IN THE ARCHES COURT OF CANTERBURY

Charles George QC, Dean of the Arches

Chancellor Wiggs and Chancellor Turner QC

On appeal from the Consistory Court of the Diocese of Rochester

In re St John the Baptist, Penshurst

Judgment
(approved)

Appearances:

Philip Petchey of Counsel, for the Appellant/Party Opponent, instructed by the Victorian Society, 1 Priory Gardens, London W4 1TT

Charles Mynors of Counsel, for the Respondents/Petitioners, instructed by the Petitioners c/o the Revd. Thomas Holme, The Rectory, High Street, Penshurst, Tonbridge, Kent, TN11 8BN

Introduction

1. This is an appeal by the Victorian Society against the judgment of the chancellor of the diocese of Rochester (Chancellor John Gallagher) of 1 October 2014. It has required the court to revisit the tension that frequently exists between on the one hand conservation of what is best in our heritage and on the other hand the requirements, or claimed requirements, of present day worship and mission. The second half of the 19th century saw a transformation in the layout of many parish churches, including numerous instances where chancel screens were installed (or re-installed), emphasising the specialness and secrecy of the chancel, and the separation of the clergy from the laity (topics explored in *In re St Alkmund, Duffield* [2013] Fam 158 paras 30-32, which concerned a chancel screen introduced in the mid-1890s). This appeal concerns one of the thirty-four chancel screens which Bodley and Garner, the leading ecclesiastical architects in England at the time, designed for medieval parish churches. It was erected in St John the Baptist, Penshurst between 1895 and 1897. Whatever the artistic, architectural and historic arguments in favour of retention, such screens undoubtedly conflict to some extent with the understandable aim that church buildings should be more open and useable, both for worship and other ecclesiastical and secular use.

The church

2. Dating in part from the early twelfth century, St John the Baptist, Penshurst has been significantly altered on numerous occasions over the years, most substantially by G.G. Scott who in 1854-8 rebuilt the north aisle and the chancel east wall, and incorporated a prominent timber arch with openwork tracery spandrels and large angel corbels, together with a low stone wall, to divide nave and chancel. The Italianate stone pulpit was introduced in 1865. As well as the chancel screen with which this court is concerned, Bodley and Garner also designed a screen for the north aisle, which was installed at the same time as the chancel screen or shortly thereafter. There followed the furnishing and embellishment of the chancel by, first, Bodley and Garner, and then their former assistant F.C. Eden, including the reredos, chancel rails and other screens, designed to form a harmonious ensemble.

The chancel screen

3. This was erected as a memorial to Charles Stewart, the 2nd Viscount Hardinge, by his son Charles, lst Baron Hardinge of Penshurst, and Viceroy of India from 1910-16. Son of a Governor-General of India, the 2nd Viscount was described by the chancellor as “not a particularly significant historical figure”, though he was chairman of the trustees of the National Portrait Gallery and a trustee of the National Gallery, and of some local importance. Bodley and Garner were probably asked to design the screen because of their architectural pre-eminence. According to the expert’s report of Mr Michael Hall (whose recently published book, *George Frederick Bodley and the Later Gothic Revival in Britain and America* (Yale 2014) is now the standard work on the subject), G.F.Bodley (1827-1907) was “one of the most influential architects produced by the Gothic revival [who] led the turn in Gothic

architecture in the 1860s towards more explicitly English sources and later medieval models".

4. The screen consists of eight bays, three either side of the central double opening, with a single ornamented beam along the top. Whilst it undoubtedly creates a separation between chancel and nave, and thus between the celebrant, altar and choir on the one hand, and the congregation on the other, it has been so designed that it has only a limited effect on intervisibility between chancel and nave. This is because the wooden tracery is confined to the arches above each bay, leaving large openings beneath. "Extremely ornate and pretty" is the description in Newman's edition of Pevsner's Buildings of England, *West Kent and the Weald* (3rd ed. 2012, p.448). According to Mr Hall, the Penshurst screen is among the finest half dozen that Bodley and Garner designed for any medieval parish church:

> "The screen is exceptional in the way that it satisfyingly combines a bold architectural presence, most evident in the weighty, deeply coved beam, with great delicacy in the almost transparent carved ornament of the tracery….[A]lthough the overall form of the screen and its cresting are based on 15th-century Perpendicular examples, the bold ogee arches of the tracery evoke mid 14th-century precedents".

Mr Paul Sharrock, the church's inspecting architect, said in his expert's reports that he appreciated the quality and importance of the chancel screen, but that it was similar to other Bodley screens and certainly not in the same league as his screen at St Paul's church, Knightsbridge, for example.

The listing

5. In 1954 the church was listed as Grade B (the then ecclesiastical equivalent of Grade II*), with a brief list description, which included mention of the chancel screen. In 2010 the church was promoted to Grade I (Group Value), and the list description was revised to include a lengthy description of the church and its contents (in which, under the heading "Principal Fixtures", the screen received specific mention as "Chancel screen 1895 by Bodley and Garner, in a very elaborate late Perpendicular style with delicate tracery and a coved loft"). There is also a heading "Reasons for Designation":

> "The church of St John the Baptist, Penshurst is designated at Grade I for the following principal reasons
> * Parish Church with C13 N arcade and C14 S arcade
> * C15 tower
> *S aisle and S porch rebuilt 1631
> * Heavily restored and partially rebuilt in 1864-5 by George Gilbert Scott
> * Fine reworking of the S(Sidney) chapel in 1820 by J B Rebecca
> * Excellent monuments of the C13-C19."

It would seem that these were the principal reasons for the upgrade from Grade B to Grade I.

The Hallaton scheme

6. The petitioners have been in negotiation with the Parochial Church Council ("PCC") and churchwardens of St Michael and All Angels, Hallaton in the diocese of Leicester who wish to install the chancel screen in their church, if it were to become available. St Michael and All Angels is a medieval church, which frequently holds services with everyone seated in the chancel. The proposed installation is welcomed both on aesthetic grounds (reference has been made to the screen's "graceful, filigree lightness") and as strengthening the feeling of intimacy and fellowship of those involved in such services. The installation has received preliminary support from the Leicester Diocesan Advisory Committee ("DAC"), but there remains outstanding the grant of a faculty by the chancellor of the diocese of Leicester, awaiting the outcome of this appeal.

7. Re-location to Hallaton would require the chancel screen being reduced in size (involving the loss of one bay out of three on each side of the central opening). Evidence was given to the Chancellor that the chancel screen was effectively a kit of parts, so that it could be readily dismantled and re-erected in reduced form in another location. The budget of the Hallaton Church Restoration Trust allows not merely for transporting the screen, but also for a cabinet maker and a carpenter to dismantle the screen in Penshurst and re-erect it at Hallaton.

The petition

8. The petition (as amended) of the Rector and churchwarden was for four items:
(i) removal of the Bodley and Garner screen between the chancel and the nave of the church
(ii) re-ordering of the chancel, to include the removal of the choir stalls, and the platform on which those stall stand;
(iii) relocation of six ledger stones in the chancel (choir);
(iv) laying of a new Clipsham stone floor to the chancel (choir).

9. The works (ii) to (iv) were not of themselves contentious, but depended on whether the works referred to in para (i) were allowed.

10. No objections were received as a result of the public notices and notice to relevant parties (other than from the Victorian Society). The petition was recommended by the Rochester DAC in its certificate of June 2013, confirmed in August 2013. Following a direction by the chancellor, the DAC on 6 June 2014 submitted a six-page written statement, accompanied by its relevant minutes (including those of six meetings when the matter had been considered since August 2013), re-iterating and further explaining its support. The Church Buildings Council ("CBC"), possibly on the basis that the screen would go to Hallaton, made clear that it did not raise any concern about the screen's disposal. English Heritage ("EH") did not enter an objection, whilst expressing disappointment that the screen was to be removed from the church; in correspondence with the Victorian Society shortly before the hearing, they supported the Victorian Society's alternative re-ordering plan which would have left the screen in situ, but accepted that this depended on the

strength of the petitioners' case on the need to remove the screen. Writing to the DAC in February 2012, the Society for the Protection of Ancient Buildings ("SPAB") sought review of the proposed removal of the screen, but, when the petition was lodged, SPAB did not enter an objection.

11. At the hearing in July 2014 both parties were represented by counsel with great experience of listed buildings and ecclesiastical law, who have also appeared on the present appeal. The petitioners' case on need was presented by the Rector and supporting local witnesses. Mr Tom Ashley, Senior Conservation Adviser (Churches) to the Victorian Society, accepted that the Victorian Society's proposals would mean a foregoing of the flexibility that would come from removing the screen. He also gave evidence relating to the Victorian Society's alternative scheme, for retaining the screen in situ but with an altar in front of it. Historical and aesthetic evidence on the screen and its architectural role was given for the petitioners by Mr Sharrock, and for the Victorian Society by Mr Hall. The Archdeacon of Tonbridge gave evidence in support of the petition.

12. The hearing lasted an unusually long time (four days). By his judgment the chancellor directed that a faculty should issue for all the works set out in para 8 above. Having heard detailed argument in relation to the screen, he also imposed conditions, advanced by the petitioners. The chancel screen might be dismantled and transported to Hallaton, if that scheme went ahead. If the chancel screen had not been erected at Hallaton within two years, it might be removed from the church and put into appropriate storage as approved by the DAC or, in default of approval, by the Court, so that an alternative home could be found for it.

