General Synod Questions submitted 2010 - 15.

Introduction

Synod members can submit up to two formal questions at each meeting. Questions must be submitted two weeks in advance and are answered on the first night of Synod, at which a supplementary question can also be asked. When I was a member of staff at Church House we drafted the answers to the questions, and it used to irritate me that most questions weren't really asking for information, but instead were making a 'political' point. However, now I am a Synod member, I appreciate how little influence an ordinary member has: we can make speeches, but few people are listening; we can write on blogs or websites, but few people read them; we can vote on motions, but most motions make little practical difference. Submitting a question is one of the few opportunities we have to prompt the authorities to consider making a change. This page of my website lists the questions I have asked, why I asked them and the answer that I received.

Questions I asked at the November 2014 General Synod

The question I asked (to the Chair of the Ministry Council)

Paragraph 15 of the 19 July 2014 Consistory Court Judgment in the matter of Emmanuel Church, Leckhampton states:

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

What steps are the Ministry Council taking in respect of the content of Initial Ministerial Education, to ensure that such a situation can never occur again?

The reason I asked it

In July (see below) I raised the case of a church who sought permission to sell a secular object which was not on display in the church, they went through all the correct procedures but were opposed by the Church Buildings Council. This time I am raising the opposite problem, where a church had a significant religious painting on display in the church and then flogged it off without consulting anyone - they did not consult the archdeacon or the Diocesan Advisory Committee - and did not apply for a faculty to sell it. The priest when questioned by the Chancellor, after the sale had been discovered, said that she thought that a faculty only needed to be applied for when a church wanted to make changes to its building, and didn't know that one was also needed before selling off church items. The Chancellor in her judgment includes a helpful reminder of the rules.

I attach the Judgment

Given that few people read legal judgments it is important to ensure that clergy receive sufficient training in the procedures that they have to use. The Ministry Council has oversight of the training requirements for clergy, hence my question to them.

The answer I received

The Ministry Division oversees the curriculum taught in the pre-ordination phase of IME and works with colleagues in dioceses for the curate phase. Throughout training, ordinands and curates are introduced to canon law and its practical

outworking, assisted by publications created in partnership with the Ecclesiastical Law Society which are given to all ordinands. Pre-ordination training focuses on the fundamentals of the relationship of ecclesiology and church law, while training during curacy has a more directly practical aim. The Durham-validated Common Awards include modules at degree and Masters level in this area. Dioceses also equip new incumbents in their new responsibilities both initially and in their continuing ministerial development.

Questions I asked at the July 2014 General Synod

The question I asked (to the Chair of the Church Buildings Council)

Regarding the 14 April 2014 Judgment of the Arches Court of Canterbury '*In re St Lawrence, Oakley with Wooton St Lawrence*', where the Church Buildings Council won its case, thereby preventing the sale of a helmet by the parish church.

On what grounds did the CBC decide that they would be furthering the mission of the Church of England by objecting to the sale of a piece of armour, which paragraph 26 of the Judgment describes as an "entirely secular object"?

The reason I asked it

Until 1969 there hung in the church of Wooton St Lawrence some pieces of 16th century armour - a dagger, gauntlets, spurs and a helmet - above a marble monument to Sir Thomas Hooke. There is no evidence that the armour ever belonged to Sir Thomas, and it was probably added later by way of display. In 1969 the armour, with the exception of the helmet, was stolen. The helmet was therefore removed from the church for security and has been in either a bank vault or a museum for the last forty years. Security costs mean that there is no prospect of the helmet ever being displayed in the church again. The church, with the approval of the Diocesan Advisory Committee, applied for a faculty to sell the helmet and use the funds raised for the church's mission. The Diocesan Chancellor considered the case and granted the faculty. The Church of England's Church Buildings Council then appealed against the decision to the Court of Arches and in April 2014 won their case, thereby preventing the sale of the helmet

I attach the Judgment

The Church Buildings Council have celebrated their success in a Press Release of 14 April and in their Annual Review.

Whilst I agree that the Church Buildings Council should take action to prevent the sale of the Church of England's religious treasures, there is a balance to be struck between preserving history and enabling the Church to have the funds to continue its mission today. In preventing the sale of a military helmet which is not displayed in a church, I think the Council got the balance wrong, even though they won the legal argument.

The answer I received (from Anne Sloman, Chair of the Church Buildings Council)

In its judgment, the Court of Arches quoted with approval the following passage from *Treasures on Earth* (GS 132):

"One of the most excellent ambitions of Christians…has been to express their faith in the language of the arts - in architecture, sculpture, painting, mosaic, music and poetry - and this to build houses of God which are symbols of that faith, thereafter furnishing them with objects as nearly worthy of the worship of God as human skill can make them. The triumphant realisation of that godly

ambition by men in every age from that of the early Christian church down to the present day has been instrumental in creating the great store of treasures owned by the churches…"
The Court went on to say, "Church treasures include secular objects deposited in churches for devotional and other reasons."
This is consistent with the Church Building Council's policy on Treasures:
"The material objects of our churches are held in common not only with our predecessors but also our successors. The theological tension is played out in each generation and in each place. The faith of the past will be destructive if it constrains and does not enable the faith of the future. Places and objects are conveyors of identity, memory and doctrine. They cannot be idolised, but their role in communicating faith cannot be downplayed." (Church Buildings Council, Guidance note on Treasures).
The Wooton armet had formed part of the accoutrements of a tomb in the church of St Lawrence, Wooton St Lawrence for over three hundred years before being removed to the Royal Armouries for safe keeping. It was held by the Court to be a "national asset with historic links to the parish." The Court also held that the parish, which it described as "well-managed and reasonably well-resourced", had failed to establish any financial case for selling the armet. That had been the view of the Church Buildings Council from the outset and the Council was therefore pleased that its position was ultimately vindicated by the Court. The Council also welcomed the Court's conclusion that the "strong presumption against disposal by sale of Church treasures…is both soundly based and generally beneficial in its consequences." As a result of the Council's intervention a significant historic and artistic asset that forms part of the heritage and history of the Church has been preserved for the benefit of future generations of parishioners and for the public more widely and helpful clarification has been provided by the Court of the test that should be applied to any future applications for the sale of church treasures."

<u>The question I asked (to the Secretary General)</u>
Item 508 on the General Synod Agenda for Saturday 12 July will move that Amending Canon No.31 (GS 1877D) be "promulged and executed". Paragraph 8 of the Amending Canon will reinstate, in a modified form, Canon C 19 (of guardians of spiritualities). If the Synod agrees to promulge the Amending Canon, will the Legal Office be producing a guidance note on Canon C 19 and will it be published on this page of the Church of England website http://www.churchofengland.org/about-us/structure/churchlawlegis/canons.aspx so that future readers of the Canon, who are unable to understand its meaning, can have ready access to a guidance note as to its meaning?

<u>The reason I asked it</u>
Synod has approved another Church rule (Canon C19), but it is written in such obscure language that most readers won't have a hope of understanding it. When the draft went to a revision committee, I proposed that alongside the Canon there should be published a note of explanation for the reader. The revision committee only partly accepted my request, their Report (GS 1866Y-1877Y) stated,
"159. In his submission Mr Vincent [...] raised a concern over the lack of a definition of the "guardianship of the spiritualities" [...] and about the use of the expression "presentation to benefices sede vacante". [...] 166. The Committee voted by 10 votes to 1 in favour of retaining the expression "sede vacante". It

voted against inserting explanations of other technical terms employed in the Canon. [...] 167. Some members of the Committee nevertheless had sympathy with the points raised by Mr Vincent and requested that the Legal Office should produce a guidance note on the new Canon when it was promulged."
At the July Synod we will be voting to 'promulge' the new Canon, and by asking the question now, I am prompting the Legal Office of the request to produce a guidance note. If the answer I receive is no they are not going to, I will raise the subject in the debate on the Canon.

The answer I received (from William Fittall, Secretary General)
Some members of the Revision Committee requested that the Legal Office should produce a guidance note on the new Canon and one will be prepared.

Questions I asked at the February 2014 General Synod

The question I asked
GS 1938-9X, the Explanatory Memorandum of the *Legal Officers (Annual Fees) Order 2014* refers to the *Legal Fees Review 2012-13*. Page 27 of that report states:
"11. The Value Added Tax treatment of retainers and faculties should be clarified with a view to establishing them as 'Outside the Scope of VAT', partly offsetting the cost increase. We recommend that a working party of registrars, with experience of establishing this, is formed, led by an FAC member and supported by specialist professional accountants, to resolve this matter during the course of 2013. Depending on professional advice and the eventual outcome, substantial VAT refunds may also be achievable for both some dioceses and the Church Commissioners."
Was a working party established, and if so, what progress did it make?

The reason I asked it
The Synod was asked to approve an increase in the retainer paid to diocesan registrars (legal officers). The report refers to a review which had recommended mitigating this increase by investigating whether these fees should be classed as outside the scope of VAT. This would create a saving for the Church. The report does not say whether such investigations were ever carried out.

The answer I received (from Geoffrey Tattersall QC, Fees Advisory Commission)
The Commission is actively pursuing this recommendation in collaboration with the Ecclesiastical Law Association, which has nominated two registrars to serve on the working group. The group will shortly be holding its first meeting, at which we plan to clarify the issues and decide on next steps, including the provision of specialist advice to support the group's work.

Questions I asked at the July 2013 General Synod

The question I asked
In the light of:
1. what is said in the Seven Principles of Public Life about the need for openness about decisions and the reasons for them; and
2. the fact that the Summary of the Decisions taken at the December 2012 meeting of the House did not state in clear terms that a policy decision had been taken by the House about the eligibility of clergy in civil partnerships for

consecration to the episcopate, following the work undertaken by the group chaired by the Bishop of Sodor and Man,
has the House reconsidered the advisability of only publishing a Summary of Decisions rather than its Minutes? And if not, will it now do so?

The reason I asked it
At the November 2010 Synod I submitted a Question suggesting that House of Bishops publish the full minutes of its meetings, rather than just a Summary of Decisions. The answer I received (see below) was that the current methods are sufficient. However, December was a good example of how the current system is inadequate. A policy decision had been taken by the House of Bishops which was reported in one line in the Summary of Decisions which was so bland that readers didn't know that a policy change had taken place, what it was or why. Only later in response to requests was a fuller explanation given.

The answer I received (from the Archbishop of York)
The House puts a wide range of material into the public domain and also answers questions from Synod members. It has no plans to alter its current practice in relation to its minutes and the published summaries of decisions.

The question I asked
In the light of:
1. the fact that meetings of the House are no longer meetings solely of bishops; and
2. the reference in the statement by the House of 21 May 2013 to the House having "committed itself to creating a climate of transparency ...",
has the House reconsidered whether its meetings should in future be held in public rather than in Committee of the whole House under Standing Order 14?

The reason I asked it
The House of Bishops' Standing Orders state, "13.a. The public shall be admitted to all sittings of the House within the limits of the seating capacity as may be allocated by the Secretary." However, House of Bishops meetings never follow that and instead they always pass a motion under Standing Order 14 to go into a "Committee of the Whole House" in order to exclude observers. Whilst there may be occasions where this is necessary, I do not think that this is necessary on every occasion. And, given recent changes such as the decision by the House of Bishops to widen its membership to include some senior women priests as non-voting members, and its statement about transparency, this was a chance for me to push for further openness.

The answer I received (from the Archbishop of York)
It would fundamentally change the nature of these meetings if they were open to the press and public. All institutions need space for frank conversation and deliberation in private and the House welcomes, therefore, the facility provided by the ability to meet in Committee under Standing Order 14.

Questions I asked at the July 2012 General Synod

The question I asked
The House of Bishops – Summary of Decisions HB(12)M1 records that the House, at its meeting on 21-22 May, rejected an amendment "designed to add

to clause 5 of the draft Measure a requirement that the code of Practice should give guidance on ... non-discrimination in relation to the discernment of vocations." What do the full minutes of the House of Bishops' meeting record regarding the Houses discussion of this matter?

