

## Delivering the project permissions: How to prove the need?

“How Chancellors go about considering faculty applications in contested cases, how they weigh up arguments, what kind of evidence of need they look for.”

Wednesday 21 September  
14.05 – 14.30

Holbeck St Luke LS11 8PD

### Overriding duty

Ecclesiastical Jurisdiction and Care of Churches Measure 2018 s.35

“A person carrying out functions of care and conservation under this Measure, or under any other enactment or any rule of law relating to churches, must have due regard to the role of a church as a local centre of worship and mission.”

### Ecclesiastical exemption.

An ecclesiastical building used for ecclesiastical purposes is exempted from the need to obtain listed building consent [(s.60 Planning (Listed Buildings and Conservation Areas) Act 1990)].

Exemption is predicated upon an alternative, and equally rigorous, system being maintained for the regulation of alterations to historic churches i.e. the faculty jurisdiction.

“The Church of England only has the ecclesiastical exemption because the Government’s understanding is that the faculty jurisdiction does, and will continue to, provide a system of control that meets the criteria set out in guidance issues by the relevant department of state in relation to the ecclesiastical exemption.” (*In re St Alkmund, Duffield*)

Note that “litigation of the Consistory Court is not adversarial in the conventional sense. It follows that the absence of a party opponent does not lead inevitably to the petition being granted. The Court must still examine with care whether a faculty should be granted. In the absence of robust consideration and review by the court, the ecclesiastical exemption would become nugatory.” (The Worshipful Mark Hill QC, Chancellor, *In the matter of All Hallows, Bardsey* [2018-022933])

### Process, evidence etc. in opposed proceedings

There are two types of opposition in faculty proceedings. The first is where letters of objection are received, but the authors of those letters are content for their letters to be taken into account by the Chancellor, without their becoming party opponents.

The second is where one or more objectors decide that they do wish to become party opponents, in which case the matter then becomes contested. This will usually lead to a formal court hearing, although the Chancellor may order that the proceedings be determined upon consideration of written representations rather than by a court hearing, if all parties agree.

In a contested case, the Chancellor will give directions. This will usually include directions as to witness evidence, expert reports and documentation. Witness evidence will usually be served in advance and must contain a “statement of truth”. Any oral evidence at the hearing will be given under oath or solemn affirmation, and usually witness statements will be taken as read, so the witnesses will simply be questioned when they attend the hearing in order to amplify their evidence or give further assistance to the Chancellor.

The burden of proof is on the petitioner proposing the change to the church building. Parishioners' wishes will be given considerable weight, however this information should be given either by direct evidence from parishioners, or from churchwardens giving evidence as to local opinion that is within their own knowledge. Signed "petitions" will be of little evidential value ("The difficulty with public petitions is that the Court can never be certain about the basis upon which a signature has been appended to the petition. It is not possible to know what has been said to a signatory...Public petitions will usually, at best, demonstrate no more than a general sense of some public concern or dissatisfaction to the Court" – Ruth Arlow, Chancellor, *Re All Saints, Filby* NR188/14).

In addition, the Chancellor will often either hold the hearing in the church itself, or visit the church in advance of making their decision.

The civil standard of proof is applied – i.e. a faculty will be granted if the balance of evidence favours its grant rather than its refusal. However, in the case of listed buildings, there is a strong presumption against change, and there is a significant burden on the Petitioners to rebut this.

Currently, the approach set out in the case of *Re St Alkmund Duffield* [2013] Fam 158 is now universally adopted. This was an appeal against the Chancellor's refusal of a faculty for the relocation of a chancel screen to the arch of a side chapel in a Grade 1 listed church. The original proposal was to remove the screen entirely; subsequently this proposal was changed to include its relocation to a side chapel. The DAC considered that the work was likely to affect the character of the church as a building of special architectural or historic interest, but raised no objection. The petition was formally unopposed, but there were letters of objection from English Heritage, the Society for the Protection of Ancient Buildings, and the Victorian Society.

The Chancellor nevertheless decided to hold a hearing "so that the petitioners had a full opportunity to explain what they wanted, and why, and I would be able to put questions to the petitioners and clarify any points of uncertainty.". The Chancellor heard evidence from the person who was managing the project, from the Vicar, the two church wardens, and a long-standing member of the congregation.

The appeal court decided to substitute its own decision for that of the Chancellor, rather than remitting it back to the Consistory Court, not least because the appeal hearing had been held in the church and so the panel had had the opportunity of seeing the chancel screen in situ. They had before them the witness statements of those who had given evidence at the original hearing. The appeal panel was particularly influenced by the evidence of the two church wardens, and took the view that there was a "genuine pastoral case for removing the screen, because its presence is regarded not only by [the vicar] but also by his congregation as a hindrance not merely to worship but especially to mission".