13. The faculty implicitly granted permission for reduction of the screen in the event that the Hallaton scheme went ahead, and gave liberty to apply in respect of any (other) cutting down of the chancel screen, depending on its ultimate destination.

14. Because the proceedings were pending on 1 January 2014 when the Faculty Jurisdiction Rules 2013 ("the FJR 2013") came into force, the consistory court proceedings were subject to the Faculty Jurisdiction Rules 2000 ("the FJR 2000") (see FJR 2013 rule 20.3(1)). It was only during the hearing that the correct situation was appreciated, and this generated Supplementary Notes by both counsel after the hearing, together with a Reply from Mr Petchey.

The judgment

15. The judgment contains a helpful summary of most of the evidence and submissions. The Chancellor found that:

(a) there was a physical divide made by the screen which made communication and eye contact difficult (para 15), the screen being dominating, intrusive and gloomy (para 46)
(b) removing the screen would make the church more open and viable for worship, less dark and gloomy, and more flexible and acceptable for modern worship needs and practices (paras 39 and 45)

(c) the Victorian Society's alternative, involving accommodating an altar below the chancel step and screen, would cut off the altar and the Rector from the chancel; there would be little room to move around the altar (para 17) and it would deflect the purposes of the parish's proposals, wants and needs (para 39)
d) the proposals would not result in significant harm to the church as a building of special architectural or historic interest (para 42)
e) even if they were considered to result in such harm, the harm would not be serious (para 44), but slight and most certainly not substantial or significant (para 46)
f) the justification for carrying out the works was overwhelming in terms of the church's requirements of worship and mission (para 45).

16. In carrying out the balancing exercise he took into account that in the case of a listed church the benefits needed to be greater than would otherwise be the case if they were to outweigh disbenefits (para 40). He attempted to follow the guidelines suggested by this court in *Duffield* para 87.

The appeal

17. On 29 November 2013 the Dean granted leave to appeal, confined to four grounds. However, as permitted by the Dean's order, at the hearing the Victorian Society renewed its application for leave to appeal in respect of the other grounds. Since there was considerable overlap between the already permitted grounds and the renewed grounds, and since the reasoning behind all grounds had been extensively set out in counsels' skeleton arguments, we conducted a "rolled-up" hearing.

18. In accordance with the practice followed most recently in *Duffield*, the appeal was heard in the church at Penshurst, rather than in London, so that we could better understand the artistic and architectural arguments, and so that, in the event that we were to set aside the judgment below, we could ourselves re-determine the matter if we did not decide to remit the matter for rehearing, as provided for by rule 16(1) of the Faculty Jurisdiction (Appeals) Rules 1998 ("the Appeals Rules 1998").

Underlying principles

19. Before turning to consider the specific arguments advanced on appeal, it is worth distinguishing between two separate, though related, matters, both of which arise in the present appeal. The first relates to works to listed buildings; the second to works affecting articles of special architectural, historical, archaeological or architectural interest, sometimes known as church treasures.

(1) *Listed building considerations*

20. Where works are proposed to a listed building, a balancing exercise has to be carried out, in respect of which this court gave guidance in *Duffield* para 87.

21. For those chancellors who would be assisted by a new framework of guidelines, the court suggested an approach of asking:

"(1) Would the proposals, if implemented, result in harm to the significance of the church as a building of special architectural or historic interest?
(2) If the answer to question (1) is "no", the ordinary presumption in faculty proceedings "in favour of things as they stand" is applicable, and can be rebutted more or less readily, depending on the particular nature of the proposals……Questions 3, 4 and 5 do not arise.
(3) If the answer to question (1) is "yes", how serious would the harm be?
(4) How clear and convincing is the justification for carrying out the proposals?
(5) Bearing in mind that there is a strong presumption against proposals which will adversely affect the character of a listed building…., will any resulting public benefit (including matters such as liturgical freedom, pastoral well being, opportunities for mission, and putting the church to viable uses that are consistent with its role as a place of worship and mission) outweigh the harm? In answering question (5*),* the more serious the harm, the greater will be the level of benefit needed before the proposals should be permitted. This will particularly be the case if the harm to a building which is listed grade I or II*, where serious harm should only exceptionally be allowed".

22. We make four observations about these questions:
(a) Question (1) cannot be answered without prior consideration of what is the special architectural and/or historic interest of the listed church. That is why each of those matters was specifically addressed in *Duffield* paras 57-58, the court having already found in para 52(i) that "the chancellor fell into a material error in failing to identify what was the special character and historic interest of the church as a whole (including the appearance of the chancel) and then to consider whether there would be an overall adverse effect by reason of the proposed change".
(b) In answering questions (1) and (3), the particular grading of the listed church is highly relevant, whether or not serious harm will be occasioned. That is why in *Duffield* para 56 the court's analysis of the effect on the character of the listed building referred to "the starting point…that this is a grade I listed building".
(c) In answering question (4), what matters are the elements which comprise the justification, including justification falling short of need or necessity (see *Duffield* paras 85-86). That is why the document setting out the justification for the proposals is now described in rule 3.3(1)(b) of the FJR 2013 as a document "*commonly known as* a "statement of needs"" (italics added), in recognition that it is not confined to needs strictly so-called.
(d) Questions (1), (3) and (5) are directed at the effect of the works on the character of the listed building, rather than the effects of alteration, removal or disposal on a particular article.

23. Central to the arguments on this appeal has been the way in which the chancellor purported to apply the *Duffield* guidelines in the present case.

(2) *Church treasures*

24. Church treasures are articles of particular (or special) historic, architectural, archaeological or artistic interest falling within the faculty jurisdiction: see rule 15(1)(a) of the FJR 2000 (now rule 8.6(1)(c) of the FJR 2013). Such were the Burges font in *Re St Peter's, Draycott*, [2009] Fam 93; the Oldrid Scott chancel screen in *Duffield*; and the Flemish armet in *In re St Lawrence, Wootton* [2015] Fam 27. Where church treasures might be adversely affected through movement or removal unless special precautions were taken, the CBC's advice must be sought: rule 15(2) of the FJR 2000 (now rule 8.6(2) of the FJR 2013); and where disposal (by loan, gift or sale) is involved special rules apply, as most recently refined in *Wootton*, where the interest in maintaining public visibility was emphasised (see para 37).

25. Since *Duffield* concerned movement of a chancel screen to another location within the church, no issue concerning alteration, removal or disposal of the screen arose (see *Duffield* para 13). In the present case both removal and disposal are envisaged (as well as a significant alteration in size, if the Hallaton scheme goes ahead).

26. If the chancel screen constitutes a church treasure (a matter we consider below), it is important that all matters relevant to this status are taken into account in the decision-making process, and not only those relating to the character of the listed building. As English Heritage's advice, contained in *New Work in Historic Places of Worship* (2012), states:

> "Chancel screens are generally important to the character of a church – *as well as often being important objects in their own right* – and we would encourage their retention in situ." (italics added)

There will be cases (unlike the present) where a church treasure is located within an unlisted building, so that no considerations under the *Duffield* guidelines arise, but there will still be a need to weigh carefully the inherent artistic worth of the article. Obviously some church treasures are of more interest than others, and a stronger justification will need to be made out to justify alterations, removal or disposal of those of greater interest. That accords with the approach taken in *Wootton* para 53 in the context of disposals by sale.

27. In this context, assuming this chancel screen is a church treasure, it is irrelevant that it is a fixture (as are also fitted furnishings or paintings, decorated or painted panelling and carvings, or in-built clocks, to give but a few examples) rather than a moveable item (for the somewhat indistinct boundary between chattels and fixtures, see *Berkeley v Poulett and Others* (1977) 1 EGLR 86, CA, 88-89). There is no reason to apply a different approach depending on the distinction (which is irrelevant to the intrinsic value of the article); and the wording of FJR 2000 rule 15(6) (now FJR 2013 rule 8.6(4)) ("article" includes…an object fixed to land or a building") shows that the distinction is irrelevant in terms of mandatory consultation, as it is in our view more widely. In *Draycott* there was uncertainty whether the font was a moveable item or a fixture, but the factors held to be relevant in the case of disposal of the font if it were a moveable item (which included that "the church would be diminished in interest by the disappearance of a work of considerable architectural, artistic and historic importance") were held to "apply equally" if it were a fixture (see paras 76 and 82(3)). We accept the submission of Mr Petchey, counsel for the

Victorian Society, that it would be unacceptable to adopt a less rigorous approach to a church treasure which is a fixture than to one that is not. Dr Mynors, counsel for the petitioners, fairly pointed out that previous cases which have considered the proper approach to church treasures have involved moveable chattels, which could without difficulty be enjoyed on their own and had a value readily realisable on the open market. He conceded, however, that in the case of a chancel screen of some intrinsic interest in itself, the act of removing it and re-erecting it elsewhere has some of the characteristics of removing a chattel to another location; and that this made it appropriate to consider, as what he termed "a subsidiary issue", the extent to which the screen is "part of the heritage and history not only of the church, but also of all the people, present and future, of the parish", a phrase used by this court in *St Mary the Virgin, Burton Latimer* (unreported, 26 October 1995). This aspect of an object as "part of the local heritage" was also referred to in *Wootton* para 59, both *Burton Latimer* and *Wootton* being concerned, however, with chattels rather than fixtures.