The reason I asked it

The House of Bishops had been asked to amend the draft women bishops legislation to insert an assurance which would say that in future, once there are women bishops, a candidate for ordination will not be discriminated against if they theologically disagree with the ordination of women. The House of Bishops had chosen not to insert that assurance, but gave no reason why. I was concerned about this because it seemed to go against the 1998 Lambeth Conference assurance, resolution III.2, "that those who dissent from, as well as those who assent to the ordination of women to the priesthood and episcopate are both loyal Anglicans".

The answer I received (from the Archbishop of York)

The minutes of this, as of other House of Bishops meetings, are not published. GS 1708-1709ZZ does, however, provide a description account for the General Synod of the House of Bishops' of the six amendments tabled by members of the House and recorded the decision taken. The House's decision not to amend clause 5 in relation to non-disrimination, in relation to discerning vocations, was a reflection not of any doubt over the principle, but of a view that statutory provisions in relation to the discernment of vocations were not required.

The supplementary question I asked

Were the House of Bishops committed, that they will not in the future, introduce discrimination against candidates for ordination on the grounds of their theological views on the ordination of women?

The reason I asked it

In some other countries (e.g. Sweden) when women have been ordained as bishops it starts out that those who have a different theological view are allowed to remain in the Church, but then provisions are later removed and only one view is then permitted to be held by future ordinands, and consequently no traditionalists are permitted to become priests. When the Church of England ordains women as bishops there will be no ban on those of a different theological opinion being selected for ordination, but in time pressure will be applied to introduce a ban. I hoped by asking that supplementary to receive a statement assuring us that this will not happen, so that in a few years time, when pressure is applied, that statement could be referred to in resisting a ban.

The answer I received from the Archbishop of York

The House is committed to the three principles, as I've just said, and I cannot see how that actually can come about, because if you're committed to the three principles, I don't see what you're suggesting would be a possibility. So I hope the House will continue to be committed to those three principles, and in time of course, one hopes that the Church, being what it is, a body of Christ made up of all kinds of different understandings, different views, apart from our commitment to the Gospel and to Jesus Christ, that still those principles will be applied by Anglicans not yet born.

[The three principles to which the Archbishop was referring was from the January 2012 Archbishops' Foreword to the draft Code of Practice on the Draft Bishops and Priests (Consecration and Ordination of Women) Measure (GS Misc 1007):
"the House will continue to uphold these three principles:
- Bishops will continue not to discriminate in selecting candidates for ordination on the grounds of their theological convictions regarding the admission of women to Holy Orders;
- In choosing bishops to provide episcopal ministry under diocesan schemes for parishes requesting this provision, diocesan bishops will seek to identify those whose ministry will be consistent with the theological convictions concerning the ordination of women to the priesthood and episcopate underlying the Letter of Request;
- The archbishops and bishops commit themselves to seeking to maintain a supply of bishops able to minister on this basis. This will obviously have a bearing on decisions about appointments and on the role of bishops occupying the sees of Beverley, Ebbsfleet and Richborough (which will, as a matter of law, continue to exist even after the Episcopal Ministry Act of Synod has been rescinded)."]

<u>The question I asked</u>
In the light of the object of the Archbishops' Council in the National Institutions Measure 1988 to "promote" and "co-ordinate", has the Council considered whether to promote greater transparency in the National Church Institutions by recommending changes – for example to change the approach taken in the 'Year in Review' in *The Church of England Year Book*, so as not only to draw attention to those church attendance statistics that show an increase, but also to refer to the figures that show a decrease?

<u>The reason I asked it</u>
The 'Year in Review' in the *Church of England Year Book* follows the style of the annual reports of secular organisations of putting the best possible gloss on events. I think that the Church should be different, it should 'tell it as it is' without gloss.
The 2010 Year Book's Year in Review says, for example, (page xxvii), "while some trends in churchgoing continue to change, the overall number of people attending church had altered little since the turn of the millennium." However, a study of the actual figures (page Ivii) reveals that the average weekly attendance and the average Sunday attendance saw an 8% decline from 2000-2007. Describing an 8% decline as "little altered" puts the best gloss on this, but the disadvantage is that it fails to draw people's attention to the challenge presented by the figures.

<u>The answer I received, from Mr Philip Fletcher on behalf of the Presidents</u>
The Council takes its role in promoting and coordinating the church's mission very seriously and our aim is indeed for greater transparency where that can be achieved. There is nothing wrong with drawing attention to good news stories in order to achieve balance.
That said, the line between news management and spin is a fine one and we try assiduously to stay on the right side of it.

The Year in Review is only one source of information and I would draw your attention to the annual booklet on Church Statistics which sets out the data very clearly, with some analysis.

Questions I asked at the February 2012 General Synod

The question I asked

Has the Standing Orders Committee considered whether revision committees, to which legislative and liturgical business are committed, should be required, or encouraged, normally to meet in public, in the same way that public bill committees of the House of Commons examining legislation at committee stage do; and if not will it do so now?

The reason I asked it

Anyone who wants to can attend the General Synod meetings and sit in the public gallery, or listen to the debates broadcast on the website. They can then read a transcript of the debate in the published Report of Proceedings. This is the same level of openness as Parliament. However the next stage is then for the draft legislation passed by General Synod to be considered by a Revision Committee. In Parliament, such committees are open to the public to observe and are often televised. In Synod, Revision Committee discussions are held in secret and only the outcome of the discussions are published in their report. Why should Parliament be more open to people than the Church? The Church should be at the forefront of openness, not lagging behind.

The answer I received

Mr Geoffrey Tattersall QC, Chairman of the Standing Orders Committee:
In accordance with the undertaking I gave in the debate on its 44th Report at the February 2010 group of sessions, the Standing Orders Committee is in the process of reviewing revision committee procedures, and the issue will be discussed further at the Committee's next meeting later this year. As part of that review, the Committee will be considering whether revision committees should either be required by the Standing Orders, or encouraged by guidance, to meet in public.

The question I asked

In the light of the statement by the Secretary General in GS Misc 979 that there were "as yet unresolved legal questions" regarding the possibility of Ordinariate congregations sharing Church of England church buildings under the Sharing of Buildings Act 1969, what progress has been made towards resolving those legal questions, and what plans have been made to promote the ecumenical sharing of church buildings with ordinariate congregations once those legal questions have been resolved?

The reason I asked it

Church of England buildings can be shared with the congregations of other denominations. The Church of England service can be at one time on a Sunday and the other denomination's service can be at another time. This saves both denominations the cost of having separate buildings and can also be a small ecumenical step. Over the last year some traditionalists have left the Church of England to come into full communion with the Roman Catholic Church, whilst retaining some of their 'Anglican patrimony' by joining the Ordinariate. However,

some in the Church of England have said they will refuse Ordinariate congregations the use of CofE buildings. In my view, just because someone leaves the CofE doesn't mean that we should lock our doors to them. The statement that I refer to in my question is GS Misc 979, '*The Roman Catholic Ordinariate of Our Lady of Walsingham: Some Questions and Answers on the Legal Implications for the Church of England'* page 4:
http://www.churchofengland.org/media/1173305/gs%20misc%20979.pdf
"It would be possible in law for any 'church building' (including inter alia church halls) to be used by a congregation of the Ordinariate under a sharing agreement made under the Sharing of Church Buildings Act 1969, given that the Church of England and the Roman Catholic Church are churches to which that Act applies. However, there are as yet unresolved legal questions about the precise application of the 1969 Act in that context."

The answer I received
William Fittall, Secretary General:
The Roman Catholic Church has made it clear that it expects Ordinariate congregations to worship in Roman Catholic churches so the application of the 1969 Act is somewhat academic. GS Misc 979 also makes clear that use of Church of England churches by non-Anglican congregations is also in principle possible without a sharing agreement under the 1969 Act, though any such arrangement would require, amongst other things, an assessment of the pastoral implications and the agreement of the Anglican diocesan bishop.

Questions I asked at the July 2011 General Synod

The question I asked
Noting that:
i. the Archbishops' Council 2012 Budget (GS 1842) records on page 46, paragraph 5, the decision to propose to continue to freeze the level of the Church of England grant to the World Council of Churches;
ii. paragraph 6 of that document records the decision to propose to increase the Church of England grant to the Conference of European Churches (CEC) by 3.5% in 2012, on top of the 2% increase in 2011; and
iii. the 2009 Response to the CEC CSC Work Programme by the Baptist Union of Great Britain, the Church of Scotland, the Church of England's House of Bishops' Europe Panel, the Methodist Church and the United Reformed Church criticized CEC's strategy,
has the Archbishops' Council considered freezing the level of grant to CEC until such time as the criticism of CEC's strategy made in 2009 has been considered by CEC and, if valid, addressed?"

The reason I asked it
In July, the General Synod approved for 2011 a 2% increase in the Church of England's contribution to the Conference of European Churches (CEC) to £85,700 see http://www.churchofengland.org/media/39761/gs1781.pdf The General Synod sends representatives to the Conference of European Churches (CEC) and worthy speeches are made and worthy reports are written, but I can't think of a single CEC debate or report that has had a real impact on the life of the Church of England, or any other Church. The Church of England's submission
http://assembly.ceceurope.org/uploads/media/Joint_UK_Church_Response_to_Lyon.pdf
recommended various changes that could make the CEC a useful organisation – such as alerting members to draft European legislation that Churches might

want to lobby about. The CEC set up a working group to look into the suggestions received. They will then consult again and bring back recommendations in 2013 http://www.cecrevision.dk/fileadmin/filer/pdf/01_Motion_ADOPTED_Lyon_Assembly.pdf. In the meantime we are increasing our financial contribution (which comes from parish share) to an ineffective organisation, while awaiting improvements that may never come.

The answer I received
Mr Andrew Britton:
Taking into account the achievements so far in addressing CEC's objectives with greater transparency and accountability as well as the on-going work reviewing CECs future strategy, in which the Bishop of Guildford is closely involved, the Council considered that an increase to the grant, broadly in line with inflation, was appropriate.

My observations on the answer
The answer did not specify what the "achievements" are, and it is surprising that such claims are made given that the CEC decided that their response to the 2009 criticisms would not be until 2013 when they would propose recommendations. Nevertheless, the purpose in my asking the question was to flag up the issue.

Questions I asked at the November 2010 General Synod

The question I asked
Noting that the Bible records the Apostles' debates (e.g. Acts 15) rather than simply recording decisions taken, and that the fifth of the Seven Principles of Public Life quoted in the General Synod Code of Practice (GS Misc 955) states 'Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands', what has been identified as the wider public interest justification for the full minutes of House of Bishops' meetings remaining strictly confidential and only a summary of decisions being published?

The answer I received
The Archbishop of York (Dr John Sentamu):
The outcomes of House of Bishops' meetings are already reported to the Synod and the House frequently issues explanatory material in the form of statements/GS Misc documents, but generally the meetings are held in private under SO 14 and can involve candid and robust discussion. In my judgement bishops need to be able to 'speak the truth in love' (Ephesians 4.15) in the privacy of their meetings without being inhibited by the thought that a detailed account of the exchanges is to be published.

The supplementary question I asked
Declaring an interest as a former minute-taker of House of Bishops' meetings: Is it still the practice of the House of Bishops to include in their meetings a private session in which the House of Bishops' minute-takers are not permitted to be present, which has had the unintended consequence that House of Bishops' decisions have been taken of which there is no official record?

The answer I received

The Archbishop of York:

As far as those private sessions without minute-takers are concerned, if you mean officers who work for Church House, yes that happens because sometimes the meeting may also involve discussion about those particular members of staff and it would not be appropriate for them to be present. I do not think that any unintended consequences have arisen as a result of minute-takers not being present, but I am here to discover that as a reality, because it does not ring true. Since you are never at the meetings, sir, you do not know.

