

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways that are proportionate to the importance of the case and the complexity of the issues; and
- (d) ensuring that it is dealt with expeditiously and fairly.

By FJR 1.3, there is a corresponding duty on the parties to help the court to further the overriding objective.

30. I deal first with the evidence of Professor Shepherd. It appeared that the Professor had been labouring under some slight misapprehension as to the true facts concerning the trade in slaves in the 17<sup>th</sup> century. As I pointed out at the hearing, paragraph 14 of Professor Shepherd's witness statement refers to the RAC as having been founded in 1663 when the expert evidence (at paragraph 36 of Dr Edwards's witness statement) is that the RAC was not incorporated by charter until 1672. However, I accept Mr Jones's observation that the RAC was effectively the successor to the business of the earlier corporate slave trading entity, the RA. I would not therefore have excluded Professor Shepherd's evidence on this basis alone. I did so because I was satisfied that it added nothing material to the evidence of the petitioners' other witnesses or to matters which are either (1) common ground or (2) of such general knowledge that I can take judicial notice of them. Both slavery, and the trade in slaves, are now universally recognised to be evil, utterly abhorrent, and repugnant to all right-thinking people, wherever they live and whatever their ethnic origin and ancestry. They are also recognised to be entirely contrary to the doctrines, teaching and practices of the modern Church. To have admitted Professor Shepherd's evidence would have been unnecessary and disproportionate; it would have added to the length and costs of the hearing; and it would have exacerbated the existing imbalance between the number of witnesses to be called by the petitioner and the parties opponent.

31. Turning to the evidence of Dr Graham, it seemed to me that it was both reasonable and proportionate to allow the parties opponent to call the evidence of an expert historian to

respond to the expert evidence of Dr Edwards. That would ensure that the parties are on an equal footing; and it would be proportionate to the significant issues of contested heritage that fall to be determined on this petition. Even with the evidence of Dr Graham, and noting that Professor Goldman also wishes to give evidence in opposition to the petition, the parties opponent will still be calling no more, and very possibly fewer, witnesses than the petitioner. I note that at the hearing Mr Jones had no objection to the court being assisted by expert evidence provided this did not imperil the dates fixed for the hearing. Had the parties opponent sought permission to call the expert evidence of an historian at the directions hearing in November, such permission would readily have been granted, provided it did not interfere with any existing substantive hearing dates. Since the hearing on 8 January 2022, Mr Gau has informed the Registry that, due to the timing of the disclosure of the petitioners' expert report and the subsequent attempts by the parties opponent to find someone appropriately qualified to give expert historical evidence on their behalf, it appears highly unlikely that any agreed expert report can be prepared in time before the hearing; but they will endeavour to do all they can to achieve this. Even without an agreed joint statement from the experts, however, a second expert report may well serve to focus any cross-examination of the experts, and it may thereby save time at the hearing.

32. However, I was satisfied that it would be contrary to the overriding objective to allow any adjournment of the substantive hearing so as to enable Dr Graham to have all the time he considered necessary to produce a full expert report. In my judgment, that would have delayed the final disposal of this petition in a way that would have been unfair to, and to the detriment of, the petitioners. It would have added to the costs of the proceedings. I reject Mr Gau's submissions that the petitioners have acted contrary to the overriding objective to the detriment of the parties opponent, or that there has been any inequality of arms (other than the inevitable financial imbalance between the parties, about which this court can do nothing). I prefer the competing submissions of Mr Hill and Mr Jones (referenced earlier in this judgment).

33. Further, I considered it to be unnecessary for the fair disposal of the petition to grant any adjournment of the substantive hearing. Although I accept that Dr Graham considers that there is much more research that he would wish to undertake, I agree with Mr Gau's characterisation of Dr Graham's preliminary assessment as an "extremely impressive" document. I have no doubt that it will assist me considerably in identifying any uncertainties, or lack of clarity, about the nature and extent of Rustat's involvement, financial and otherwise, in the 17<sup>th</sup> century trade in slaves and also about contemporary attitudes to slavery in Britain. I accept Mr Jones's submission that the principal underlying facts are likely to be largely common ground; and to the extent that they are not, after more than three centuries they are likely to prove incapable of definitive resolution, whatever the state of the expert evidence before the court. It is the interpretation of the ascertainable facts, and their significance, which are likely to be susceptible to differing analyses and emphases. I am not satisfied that I will be materially assisted in the resolution of such issues by a more comprehensive, "Roll-Royce" (or, nowadays perhaps, "Tesla") quality expert report from Dr Graham. Nor am I satisfied that it would be proportionate to allow the expenditure of time and costs required for the parties opponent to produce such a report. I also accept the petitioners' submission that the parties opponent could, and should, have anticipated any potential need for any report from an expert historian at a much earlier stage in the present

litigation, provided for it in the draft directions they were seeking from the court, and made due allowance for it when arranging for the substantive hearing dates.