This court's jurisdiction

28. As explained in *In re Holy Trinity, Eccleshall* [2011] Fam 1 para 71:

> "These are not proceedings by way of judicial review of the chancellor's exercise of discretion, but appellate proceedings in which, as provided by rule 16(1) of the 1998 Rules we may:
>
> > "(a) draw any inference of fact which might have been drawn in the proceedings in the consistory court; (b) give any judgment or direction which could have been given on the consistory court or remit the matter for rehearing and determination in the consistory court by the chancellor or a deputy-chancellor, as the court considers appropriate."
>
> As stated in *In re St Peter and St Paul's Church, Chingford* [2007] Fam 67, para 52:
>
> > "Matters of primary fact are matters for the judge of first instance. But where the decision is based on an erroneous evaluation of the facts or on a balancing exercise in which the chancellor has failed to evaluate the facts correctly such as taking into consideration matters he/she should not, or ignoring relevant considerations which should have been taken into account, then it is well settled that this court can set the chancellor's decision aside and consider the matter anew: see *In re St Edburga's, Abberton* [1962] P 10 and *In re Bentley Emmanuel Church, Bentley* [2006] Fam 39."
>
> ……
>
> It is not necessary for [the appellant] to persuade us that the decision was actually perverse, though the test is a demanding one".

29. In *Duffield* para 53 the court indicated that there was no practical distinction between the conventional basis set out in *Eccleshall* and that which applies in civil appeals under rule 52.11(3)(a) of the CPR (including errors of law and fact as well as inappropriate exercise of discretion).

30. In this appeal Dr Mynors has sought to challenge the traditional approach based on "an erroneous evaluation of the facts as a whole", on the ground that

Abberton was decided in 1961 when the relevant procedural rule was rule 1 of the Rules and Regulations of the Arches Court (1903), which provided that:

> "All appeals to the Court of Arches in cases of applications for a faculty *shall* be by way of re-hearing" (italics added).

He contrasted this with the position under rule 16(1) the Appeals Rules 1998, set out above, where the court is entitled to draw any inference of fact that might have been drawn in the consistory court; but is not required to do so, since it may simply rely on the finding of the consistory court. Similarly he points out that the court now has a discretion either to issue its own judgment or to order a re-hearing. In these circumstances he suggests that the proper approach is not that in *Abberton*, but rather "whether there has been a disregard of principle or misapprehension of facts" (*Young v Thomas* [1892] 2 Ch 134, 137).

31. Mr Petchey drew our attention to rule 8 the Ecclesiastical Jurisdiction (Faculty Appeals) Rules 1965, which was in similar terms to rule 16(1) of the Appeals Rules 1998, and to the many cases in this court which, since 1965, has proceeded on the basis that the test in *Abberton* still applied.

32. We are not persuaded that there is any real distinction between the *Abberton* test and that in *Young*; and in any event we consider that the *Abberton* test has been applied so continuously by this court over the past fifty years that it would not be right now to substitute a differently worded test.

33. We also bear in mind that, when challenges are made to a judge's reasoning and to the adequacy of the reasons he gave:

> "the essential test is: does the judgment sufficiently explain what the judge has found and what he has concluded as well as the process of reasoning by which he has arrived at his findings" (*Re B (Appeal: Lack of Reasons)* [2003] 2 FLR 1035 para 11).

Allied to this is the need not to adopt too narrow a textual analysis of a judgment in approaching the question of whether a judge has misdirected himself.

The Grounds of appeal

34. As already indicated, this appeal raises issues relating to alleged harm to a Grade I listed building and to the screen as an article of intrinsic artistic interest. Although pleaded and argued by Mr Petchey under ten heads, which cumulatively were said to represent an erroneous evaluation of the evidence, the reality was, as it seems to us, that his case fell under three heads: first, that the chancellor had failed properly to address the issue of harm arising under questions (1) and (3) in *Duffield* para 87 and also as it arose in relation to the screen itself; second, that he had failed properly to address the issue of justification under question (4) in *Duffield* and in relation to the screen itself*;* third, that by reason of one or both of these failures, the balancing exercise he had carried out failed properly to address the presumptions which arose both under questions (2) and (5) in *Duffield* and in relation to alteration, removal and disposal of the screen.

The issue of harm

1) *Submissions on harm*

35. There were several strands in Mr Petchey's argument. The first was that the chancellor did not ask himself what was the special architectural character of the church nor what was its special historical interest, and gave no reason for his conclusion in para 42 of the judgment that no significant harm would arise to its special architectural or historic interest by the removal of the screen other than that it "was not mentioned as being of significance, or indeed at all, in the Grade I listing Reasons for Designation" (Ground 1). Mr Sharrock had explained how the church evolved through all periods; that much of what can now be seen is of the nineteenth century; the finishes internally are of the nineteenth century; the medieval layout and detail has largely disappeared. The phrase he used when giving oral evidence was that "we were looking at Victorian clothes around a medieval body" (a description agreed by Mr Hall). The chancellor had not explained or engaged with the question how the removal of a principal feature which was Victorian from a church which wore Victorian clothes did not cause any significant harm.

36. Closely related to this was Mr Petchey's contention that the chancellor misunderstood the significance of the building's list description, failed to appreciate that the screen was described in the listing as one of its "principal fixtures", and placed inappropriate weight on the fact that the screen was not mentioned in the Reasons for Designation (Ground 6). In para 30 of the judgment the chancellor had wrongly said that "the screen gets no mention in the church's Grade I listing"; and he had apparently not appreciated in his references in paras 42 and 44 of the judgment to the Reasons for Designation that they were only "principal reasons", rather than any indication that the screen played no significant role in the special architectural character and historic interest of the church.

37. Thirdly, Mr Petchey argued that in concluding that the harm was not significant, the chancellor had erroneously put weight on the fact that the status quo ante 1890 was being restored. Removal of the screen would not restore the status quo ante 1890 (because it would not restore G.G.Scott's low stone chancel wall), nor would it restore the status quo ante 1860 (because his wooden chancel arch would remain (Ground 2). This argument derived from three passages in the judgment. In para 41 the chancellor stated:

> "In passing, it is relevant, in my judgment, that what is sought is merely the undoing of what was done about 130 years ago, relatively recently in the life of this church, so as to restore things as they had stood for several hundred years insofar as the nave's separation (or lack of it) from the chancel, is concerned".

In para 44 he again referred to the fact that "the status quo ante circa 1890 is being restored". And in para 47 he said that "The screen is not integral to the church or to its architecture; quite the reverse…."

38. Fourthly, it was argued that the chancellor had wrongly failed to take into account two matters related to the historic interest of the screen and its contribution to the historic interest of the church, namely that it was a memorial to Viscount

Hardinge, and the local tradition that it was made of local oak, which were two local historic links which would be severed if the screen was relocated to Hallaton (Ground 8).

39. Fifthly, in relation to the intrinsic worth of the chancel screen, and its contribution to the special architectural and historic interest of the church, the chancellor's evaluation was flawed by the unfair approach he had taken towards the evidence of Mr Hall (Ground 9). Here it is necessary to set out the greater part of para 30 of the judgment:

> "Mr Hall, who gave evidence for the Victorian Society, undoubtedly knows a considerable amount about Bodley and Garner screens. His evidence was, in my judgment, highly partisan, although he did expressly state that he made no comment on the parish's needs. It was, however, clear from the thrust of his evidence, and the manner in which it was given, that he had no interest in the wants or needs of the church. Effectively, the only consideration for him was the preservation of the chancel screen. This led him to the surprising assertion: "My aesthetic opinion is that (the church) called out for a screen"; albeit he conceded that; [sic] "one's view might be influenced by one's churchmanship". The further assertion that the chancel screen is; [sic] "the Church's most exclusive fitting" is an example of his partisanship, the more so when one bears in mind that the screen gets no mention, [sic] in the church's Grade I listing. The extremity of his position was further exemplified when he said that the relatively minor reduction in size of the screen required if it went to Hallaton would be "mutilation". Courts these days expect and require experts to be free of bias and to be unaffected by the effect upon their clients of the exigencies of litigation. This, I regret could not be said of Mr Hall".

40. Mr Petchey drew attention to the absence of any allegation of bias or impropriety in relation to Mr Hall's evidence (both written and oral) in Dr Mynors' written Closing Submissions before the chancellor, and in particular to para 24 which read:

> "Mr Hall accepted that the use of a church is a key consideration; and that the needs of worship and mission are hugely important. He perfectly properly did not seek to challenge the Parish's case on the need for the proposed change".

Both he and Dr Mynors are agreed that there was no indication from the chancellor during the hearing that Mr Hall's evidence would or might be questioned as partisan or biased and of less weight on that account; and that there was nothing in Mr Hall's oral evidence or demeanour as a witness which led either of them to expect comment such as contained in para 30 of the judgment.

41. Mr Petchey's final arguments on harm both concerned the intrinsic importance of the screen. First, the chancellor had not properly addressed the harm to its integrity that the screen would suffer by being cut down, apparently considering as extreme the argument that harm would be so caused (this formed part of his Grounds 1 and 9). Second, that since he was satisfied that the screen could be cut down without causing it any harm or any harm which should lead to the conclusion that it should not be cut down, what the chancellor should have done was to make the faculty conditional on relocation to Hallaton, rather than imposing conditions

which left open the possibility of the dismantled screen being put into storage which might be indefinite, with the risk that it would eventually disappear (Ground 10).