My observations on the answer

I do know of unintended consequences. I remember when I was a member of the House of Bishops' Secretariat we were once asked by the bishops what our progress had been in taking forward one of their decisions. When we said we didn't know what they were talking about, they said that it was a decision they had taken in one of their private sessions and they must have forgotten to tell the staff, which was why we hadn't been able to implement it!

The question I asked

Have the Church Commissioners identified the possible savings for the Church of England if they closed the Mission Development Fund and instead paid the money direct to the Archbishops' Council's budget (thereby reducing parish share, and giving every parish more money to spend on its mission), in terms of eliminating the administrative cost to the Church Commissioners and dioceses of running the scheme and the time spent by parishes in applying for grants?

The reason I asked it

The money for the central spending of the Church, on clergy pay and pensions, training for ordination and other national responsibilities, comes partly from the parishes - who contribute through their parish share to the diocese, who then pass the money on to the centre as the diocesan contribution - and partly from the Church Commissioners.

The *Archbishops' Council Annual Report* states that, in 2009, £28 million came from the dioceses/parishes and £41 million from the Church Commissioners. The Church Commissioners contribution to the centre could have been £5 million more and consequently the parishes contribution £5 less, but instead the Church Commissioners gave £5 million to the dioceses in a "Mission Development Fund" (previously called Parish Mission Fund).

At first sight this mission money sounds excellent, and there are lots of good news stories in the scheme literature giving examples of what this "extra" money has achieved - and of course, lots of great work for mission has been achieved with it.

However, when you look at the big picture, you realise that, although all the official documents refer to it as "extra" money, it isn't really extra money. What is actually happening is that the Church Commissioners are not giving £5 million to the centre; with the result that parish share is £5 million more than it needs to be. How do parishes find this £5 million for parish share? By cutting the amount of money that the parish has for mission. Parishes can then apply to get back the mission funds they lost, by applying for a grant from the Mission Development Fund. However, the full sum is not recovered by the parishes, because of the administrative costs of running the scheme.

I suggest the Commissioners should simply pay the money direct to the centre, and parish contributions to the centre to be reduced by the same amount. Parishes can then use the money they save, from their lower contribution, on mission. This is perfectly possible, and has already been allowed for one diocese. See *The Archbishops' Council 2011 Budget,* GS 1781, paragraph 46: "*As in recent years the apportionment for the Diocese in Europe (estimated to be around £59,000 in 2011 in advance of pooling adjustments) is waived to enable corresponding funds to be available for mission projects as the Diocese is not legally able to receive funds from the Mission Development Fund.*"

The answer I received

The First Church Estates Commissioner:

The Commissioners and Archbishops' Council believe that the mission development funding adds value to the Church's mission by providing dioceses and parishes with a dedicated stream of funding to invest in new opportunities. The course of action Mr Vincent proposes could not in any case be supported. The Commissioners have the legal power to support the administrative costs of their own statutory functions but not those of the Archbishops' Council; their funds cannot, therefore, be directed towards the Council's budget.

My observations on the answer

I should have worded my question differently and asked what would be the savings if the Commissioners made the Mission Development Fund money part of their normal allocation to dioceses, thereby reducing parish share, thereby giving parishes more money to spend on mission without having to go through the bureaucracy of applying for mission grants.

In the Consistory Court of the Diocese of Gloucester

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

B E T W E E N:

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

Janet Crompton-Allison

Richard Welch [Church Wardens]

Petitioners

and

Alden Bennett

Interested Party

JUDGMENT

Chancellor June Rodgers

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

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

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

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

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

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

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

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

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

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

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

7. "Why?" I can hear PCCs ask.

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

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

   These rules can be summarised simply as follows:-

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

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

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

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

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

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

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

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

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

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

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

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

11. However, any Diocese has to oversee all the items within its overall care. These items, often the gift of benefactors from previous generations, form part of the parish life, the heritage of a local community and may be of national heritage importance. This point has been stressed by the Church Buildings Council (and I will refer to their stance as to "Church Treasures" in greater detail later in this judgment). Does that mean that <u>all</u> contents of a Church are to be retained for ever, and never sold? Must this include the worn out carpet? The moth- eaten hassocks? The irrevocably bat-stained altar cloths? But what of something of far greater value which a Church may have in its possession?

12. Once a PCC has decided that they would wish to apply <u>properly</u> for a Faculty to sell an item, they then, I am afraid, face further legal hurdles to surmount. These have been clearly set out in the recent Court of Arches decision of *In Re St Lawrence, Oakley with Wooton St Lawrence* [14th April 2014, approved transcript]**.** I shall refer to the test set out in that authority below, when I consider Emmanuel's reasons for a sale, now that they have got round to making this application for a Faculty.

13. What happened in Emmanuel Church is a text book example of how not to go about trying to sell an item from a Church.

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

14. THE HISTORY OF THE MATTER.

In the light of an emergency Directions' hearing I held on 15th February 2014, following an initial enquiry by the Archdeacon

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

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

That is all.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

However, worse was to come.

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

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

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

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

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

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

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

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

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

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

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

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

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

18. **WHAT DID HAPPEN?**

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

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

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

"Hi folks

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

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

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

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

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

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

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

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

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

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

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

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

That declaration was wrong.

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

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

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

19. **THE PAINTING**

The description of Lot 225 in the catalogue reads:-

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

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

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

Monday, 28 October, 2013

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

Sale Results

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22. **THE LAW**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28. What I might have ordered if this had come to me, as it should, before any disposal, is now academic and a matter of speculation. I have no doubt, nevertheless, that I would have wanted to examine thoroughly disposal by loan to a local museum and limited disposal by sale to such an institution. It may be supposed that it would have been said that disposal by loan would have released no moneys and disposal by limited sale would have not released the order of moneys required to contribute significantly to the emergency works. All that however, is not where we are today.

29. The Archdeacon of Cheltenham said in evidence, and I accept, that the brutal truth was that if this faculty is not granted this parish would be bankrupt.

30. Thus, I conclude that the financial needs of this parish are substantial and urgent, and, the financial consequences of refusing the application to the parish would be disastrous. That conclusion is significant but not alone sufficient.

31. I find that there is really no historic, local or social connection between this painting and this church. It arrived as a windfall gift, which for some time (if ever so utilised) has been redundant for any mission use in this church. This Ittenbach painting did not come from a well known local family, nor was it connected with some historic act or activity in the parish. In no way does it resemble the history and parochial link with the parish, which the armet had in *Re St Lawrence, Oakley with Wootton St Lawrence.* The Ittenbach painting's existence in Emmanuel Church was not to all obvious in the Church;

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

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

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

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

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

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

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

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

Accordingly, I make the following orders:-

1. There is granted a Faculty to the Priest in Charge, Church Wardens, and PCC of Emmanuel Church Leckampton Cheltenham, confirming that they may sell the painting of the Virgin and Child by Franz Ittenbach.

2. That there is a declaration that this painting, having been sold by Messrs Chorley's of Prinknash Gloucestershire, was purchased in good faith by Mr Alden Bennett, who by reason of this Order has now good title to the said painting legally to retain or to dispose of as he may see fit.

3. That Mr Alden Bennett is hereby released from all undertakings which he has given to this Court in respect of the said painting.

4. That the Petitioners do pay the costs of and arising from this Petition (neither Mr Bennett nor Chorley's having sought any

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

5. That a copy of this judgment is to be displayed publicly for 28 days following receipt in the Church of Emmanuel Leckhampton, and shall be available on line and from the Diocesan Registrar.

6. That the Diocesan Registrar sends copies of this Judgment forthwith to secretaries of trade bodies for auctioneers and fine art and antique dealers in the United Kingdom.

19th July 2014

June Rodgers, Chancellor

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IN THE ARCHES COURT OF CANTERBURY

Charles George QC, Dean of the Arches

Chancellor McClean QC and Chancellor Briden

On appeal from the Consistory Court of the Diocese of Winchester

***In re* ST LAWRENCE, OAKLEY WITH WOOTTON ST LAWRENCE**

Judgment
(as approved)

Appearances:

Alexander McGregor of Counsel, for the Appellant/Party Opponent, instructed by Stephen Slack, The Legal Office, Church House, Westminster SW1P 3AZ

Peter Smith of Counsel, for the Respondents/Petitioners, instructed by Brutton & Co, Solicitors, West End House, 288 West Street, Fareham PO16 OAJ

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INTRODUCTION

1. This case concerns the Wootton St Lawrence Armet ("the armet"). An armet is a type of helmet, worn by knights and men-at-arms during the fifteenth and sixteenth centuries, and characterised by a rounded skull, with an extended tail-piece at the back and hinged cheek-pieces which opened to accept the wearer's head and which when locked closed around the face at the chin. This armet is a good example of a rare type, probably of Flemish origin, and dating from about 1500. There are in England only fourteen other surviving continental armets, all of which at some stage were displayed in English churches. No English armour dating from around 1500 and before survives apart from this group. Apart from its historic interest, it is also an article of intrinsic beauty and fine craftsmanship, unusually retaining its later, seventeenth century painted decoration.

2. Church treasures, as such articles are sometimes described, are rightly prized. As was said in *Treasures on Earth* (a report by a working party of the Council for Places of Worship, 1973, para 2):

> "[O]ne of the most excellent ambitions of Christians…has been to express their faith in the language of the arts – in architecture, sculpture, painting, mosaic, music and poetry – and thus to build houses of God which are symbols of that faith, thereafter furnishing them with objects as nearly worthy of the worship of God as human skill can make them. The triumphant realisation of that godly ambition by men in every age from that of the early Christian church down to the present day has been instrumental in creating the great store of treasures owned by the churches…"

Church treasures include secular objects deposited in churches for devotional or other reasons.

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3. Various matters, including financial exigency, security issues, and perceived mission imperatives, have over the past half century led to an increasing number of petitions seeking to dispose by sale of church treasures. In this court alone, since the seminal judgment in *Re St Gregory's, Tredington* [1972] Fam 236, the issue has been considered on four occasions: *In re St Helen's, Brant Broughton* [1974] Fam 16; *Re St Martin-in-the-Fields* (unreported, 31 October 1972); *Re St Mary the Virgin, Burton Latimer* (unreported, 26 October 1995); and *Re St Peter's, Draycott* [2009] Fam 93. There have been numerous consistory court judgments. Yet this remains a controversial area of the law. Despite re-iteration by this Court that the jurisdiction to grant faculties for the sale of treasures is be "sparingly exercised", the consistory court judgments, whilst repeating these words, show a growing readiness to sanction sales, including sales not to museums but on the open market. One recent case, *Re St James, Welland* [2013] PTSR 91 (Worcester consistory court), to which we return at para 35 below, contains the dictum:

> "[T]he Church was not founded to perform the role of guardian of art treasures for their own sake; nor is there any rule of law requiring that it should fulfil such a role".

4. The facts of the present appeal are decidedly unusual, and most unlikely to be repeated. Nevertheless, its determination has involved the court in going back to first principles, and it is to be hoped that further hearings can be saved the plethora of citations which we were called upon to consider.

BACKGROUND

(a) The 2013 faculty

5. This appeal is brought, with leave of this court, by the Church Buildings Council ("CBC") against the judgment of the consistory court of the Diocese of Winchester (Chancellor Clark

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QC), of 22 August 2013. Having considered written representations from the petitioners and from the CBC (as party opponent), the chancellor allowed, subject to conditions, a petition by the churchwardens and assistant minister of the parish of Oakley with Wootton St Lawrence, of 11 July 2010, for "Sale of Wootton Helmet, a 15th century Flemish Armet currently on loan to the Royal Armouries" ("the 2013 faculty").

(b) St Lawrence, Wootton

6. There were until recently three churches in what is now the united Parish of Oakley with Wootton St Lawrence. One, St John, Oakley, was demolished in 2012 and the site has been laid out as additional burial space and as a garden of remembrance. Of the remaining two churches, the principal one is St Leonard's, Oakley. St Lawrence, Wootton ("the church"), plays very much the minor role, its services being limited to about fifteen a year, including a recently instituted monthly evening service of Parish Praise.

