Neutral Citation Number: [2022] EACC 1

IN THE ARCHES COURT OF CANTERBURY

IN THE MATTER OF ST MICHAEL AND ALL ANGELS, BERWICK

JUDGMENT

---

1. SUMMARY

1.1. This is an appeal from the decision of the Deputy Chancellor of Chichester Diocese dated 13th September 2021, whereby he refused to grant a faculty on the Petition of the Reverend Mr Peter Blee, Rector, Mrs Ruth Nares, Churchwarden and Mr Crispin Freeman, PCC Member of the Parish of St Michael and All Angels, Berwick.

1.2. For the reasons set out in this Judgment, we are unanimously of the view that the conduct of the proceedings in the Consistory Court was fatally flawed and that the judgment of the Deputy Chancellor cannot stand.

1.3. Accordingly, we allow the Appeal.

2. THE PETITION AND CONSULTATION RESPONSES

2.1. The Schedule of Works or Proposals included within the Petition is in the following terms:

> *"The replacement of the existing Victorian and 20th Century fixed pews with stackable pews made by Treske. The existing pews to be sold and the memorial plaques on the C20th Century pews to be retained and archived."*

The Petition is in the statutory Form 3A, pursuant to Rule 5.3 of the Faculty Jurisdiction Rules 2015 ("the Rules").

2.2. The Petition was supported by a "Statement of Need for the Replacement of the Existing Pews with Stackable Pews". This comprehensive, illustrated, document describes the seating arrangements in the church, as they stood prior to temporary removal to enable refurbishment works authorised by faculty sometime before February 2021.

2.3. There were three forms of seating: Victorian pews by Woodyear, 1970s pews of similar design to the Woodyear set, but in a different colour of wood; and a small number of wooden framed, rush seated chairs dating from a reordering in the 1930s resulting in the creation of a Lady Chapel. The Statement of Need explained the desire of the Parish to continue to enjoy and exploit the freedom which temporary removal of the historic seating has created, in order to continue their programme of outreach and community events.

2.4. The church is a Grade 1 listed building. The listing description is, as the Deputy Chancellor said, 'pithy'. As well as the construction details normal in such documents, the description notes:

"The church contains a series of C20 mural paintings by Quentin and Vanessa Bell and Duncan Grant of 1942-3".

These wall paintings, it is not disputed, are highly significant. They are the result of the inspiration and patronage of Bishop George Bell, who was convinced of the need, in the face of what he saw as the moral, social and cultural collapse in mainland Europe, to re-establish relationships between the Christian Church and artists. The presence of these murals within a Grade 1 listed building means that any alterations must be given careful attention. Accordingly, the Statement of Need is full and also, as the Deputy Chancellor found, fulfils the role of a Statement of Significance.

2.5. The Diocesan Advisory Committee ("DAC") visited the church in October 2020 and their report of this meeting was included with the Petition. They recorded their feeling:

"that the existing pews and chairs have some character and heritage significance ... the pews and chairs were not, in themselves, particularly significant or beautiful, but that they held some significance as they may have been a reference point for the decorative scheme by Grant and Bell..."

Additionally, the Statement of Need records a further communication from the DAC in the following terms:

"The DAC feels that the chairs at Berwick have both historic and artistic interest and that any proposal to remove them should be included in a faculty application".

2.6. The Deputy Chancellor recorded the conclusions of Historic England in response to consultation on the Petition, seeking *"convincing justification"* for *"wholesale"* removal of the pews. He also noted their advice that:

"the mixture of pews and rush seated chairs is typical of and intrinsic to many rural parish churches. It tells the story how the village community, based on its means, furnished and patterned the church over the decades ... this arrangement ... has some significance".

Elsewhere, the judgment refers to Historic England's advice that the Victorian pews and rush seats *"would have most likely been the seating arrangement when the Bloomsbury artists painted the frescos in between 1941 and 1944"*.

2.7. Pausing there, it is clear from this brief review, and we find that:

(1) the Petition sought consent to remove two sets of pews but did not include removal of the chairs;

(2) the chairs were regarded by the DAC and Historic England as being of some historic significance, taken together with the pews;

(3) Historic England did not support the *"wholesale removal"* of pews proposed in the Petition.

3. THE DEPUTY CHANCELLOR'S JUDGMENT

3.1. The Deputy Chancellor had regard to the judgment of this Court in *Re St Alkmund, Duffield* [2013] Fam 15T, as was entirely appropriate, in view of the statutory listing.

3.2. He rejected the submission of the Petitioner's (now Appellant's) Counsel to the effect that the proposals would not cause harm to the significance of the church as a building of special architectural or historic interest (the first *Duffield* guideline). The remaining guidelines therefore fell to be addressed, all of which relate to the striking of a balance between heritage harm and public benefit in the particular circumstances of a case.