42. Dr Mynors' response to Ground 1 was that the introductory wording of para 87 in *Duffield* recognized the court's appreciation of "the danger of imposing an unduly prescriptive approach in what was essentially a balancing process". This had been acknowledged by the chancellor in the present case who said (para 38 of the judgment):

> "As has been correctly argued before me, I have to carry out a balancing exercise, and ask the question: "Does the benefit of moving the chancel screen outweigh the harm caused by its removal?"

Dr Mynors argued that the approach of Mr Petchey was precisely the "unduly prescriptive framework" deplored in *Duffield.* The chancellor had before him ample evidence as to the architectural and historic significance of the church, presented by the two expert witnesses in their written and oral evidence, and in other documentary evidence, including the list description. He had briefly summarised the significance of the church, and the screen in particular, in paras 6 to 8 of the judgment, based on the Statement of Significance. He had noted Mr Hall's perception of the harm that might be caused by the removal of the screen in para 30 of the judgment. The chancellor was not persuaded that significant harm would arise from the removal of the screen (para 42) and had taken into account that the screen was not mentioned in the Reasons for Designation. In the light of that assessment, he was not persuaded that significant harm would arise from the removal of the screen (para 42). His analysis was brief, but in essence he was accepting Mr Sharrock's assessment of the significance of the church and the screen, and rejecting Mr Hall's assessment of the harm. It was clear from the language of paras 42 to 46 of the judgment that the chancellor had the five *Duffield* questions in mind. On the chancellor's findings questions (3), (4) and (5) did not fall to be answered, but he had considered them anyway, concluding that he could not imagine that any harm could be considered serious (para 44). In respect of Ground 6, the chancellor was entitled to have regard in his paras 42 and 44 to the fact that the screen was not mentioned in the Reasons for Designation, and he must have intended in para 30 to refer to the absence of mention in the Reasons for Designation, rather than the list description. It must have been perfectly obvious to the chancellor that the screen *was* mentioned in the list description, but not as one of the starred features in the Reasons for Designation.

43. In response to Ground 2, Dr Mynors argued that removal of the screen *did* restore the position to roughly what it was prior to the 1890s – in that there will no longer be a chancel screen – and more closely to what it was prior to the 1850s – in that there will not be a low stone wall. The position will thus be as it was from at least 1600 to 1850 – save that the wooden arch will remain in place, thus providing for greater separation of chancel and nave than existed prior to 1850. Any slight inaccuracy by the chancellor was of no consequence. It was not perverse to consider that the removal from the church of a feature that was added some while after it was first built is different from the removal of a feature that was present from the outset.

44. In response to Ground 8, the chancellor had expressly referred in his judgment (paras 8-9) to the historical fact that the screen was a memorial to Lord Hardinge and to the fact that it was reputed to have been made of local oak. He was

therefore aware of these aspects of the local historical interest of the screen. It is to be presumed that the chancellor did not give these two matters any particular importance, this was not of great moment, since every feature in an old church is likely to have had some origin, and most timber items would have been made of local materials.

45. In response to Ground 9, there was a marked difference between the content of Dr Mynors' skeleton argument and his oral submissions. In the former he argued that many witnesses, instead of simply saying that removal of a particular feature would be harmful and would need to be justified by a strong case on need, habitually assert that the removal of the feature "must" be resisted regardless of the actual case as to need. The chancellor was doing no more that noting that Mr Hall was, in his view, straying beyond the proper role of a witness, and seeking to reach an overall decision on the basis of considering only one side of the balance. The chancellor was entitled to differ from Mr Hall's aesthetic judgment, reference being made to *Eccleshall* para 64 ("a chancellor is not bound by expert advice on aesthetic considerations") and the cases cited there; to regard Mr Hall's use of the word "mutilation" to describe what the chancellor considered to be "a relatively minor reduction in size" (para 30) as an indication of the somewhat extreme position being adopted by Mr Hall; and therefore to reach the assessment that Mr Hall was partisan and not free from bias. In his oral submissions, however, Dr Mynors accepted that there had been no prior indication from anything that had taken place at the hearing that Mr Hall's evidence would be treated as partisan and biased; that Mr Hall had not asserted that the screen must not be removed, whatever the actual case as to need; and that he had accepted in cross-examination that the use of the church was a key consideration and that had not sought to challenge the parish's case on need for the change. Dr Mynors expressly described the tone of para 30 of the judgment as "unfortunate", and "a little unfair to Mr Hall"; and disclaimed any suggestion that the evidence of Mr Hall had been affected in any way "by the effect upon [the Victorian Society] of the exigencies of litigation" (the chancellor's phrase in para 30 of the judgment).

46. In response of Mr Petchey's arguments on harm to the integrity of the screen (Grounds 1 and 10), Dr Mynors repeated his contention that the chancellor was entitled to conclude that the reduction of the screen was "relatively minor" (para 30 of the judgment). So far as concerned the position if the Hallaton scheme did not go ahead, the chancellor was entitled to feel that the removal was justified on its own terms, whether or not there was a new home available. It was therefore perfectly logical for him to deal with the relocation or disposal of the screen in the way he did, and to grant a faculty for the removal of the screen, regardless of whether or not there is a new home for it.

(2) Analysis and determination on harm

47. On Grounds 2, 8 and 10 (on all of which permission to appeal was originally refused) we refuse the renewed applications, since we find convincing the arguments of Dr Mynors, set out above and which we do not need to repeat.

48. On Grounds 1 and 6, which really stand together, we are very aware of the risk of requiring too much by way of detailed reasoning from chancellors, and have felt tempted to conclude that, albeit in a rather rough and ready way, this chancellor has explained the reasons for his decision that the harm would not be significant.

49. Unfortunately, however, and leaving aside Ground 9 for the time being, we do not consider that this course is open to us. It is difficult to discern "the process of his reasoning" (to use the phrase in *In re B (Appeal: Lack of Reasons*), set out in para 33 above), by which the chancellor has reached conclusions which are difficult to comprehend, and in some cases were simply not open to him.

50. A peculiarity of the chancellor's judgment in this case is that it is not clear how he rated the intrinsic worth of the chancel screen, nor whether he considered it to be of special architectural, historic or artistic interest. Despite the views of Mr Hall and Mr Sharrock to which we referred in para 4 above, the chancellor merely stated that he was not saying that the screen was "of no value, and should be cast aside onto the scrap heap" (para 47 of the judgment). To use Dr Mynors' phrase in his oral submissions to us, the chancellor's view was that the screen was "only of some value". This may be why the chancellor (whom Dr Mynors described orally as "obviously not a screen man") was so untroubled by the narrowing, which would be necessary if it were to be installed in Hallaton (see para 47 of his judgment), and by the possibility that it might be stored indefinitely.

51. We can only suppose that the relatively low artistic value the chancellor attributed to the screen stemmed in large part from the fact that it was not mentioned in the Reasons for Designation. This was to leave out of account that those reasons were merely the "principal reasons", and most likely related to the principal factors that in the opinion of those responsible for the revision of the listing in 2010 had caused the lifting from Grade B to Grade I. Additionally he nowhere mentioned that the chancel screen was expressly referred to as one of the "principal fixtures" in the church in the revised list description, and we are unable to be sure that it was merely a slip of the pen which led to the chancellor's wholly erroneous statement in para 30 of the judgment that "the screen gets no mention in the church's Grade I listing".

52. The chancellor was not bound (nor probably competent) to resolve the slight difference between Mr Hall and Mr Sharrock as to how highly the screen was to be rated amongst the numerous screens designed by Bodley, since even Mr Sharrock stated in his second witness statement that "the importance of Bodley's screen has never been questioned". But he was, we consider, bound on the evidence to conclude that the screen was of considerable intrinsic merit, or in other words a church treasure, the alteration, removal or disposal of which would require strong justification. That is nowhere recognised in the judgment.

53. In relation to the effect on the listed building of removal of the screen, the chancellor was clearly aware of, and trying to answer, question (1) in *Duffield*, which he set out in the first sentence of para 42 of the judgment. But instead of finding that there would be harm (or no harm) to the significance of the church as a listed building, the answer he gave was that he was "not persuaded that significant harm would arise" (second sentence of para 42), which we construe as meaning that there would be some, but insignificant, harm to the significance of the church as a listed

building. But he gave no reasons whatever for that answer, save that the screen was not mentioned in the Reasons for Designation (which could not in our opinion be a sufficient reason for his conclusion); and the reference to restoring the status quo ante 1890 (which could be at best an incomplete reason).

54. It is entirely unclear from the judgment what the chancellor considered to be the special architectural character or special historic interest of the church, a matter on which he was unfortunately not assisted by the reports of Mr Sharrock and Mr Hall which were silent on that issue. However, following oral evidence and cross-examination the special architectural character was agreed to be that of a medieval church wearing, particularly in its interior, Victorian clothes. We accept Mr Petchey's argument that a finding that the removal of so large and prominent a Victorian screen from such a Victorian interior would not cause significant harm to that special architectural character required explanation.

55. Similarly, one might have supposed that removal of the screen would, whatever the position in relation to special architectural character, have involved harm, and possibly significant harm, to the historic interest of the church. Again no explanation was given for the chancellor's conclusion that there was no significant harm.

56. It may be that the chancellor's answer to question (1) in *Duffield* was based on the final sentence of Mr Sharrock's first witness statement, under the heading Conclusion, which was as follows:

> "I consider that the removal of the Chancel screen would be a change to the appearance of the church but I do not believe it would harm its overall significance".