7. Notwithstanding its legal duty to maintain both churches, the Parochial Church Council ("PCC") now only takes responsibility for funding utilities and insurance at the church. There is a Wootton St Lawrence Repair Fund ("the Repair Fund"), which had a balance of £17,098 at the end of 2012. The Repair Fund has its own stewards, and is principally supported by subscriptions from some of the residents of the village of Wootton St Lawrence. According to a note to the united parish accounts for 2012, "the PCC has no authority over the running or organisation of the fund". The parish's Annual Report 2012, under the heading Wootton St Lawrence, refers to the recent restoration and painting of all the faces of the clock and the installation of an automatic winding system. This presumably accounted for a major part of the £7,707 expenditure from the Repair Fund in 2012.

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8. The income and expenditure account of the combined parish for 2012 showed a surplus income of £5,788, following payment of diocesan parish share of £65,000. The net assets of the united parish stood at £780,581 at the end of 2012. Of the fixed assets, £25,000 is attributed to a parcel of unconsecrated land, which the accounts record would have a current market value as building land in excess of £700,000.

(c) The armet

9. In a recess in the south wall of the chancel of the church there is a white marble monument to Sir Thomas Hooke, baronet, who died in 1677, having built and lived in a local manor house called Tangier House. His effigy is of a reclining gentleman wearing plate armour. He is resting on one arm with one hand on a helmet. About five feet above the monument is an ornate bracket coming down from the top of the wall. On the bracket are the initials “T.H.” and the date “1677”. Until 1969 the armet hung from the bracket, together with a pair of gauntlets, a pair of spurs and a dagger. In 1969 the gauntlets, spurs and dagger were stolen. Because of its potential value and the evident lack of security, the armet was placed in a bank vault in Basingstoke. The deposit fee proved expensive and in 1974 a faculty (“the 1974 faculty”) was granted by Chancellor Phillips to permit the indefinite loan of the armet to the Armouries of the Tower of London. At that time, as the present chancellor records in his judgment, no thought seems to have been given to the implications of whether the armet was part of a funerary monument to Sir Thomas Hooke, and, if it were so, whether his descendants approved of the loan. Early in 1975 the armet was taken to the Tower of London, where it remained for some fifteen years. In 1996 much of the collection of armour at the Tower, including the armet, was transferred to the Royal Armouries Museum in Leeds (“RAM”). There it stayed, in a storeroom but viewable by arrangement, until 2010.

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10. Under the terms of the original loan agreement, the agreement could be determined on one month's notice by either party. The agreement, however, was varied in 2001 when the insurance arrangements were altered. The loan became subject to yearly renewal. The agreement expressly provided that "If at any time during the period of the loan it becomes necessary to sell the object(s) lent, the lender agrees to give the Board [of Trustees of RAM] first refusal and to allow it reasonable time in which to complete the purchase".

(d) The proposal to sell the armet

11. In early 2010 the parish became aware of the value of the armet (then valued at significantly in excess of £25,000) and conceived the idea of selling it. RAM was prepared to shorten the notice period. On 10 April 2010 the PCC unanimously approved its sale. The chancellor refers to the PCC being "short of funds" at that time. The relevant PCC Minutes record that:

> "Should the sale be approved it is suggested that 10% of the value be given to the Wootton Fund [presumably a reference to the Repair Fund] with the remaining funds being used to cover the cost of the demolition of St. John's church (if and when approved) and the provision of a seating area in the central part of the graveyard where visitors have an opportunity to sit and reflect, with any remaining balance being used for the [St Leonard's] Centre".

12. On 2 June 2010 the Diocesan Advisory Committee ("DAC") recommended sale, but with the provisos that independent valuations of the helmet be sought and submitted as part of the faculty application and that a facsimile of the helmet should be made and displayed in the church with an explanation of its association to [sic] the church and which organisation now owns it. The DAC added a comment it would be desirable for the item to be sold to RAM or another museum

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in the United Kingdom rather than on the open market. This followed the view expressed by the Historic Environment Manager of Winchester City Council that "The least the church could do would be to try to ensure that the helmet stayed in Hampshire preferably, or at least in England". On 12 July 2010 the specialist London valuers and auctioneers, Thomas Del Mar, gave a "conservative pre-sale estimate" of £30-40,000, whilst proposing an insurance figure in the region of £80,000 to reflect the armet's possible value on a sale by private treaty.

(e) The 2010 faculty

13. On 11 August 2010 the chancellor granted the unopposed faculty ("the 2010 faculty"). He imposed several conditions of which the first was that:

> "Subject to the possibility of a prior satisfactory and acceptable offer being made by the Royal Armouries or some other British museum or institution, the helmet shall be sold on the open market for the best possible price".

The same conditions were imposed on the 2013 faculty under appeal.

(f) The auction

14. RAM had indicated to the petitioners in May 2010 that it was interested in acquiring the armet. In September it said that it needed the vendors to state a price, which would enable it to approach possible funders to assemble the necessary sum. Unfortunately, but perhaps understandably, the petitioners merely informed RAM of the alternative £80,000 valuation, and at this point no offer was received from RAM. On 8 December 2010 the armet was sold at public auction in London to an American collector, the successful bid being £45,000 (slightly in excess of Thomas Del Mar's auction estimate), the under-bidder being RAM.

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(g) The intervention of the CBC

15. The sale of the armet generated expressions of concern by conservation interests, including RAM. The CBC, which had not been consulted (as it should have been) under rule 15(2) of the Faculty Jurisdiction Rules 2000, requested the chancellor to set aside the faculty under rule 33. The CBC indicated that it sought to raise three specific issues which went to the merits. First, that the armet was part of the funerary monument to Sir Thomas Hooke. Second, that as such, it was necessary to obtain the consent of any living heirs of Sir Thomas before good title could pass to any buyer. Third, that in any event, the court should not order the sale of the armet. The chancellor very properly decided on 31 May 2011 that it was just and expedient under rule 33 to set aside the faculty he had issued, so that the whole matter could be reviewed. This meant that the result of the auction was left in limbo.

(h) Tracing the living heirs of Sir Thomas Hooke

16. With the help of two genealogists, the petitioners traced two living heirs, Sir John Hamilton Spencer-Smith and Mr James Lee. By a deed of gift of 28 February 2012, the former transferred the whole of his ownership in the armet to the churchwardens of the parish, with intent to give effect to the sale of the armet in exchange for the PCC undertaking to maintain and repair the tomb of Sir Thomas. Mr James Lee also agreed to the sale, but on condition he received half the price obtained thereby.

(i) Adoption of written representations procedure

17. Meanwhile, the CBC became a party opponent to the petition; the petitioners continued the task of tracing the heirs to Sir Thomas Hooke; and the chancellor fell seriously ill. Finally, with the consent of both parties, the chancellor directed under

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rule 26 that it was expedient to determine the proceedings on the basis of written representations.

18. In *Draycott* at para 36-37 the Court of Arches said that:

> "Whilst the [written representations] procedure has the advantage of limiting the costs of contested faculty proceedings, this should not be the sole criterion for using the procedure….The circumstances of each case will differ, and the chancellor will have to consider all relevant factors in deciding whether or not to use the written representations procedure instead of an oral hearing.
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> In this case we think it would have been better if the chancellor had not offered to use the written representations procedure in view of the serious issues which arose and those canvassed in this appeal. In our judgment this was a case more suitable for hearing in court. However, we recognise that it is easier for this court, with the benefit of hindsight, to reach such a conclusion".

19. The same is true of the present case. The lesson of these two cases is that the dictum in *Tredington* at 246F that "Faculties of this kind should seldom if ever be granted without a hearing in open court", perhaps modified to omit the words "if ever", should be borne in mind by chancellors in disposal cases, whether or not the petition is formally opposed.

THE JUDGMENT UNDER APPEAL

20. The chancellor dealt in considerable detail with the three issues raised by the CBC. He was satisfied on the balance of probabilities that the armet formed part of a funerary monument set up after his death to the memory of Sir Thomas Hooke. In para 11 of his judgment the chancellor concluded:

> "It follows that, even though it was in a sense attached to the building, it never became part of the freehold of the

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> Church. It remained the property of the person by whom it was erected during his or her lifetime. On the death of the person placing it in position it became the property of the heirs of Sir Thomas Hooke. This has long been established at common law, and it has been enshrined in statute in Section 3 of the Faculty Jurisdiction Measure 1963".

There is no cross-appeal on that finding.

21. On the question whether the consent of all living heirs to Sir Thomas Hooke had been obtained, the chancellor stated in para 13 that:

> "the parties in this case agree that the armet is owned jointly by the churchwardens of St. Lawrence and Mr James Lee in equal shares. It follows that there is now no issue relating to the ownership of the armet, or, subject to Mr Lee's interest, the right of the churchwardens to give good title under a sale. By virtue of this agreement, the Court may, in the exercise of its discretion, grant a faculty".

There is no challenge to that conclusion.

22. The chancellor proceeded to consider what he described in para 13 as "the crucial, but contentious, issue, namely whether or not the sale of the armet should be permitted".

23. He accurately summarised the written representations of the parties. He directed himself that it was for the petitioners to prove their case by proving good and sufficient grounds to warrant the sale of the armet in circumstances where the court's jurisdiction should be exercised sparingly. He said that he had borne in mind the principle, confirmed in *Draycott*, that the more valuable the article, the weightier will need to be the reasons to justify the sale. His conclusion was that the petitioners had proved their case and justified an order for sale and "have crossed this high threshold" (para 34).

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24. He said that he had in particular taken into account the factors set out in sub-paragraphs 33 (c), (d), (e) and (i) of his judgment. In para 33 (c) he found that the armet was "a valuable piece of armour dating from the first half of the sixteenth century", although there were finer examples in existence of helmets/armets dating from the same period. In para 33 (d) he found that the connection between the armet and Sir Thomas Hooke was tenuous, since it had probably been acquired after his death as part of a funerary monument, and there was no aesthetic or artistic link between the armet and the monument. He found that the connection between the Hooke family and Wootton St Lawrence had been short-lived, there being no evidence to suggest that Sir Thomas or his son (who sold the property in Wootton St Lawrence) were individuals of local or national distinction. In his view:

> "the possible link between the armet and the present and future inhabitants of the parish is very limited. It does not play a significant part in the history or heritage of the village".

In para 33(e) he noted that the armet had not been on display in the church since 1969 and for security reasons there was no prospect of its ever being returned there:

> "Since the armet never had a function within the Church, it logically cannot be said to have been "redundant" in the normal sense of the word…..[T]he fact remains that the connection between the armet and the Church has been severed, and there is no prospect of the severance ever being reversed".

In para 33(i) he said:

> "I am satisfied that the Petitioners have now proved good financial reasons for seeking the sale. Those reasons are probably not far short of a financial emergency in themselves, but…it is unnecessary for the Court to reach that conclusion. The fact that one half of the net proceeds would go to Mr Lee is of no significance."

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25. The chancellor said that he had taken into account the historic significance of the armet and the CBC's suggestion that it should remain in RAM or a museum, but that these concerns "were outweighed by the factors in support of a sale" (para 34).

JURISDICTION

The issue

26. The armet is an entirely secular object. Whilst it remained in the church it was undoubtedly subject to the faculty jurisdiction, regardless of its ownership by the heirs of Sir Thomas Hooke. As was said in *In re Escot Church* [1979] Fam 125,127 (Exeter consistory court), in relation to a painting which was claimed to have been loaned to a church:

> "The consistory court alone has jurisdiction over the introduction of moveable items into and their removal out of a church…Authority is now sought to remove the painting out of the custody of the church. Had Sir John brought proceedings to establish title in a temporal court, and had he succeeded in making out his claim, he would still have required a faculty (which would no doubt have been granted) to enable him lawfully to remove the painting from the custody of the church".