The court's evaluation was that there would not be overall harm to the special architectural character of the listed building, but that there would be some harm to its special historic interest. There was, however a "strong and convincing case for change on the theological, visual and practical grounds advanced by the petitioners". It was noted that there is a strong burden of proof on the petitioners in the case of a Grade I listed building. An important factor was that the screen was to be retained in the church, and therefore the work carried out was reversible.

During the course of its judgment, the court set out what is now known as "the *Duffield* approach", which sets out a series of questions to be answered by the Chancellor:

1. Would the proposals, if implemented, result in harm to the significance of the church as a building of special architectural or historic significance?

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

Essentially, the *Duffield* framework assists the Chancellor in balancing the strength of the need of the petitioners against the harm that would be caused to a significant heritage asset.

#### Applying the *Duffield* framework – removal of pews

The removal of pews is one of the most regularly contentious issues in Consistory Court proceedings, and here I consider some examples of its application

#### *Re All Saints, Filby* NR188/14

This was a Grade II listed village church which was considered by the DAC to be “visually over-pewed”. The size and age profile of the congregation was such that there were concerns that there would not be a viable worshipping community surviving into the next generation. At the same time, a successful monthly “Messy Church” congregation of up to 80 people had been created, but the limitations of the church building meant that it was difficult to carry out that new ministry effectively.

The contentious part of the faculty petition was the removal of pews from the north and south aisles. The central block of nave pews was to be retained unaltered. The Victorian Society objected, as did a number of parishioners (32 letters of objection were received by the Registry). None wished to become a party opponent. There was also a petition submitted containing 38 signatures – which was treated with significant caution by the Chancellor (see earlier quote).

Applying the *Duffield* framework, the Chancellor considered that the proposals would result in significant harm, but that such harm would not be serious (for the reasons, as stated above, that the church was generally considered to be over-pewed). She took into account the fact that the pews were of no particular merit or significance. It is also important that she considered that the works were reversible, since the pews could be reintroduced into the aisles at a later date should the congregation desire this in future. She considered that there was a “clear and convincing justification” for the removal of the pews, that the parishioners had demonstrated that they had “due regard to the role of the church as a local centre of worship and mission”, and that there was therefore a clear public benefit in meeting the needs in the parish for greater space and flexibility. The faculty was granted.

#### *In the matter of All Saints, Otley* 15-46C

This is a Grade I listed church. A significant programme of alterations were proposed, including the removal of pews in the nave and side aisles and the introduction of chairs.

The petitioners engaged with the amenity societies. As a result, the plans evolved over time before the faculty petition was submitted, and in particular SPAB commended “the PCC’s thoughtful and

methodical response to the initial views of the consultees". There were two letters of objection, but neither individual chose to become a formal objector. The Chancellor commented on the "careful and pastoral letter in response" written by the vicar to the objectors setting out the thinking behind the proposals.

The Chancellor applied the *Duffield* framework, and considered that the proposals would result in harm, but that the revised proposals as submitted were less invasive than the original proposals, and that overall, the level of harm was moderate. In considering the justification, he took into account the Statement of Significance, the Statement of Need, the letter from the incumbent to the authors of the letters of objection, a note of the PCC discussion and the minutes of a visit by the DAC. He noted:

"Occasionally the term "flexibility" is deployed as an objective when there is no consensus as to what a parish wants to do. In this instance I am satisfied that the PCC has truly turned its mind to the use of its sacred place, how it is heated and lit, increasing access and providing toilets and facilities for the young, the elderly and the infirm. I has given thought to liturgy and, especially, Eucharistic gathering as well as audio visual means of enhancing contemporary worship. It has also had regard to increased community uses of the church and to the welcoming more people over the threshold. The genuine needs and ambitions of this parish all militate in favour of the proposals."

The Chancellor's view was that the pastoral benefits, which were "carefully identified and articulated by the PCC" would outweigh the harm, and a faculty was granted.

#### Re Holy Trinity, Kingston upon Hull [2017] ECC Yor1

Hull Minster is a Grade I listed building. A petition was submitted requesting a faculty for the major reordering of the nave amongst other works. The most contentious issue was the reordering (and large-scale removal from the nave) of the Victorian pews, and the Victorian Society became a party opponent.

At the time of the consideration of the faculty petition, the church was in a state of serious decline, with a steadily decreasing electoral roll, and a budget deficit which was eating into the church's reserves.

A significant reordering proposal was made, and initial consultations were held with the amenity societies. After a lengthy period of consultation with the DAC, a petition was submitted and was recommended by the DAC. There were no objections from the public, but the Victorian Society registered a formal objection, particularly in relation to the pews, which were "a near intact scheme from an important phase of early Victorian restoration by an architect of major regional significance".