But reliance was not placed by Dr Mynors on that statement (which does not appear to be summarising anything in the main part of the witness statement); and in any event that final sentence was entirely unrelated to any assessment of effect on the special historic interest of the church.

57. Mr Petchey contrasted the compression of the chancellor's judgment with the analysis of effect on special architectural character and historic interest in *Duffield* paras 57-60. But nothing in this present judgment is intended to suggest that in every case chancellors will need to go into as much detail as was done there. It is, however, necessary that a rigorous analysis is done, using whatever particular structure individual chancellors consider appropriate. That was not done in this case.

58. We turn then to Ground 9, concerning the chancellor's treatment of Mr Hall. There are here three preliminary points, none of which were mentioned in counsels' skeleton arguments and which were only briefly explored when raised by the court during the hearing:

(1) Rule 10.5 of the FJR 2013 contains detailed provisions relating to expert reports, mirroring those in the CPR, including among other detailed requirements, rule 10.5(1) that no party may call an expert or put in evidence an expert's report without the court's permission. There is provision requiring that any such report must contain a statement that the expert understands their duty to the court; that the report be addressed to the court and not to the party from whom the expert has received instructions; and that where there is a range of opinion on the matters dealt

with in the report, the report should summarise the range (rule 10.5(3)(a),(b) and (h)(i). But there is nothing similar in the FJR 2000 which govern these proceedings, save for rule 19(3)(iii) and (iv) which provide that directions "shall" be given that there be an exchange of the reports of expert witnesses to be called by the parties and that they be requested to identify matters upon which they agree and those upon which they disagree; and that the number of expert witnesses to be called be limited to such number as the chancellor or registrar deems appropriate in the case in question. No such directions were given in this case.

(2) There tends to be a qualitative difference between the evidence of experts on, say, engineering, structural or heating matters, and that of experts on matters of architectural appreciation and aesthetics. That is for at least two separate reasons. First, the very nature of the subject-matter in the second category is such that total objectivity is unattainable, because taste is necessarily to some extent a subjective matter. Second, within the second category, the more knowledgeable experts are in their particular subject, the more likely it is that they will attribute additional value to their specialist area of expertise. They may, to use Dr Mynors' phrase, become "enthusiasts", not a quality one looks for in expert witnesses generally, and most unlikely to arise within the first category.

(3) There is a special feature relating to consistory court hearings. Petitioners will almost always, as here, use as their expert witness the church's inspecting architect, who will normally be the designer, or an active participant in and adviser on, the scheme which is being promoted. Thus in the present case Mr Sharrock acknowledged in his first witness statement that he was the "design team leader", and that he had prepared the Statement of Significance in 2011, which he asked should be treated as part of his evidence. The party opponent is often, as here, the relevant (or most affected) national amenity society (defined in s.31((1) of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 ("the CCM"), repeated in rule 2(1) of the FJR 2000, and rule 2.1(1) of the FJR 2013). Such amenity societies exist to campaign for the conservation, preservation and better appreciation of the architecture and church treasures of a particular historical period. Normally the amenity societies' witnesses will be members, and often active members, of the particular amenity society. As stated in his report, Mr Hall has been a member of the Victorian Society since 1982; since 2000 he has chaired its Activities Committee; and in 2013 he was appointed editor of its magazine, The Victorian. Despite these qualifications to their independence, the importance of such experts to the functioning of the faculty jurisdiction is obvious, and particularly so given the limited financial resources on both sides. Chancellors are not (save exceptionally) qualified architects or conservationists, and they need all the assistance they can get from both parties in reaching an informed decision. No argument was addressed to us that persons falling within the position of Mr Sharrock and Mr Hall were excluded from the provisions relating to experts contained in the FJR 2000 and 2013, although in a Note, submitted after the conclusion of the hearing, Mr Petchey recognised that those provisions were "less apt" in the case of Mr Sharrock and Mr Hall than in the case of certain other types of expert.

59. The duty of experts is to help the court on the matters within their expertise, and this duty overrides any obligation to the person from whom they have received instructions or by whom they are paid. As said in *Toth v Jarman* [2006] 4 All ER 1276, CA, para 100:

> "It is now well-established that the expert's expression of opinion must be independent of the parties and the pressures of the litigation".

This was acknowledged by both experts in the statements of their duty contained in their reports. If an expert is qualified to give evidence, the fact that he is an employee of one of the parties to the litigation, or has an interest in the proceedings, does not, subject to appropriate disclosure, absolutely disqualify him from giving evidence (*Toth v Jarman* para 112, following *Field v Leeds City Council* (2000) 17 EG 165, CA). As was said in the latter case, "The fact of his employment may affect its weight but that is another matter" (para 31).

60. A chancellor is not bound to follow the opinion of experts, but he is bound to give their evidence very considerable weight, unless it is plainly misconceived or so biased as to be valueless. Where manifest partisanship or bias is detected, then this should be raised with the individual expert during the course of the hearing, so that he or she can respond. It is not in our opinion desirable, or fair, for chancellors to include derogatory comments about expert witnesses in their judgments without the witness having the chance to defend their position.

61. We have seen nothing to suggest that Mr Hall acted improperly in the way he compiled his expert reports or gave his oral evidence. Mr Hall's description of the history of the church, by no means confined to Bodley's role in carrying forward the other Victorian alterations, was erudite and comprehensive; and the chancellor was privileged to have evidence from someone with unrivalled expertise in late Victorian architecture, and in particular the career and works of Bodley himself. Enthusiastic as he no doubt was about Bodley's contribution, and the importance of this screen both as a work of art and for its contribution to the special character and interest of the church, there was nothing partisan or biased about Mr Hall's evidence. It was not proper to categorise as "extremism" Mr Hall's deeply felt concern about the proposed alteration to the screen to accommodate it at Hallaton (a reduction in width of about one quarter, leading to a markedly different screen to that which Bodley designed) . It was not a proper criticism that Mr Hall "had no interest in the wants or needs of the church"; those were matters outside his expertise, as he expressly stated in his report. There was also, as Dr Mynors conceded, nothing to indicate that his evidence was in any way affected by the effects for the Victorian Society of the "exigencies of litigation". We accept the joint view of both counsel that the chancellor's criticisms in para 30 of the judgment were unfair and unjustified. It follows also that the chancellor's own conclusions under *Duffield* question (1) and in relation to the intrinsic worth of the screen were most probably influenced by the disdain he conceived for Mr Hall's evidence.

62. The upshot is that the appeal in respect of Grounds 1, 6 and 9 succeeds.

The issue of justification

1) Submissions on justification

63. The Victorian Society's case is that the chancellor failed in at least two respects in appraising the petitioners' justification for carrying out the proposals, a

matter they consider relevant both under *Duffield* question (4) and in respect of the proposed alteration, removal and disposal of the screen as a church treasure.

64. Mr Petchey argued that the chancellor had failed to address the case of the Victorian Society on need (Ground 5). This was that the screen did not inhibit the sort of traditional services with a robed choir that were currently held in the church; and that the asserted lack of flexibility in respect of future use was a potential requirement rather than a present need.

65. He also argued that the chancellor had failed properly to address the Victorian Society's alternative scheme, which involved positioning a removable altar in front of the screen, and removing the front two rows of pews (Ground 7). This would have had the important benefit (from the point of view of the chancellor) that worshippers in the nave would not have a screen between them and the celebrant at the Eucharist; and also the benefit of preserving the screen. The chancellor's description of this alternative as "the worst of all options" (para 17) failed to recognise its benefits. Additionally, the Victorian Society's alternative allowed the celebrant the same space behind the new altar as currently existed behind the altar in the chancel, which made it hard to understand the chancellor's criticism in para 17 of the judgment that "there would be little room to move around the altar table". Moreover it was unclear in the judgment whether the chancellor had in mind the Victorian Society's own alternative, or the variant of it prepared by Mr Sharrock. The latter would increase the space behind the altar and allow for a rail at which communicants could kneel; but it would also increase the number of pews to be lost, so that the remaining pews would be starting half way down the aisle, matters about which the chancellor expressed concern in paras 17 and 36 of the judgment.

66. Dr Mynors responded to Ground 5 that evidence on the perceived need to remove the screen had been given by a number of witnesses appearing on behalf of the petitioners, whose evidence the chancellor had found compelling. It was often the case that a "need" argument is based on future uses or potential requirements; almost by definition the types of worship and other activities that would be prevented or impeded by the presence of the screen do not take place at present, because of the screen. The Victorian Society's case on need amounted to no more than an assertion that the parish could continue to operate by holding services, and concerts and other activities, of the type that currently take place, which would not be a satisfactory method of operation because it would not enable the parish to do what it now felt to be necessary in its role as a local centre of worship and mission.

67. In response to Ground 7, Dr Mynors argued that there was nothing to indicate that the chancellor had failed to understand what the Victorian Society was suggesting. The chancellor had been entitled on the evidence to conclude, as he had in para 39, that:

> "None of the counter-proposals put forward by the Victorian Society can be said to be remotely practicable. They would, as the thrust of Mr Shorrock's [sic] evidence quoted above reveals, have the effect of deflecting the purpose of the parish's proposals, wants, and needs."