If before 1969 the heirs had wanted to recover the armet, they would have needed a faculty, and, given its role as part of the funerary monument, the outcome would have been a great deal less certain than appeared to the chancellor, on different facts, in *Escot*.

27. Since 1969 it has not been in any church. When the 1974 and 2010 faculties were granted it was still owned by the heirs of Sir Thomas Hooke. But was it in law still subject to the faculty jurisdiction? And if not, does the obtaining by the churchwardens of a half-share in its ownership in 2012-13 (and prior to the 2013 faculty) change matters?

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28. A faculty should have been sought in 1969 before the armet's removal to the bank vault. Therefore a faculty was undoubtedly needed to approve retrospectively the removal from the church and the loan to a museum. The position after the 1974 faculty is much less clear. If the co-heirs had sought to terminate the bailment to the museum, could the bailees lawfully have refused to release the armet to its owners? Had the matter been referred to a secular court, would the court have refused jurisdiction in the absence of a faculty authorising the release of the armet to the co-heirs? These are difficult questions, it being irrelevant to their determination that if the co-heirs had indeed applied for a faculty for return of the armet, we consider that the faculty would inevitably have been granted (assuming that the consistory court did retain jurisdiction). In a museum the armet was no longer fulfilling the purpose for which it had originally been bailed to the churchwardens, and we can see no grounds on which the co-heirs' petition could have been refused.

Submissions on jurisdiction

29. Counsel before us approached this issue very differently. For the CBC, Mr McGregor reminded us of the terms of section 11(1) of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 ("CCM") that:

> "For the avoidance of doubt and without prejudice to the jurisdiction of consistory courts under any enactment or rule of law, it is hereby declared that the jurisdiction of the consistory court of a diocese applies to all parish churches in the diocese and the churchyards *and articles appertaining thereto"* (emphasis added).

He argued (and this is not in doubt) that the armet was at all material times an "article" and that on removal from the church for the purpose of lending to a museum the article continued to "appertain" to the church. This was because "appertaining" implied the existence of a relationship between the article and

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the church, and did not imply ownership by any particular person. He correctly points out that an article which is unlawfully removed from a church continues to appertain to the church and to remain subject to the faculty jurisdiction. To which we would add that an article removed from a church for repair or for a temporary exhibition elsewhere would undoubtedly remain under the faculty jurisdiction, and regardless of ownership. He referred to *Re St Nicholas, Chislehurst* (unreported, 1999) (Rochester consistory court), where the chancellor granted a faculty for the loan of a helm and sword to RAM, saying that:

> "The faculty will further provide for the helm and sword to remain apart from the tomb to which they relate and until further Order, there being liberty to apply for further directions".

This, he submitted, was only consistent with the helm and sword continuing to be subject to the faculty jurisdiction, notwithstanding that they were to be removed from the church and that property in them was not in the churchwardens. We agree. Similarly, we have no doubt that the intention of Chancellor Phillips in granting the 1974 faculty was that the armet would remain under the faculty jurisdiction. But did that intention have effect in law to preserve the faculty jurisdiction?

30. For the petitioners, Mr Smith contended that by introducing an article into a church, the owner at law placed it into the custody of the churchwardens for its safety and protection. The relationship of the churchwardens to the article was therefore one of custody or bailment, and in this respect the legal relationship with the heirs-at-law was not greatly different from that between the churchwardens and the parishioners with respect to the ornaments and utensils of the church. Once, however, the article was removed from the church, albeit under faculty, it could no longer be said to be in the custody of the churchwardens, since it was then in the custody of the person or organisation into whose care it had been placed. Unless the legal owner had been a party to the

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loan arrangement or had agreed to the terms upon which the article had been removed from the church (which had not been the case here), he submitted that the consistory court would have no jurisdiction to interfere thereafter in the legal title of the article's owner. That was also the view of the chancellor in *Re St Bartholomew's, Aldborough* [1990] 3 All ER 440, 445a (York consistory court), who was considering a petition to sell a fourteenth century helmet, which had been on loan to the Tower of London. In the present case what Mr Smith contended to be crucial was that the heirs-at-law had now agreed to the sale. Therefore the sale for which a faculty was sought was effectively a sale by the churchwardens for the benefit of the parish. This, he argued, effectively brought the matter back by a form of reversion within the faculty jurisdiction.

Conclusions on jurisdiction

31. Mr Smith's approach to reversion receives support from *Aldbrough*, where by the time of the hearing the heirs-at-law had reached an agreement with the parish very similar to that reached in this case with Sir John Hamilton Spencer-Smith, which was held (at 445b):

> "to give a sufficient interest in the helmet to [the church representatives] to bring it within the faculty jurisdiction".

We find the argument on reversion wholly unpersuasive. If the armet ceased to be subject to the faculty jurisdiction in 1974, we do not consider that any subsequent acquisition of title by the churchwardens can revive the faculty jurisdiction, unless the article were to be re-introduced to a church (for which a separate faculty would in any event be required).

32. We readily accept that the word "appertaining" in section 11(1) of the CCM does not imply ownership by any particular person; otherwise, there would have been no jurisdiction over the article even when it was in the church (as to which see *Escot*). We are doubtful whether the historical link between the armet and the church is itself enough to constitute a continued

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"appertaining thereto". If this were the case, then there would be a continuing duty of annual inspection of the armet, pursuant to section 5 of the CCM.

33. On the other hand, it would be anomalous (as well as highly regrettable) if the jurisdictional consequence of a faculty sanctioning a loan to a museum depended on ownership of the article loaned. The flaw we perceive in Mr Smith's analysis is its assumption that the role of the churchwardens in relation to the armet terminated in 1974. It did not. The loan was the subject of a contractual agreement under which both parties had rights and responsibilities. Further, whatever the position under section 5 of the CCM, it remained the responsibility of the churchwardens from time to time to check that the bailee was honouring its responsibilities under the loan agreement and whether alternative arrangements needed to be made for the armet, whether by way of different terms for the loan, or loan elsewhere, or even disposal by sale (whether open or restricted). It is this element of continuing custodianship which had the legal effect of retaining the armet within the faculty jurisdiction. For the future, and whilst such wording will not of itself determine the jurisdiction issue, we strongly recommend that chancellors sanctioning loans, regardless of ownership of the articles concerned, contain clear, express provisions relating to the continuance of the faculty jurisdiction in respect of the article loaned.

CATEGORIES OF DISPOSAL CASES

<u>The three categories</u>

34. There are three types of disposal of treasures, each of which requires a faculty:

(a) The first, which does not involve any change of ownership, is where the item is placed on long term loan to a museum, art

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gallery or diocesan treasury ("disposal by loan"). Such loan arrangements have the advantage that the item is held securely, at no or minimal cost to the church of origin, and normally placed on display, or at any rate made available for public view and scholarly examination. This court held in *Brant Broughton* (at 22A-B and 23 A-B) that parishes should not seek disposal of valuable articles merely because of the cost of obtaining full cover insurance; if limited insurance cover could be obtained at an affordable premium, and the article was not redundant, then that strengthened the case for retention of the item within the church. Where, however, there are compelling reasons why the treasure can no longer be retained in the church, such a loan will normally be a sensible solution, greatly preferable to long-term deposit in a bank vault, unlikely to excite objection, and likely to be sanctioned by faculty. Where the treasure is owned by a third party who (or whose successor in title) has retained ownership, the owner should, if traceable without undue expense or delay, receive special notification of what is proposed. The owner may wish to petition for return of the treasure, because (as mentioned above) the original purpose of the bailment to the church in question will cease on the treasure's removal from the church.

(b) The second is where the item is to be sold to a museum, art gallery or (more rarely) diocesan treasury ("disposal by limited sale"). Since the church will lose ownership, such sales are not lightly allowed and require special justification. In *Re St Martin-in-the-Fields* (unreported, 21 January 1988) (London consistory court), (referred to below as *St Martin-in-the Fields (1988)*, to avoid confusion with the Court of Arches case concerning the same church), the chancellor permitted the sale of a bust by Michael Rysbrack to a suitable national institution because "an emergency exists in respect of the vicarage", which urgently required expenditure of about £350,000, of which £200,000 would have to be met by the petitioners, even assuming a contribution from the Parsonages Board of £150,000. In these circumstances it was held "impossible to

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see where the money would come from except by a sale of the bust, the one remaining realisable asset of this church".

(c) The third is where the item is to be sold, regardless of who the purchaser is, to whoever will pay the highest price ("disposal by outright sale"). Outright sales were sanctioned by this court, subject to stringent criteria, in *Tredington* and *St Martin-in-the-Fields;* and refused in *Brant Broughton*, *Burton Latimer* and *Draycott.*

35. Disposal by loan and disposal by limited sale both safeguard the security and (to some extent) visibility of the article. The former has the advantage of retaining control (and usually ownership – the exception being where the church does not have ownership, as here), whereas ownership and any form of control are lost entirely in both forms of disposal by sale. From the point of view of petitioners, the disadvantage of disposal by loan is that it does not release a sum of money which can be deployed to other church purposes. We consider that the dictum in *Welland*, quoted at para 3 above, adopted too narrow a role for the church as a guardian of art treasures. We do not accept the chancellor's view in that case that churchwardens' powers are limited to acquiring and dealing with property for purposes which are principally concerned with worship and mission; or its corollary that the churchwardens ought therefore to dispose of property that is not capable of being applied for such purposes.

A sequential approach

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

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approach. In *Burton Latimer* this court rejected an appeal against a refusal to permit the sale of items of silver, which, following ten years in a bank, had been on loan to the Peterborough Cathedral Treasury for fifteen years, where they had been from time to time displayed (p.2). The petition was held to be premature, there being no pressing need for sale. Before authorising the sale of the bust in *St Martin-in-the-Fields (1988)*, the chancellor stated that he would have rejected the petition for limited sale if the petition had merely been based on the problems to the petitioners of keeping it safe and the advantages of public display in such an institution. This was because "the problem could readily be solved by lending the bust to some public museum, art gallery or other like institution where it could be exhibited to the public with all necessary security" (p.4). Similarly, in *Re St Nicholas, Porton* (unreported, 2002) (Salisbury consistory court), the deputy chancellor, in refusing a petition for the outright sale of two seventeenth century joint stools, said that:

> "The ideal solution would be their placement on long term loan in a museum or similar institution, where the need for conservation…might also be addressed. Under such an arrangement the stools would remain subject to the faculty jurisdiction and sale might be authorised by the court at some time in the future if there were good reasons for it".

As between disposal by limited sale and disposal by outright sale, the balance lies between the greater sum which can usually be obtained by the latter, as against the public visibility which can only be assured by the former.

37. With one exception which we examine below, decisions have generally recognised that the interests of public visibility should normally prevail, when the court is considering proposed disposal by sale of articles of local or national distinction. Thus in *St Martin-in-the-Fields (1988)*, the chancellor recorded that the petitioners' statement of case had been amended to seek only "a restricted power to sell the bust to a suitable national institution as distinct from a power to sell by public auction"

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(p.2-3); and later he stated that he accepted the evidence of several specialist and artistic witnesses that "it is most undesirable that the bust should leave this country" (p.3). He made it plain that "if [the] petitioners were to [seek authority for the sale by public auction] they must make a separate case for it". In *Re St Mary, Barton upon Humber* [1987] Fam 41, 55E (Lincoln consistory court) the chancellor rejected a submission that a restored coat of arms should be sold at auction rather than go to a museum:

> "…[O]ur churches and their contents are part of our national heritage and there is much to be said for such items being displayed where they can be of benefit to all rather than sold to a private collector".

In *Aldbrough*, where disposal by limited sale was permitted of a helmet currently on loan to the Tower of London, the chancellor said that (at 454h):

> "A chancellor would presumably not grant a faculty for sale [of such a loaned article] unless he was satisfied on the evidence that there was at least a probability that the item would be purchased by a museum or other body where it could be kept in England and would be on show to the public".