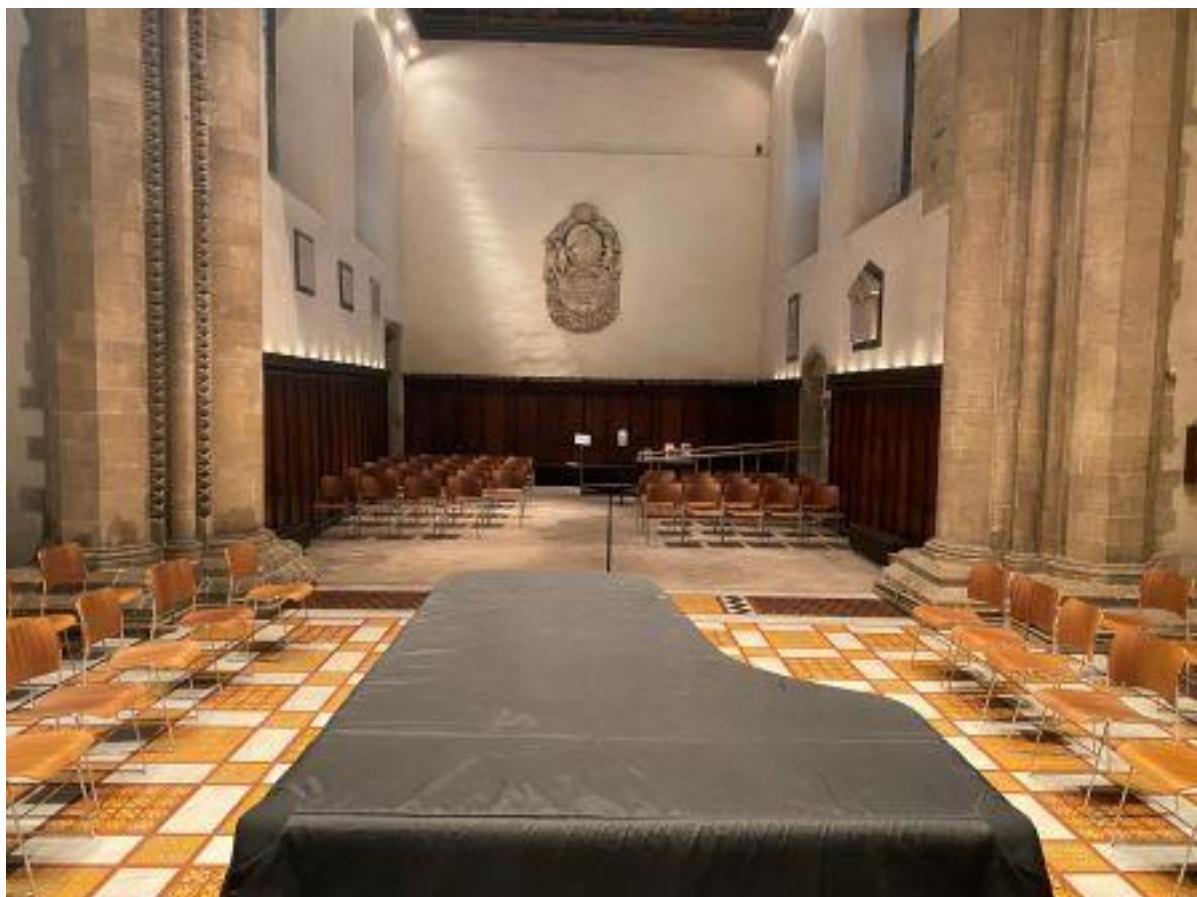
34. As discussed on 8 January 2022, arrangements will be made for the substantive hearing to extend into a fourth day if this becomes necessary. The costs of the parties' opponent's application, and of the hearing on 8 January 2022, will be reserved to the substantive hearing of the petition.

*David R. Hodge*

Deputy Chancellor Hodge QC

18 January 2022

View of the Rustat Memorial from the Chancel Screen



## View of the Rustat Memorial



View of the Chancel Screen from the West Wall