(2) Analysis and conclusions on justification

68. Leave to appeal was initially refused on Ground 5. We have already observed at para 22(c) above that it was not necessary for petitioners to demonstrate need properly so-called, but merely that the advantages of what they propose will outweigh the conservation objections in respect of the removal of a church treasure in a Grade I listed church. Mr Petchey's arguments placed too much weight on the parish's ability to continue as before, as if that demonstrated an absence of justification. For the reasons outlined by Dr Mynors, we refuse the application to renew in respect of this Ground.

69. Mr Petchey's Ground 7 (for which permission to appeal was granted) is stronger. In relation to the number of pews which would be lost if the altar were placed in front of the screen, we do not understand how the chancellor reached the figure of "some four or five pews" (para 17), which exceeds even the number that would be lost in Mr Sharrock's variant of the Victorian Society's more modest alternative. It would have been preferable for the chancellor accurately to describe and analyse first that alternative, and then the variant. But, even had he done so, his conclusion would, as it seems to us, have inevitably have been precisely as stated in para 39 of the judgment, in the passage which we have already set out. Whereas in many churches, an altar can be positioned in front of the chancel, and in front of a screen, the dimensions of this particular church are such that it would simply not function satisfactorily. Thus the appeal on this Ground also fails.

Striking the balance

(1) Submissions on striking the balance

70. We shall consider Mr Petchey's three final Grounds under this head, which is relevant to *Duffield* question (5) and also the balance in relation to the loss of the screen itself. There is an overlap with the previous two heads, under either or both of which these Grounds could have been considered.

71. Mr Petchey argues that the chancellor failed properly to address the issue of the possible relocation of the screen (Ground 10). The possibility that the screen might be put into storage only emerged during the course of the hearing. That was unacceptable to the Victorian Society who argued before the chancellor that no faculty should issue unless it provide for the relocation of the screen to a location which the court considered satisfactory. There was a possibility that the Hallaton scheme would not materialise, and the chancellor had failed to engage with the possibility that if the screen were stored, it might eventually simply disappear.

72. Mr Petchey's Grounds 3 and 4 overlap to some extent, relating to the way in which the chancellor took into account the fact that the DAC supported the scheme and that the CBC and SPAB had not objected. This had wrongly been perceived by the chancellor as strengthening the petitioners' case.

73. The argument had several strands. First, and most fundamentally, Mr Petchey argued that these bodies' support and/or non-objection (including the DAC's written statement and minutes, provided pursuant to the direction of the chancellor) was not evidence in the case, because they were not the subject of oral evidence from the bodies concerned. He prayed in aid the criticism in *Duffield* para 16(iv) of the chancellor in that case for proceeding improperly on the basis of unsworn oral statements, which was the background to the replacement of the of rule 21 of the FJR 2000 by the new rule 11.2(1) of the FJR 2013 ("…evidence at a hearing must be given orally under oath or solemn affirmation"). Mr Petchey also drew attention to rules 21(2), 23 and 25(1) of the FJR 2000 (rules 12.1(1), 12.3(1) and 12.5 of the FJR 2013), which showed some of the routes by which bodies such as the DAC, CBC and SPAB could give oral evidence without becoming parties to the proceedings. Accordingly no weight whatever should have been given to the support of the DAC and non-objection and the CAC and SPAB. Alternatively the chancellor should have expressly stated in his judgment that, because of the absence of oral evidence and thus the impossibility of testing by cross-examination, the weight he could accord to the support and non-objection was minimal. Finally, in the case of SPAB the chancellor overlooked the existence of a letter of 13 February 2012 from the SPAB, in which the removal of "the fine Victorian screen" had been deplored as "a real loss to the historical development of the church". However one looked at the matter, the Victorian Society had been treated unfairly.

74. Dr Mynors responded to Ground 10 that if for some reason the Hallaton scheme fell through, there clearly had to be some alternative plan in place. The chancellor had felt that the removal of the screen was justified on its own, whether or not there was a new home available. It was therefore perfectly logical for him to deal with the relocation or disposal of the screen in the way he did.

75. Responding to Grounds 3 and 4, Dr Mynors relied particularly upon rules 14, 15(2) and (3) and 19(1)(v) of the FJR 2000 (rules 6.2(1), 8.6, 8.7 and 10.2(2)(i) of the FJR 2013) in the case of the DAC and CBC; also rule 13(6) of the FJR 2000 (rule 8.5(1)(b) of the FJR 2013) in the case of SPAB as a national amenity body. These enabled provision to the chancellor of advice in the case of the former bodies and comments (or representations) in the case of SPAB, which impliedly the chancellor had to take into account. This was regardless of whether the body also gave sworn oral evidence at any hearing. It would, he argued, be very odd if the views of the DAC and CBC were irrelevant, absent sworn oral evidence, in that these bodies were specifically constituted among other things to provide guidance to chancellors on the determination of faculty proceedings (CCM Sch 2, paras 1(a)(i) and 2(b); Dioceses, Pastoral and Mission Measure 2007 s.55(1)(b)). The chancellor was thus entitled to give weight to their views. In respect of the DAC's written statement, it was the subject of a direction under rule 19(3)(v) of the FJR 2000 (rule 10.2(i) of the FJR 2013) and thus admissible. In the case of SPAB Dr Mynors doubted that the chancellor had put their non-objection into the scales in favour of the proposal; he had simply recorded correctly that they had not objected.

(2) Analysis and conclusions on striking the balance

76. Leave to appeal was initially refused on Grounds 3, 4 and 10, and, largely for the reasons given by Dr Mynors we would not allow the application to renew on the last two Grounds. In relation to Ground 10, the chancellor's approach was one which was open to him, and we do not consider it arguable that he was bound to give further reasoning (see *Re B (Appeal: Lack of Reasons)*). In relation to Ground 4, it would have been better if the chancellor, instead of recording that SPAB "have raised no objection to what is proposed", had said that they had not formally objected. But we are satisfied that this is what he meant and consider, in any event, that all he was doing was recording SPAB's position rather than using this as some form of support for the petitioners' case. Although in paragraph 37 of the judgment the chancellor again referred to the fact that SPAB had not objected to the removal of the screen, there is no indication that he gave any significant weight to the fact of its non-objection.

77. Although leave to appeal was also initially refused on Ground 3, we now consider, with the benefit of full argument including additional matters contained in the Mr Petchey's Supplementary Note and his Reply to Mr Mynors' Supplementary Note, that this ground raised an important issue. However, we are also satisfied that the arguments of Mr Petchey are for the most part misconceived. We distinguish between the DAC certificate and the DAC's written statement.

78. The observations in *Duffield* para 16(4) (and the revised provisions of rule 11.2(1) of the FJR 2013) are directed at how oral evidence is to be given at the hearing, not at excluding the advice of the DAC and CBC, and the comments/representations of the national amenity societies and EH, unless these are supported by oral evidence from the body concerned. DACs and the CBC do not have the resources to field qualified witnesses for every consistory court hearing in which they have proffered advice under the relevant provisions of the rules (to which reference has already been made), and the same applies to the national amenity bodies. In countless consistory court hearings such advice and comments/representations have been taken into account, in the absence of support from a witness giving sworn oral evidence. This was the course adopted by this court in *Duffield* (see paras 2 and 55), albeit without argument to the contrary. The position is exactly the same in respect of letters received from objectors who do not choose to become parties opponent (see rule 16(3)(a) of the FJR 2000 and rule 9.3(1)(b) of the FJR 2013). Chancellors are bound to take these letters into account (see rule 16(6) of the FJR 2000 and rule 9.5(2) of the FJR 2013), whether or not a hearing is held. This is another, even clearer, instance where materials unsupported by oral witness statements are taken into account by chancellors. We accept, however, Mr Petchey's argument that the weight which can be afforded to such views (be they from bodies such as the DAC and CBC, or from objectors who have not become parties opponent) is necessarily diminished by the absence of opportunity for cross-examination. But we do not consider that it was necessary for the chancellor to spell this out in his judgment. Furthermore, if the Victorian Society had wished to test the views of the DAC and CBC it should have sought from the chancellor a direction that they make qualified witnesses available to be cross-examined by the party opponent. No such application was made.

79. In respect of the DAC written statement, we doubt Dr Mynors' argument that the chancellor's direction of itself rendered the statement admissible. We do not consider that rule 21(1)(b) of the FJR 2000 (rule 11.3(1)(b) of the FJR 2013) by implication applies to make the written statement admissible. Further consideration should have been given at the directions hearing (or on receipt of the chancellor's subsequent directions) as to how the statement which the chancellor was requiring from the DAC was to be admitted in evidence at the hearing. However, there is nothing in the chancellor's judgment (including the reference to DAC support in para 37) to suggest that he took into account, much less gave weight to, the contents of the DAC's written statement and the accompanying minutes (as opposed to the DAC certificate). Therefore it is not necessary for us to reach any final decision on its admissibility.

80. Accordingly we reject the appeal on Ground 3.

Setting aside

81. For the reasons already rehearsed we consider that the decision below was seriously erroneous on a number of grounds, each sufficient to vitiate it. As his Ground 11, Mr Petchey also asked us to set aside the decision because, taken as a whole, it represented an erroneous evaluation of the evidence. In paras 28-32 above, we have re-affirmed the continuing relevance of that test, and, were it necessary, we would grant permission and also find for the Victorian Society on that ground.

REDETERMINATION

(1) Preliminary issue

82. We set out above rule 16(1)(b) of the Appeals Rules 1998 which enables us either to substitute our own judgment for that of the chancellor or to remit the matter for rehearing and determination by the consistory court, which in this case would necessarily mean by the deputy chancellor (or one specially appointed for the purpose).