The chancellor directed that:

> "The sale must be to the Royal Armouries or to some other museum which will agree to keep the helm in England and keep it on display to the public. I set the price at £20,000 with liberty to apply to review this."

In *Re Holy Trinity, Batley Carr* (unreported, 6 August 1997) (Wakefield consistory court), the chancellor said that he would approve a sale of certain screens and furniture:

> "either to another church or museum, and that if any other sale is to be sought I should need to be satisfied that proper efforts had been made to achieve a sale to a church or museum".

In *Draycott* the petitioners originally proposed sale of a Burges font to a private collector. This was regarded by the chancellor as unacceptable, but he went on to consider (and allow) an

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alternative, not raised in the petitioners' submissions, namely sale to a public museum or collection, or failing that, sale by public auction (paras 8 to 10). When the chancellor's decision was appealed to this court, there was no cross-appeal against the rejection of the petitioners' case for sale to a private collector (para 11). In *Re St Columba, Warcop* (unreported, 21 December 2010) (Carlisle consistory court), the court permitted the sale of an oil painting of St Andrew, currently on loan to the Bowes Museum at Barnard Castle, but only subject to two conditions:

> "(a) the painting shall first be offered for sale to the Bowes Museum at Barnard Castle at a price to be agreed which is not less than £30000
>
> (b) if no sale can be achieved before 20th December 2011 [12 months from the date of judgment] the painting shall be sold by auction at Sotheby's" (para 50).

Such a condition was intended to achieve the like effect as condition 1 attached to the 2010 and 2013 faculties, to which we referred at para 13 above, although the wording in *Warcop* is considerably more precise.

38. Although disposal by outright sale was permitted by this court in both *Tredington* and *St Martin-in-the-Fields*, there is no indication in either of those cases, both of which concerned the sale of redundant silver in circumstances of financial emergency, that disposal by limited sale was an option. True, in *Tredington* the deputy dean said at 244F that if the case were an application to sell the flagons to the county museum at an undervalue "that would be a matter for sympathetic consideration"; but that was not being sought by the advisory bodies nor (so it would seem) being suggested by anyone as a viable prospect.

39. A recent exception to the general approach is *Re St Michael and All Angels, Withyham* [2011] PTSR 1446 (Chichester consistory court). There the chancellor permitted the sale of a set of four 14th century Italian paintings, which had

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been on loan to the Leeds Castle Foundation since 1997. He considered, and rejected, a representation by the CBC that the sale should be restricted to a public institution in Great Britain. The chancellor said at para 39:

> "I am satisfied, for the reasons given by Sotheby's, that this might well result in the paintings not achieving the best price possible. As charity trustees, the parochial church council are obliged to realise the full value of any assets to be sold".

We invited submissions from Counsel in relation to the proposition in the second sentence, which is inconsistent with the dictum in *Tredington* about possible sale to a museum at an undervalue. Both Counsel drew attention to the inherent misconception in *Withyham* that the court was concerned with the powers of the PCC. It is the churchwardens who have the legal title to the goods of the church. The churchwardens, however, are not charity trustees. Counsel were agreed that if the faculty authorised a sale only to a museum for the best price that could be obtained from such a museum, that lawfully limited the duty of churchwardens. We agree, and would only add that were it otherwise churchwardens would not be able, pursuant to faculty, to give or sell at an undervalue articles to other churches.

LEGAL PRINCIPLES IN DISPOSAL CASES

Previous decisions of the Court of Arches

40. In *Tredington* this court was concerned with the proposed sale of two silver flagons, used in the past as communion vessels, but "far too valuable to be used in the service of the church" (at 244D-E) and which had "been kept, for many years…, in a bank or museum" (at 245A). The court cited from legal textbooks which recognised that (at 240G-241A):

> "while church goods are not in the ordinary way in commerce or available for sale and purchase, yet the

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> churchwardens with the consent of the vestry (now the parochial church council) and the authority of a faculty may sell them or even give them away…To obtain a faculty some good and sufficient ground must be proved…some special reason is required if goods which were given to be used in specie are to be converted into money".

At 246G-247A, the deputy dean summarised his reasoning for permitting sale, and the approach which should be followed in such cases:

> "As to the grounds for granting the faculty, I have granted it in this present case because the flagons are redundant and because there is an emergency in the finances of the parochial church council, due to the state of the fabric and the small congregation of the church. I have also stated that faculties can be granted to enable churchwardens to make a gift to religious and charitable purposes. I must not be understood to say that those are the only grounds for exercising the discretion in favour of a sale; other kinds of cases must be considered as and when they arise, but the jurisdiction should be sparingly exercised".

41. In *St Martin-in-the-Fields* this court was again concerned with redundant silver, which was either in the custody of the London Museum or in the bank (p.1). The evidence showed that necessary and urgent items of repair to the church and crypt would cost more than £70,000 with architect's fees; and that if this cost was met from the capital funds of the parish, the work of St Martin's, "including the great work of social service based on the church and the crypt, would suffer" (p.4). It was not in dispute that there was "a financial emergency for the parish, which would be a good and sufficient ground for granting a faculty", and the only reason the chancellor had refused the faculty was because he considered that a public appeal for funds should first be sought (p.4). However, this court held that in circumstances where there were good reasons for not making a public appeal which (on the evidence)

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was likely to fail unless it were preceded by the sale of the silver, the faculty should issue (p.7-8). The judgment emphasised (p.9) that:

> "St. Martin's is a special case, because of the special character of its ministry. In other cases where parishes have redundant silver, it may well be that the possibility of raising money by an appeal to the public will be a relevant factor in considering whether there is a good and sufficient ground for granting a faculty to sell the silver".

42. In *Burton Latimer* the petitioners sought to sell "silver on the open market so that the proceeds may be used to "kickstart"… a campaign to raise the monies necessary for an extension to the church", for which planning permission had thus far been refused (p.2). The chancellor's refusal on grounds of prematurity was endorsed (p.8 and 10). The court said of the "decision and principles" in *Tredington* that "we heartily endorse each" (p.5). In addressing the question of "good and sufficient reason for sale", the court said (p.6-7):

> "Redundancy may be such a reason although this is unlikely in the case of parish silver [because it could normally still be used in the church: see p.5)]. Changes of investment – such as the appellants have suggested – are likely not to be such a reason. Financial emergency may well be such a reason… The jurisdiction should be exercised sparingly".

43. Understanding of the decision of this court in *Draycott* is not helped by the deficient headnote to the Law Report which reads:

> "a consistory court should not exercise its jurisdiction to authorise the sale of moveable property in order to carry out repairs to a church merely on the basis of financial need but had to be satisfied that there was a "financial emergency", which meant an immediate pressing need to carry out critical work for which funds were not, or could not be made, available".

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That is certainly how the court defined “financial emergency” (para 76), but the court did not hold that a financial emergency was the only reason which could justify a sale, or was even a prerequisite for sale. As we have explained in para 37 above, the court was reviewing a decision to permit the disposal by limited sale of a Burges font, which was not redundant. Although there was a programme of repairs and improvements to be carried out over the next five years, the building was structurally sound and weather-tight (paras 67 to 69), and there had not even been an application to the diocesan parish development fund (para 73). Given the loss to the church and the community which would be involved by the sale of the font prompted by an “opportunistic offer by a collector”, the faculty should have been refused (para 76). In para 61, the court re-iterated that “a good and sufficient ground must be proved”, and that the jurisdiction should be exercised sparingly, both principles taken from *Tredington*.

A two-stage approach, involving special grounds?

44. It is clear from *Tredington*, *Burton Latimer* (p.6) and *Draycott* (paras 60 and 61) that the term “special grounds” is synonymous with grounds which are “good and sufficient”. Mr McGregor contends that a two-stage approach is implicit in *Tredington.* First, is or are the grounds “good and sufficient” or “special”? If so, and only if so, should the court proceed to consider whether the advantages of sale outweigh the disadvantages. At this stage we consider it worth spelling out the practical inconvenience of a two-stage approach, namely that, absent one or more “special” grounds a faculty must be refused, whatever the cumulative weight of “non-special” factors; whereas if there is at least one “special” factor, then the “non-special” factors enter into the balancing exercise.

45. Incantation of the “good and sufficient” ground(s) test begs the question of what constitutes “special” or “good and sufficient grounds”. Accepting, as Mr McGregor must, that the

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categories of “special” reasons are not closed (which follows from *Tredington* and *St Martin-in-the-Fields*), what is the qualification to pass the first stage test of “good and sufficient” or “special”? Mr McGregor suggests that a special reason is something which is not ordinary, and that a distinction should be drawn between a special (out of the ordinary) reason and a commonplace one.

46. In a number of consistory court cases a two-stage approach has been followed, see, for example, *St John the Baptist, Halifax* (unreported, 19 December 2000) (Wakefield consistory court), followed by the same chancellor in *Re Lincoln St Giles* (12 April 2006, unreported save at (2006) Ecc LJ 143) (Lincoln consistory court)) (paras 27 and 45), the latter decision being referred to, on another issue, in *Draycott* (para 63). In the first case (as set out in para 27 of the later case), the chancellor defined “good” grounds as:

> “amounting to “some special reason” of which “[an] example is redundancy, but that is not an essential ground nor is it the only possible ground”;

And he defined a “sufficient” ground as meaning that:

> “when considered against all the material before the court, it is of sufficient weight to persuade the Chancellor that a faculty should issue”.

Then, in a passage immediately following those definitions, the two stages were conflated:

> “This means that the Chancellor will consider all the evidence surrounding the proposed sale, he will consider the reason for sale, the proposed use of the money to be raised, the historical or artistic significance of the item, and then exercise his discretion in deciding whether a good and sufficient reason has been proved. He…will consider all the evidence and then exercise his discretion”.

However, later in *Re St Giles, Lincoln* (para 45) the chancellor reverted to the two-stage approach:

> “…I do not consider it is necessary to show that there is a “very convincing argument” that rebuts the presumption

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> against sale…In order for me to grant a faculty the Petitioners must persuade me on the balance of probabilities that some good and sufficient reason has been proved. A good ground is a "special reason". I am satisfied that the special reason here is the fact that there is no longer a meaningful relationship between the church of St Giles and the painting. I am also satisfied that in the present financial circumstances of this church, that ground is a sufficient ground, notwithstanding that the painting may be lost to Lincoln".

47. We shall return to the question of "meaningful relationship" in our consideration of "separation". We see no reason to avoid an approach requiring "a very convincing argument" for sale, which is consistent with the approach followed in *Tredington, St Martin-in-the-Fields*, *Burton Latimer* and *Draycott*, though that particular expression was not used.

48. In *Re St John the Baptist, Stainton-by-Langworth* (April 2006, unreported save in (2006) 9 Ecc LJ 144) (Lincoln consistory court), the same chancellor permitted the sale of a redundant two-handled chalice. He observed that the financial climate had changed since *Tredington*, and that a more complex balancing exercise than mere financial emergency was required to be considered, since the general public might feel aggrieved that the church was asking for funds whilst it held redundant assets, and it was important to enable a viable congregation both to remain and increase. Whilst redundancy has always been accepted to be a special reason for sale, the approach in *Stainton-by-Langworth* is not consistent with a narrow concentration on what is rare and not commonplace, nor with a distinct two-stage approach.

49. In *Withyham*, following an impeccable summary of previous case-law, the court approved disposal of paintings without prior identification of any factor or factors as "special", treating the matter as a "balancing exercise" in which "all

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relevant factors point in favour of the grant of a faculty" (para 32). In his proposed grounds of appeal Mr McGregor contended that if *Withyham* held that either a substantial degree of alienation or financial need falling short of a financial emergency amount to a special reason it was either contrary to, or unsupported by, authority and should be overruled. He did not expressly pursue this contention either in written or oral submissions to us, but it is the logical corollary of his submission on the narrow meaning of "special" and the need for a two-stage approach.