The decision was made by Canon Peter Collier KC, Chancellor, on the basis of written representations. He directed that witness statements, skeleton arguments and other comments be produced. He also visited the church.

A number of witness statements were served, including from a director of the Victorian Society, the Vicar, the Associate Vicar and the church's Operations Manager.

The Chancellor applied the *Duffield* framework.

The judgment lists the elements of the nave pews which contribute to the architectural and historical interest of the church:

“There is the timing of the work – it clearly took place at a time when the Ecclesiological Movement was having an impact on the design, reordering and furnishing of Anglican churches. Then there is the particular designer – Lockwood was a person of some significance in Yorkshire, Hull being a place of his early work. Then there is the craftsmanship of George Peck [a local Hull carver] who carved the poppy-headed pew ends. The complete infilling of the interior of the nave with these large dark pews is itself a significant factor, as is the collegiate styled side aisle pews. Finally the survival of the ensemble along with the pulpit for over 170 years, largely untouched is also an important factor. Itemising those significant features separately and seeing them together indicate that they singly, but more particularly together, make this pewed interior a significant heritage asset.”

The Chancellor concluded that “the loss of the permanent fully pewed state of the nave will be a serious loss to this aspect of the Victorian heritage which forms a part of the architectural and historical heritage of Hull Holy Trinity.” This meant that he had to consider the question of justification – “How clear and convincing is the justification for carrying out the proposals?”

The Chancellor considered the liturgical need, the practical need and the “dire financial need” justifying the proposals.

The judgment deals with the burden of proof:

“What is the standard of proof I must apply? It is not the criminal standard of being sure beyond reasonable doubt. It is being satisfied that something is more likely than not to be the case. I also bear in mind the many dicta to the effect that the weightier the matter to be established the more cogent the evidence that is required to establish it.”

In relation to the liturgical need and the practical need, the Chancellor was *not* persuaded by the evidence produced by the Petitioners to justify the removal of the pews; he considered that flexibility of space could be created by more limited intervention. However, he took the view that if the financial projections supplied in evidence by the Petitioners were accurate then there was a significant need for change, to make the church self-sufficient and viable for the future, since the plan was to hire out the church for a variety of events. The Chancellor was satisfied that the petitioners had established that if they could produce a cleared nave, they would be able to balance their books and pay their way in the future.

The Chancellor was clearly influenced by the petitioners’ proposal to retain the Peck carvings:

“Our plan is to ensure they [the carved pew ends] retain their heritage significance and are properly curated and exhibited. They may not be in the positions intended by the Victorians who installed them, but we believe them to be in a much better position and will draw attention to them through guides and exhibitions. We will be maintaining the ensemble but in a new form. In addition we will have returned a greater part of the nave to the open space intended by its medieval architects.”

The following paragraphs set out the matters which in the end persuaded the Chancellor to grant the faculty to remove the pews from the nave:

“If the current team is able to achieve financial viability then for the foreseeable future this church will remain open, active, and a centre for worship and mission – as Hull Minster - and if so then increasing numbers of people will visit it, will see the Peck poppyheads, may even learn who Lockwood was, and will have an opportunity to learn about the Victorian revival of liturgy and church furnishings.”

“The Victorian Society is quite right about the significance of this fully pewed interior and the loss from a pure heritage viewpoint that will result from what I propose to allow, but I am quite satisfied that if I do not permit this development then it will be a significance that will be unlikely to be appreciated except by aficionados on tours by appointment or those reading of what might have been.”

The Chancellor granted the faculty.

What lessons can we learn from these cases?

The following can be distilled:

1. Well-drafted Statements of Significance and Statements of Need are crucial. In particular, the “need” must be a real need, evidenced by examples from the life of the church and its congregation.
2. Where formal objections are made and the matter becomes contentious, carefully-drafted witness statements, in the correct format, are required.
3. The Chancellor will place particular significance on those witnesses who can testify to the views of the parishioners, and the practicalities of the situation on the ground, such as churchwardens.
4. Signatures on petitions bear little, if any, weight.
5. Whether or not the proposed changes are reversible, or the heritage can be retained in some other way, will be important.
6. The Hull Minster case shows that even in the most extreme of cases, it is possible to persuade a Chancellor to allow change that is of significant harm where the viability of the church is in question – harking back to my comments at the very beginning of this talk, that under the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, “A person carrying out functions of care and conservation under this Measure, or under any other enactment or any rule of law relating to churches, must have due regard to the role of a church as a local centre of worship and mission.”.

Louise M Connacher  
Registrar of the Province of York  
21 September 2022

## Cases referred to

Re St Alkmund Duffield [2013] Fam 158

The “Duffield” framework:

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