83. In *Duffield* para 55 the court took the former course:

> "It would not be sensible or economical to remit the matter to the consistory court. Unusually the appeal hearing was held in St Alkmund's and we therefore have the benefit of having spent a whole day in this church, in sight of this chancel screen and appreciating the character and ambience of the church. We of course, also have the objections advanced by [English Heritage] and the amenity societies, as well as the evidence in the witness statements which we admitted. We also have before us a mass of legal authorities and planning policy documents. We therefore regard the most appropriate course is for us to substitute our own determination for that of the chancellor".

This court adopted a similar approach in *Wootton* para 89, citing other cases of

redetermination concerning church treasures.

84. Mr Petchey has urged that we should remit the matter to the consistory court, despite the cost and delay this would involve. This, he says, would be appropriate because we have not heard the evidence (and cross-examination), and because not all the important evidence that was given was recorded in the chancellor's judgment. In particular he considered that redetermination required re-calling Mr Hall and Mr Sharrock.

85. Unsurprisingly, Dr Mynors favoured immediate redetermination by this court. He informed us that there appeared to have been 29 appeals to the Court of Arches or the Chancery Court of York since 1945. In all 29 cases the appeal court had itself made the decision as to whether or not a faculty should be forthcoming. He argued that the court in this case had ample material available to enable it to redetermine the petition. Insofar as the witnesses had added to their witness statements when giving oral evidence, counsel for each party had the opportunity to summarise such additional evidence in their closing submissions to the chancellor which had been made available to us. If there had to be a re-hearing this was likely to last at least as long as the hearing at first instance and produce little if any additional benefit. Neither party had unlimited funds, and the parish wanted to see the matter determined without further delay, 18 months having already passed since the petition was submitted.

86. We find the case for immediate redetermination compelling. Although the issues are in some way more complex than those which arose in *Duffield*, particularly because in that case the screen was not to be removed from the church, we now have sufficient familiarity with the church itself, the evidence and the arguments, to carry out the redetermination ourselves.

(2) The screen as a church treasure

87. We have no doubt at all about the high quality of design and workmanship of the screen. It is not necessary for us to resolve the slight difference between Mr Hall and Mr Sharrock as to whether it is one of the very finest of Bodley's screens, or whether there are others of even higher quality. The colour of its wood is less dark, and the screen as a whole less obtrusive, than we had imagined from reading the judgment. In considering its intrinsic worth, it is of little relevance that it dates only from the 1890s, or that it was not mentioned in the listing as one of the principal reasons for the Grade I designation. It was rightly listed as one of the church's principal fixtures, and there is a heavy onus on those who seek its removal. Thus our starting point differs materially from that of the chancellor.

88. Such is its width, and such the liturgical unfashionableness today of large chancel screens, that we consider it unlikely that any church will be found able to accommodate the entire screen. Like the chancellor we regard it as very fortunate that the greater part of the screen can be accommodated at Hallaton. We have seen photomontages showing how the reduced screen would appear following erection at Hallaton. Whilst, unlike the chancellor, we can readily understand why Mr Hall, as a Bodley scholar, regards the proposed reduction from eight to six arches as a

"mutilation", we are satisfied that the reduced screen will still be very fine, and capable of being readily appreciated and interpreted by visitors to the church at Hallaton (including other Bodley scholars), especially if photographs are taken of the screen prior to its dismantling and made available at Hallaton. It would be even better if the screen could be relocated within the church at Penshurst, but that has been explored and is not feasible.

89. We have also borne in mind the encouragement by English Heritage in *New Work in Historic Places of Worship* (2012) p.7 that chancel screens should be retained in situ, and that where liturgical change has reduced the use of a significant chancel, it may be possible to retain the chancel (and the chancel screen) as a chapel. The dimensions of the aisles of this church are such that continued use of the chancel is required as part of the church as a whole, with or without the screen, and no one has suggested its conversion into a chapel.

(3) Effect on architectural character

90. We approach this matter by reminding ourselves again that this is a Grade I listed building. Even if the screen were not specifically mentioned in the listing description (as the chancellor seems to have supposed), the relevant guidance on listing on the English Heritage website is that:

> "[D]escriptions [in the listing] are not a comprehensive or exclusive record of the special interest or significance of the building and the amount of information in the description varies considerably.
>
> Any omissions from the list description of a feature does not mean that it is not of interest…."

91. We have already referred to, and endorsed, the description of that special character agreed between the two experts, namely that it is of a medieval building wearing Victorian clothes. Mr Hall is recorded in Mr Petchey's Closing Submissions to the chancellor as saying that this was a relatively modest medieval church, with interest arising from its subsequent adaptation. Whilst much of that Victorian clothing will remain (including the other Bodley screen in the north aisle, and the other chancel furnishings, some by G.G.Scott, some by Bodley and Garner and F.C.Eden), a principal Victorian feature will have been stripped away. We also note, and agree with, the concession made by Mr Sharrock under cross-examination that the screen does not detract from the character of the church, although the petitioners' case had been opened before the chancellor on the basis that the screen was intrusive.

92. On the other hand we respectfully do not share the view of Mr Hall that "the removal of the [screen] would leave the remaining fittings looking aesthetically stranded in a largely mid-Victorian interior"; nor that the arched brace of Scott's chancel arch (which will remain) calls out for a screen to make a balanced composition. The remaining fittings will still make an important and pleasing architectural and aesthetic contribution, as will the arched brace, there being no contemporary evidence that it was designed with a view to the insertion of a chancel screen. Furthermore there are some key features of the church which will be totally

unaffected by the removal of the screen, for example the Sidney Chapel in the south chancel, magnificently rebuilt in the 1820s by J.B.Rebecca.

93. Therefore the effect on the special architectural character of the church will be harmful, and significantly so. Mr Petchey submitted to the chancellor that the harm would be very serious. Here we do not agree. In our view it will not be seriously harmful, nor such as to compromise, much less destroy, the special architectural character of the church of which most of the essential ingredients will remain.

(3) Effect on historic interest

94. The special historic interest of this church lies in the diversity of the timing of its elements, which culminated in the work of the late nineteenth century architects. As stated in section 10 of the CBC's Guidance Note, *Treasures* (May 2014):

> The interiors of churches and their ornaments have not remained static since they were first consecrated, and their history and the history of the communities they serve is often told through alterations and accumulations over the years".

Unlike the chancellor, who made no mention of this aspect of the matter, we consider that the special historic interest will be significantly harmed. At the hearing Mr Sharrock accepted, and we agree, that the screen made a positive heritage contribution to the church. And we find unsurprising that Mr Hall should contrast what was said in the Statement of Need ("work is being done to…extend further the explanation of the historic significance of the fabric and memorials") with the undoubted fact that, as he put it, "the proposal will involve the removal of a fitting that is a memorial to a family of both local and national – even international – significance".

95. There will plainly therefore be harm to the historic interest of the church, and that harm will in our view be significant. We are not, however, persuaded that the harm will be serious. Photographs will no doubt be available so that visitors can readily appreciate what form the former screen took. Moreover removal of the screen will (as the chancellor mentioned) restore the church more closely to how it looked for almost 300 years after the former chancel screen (assuming there was one, with or without rood) was removed.

(4) Duffield questions (1) and (3)

96. These questions, which look to the totality of the special architectural and historic interest of the church, have to be approached in recognition that this is a Grade I church where the burden on those seeking change is greater than in the case of churches which are of a lower grade. We would answer "yes" to *Duffield* question (1), but to question (3) we would answer that the harm, though significant, is less than serious. This level of harm was underrated by the chancellor, but it is not such as to require exceptional justification (see *Duffield* question (5)).

(5) Justification

97. We have carefully read all the witness statements submitted on the petitioners' behalf, some of which were summarised by the chancellor in his judgment. We take into account the fact that we have not heard Mr Petchey's cross-examination; and also that the form of worship currently practised in the church could continue without removal of the screen, which is why the Victorian Society contended that there was no strict need to remove it.

98. Like the chancellor we have found the petitioners' justification impressive. Even though, as mentioned above, the screen is relatively light in colour and does allow a measure of intervisibility, we accept the chancellor's finding (para 15) that:

> "…there was indeed a physical divide which made communication and eye contact difficult, and, for want of a better term, a psychological divide which caused someone sitting above the [chancel] step, i.e. behind, or to the east of the screen, to feel detached and separated from those in the body of the church, i.e. in the nave".

We can readily appreciate, as did the chancellor, the desire of the Rector and his congregation (including members of the choir) that those leading worship and those providing music at the service should be more visible and involved.

99. Evidence was given that removal of the screen would give liturgical flexibility and thereby improve appreciation and participation in existing services. We doubt that experiments with Messy Church (mentioned in evidence before the chancellor, but without, it would seem, enthusiasm from the Rector) would be affected one way or the other by removal of the screen. Nevertheless, we agree that the screen's removal would provide the opportunity to explore alternative forms of worship, as well as giving flexibility for other compatible uses of the church by the local community. We have been much influenced by the witness statements of those who have been involved in the staging of concerts in the church, who highlighted the problem with sightlines and space requirements which in large part result from the existence of the chancel screen. We can well understand why several concert opportunities have had to be passed over because of the difficulty in accommodating anything other than a very small group of performers.