The proper approach to disposal by sale

50. We consider that an analogy can helpfully be drawn with the position which arises, in secular planning law, in relation to proposals for development within the Green Belt, save where the development falls within the category of "appropriate development". In the case of "inappropriate development", the policy requires that "very special circumstances" have to be shown, which "clearly outweigh" the harm caused by the development. Initially the lower courts applied a two-stage test of first asking whether the circumstances could reasonably be described as very special; and if, but only if, they could be described as very special, did the question arise whether the very special circumstances clearly outweighed the harm. This led to definitional concerns as to what were "very special circumstances", with a distinction drawn between the very special and the commonplace. Finally in *Wychavon District Council v Secretary of State for Communities & Local Government and Butler* [2009] PTSR 19, the Court of Appeal held (para 21) that it was:

> "wrong…to treat the words "very special" in…the guidance as simply the converse of "commonplace". Rarity may of course contribute to the "special" quality of a special factor but it is not essential, as a matter of ordinary language or policy. The word "special" in the guidance

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> …connotes a qualitative judgment as to the weight to be given to the particular factor for planning purposes".

Moreover, there was "no reason to draw a rigid division between the two parts of the question" (para 25). This was because there was (para 26):

> "no reason, in terms of policy or common sense, why the factors which make the case "very special" should not be the same as, or at least overlap with, those which justify holding that green belt considerations are "clearly outweighed"."

51. If similar reasoning is applied in respect of "special" reasons in this part of the faculty jurisdiction, then qualitative weight, including the cumulative weight of individual factors, some or all of which may not be specially rare, is all that has to be identified; and the requisite weight is that which is sufficient to outweigh the strong presumption against disposal by sale. Sales will rarely be permitted, but that is because of the strength of the presumption against sale. There is nothing in previous authorities of this court to compel a two-stage approach; and, rather than continuing to engage in the semantics of what is "special", chancellors need merely decide whether the grounds for sale are sufficiently compelling to outweigh the strong presumption against sale.

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

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develop criteria for an emergency situation that would put a case into a distinct category.

53. In *Draycott* (para 65) this court approved the statement of the chancellor in *Stainton-by-Langworth* that:

> "Quite clearly the more valuable the plate, particularly having regard to its artistic and historic value the weightier will need to be the reason before the court in its discretion concludes that it is a sufficient reason in all the circumstances to allow a sale".

Although there was reference in *Draycott* (para 80) to a varying "standard of proof", strictly the standard of proof remains the same. It is simply that the less valuable or significant the article in question, the easier it will be to discharge that unchanged standard of proof; and the more valuable or significant the article, the more difficult it will be.

APPROACH TO "SEPARATION"

The issue

54. In some of the disposal by sale cases the article has already been removed from the church and placed in a bank or on loan, sometimes for many years. Where, as in *Tredington* (at 242E and 246H) and *St Martin-in-the-Fields* (p.4), there was a financial emergency for the parish, separation does not usually have a role as a distinct factor. But where there is something less than a financial emergency, what relevance attaches to separation? There are dicta in *Tredington* (at 244D-E and 245 B) about frustration of the purpose of the donor which suggest that some weight could attach to such separation.

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Case law on separation

55. The concept of separation has been addressed in several consistory court cases. We prefer to use the term “separation” to describe the circumstances of the article having been housed for a considerable amount of time in some place other than the church; earlier judgments have spoken of “alienation” or the severance of any meaningful relationship between the article and the church. In *Aldborough* the helmet had already been on loan to the Tower of London for ten years (at 442f-g). Having found that there was a financial crisis in the church which justified disposal by limited sale of the helmet (at 451g), the chancellor considered, amongst various points of principle which had been raised against sale, “Undesirability of alienation” (at 453j-454d). Having stated that (as here) there was no realistic possibility that the helmet would ever return to the church, he said:

> “I feel it is also relevant that the tomb and the helmet do not have any artistic or aesthetic connection, as might be the case with a pair of paintings or a pair of flagons. The connection is a historical one which, though clearly important, does not include an aesthetic element…I consider it is also relevant that the helmet is basically a secular item rather than an item of spiritual significance…In many ways the Royal Armouries is a more natural place in which to display this helmet than a church. I agree…that there has already been a substantial degree of alienation between the helmet and the tomb. In terms of the argument of principle that there ought not to be an alienation except in most exceptional circumstances I cannot avoid a conclusion that a substantial degree of alienation has already occurred…By severing the ownership of the helmet from the ownership of the tomb there is, of course, a further step in the separation, but this I think can be mitigated by appropriate records being made of the provenance of both items and their historical connection.”

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The chancellor rejected, in the absence of evidence supporting it, an argument that even limited sale in such circumstances might discourage museums from accepting loans, if "the existence of a loan might be used as a springboard for a subsequent faculty [for the sale of the loaned object]" (at 454g-j).

56. In *Lincoln* the court was considering the sale of a painting of a different demolished church which had for ten years been loaned to the Cathedral Library (paras 12 and 39) and where it was "not foreseeable that the painting will ever be again be hung in St Giles church" (para 40). Having concluded (para 40) that:

> "the connexion [sic] between St Giles and the painting (apart from the legal connexion of ownership) is now and for some time past has been effectively meaningless [and that] [i]f it were an item such as a piece of silver plate it would be redundant",

the chancellor permitted its sale, subject to a condition that "in any sale every effort shall be made to find a buyer with connections to the city of Lincoln in the hope that the sketch might be loaned or ultimately bequeathed back to Lincoln". The "special reason" on which the sale was allowed was "the fact that there is no longer a meaningful relationship between the church of St Giles and the painting" (para 45). In these circumstances the chancellor said that "it is hardly necessary for me to deal with the financial arguments" (para 44), but, having also found that "there is a real financial need" (para 44), he held that that was "a sufficient ground", albeit not itself a "special reason".

57. *Lincoln* was followed in *Warcop* and *Withyham*. In *Warcop*, the limited sale of a painting which had been on loan to the Bowes Museum for over fifty years was permitted on the 'special reason' that "there is no longer a meaningful connection between the painting and the Church or the local community" (para 41). There was also 'a financial emergency',

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which would have justified the sale in any event (para 43), though that was not the main ground relied upon by the chancellor. In *Withyham* the outright sale of fourteenth century Italian paintings was permitted, absent any "dire financial emergency", primarily on the grounds that the paintings had only been given to the church in 1849, "serve no liturgical function or canonical requirement", and "have been on permanent loan to a secular historic property for nearly 15 years" (para 32).

58. This suggests that "separation" has taken on importance as a free-standing reason for disposal by sale. This is a matter of great concern to the CBC. Mr McGregor contends that "alienation" of goods means parting with title to them, and does not encompass the loan of goods to an institution with a view to their preservation or their removal to a bank vault for their protection. The purpose, he says, of such loans is to protect and preserve the article in question, in particular to protect it against loss, which he describes as "the opposite of alienation". Thus he argues that there is no true comparison with redundancy, and "separation" cannot constitute a special reason for permitting a sale. Were the position to be that "separation" could justify sales, he argues that a prima facie case could be established for the disposal of every article appertaining to a church which has been deposited in a museum or cathedral treasury for a period of time. The mere deposit of the article on loan would provide "a degree of alienation". This argument, a modified form of which was considered in *Aldbrough* (at 454g-j), retains its force, despite our rejection of the two-stage approach with its emphasis on the identification of a "special reason".

<u>The proper approach to separation</u>

59. In *Burton Latimer* (p.7), this court, in upholding the refusal to permit the sale of antique silver, emphasised the importance

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of the history of an object as part of the local heritage. The court said:

> "A relevant factor, indicating that there should be no faculty, may be that the articles are part of the heritage and history not only of the church but also of all the people, present and future, of the parish".

In our view, in the case of historic articles with a significant past connection with a church or parish, this factor will commonly outweigh any possible argument based on "separation". For the future we consider that little weight should normally attach to "separation" as a reason for disposal by sale, and we doubt that "separation" would ever, on its own, have sufficient strength to justify sale of a Church treasure.

60. If, as we have said at para 51 above, the proper approach is not a two-stage test, but rather (as in *Withyham*) looking at the matter in the round in the context of a strong presumption against disposal by sale, then there may be some circumstances in which "separation" may not be entirely incapable of supporting the case for sale. If, however, there were to be any evidence that petitions for approval of loans were being manufactured as stepping-stones towards disposal by sale, chancellors can be confidently expected to attach even less weight to such manufactured "separation" than might otherwise be the case.

THE GROUNDS OF APPEAL

61. There were five Grounds of Appeal, most of which (against the preceding review of the applicable law) we can address quite briefly.

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Ground 1: Financial need falling short of an emergency does not amount to a 'special reason', justifying the grant of a faculty for the sale of a valuable article, either on its own or in circumstances where the article in question has been physically separated from the church because it has been deposited in a museum

62. We have already explained this court's decision in *Draycott*, where the claimed financial need fell short of an emergency, and there were other circumstances which caused the petition to fail. *St Martin-in-the-Fields* is, however, Court of Arches authority that mere financial need on its own will not justify disposal by sale. But, as Mr McGregor recognises, in relation to this armet the chancellor relied on financial need, coupled to "separation", following the approach in *Withyham*, which the chancellor held to be indistinguishable.

63. Therefore the question is whether this coupling represents an error of law. There are two aspects. First, for the reasons we have given above, we consider that "separation" is a factor to which usually little weight should attach, but we have not held that it is a wholly irrelevant matter. Therefore, there was no error of law in the chancellor taking it into account. The way in which he took it into account we shall return to under Ground 3. Second, we have already rejected the need for a two-stage test, and have observed at para 52 above that this reduces the absolute distinction between "financial emergency" and other forms of financial need. We have approved an approach of looking at the matter in the round, simply asking whether the reasons are sufficiently compelling to outweigh the strong presumption against disposal by sale. That is what the chancellor did. He expressly referred to the principle, approved in *Draycott*, that the more valuable the article, the weightier will need to be the reasons to justify a sale, and held that, on the facts of the case, the petitioners "have crossed this high threshold". Therefore we reject the appeal based on Ground 1.

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Ground 2: The chancellor's approach to the financial evidence was flawed

64. The chancellor found that the petitioners have:

> "proved good financial reasons for seeking the sale. Those reasons are probably not far short of a financial emergency, but…it is unnecessary for the Court to reach that conclusion (para 33(i)).

65. This was based on what was said in a letter from the petitioners' solicitors of 17 June 2013, stating that the cost of roof repairs was expected to be £30,862, and that the cost of new heating to be installed in the re-ordering "of the Church" was likely to be about £50,000 (para 32). The chancellor went on to say:

> "I am unclear how the first figure links with the sum loaned by the Diocese. Nor am I informed how the P.C.C. is proposing to pay for the new heating. Nevertheless, these figures indicate that, at the very least, the P.C.C. is, or will be, facing substantial financial commitments".

66. It appears that the chancellor supposed that these were repairs to St Lawrence, Wootton, whereas Mr Smith has confirmed that both relate to St Leonard's, Oakley. It is not, however, suggested that anything turns on that mistake.

67. What is, however, plain is that the two items of proposed expenditure relied on in the solicitors' letter were not the items referred to in the PCC Minutes which authorised the lodging of the petition, and to which we referred at para 11 above.

68. The CBC's written representations of 3 June 2013 expressly complained that "there is no evidence before the court" relating to the installation of a new heating system; that

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"the necessary funds to deal with the theft of the roof lead and the demolition [of St John's church] are already available in the form of loans from the diocese [for the repayment of which] the parish is able to budget…without incurring a deficit"; that the PCC's income had grown rapidly over the past five years; and that the PCC was in "a relatively strong position", as shown by the 2013 budget.