3.3. Throughout the judgment, the Deputy Chancellor approached his determination on the basis that the rush seats, as well as the two sets of pews, were proposed for removal. In his introduction, for example, at paragraphs 1 and 2, he said:

> *"1. The judgment concerns a petition for the removal of the existing pews* ***and chairs*** *at St Michael and All Angels, Berwick. Specifically, the petitioners seek faculty for the removal of (a) six pews dating from the 1850s, (b) five pews dating from the 1970s and* ***(c) a small number of rush-seated chairs dating from the 1930s****. The petitioners wish to replace* ***that seating*** *with stackable benches made by Treske. The petitioners are the Rev'd Peter Blee (Incumbent), Mrs Ruth Nares (Churchwarden) and Crispin Freeman (PCC member).*
>
> *2. The existing seating is currently in storage, following temporary removal pursuant to my directions of 23 February 2021 related to a previous petition (number 0945) encompassing, among other things, restoration works to the wall paintings and new flooring. I granted faculty for those works: see my judgment with neutral citation [2019] ECC Chi 3. By their current petition, the petitioners seek faculty for the permanent replacement of* ***the existing seating*** *with Treske Benches. The proposal is that the current pews be sold, with the memorial plaques on the 20th century pews being retained and archived.* ***Very little has been said about the rush-seated chairs. This judgment accordingly focuses to a large extent on the pews, except where I make specific reference to the chairs****".* (Emphasis added)

3.4. Other relevant passages, confirming that this was the basis of the Deputy Chancellor's approach are contained in paragraphs:

> *"23. This petition deals with three quite distinct types of seating ... rush seated chairs are also distinct, not least because – unlike the pews – they are not said to pose any obstacle whatever to the flexible use of the church space;*"
>
> *"28. Pews and seats"* brought into the *Duffield* framework
>
> "47 *... removal of the seating in its entirety ..."*
>
> *"49 ... removal of the seating in its entirety ... would seriously diminish the extent to which it continues to reflect one notable phase of its history..."*

It is clear, from all these passages, that the Deputy Chancellor treated the Petition as though it included all three forms of seating, whereas, in fact, it did not. There is no indication in the judgment, pleadings or other papers that the Petition was amended.

3.5. We have carefully considered whether the erroneous inclusion of the chairs was sufficiently significant to warrant the conclusion that the judgment cannot stand and have reached the clear conclusion that it was. Firstly, and at a fundamental level, the Deputy Chancellor did not determine the Petition before him. Secondly, as we have said, application of the *Duffield* guidelines requires consideration of the proposals, initially to decide whether or not they would harm the heritage significance of a listed building and, if so, to determine whether any public benefit which the proposals might bring would outweigh the harm. Performance of this task of consideration requires a proper understanding of the Petition and its likely effects, positive and negative. One particular aspect which the Deputy Chancellor properly pursued, in view of the nature of the guidelines and the contents of Historic England's advice, was whether there might, hypothetically, be scope to achieve at least some of the claimed benefits while making less significant changes to the building and its fabric.

3.6. At paragraphs 57 and 70 of his judgment, the Deputy Chancellor records the fact that he asked Counsel for the Petitioner (Appellant) whether his case was an *"all or nothing"* one, receiving an affirmative answer – that is, that all pews and chairs should be removed. He concluded:

"the petitioners have not come close to demonstrating that all eleven pews and all rush-seated chairs should be removed in order for adequate disability access and inclusion to be facilitated".

Clearly, the extent of the proposal was very important, both to judging whether or not harm to the heritage significance would be caused, and to the question of proportionality.

3.7. The answers which the Deputy Chancellor received during submissions were to the effect that the Petition was, indeed, of an *"all or nothing"* type – all three forms of seating. Accordingly, the Deputy Chancellor approached the centrally important *Duffield* questions on the comprehensive basis. The summary of reasons at paragraphs 100-104 is expressed in terms of *"all of these pews"* (paragraphs 102 and 103(iii)) and *"assessing the elements of the case for the proposal both individually and cumulatively"* but, at paragraph 102, dealing with proportionality and whether or not the justification put forward was *"sufficiently clear and convincing"*, he referred back to paragraphs 13 -17 and 68 – 70. These passages grapple with what the Deputy Chancellor called the *"all or nothing"* nature of the petition, as he understood it, which he described as *"the stumbling block"*. It is, therefore, clear that he regarded the comprehensive removal of all the three elements of seating described in Paragraph 1 of the judgment as fatal to the Petition. It would be wrong for us to speculate on the degree of significance which the rush chairs played in this conclusion. In these circumstances, we have no option but to find that the misdirection of the Deputy Chancellor was material to his conclusions and therefore vitiates the judgment.

4. DISPOSAL

4.1. In these circumstances, we allow the Appeal.

4.2. The Application for Permission to Appeal included many further grounds. Indeed, the ground of mistake was only added at the stage of renewing the Application before the Dean, the Deputy Chancellor having refused to grant permission on any of the other grounds. By her Order of 11th January 2022, the Dean directed that permission be granted on the new ground of mistake and adjourned consideration of the rest of the Application. The Appeal has been dealt with on the basis of written submissions, with the agreement of the Appellants, there being no other parties. In the circumstances, it is not necessary to consider the Application for permission on the other grounds.

4.3. Counsel for the Appellant frankly took responsibility for the fact that he made *"an error ... in his submissions"* which neither the parties nor the Deputy Chancellor spotted. It is, of course, most unfortunate that, as a result of Counsel's error, the Deputy Chancellor was, himself, led into error but this does not detract from the fact that a fundamental and significant error was made in the determination of the Petition. In the circumstances, we have reached the provisional view that the Appellants should bear the costs of the Appeal. We are, nevertheless, granting liberty for written submissions to be put in if the Appellants wish to seek to persuade the Court otherwise.

MORAG ELLIS QC
Dean of the Arches
David Etherington QC Ch.
Lynsey de Mestre QC, Ch.