100. Sensibly the Victorian Society concedes that removal of the screen would bring greater flexibility and that use of the church for concerts was desirable. It regards these matters as of a lower order than preserving so fine and historic a screen. The Victorian Society has, however, tried to accommodate some of the church's requirements by putting forward an alternative scheme.

101. We have looked carefully at the sketch provided by Mr Ashley showing this alternative; and also the worked up variant of this prepared by Mr Sharrock. Removal of the screen and the choir stalls will open up a range of possibilities for re-positioning the current altar, none of which form part of the current proposals, but which cannot be simply ignored. On the other hand, retention of the screen, with an altar (whether or not removable) placed to the west of it in the main aisle, involves removal of pews. By a courteous letter of 14 April 2014, the Victorian Society was informed by the Rector of the reasons why its alternative was considered unacceptable, since it did not meet the needs of the church and would "would leave

an unwelcome hole in the middle of the church between the congregation which will have been pushed further westwards and the celebrant/choir in the chancel". As expressed by Mr Sharrock in his second witness statement, "the congregation is pushed westward to an unacceptable degree"; and the introduction of a new altar, whatever its precise positioning:

> "dramatically alters the interior balance of the building and could lead to a position where the Chancel is, in practice, made redundant".

We agree, and also with his assessment that this "would be harmful to the character of the space". Accordingly, for very much the same reasons given by the chancellor, we do not regard the Victorian Society's alternative as feasible, nor as detracting from the coherence and cogency of the justification presented by the petitioners.

(6) Duffield question (4)

102. For the reasons we have just summarised, the answer we would give to *Duffield* question (4) is that the petitioners have given a very clear and very convincing justification for the removal of the screen. This provides weighty justification not merely for works which will affect the special architectural character and historic interest of the church, but also for the removal and disposal of the screen notwithstanding that it is a church treasure.

(7) Duffield question (5)

103. We remind ourselves yet again that there will be significant harm to the special architectural and historic interest of this Grade I listed church, that the screen itself will be significantly altered if it is relocated to Hallaton, and, that if the Hallaton scheme does not go ahead, the screen is unlikely to find a new home in its entirety. We come then to the striking of the balance in which a strong presumption, unrecognised by the chancellor, lies in favour of preserving the status quo. We take into account the DAC certificate recommending the proposal and the non-objection of the CBC and SPAB, but give little weight thereto since they have not been the subject of cross-examination; and we reach our conclusion without giving any weight at all to the untested views of the DAC contained in its written statement and the minutes attached thereto.

104. Because we attribute greater weight to the "harm" side of the balance than did the chancellor, on whose approach *Duffield* question (5) was not even reached, we have asked ourselves repeatedly whether there is a sensible way in which the screen can be retained. The problems of the rural church are serious and well-known. By reason of its proximity to London, this church's problems may not be an acute as in some parts of the country. Nevertheless, on the evidence placed before the chancellor we see little chance of this church surviving as a place of worship and mission (as opposed to as a place of special architectural and historic interest) unless this screen is removed, so that the building becomes considerably more flexible for liturgical and other purposes. We find compelling the evidence of the church's treasurer (who is also the leader of the project to repair the church) that removal of the screen would provide an important boost to the church's present uncertain financial viability, through extra regular contributions from an enlarged

number of churchgoers and extra income from a higher number of community events, made possible by a more practical performance area. In our view, these considerations (taken together with the totality of the justification case presented by the petitioners) substantially outweigh the harm, and require the answer "yes" to be given to *Duffield* question (5*).*

(8) The future of the screen

105. The difficult task of striking the balance has been eased by the likelihood that the Hallaton scheme will go ahead, just as, on the very different facts in *Duffield*, it was eased by "the factors of relocation and reversibility" (para 94).

106. We accept, however, as did the chancellor, that there can be no certainty of this. The position of the PCC at Hallaton may change; there could be funding problems; the chancellor of that diocese may refuse a faculty (and we make it plain that we have not ourselves visited St Michael and All Angels, Hallaton). In para 48 of his judgment, the chancellor indicated that conditions would be imposed so that if the Hallaton scheme did not go ahead within two years of the date of issue of the faculty (or an extended time), the screen could be removed and stored (presumably following dismantling) "as approved by the Rochester DAC, or, in default of such approval, this Court".

107. We have already rejected a challenge to this part of the chancellor's judgment. Nevertheless it now falls for us to reconsider the matter anew. In his Closing Submissions to the chancellor, Mr Petchey said of the default position (in which a faculty was granted):

> "The position of the Victorian Society is simple: it is not appropriate to grant any faculty, whatever the merits or demerits of the proposal to move the screen, without an identified satisfactory solution; and a condition should be imposed which should ensure that the screen is not moved until that identified satisfactory solution is in place (with a faculty, if needed, and a contract in place to ensure that it comes about). It seems to the Victorian Society that a screen that is intrinsically fine and the design of a major architect of the nineteenth century deserves at least this level of protection."

108. We too are fearful as to what may happen to the screen if the Hallaton scheme does not go ahead. It is our view that, at this stage, the faculty should only permit removal to Hallaton. If the Hallaton scheme does not go ahead within two years (or a period extended by the chancellor), then the screen must remain in situ until alternative arrangements have been approved not by the DAC, but by the chancellor with the benefit of advice from the DAC and following notification to others, such as the Victorian Society.

109. In case the Hallaton scheme does not go ahead, we give liberty to apply. Our hope is that, in this eventuality, an alternative, similar proposal for the future of the screen may be forthcoming. It may be that storage will turn out to be the only option. But the storage option should not be too readily permitted; and the chancellor will need to be informed of the precise details of any storage option, because, as we

have made plain, the screen is a church treasure in itself, the future of which needs to be safeguarded.

(9) Decision

110. For the reasons given above, notwithstanding the Victorian Society's successful challenge to the reasoning of the chancellor's decision, on redetermination we direct that a faculty should issue for all the works set out in paragraphs 8(i) to 8(iv) of this judgment, subject to the following conditions:

(1) The screen shall not be removed from the church until:

(a) a faculty has been granted for the introduction of the screen into St Michael and All Angels, Hallaton, and the details of the necessary works have been approved by the Leicester consistory court;
(b) the PCC of that church has confirmed that it will introduce the screen (save for two bays) into its church;
(c) a contract has been entered into between the PCCs of the two churches for its removal from the church and installation in St Michael and All Angels, Hallaton;
(d) the Rochester consistory court has approved the arrangements for the dismantling the screen and its transport to St Michael and All Angels, Hallaton, and any incidental storage that may be required.

(2) The screen may be dismantled, transported, stored and re-erected only in accordance with condition (1).

(3) If the screen has not been erected in St Michael and All Angels, Hallaton within two years of the date of this faculty, or such longer period as the Rochester consistory court on application made within the two year period may allow:

(a) the petitioners shall within 56 days apply to the Rochester consistory court for directions as to the future of the screen, including whether it shall remain in situ or be placed into storage, and if the latter including the details of such storage, together with written statements in support of their proposals;

(b) the Rochester DAC, the CBC and the Victorian Society shall be afforded 56 days following the said application to make any representations to the Rochester consistory court;

(c) the Rochester consistory court shall thereafter make such determination in relation to the petitioners' application as is appropriate in the circumstances then prevailing, including any preliminary directions necessary for the determination.

111. Although the Victorian Society may prove to have had a pyrrhic victory, we hope that our judgment has clarified the position on a number of issues of importance which properly caused it concern.

PROCEDURAL ISSUES

112. Two procedural issues deserve a mention, which might prevent some of what has arisen here being repeated.

113. The first concerns the practice long familiar in civil proceedings whereby copies of draft judgments are circulated, in confidence, in advance of delivery. As stated in *R (Edwards)v Environment Agency* [2008] 1 WLR 1587, HL, para 66:

> "The purpose of the disclosure of the draft speeches to counsel is to obtain their help in correcting misprints, inadvertent errors of fact or ambiguities of expression. It is not to enable them to reargue their case".

Such advance disclosure is now the practice of this court, and we commend this practice to chancellors. In the present case it might have eliminated certain errors in the judgment.

114. The second concerns the principle enunciated in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, CA, and re-stated in *In the matter of S (Children)* [2007] EWCA Civ 694 para 22:

> "[I]f counsel at the end of a judgment by a judge takes the view that the judge has not dealt with a material part of the case or in the particular instance has failed to make findings of fact or has not dealt with the evidence of a particular witness, the responsibility of counsel at that point in my judgment is to point the alleged deficiency out to the judge and invite him to give a supplemental judgment dealing with the point raised. It is not, in my judgment, appropriate immediately to ask for permission to appeal on the ground that the judge has not dealt with the issues in question."

Whilst we doubt that use of this procedure would have avoided the need for the present appeal, Mr Petchey frankly conceded that it had not crossed his mind to make such an application to the chancellor. It too might have reduced the issues in the present appeal.

COSTS

115. The order granting leave to appeal provided that the court costs of the application for leave were to be borne by the party opponent in any event, and that the party opponent would not seek to recover any of its costs of the appeal, including the application for leave, or of the hearing below, from the petitioners in any event.

116. Unless written submissions to the contrary are received by the provincial registrar within 14 days:

(1) each party shall bear its own costs in respect of the appeal; and

(2) following the principles set out in *In re St Mary the Virgin, Sherborne* [1996] Fam 63, 70 the petitioners must pay the court costs, both on appeal (but only following grant of leave to appeal) and at first instance.

9 March 2015

CHARLES GEORGE QC
SAM WIGGS
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