69. Other documents, most of which were not before the chancellor but which we admitted by agreement of the parties, clarify the PCC Minute. So far as concerns the demolition of St. John's church and laying out of the garden of remembrance, the PCC had already obtained a loan of £40,000 from the diocese, repayable over 12 years. The new seating area and additional burial space for the village were formally opened in September 2012. Overall costs came in under budget and the loan is currently being paid off at a faster rate than strictly necessary. So far as concerns the St Leonard's Centre (a project for a refurbished church hall, with attached new build church office and committee rooms on land off Rectory Road, Church Oakley), work appears to have been completed before 2012. On 12 March 2012, approximately one month before the relevant PCC resolution, the Annual Parochial Church Meeting was told that:

> "at the end of February 2012 there was an outstanding loan of £50K from the diocese but with £34k in the bank and promised pledges of £16K continuing to be met the Centre should be paid for in full by the end of this year".

70. The 2012 accounts show an annual surplus of £3,300, after expenditure of £196,772. The budget for 2013, which was before the chancellor, shows that income of £143,000 was sufficient to cover payment of parish share of £65,000, loan repayments of £5000, and "Outparish giving" of £14,900 (approximately a tenth of annual income) without incurring any significant deficit. The repayment was of the diocesan loan, made in 2012 and repayable over 12 years, in respect of the

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demolition of St John's church, which the parish is in the fortunate financial position of being able to repay over a shorter period, having already paid the cost of demolition and laying out the garden of remembrance in 2012.

71. Mr McGregor's complaint is that no findings were made (or evidence submitted) as to the ability of the PCC to raise funds over and above its ordinary income; and he repeats the CBC's written representation that the parish is in a reasonably strong financial position, such that the chancellor could not properly have come to the conclusion that the petitioners had proved "good financial reasons for seeking the sale" or that those reasons "are probably not far short of a financial emergency in themselves".

72. In response Mr Smith correctly contends that the chancellor was entitled to take the overall finances of the parish into account, without having to establish that these gave rise to a financial emergency. But that is to avoid the thrust of this Ground of Appeal.

73. In the light of the new financial documentation we are in a better position than was the chancellor to evaluate the financial position in the parish. The new documents conclusively show that this is a well-managed and reasonably well-resourced parish, carrying out its Christian mission with considerable success. As the reference to "pledges" shows, there was a successful appeal of some sort in relation to the funding the St Leonard's Centre; and the Minutes of the Annual Parochial Church Meeting on 12 March 2012 refer to "some very substantial one off donations" received in 2011. The same Minutes record that "In 2013 a fund-raising appeal is planned to raise the funds needed to repair the roof and the internal damage to the church following the lead theft". Therefore at that time (and presumably at the time the petition was under consideration in 2012-13) funding of the roof repairs was not in any way dependent on sale of the armet. But even without the

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new financial material the chancellor should have seen, in the light of the 2013 budget, that the financial case for the sale of the armet was tenuous; and before reaching the conclusions which he did, and which Mr McGregor understandably criticises, he should at the very least have sought further clarification from the petitioners.

74. We are satisfied that the chancellor should not have reached the conclusion that the petitioners had a strong financial case for selling the armet. His erroneous conclusion on financial need requires his decision on sale to be quashed, it being impossible to contend that his decision would necessarily have been the same had he appreciated the true financial position.

75. Accordingly the appeal succeeds on Ground 2.

Ground 3: The chancellor's approach to the question of a historic link between the armet and the parish was flawed

76. It is common ground between the parties that in determining whether to grant a faculty the chancellor was required to take into account the historical value of the item when considering whether the strong presumption against sale was outweighed. This is what the chancellor purported to do, expressly stating (para 34) that:

> "I have borne in mind the principle, confirmed in the *Draycott* case, that the more valuable the article, the weightier will need to be the reasons such as to justify a sale".

77. Mr McGregor's complaint is that the chancellor adopted an incorrect approach to the historic link between the armet and the parish, when he described "the possible link between the armet and the present and future inhabitants of the parish [as] very limited", and the armet as not playing "a significant part in

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the history or heritage of the village" (para 33(d)). Irrespective, says Mr McGregor, of the original provenance of the armet and the fact that the Hooke family only lived in Wootton St Lawrence for 50 years, Sir Thomas is buried in the church and the armet, which formed part of the accoutrements of his tomb, hung in the church for approaching 300 years. Such a link, he says, was far from tenuous and could not be described as "very limited" or insignificant.

78. Mr McGregor relies particularly on what this court said in *Burton Latimer* (p.7), to which we have already referred in our consideration of separation as an issue.

79. Mr Smith draws attention to the fact that the armet has not been displayed in the church for over forty years; and that it is agreed by all the parties that it can never be returned to the church. Therefore, he says, the purpose for which the armet was introduced into the church has become wholly lost and any connection with the tomb and the church severed, so that the chancellor was right to consider that any connection the armet may have had with the tomb had been lost as a result of a substantial period of alienation.

80. We have already stated our view on the limited weight which should normally be accorded to separation. The decision in *Burton Latimer* provides some support for the CBC. There too there had been a long period of separation, a period of 25 years (p.2). The historic connection with the church and the parish was treated as an important factor.

81. We consider that the chancellor erred in his approach to the issue of separation, and that there was no basis, in law or in fact, for the conclusion he reached on this aspect of the case. Therefore the appeal also succeeds on Ground 3.

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Ground 4: The chancellor failed to consider whether if there were to be a sale it should only be to a museum

82. The CBC's case in its written representations was that the armet should not be sold at all; but, in the alternative, that if the court were minded to grant a faculty, it should be on condition that any sale should only be to the Royal Armouries or to another museum in this country, such a condition being "the minimum necessary to ensure that an important aspect of heritage was not permanently lost to the local community and the nation". The chancellor recorded this alternative representation in para 27 of his judgment. Then at the start of para 33(f) of his judgment he stated:

> "The Party Opponent is not suggesting the armet should return to the Church. The suggestion is that, because of its historic value, it should remain in the Royal Armouries or a museum".

In para 33(g) he said that:

> "I am prepared, despite misgivings, to take into account the matter referred to at the outset of Sub-paragraph (f) above. I bear in mind the historic significance of the armet. I shall not, however, treat this as a paramount consideration, but only as one of several factors to be weighed in the balance".

Finally in his conclusions in paragraph 34 he again said:

> "I have also taken into account the matter set out in Sub-paragraph 33(g) above, but in my judgment this is outweighed by factors in support of a sale".

83. Mr McGregor argues that the chancellor failed to consider or decide the CBC's fallback position; and that the chancellor's statement in para 34 did not address the issue of limiting permissible purchasers if a sale were to be allowed. He draws attention to the various cases referred to earlier in this judgment in which disposals by way of limited sale have been permitted. Furthermore, if, as was held by this court in *Burton*

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Latimer, a relevant factor was that articles were part of the heritage and history of the parish at large, then this must be the more so where the article, as here, is additionally part of the national heritage.

84. The difficulty with Mr McGregor's contention is that, though the judgment contains no reasoning at all in relation to the CBC's alternative proposal of a limited sale, the chancellor did include a condition relating to "the possibility of a prior satisfactory and acceptable offer being made by the Royal Armouries or some other British Museum" (see para 13 above). That condition was not explicitly referred to in either Mr McGregor's nor Mr Smith's Skeleton Arguments; and when we raised the matter at the outset of the hearing, Mr Smith appeared to discount the condition because of the problems it posed, given the sale at auction in December 2010, pursuant to the 2010 (later set aside) faculty.

85. The wording of this condition was criticised in argument before us, and we agree that, if a sale were to be permitted, it would have been better to have given a defined period for negotiations with public institutions and to have provided clarification as to the criteria and mechanism for determining whether any offer was "satisfactory and acceptable". Nevertheless, the chancellor also granted to the petitioners liberty to apply for further directions, and this should have been sufficient to resolve uncertainties.

86. Unspecific as the condition undoubtedly was, and problematic though its imposition was for the petitioners, given the sale in December 2010, the condition shows that the chancellor accepted, at least in part, the alternative argument of the CBC. This appeal has not been brought (as it might have been) on the basis of any legal flaw in the wording of the condition; and this is not a case where the absence of reasoning in the judgment discloses, or gives grounds for supposing, a legal error by the chancellor. Thus, though it

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would have been better had the chancellor explained in his judgment his rationale for imposing the condition, we reject the challenge on Ground 4.

Ground 5: The chancellor failed to deal with the issue of whether the sale of the armet would be of sufficient financial benefit to the parish as to justify its sale

87. We can deal with this ground extremely briefly. The chancellor expressly recognised in para 33(i) of his judgment that "one half of the net proceeds would go to Mr Lee", and that "Unless he should in due course choose to pass his share over to the Church, he would be entitled to keep his moiety, even if it comes as an unexpected windfall". He went on to say that:

> "Receipt by the P.C.C. of its share of the proceeds would go some way towards alleviating, at least to some extent, the financial problems currently experienced".

88. In our consideration of Ground 2 we have criticised the way in which the chancellor came to the conclusion that the parish was experiencing financial problems. But it is clear that he recognised that the amount of money the parish would receive was reduced by reason of the agreement reached with Mr Lee, and he must have appreciated that this thereby reduced the overall benefit which he saw as justifying the sale. We do not consider that there was any error of law in failing to say more on this subject.

RE-DETERMINATION

89. As recognised in the previous decisions of this court, where it is found that a chancellor has erred in law in the exercise of his discretion, the Court of Arches, on appeal has power to substitute it own discretion, without referring the matter back to the chancellor for redetermination in the light of

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its decision, see, for example, *Tredington* at 241B-D, *St Martin-in-the-Fields* (p.7) and *Burton Latimer* (p.7).

90. Whether one looks to the existence of "special reasons", or, as we have held to be preferable, one simply looks at the matter in the round to see whether the grounds for sale are sufficiently compelling to outweigh the strong presumption against disposal by any form of sale, we are satisfied that this petition should be dismissed. The armet is a national asset with historic links to the parish and there is no proven financial case for its sale. Little if any weight should attach to the fact that it has been physically out of the church, and therefore outside the parish, for many years.

91. If the grounds for sale were stronger, then, applying the sequential test, disposal by limited sale, even if necessary at an undervalue, should take precedence over outright sale.

92. With hindsight it is clear that the original proposal to sell the armet was not driven by any urgent or pressing financial situation in the parish; rather the armet was seen as a valuable asset, which could become a source of parish funds. A similar approach seems to have been pursued by the parish in 2013. This court's decisions, particularly in *Tredington* and *Burton Latimer*, show that sales should not be approved on that basis.

93. We appreciate that our decision will cause dismay to the petitioners, who may consider that they are being penalised for the commendable strength of their financial position. It may also seem surprising to many people unfamiliar with ecclesiastical law that the petitioners are not permitted to convert the armet into usable funds. It is our view, however, that the strong presumption against disposal by sale of Church treasures, which we have applied in this case, is both soundly based and generally beneficial in its consequences.

94. In its letter to the CBC of 28 April 2013 RAM stated that:

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> "[The museum] has been active in helping churches safeguard [arms and armour], partly by taking the objects considered most at risk on loan and substituting fibreglass replicas in the churches. Though displaying the objects to the public has been a consideration in taking them on loan, the safeguarding of the objects themselves has been the museum's primary concern".

If the loan to RAM is to continue, we would hope that it might be possible to secure from RAM such a fibreglass replica of the armet. This could then, subject to faculty, be hung in the church above the effigy of Sir Thomas Hooke, thus giving new life to the connection between the armet, the church and the village of Wootton St Lawrence.

COSTS

95. The petitioners must bear the court costs in the proceedings before the chancellor; but in seeking leave to appeal the CBC undertook that if leave were granted, then whatever the outcome of the appeal, the CBC would pay the court costs of the appeal and not seek an order for its costs from the petitioners. This undertaking was reflected in the terms of the order made by the Dean in granting leave to appeal. Accordingly in these unusual circumstances the CBC will pay the court costs of the appeal, and each party will bear its own costs of the appeal, as of the consistory court proceedings. If there are any representations relating to this order, they must be made in writing to the Provincial Registrar within fourteen days of the handing-down of this judgment.

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CHARLES GEORGE QC

DAVID McCLEAN QC

TIMOTHY BRIDEN

14 April 2014