IN THE ARCHES COURT OF CANTERBURY

Charles George QC, Dean of the Arches
Chancellor Bursell QC and Chancellor Collier QC

On appeal from the Consistory Court of the Diocese of Derby

IN RE ST ALKMUND, DUFFIELD

JUDGMENT

Appearances:

Mr David Negus, solicitor, of Ellis Fermor & Negus, 35 Derby Road, Long Eaton, Nottinghamshire, NG10 1LU, for the Appellants

Mr Alexander McGregor of Counsel, as *amicus curiae*

JUDGMENT

Introduction

1. This is an appeal, with leave of the Dean of the Arches, against the judgment of Chancellor Bullimore given on 2 March 2012 in the Consistory Court of the diocese of Derby in which he refused to grant a faculty for the removal of the chancel screen in the church of St Alkmund, Duffield, and its relocation in the arch of the Bradshaw chapel. This was but one item (albeit the most significant) within a petition ("the first petition") for a re-ordering scheme; the chancellor granted permission for the other items. There was also a second petition for the replacement of audio-visual equipment and the introduction of a central projection screen into the area from which the chancel screen was proposed to be removed. It was accepted that the specific plans for the second petition depended on removal of the chancel screen, and, rather than refusing the second

petition outright, the chancellor adjourned that matter generally, with permission if so desired to submit amended plans. The present appeal is limited to the chancel screen.

2. The first petition, by the Vicar (The Reverend Dr Pickles) and two church wardens, was dated 20 July 2011. The Diocesan Advisory Committee ("DAC") expressed the opinion that the work (or part of the work) proposed was likely to affect the character of the church as a building of special architectural or historic interest, but raised no objection. (A memorandum from the DAC secretary to the diocesan registrar explained that three members recommended the relocation of the screen, three members raised no objection and two members opposed the relocation). The petition had the unanimous support of all who attended the relevant meeting of the Parochial Church Council ("PCC"), and the Church Building Council ("CBC"), after some initial reservations, also supported it. Although the petition was formally unopposed, the chancellor was required by rule 16(6) of the Faculty Jurisdiction Rules 2000 ("the FJR") to take into account letters of objection, in respect of the chancel screen only, from English Heritage ("EH"), the Society for the Protection of Ancient Buildings ("SPAB") and the Victorian Society ("VS").

The church

3. St Alkmund, Duffield is a Grade 1 listed building, situated a mile south of the village of Duffield in Derbyshire. Alkmund, an exiled Prince of Northumbria, had a reputation for being charitable to the poor and orphaned. He was murdered near Derby in 800AD by bodyguards sent by the usurping King Eardulf of Northumbria, who feared that Alkmund would attempt to replace him. Alkmund was canonised shortly afterwards. There are only six churches in the British Isles dedicated to St Alkmund of Derby, two of them in the diocese of Derby. Ironically, in the context of the theological argument advanced by the petitioners (see paras 28-34 below), the name Ealhmund (which appears to be interchangeable with Alkmund) means "protector of the temple".

4. The building of the present church began in the 12th century, and there are various Norman features, although major alterations were made in the 13th century, so that the predominant style is Gothic, in its several variations. Many additions and alterations have been made to the church over the centuries, including the addition in the 14th century of a spire to the pre-existing tower. The present internal appearance of the church is substantially influenced by major alterations in the early 1840s, designed by James Piers St Aubyn (including the removal of timber galleries) and further changes in the 1890s, designed by John Oldrid Scott (including furnishing the church throughout in fine oak, with extensive use of linenfold paneling; refurbishment of the chancel, together with a new altar and reredos, and the provision of a new pulpit and chancel screen; and an entrance screen at the west end of the church). Fine windows in the chancel by C.E.Kempe were installed at approximately the same time as the Scott alterations, although planned, and possibly designed, prior to Scott's involvement.

5. In 1997 a re-ordering of the front of the nave took place, when a dais was created in the front of the chancel screen in a space made by removing the front rows of pews. A large oak three-sided structure to act as a holy table is placed on the dais for the celebration of Holy Communion. In 1999 Scott's entrance screen was reconstructed involving substantial glazing, which has brought valuable extra light into the west end of the church. Very recently there has been a new lighting scheme which brightens the whole church including the chancel.

6. The proportions of the church are unusual, in that the nave plus side aisles is wider than it is long (17m wide by 14m long). Although the chancel is 12m long, the effect of this on the overall perception of proportions is diminished by the visual barrier (albeit partial) created by the chancel screen. A photograph of the interior of the church, showing the position between the St Aubyn and the Scott alterations, well illustrates this point.

7. The church has been described as a notable landmark in the village of Duffield and as very special. We agree.

The chancel screen

8. The screen is wrongly described in the List Entry as a rood screen, whereas it was not designed to carry a cross. The Statement of Significance contains this description:

> "The screen itself consists of a central arch with two lower linenfold side panels surmounted by tracery overall and supported by hollow fretwork carved shafts, each one different. It has a substantial loft facing the nave and dates from the 1896 alterations."

9. It is clear from reports prepared by Scott before the works started that he did not regard the chancel screen as an essential component of his proposed re-ordering, although in his view "if it should be decided to erect a chancel screen, its architectural effect will be admirable". Funding did become available, and Scott's workshop produced what is recognized by Dr Pickles to be "an example of skilled craftsmanship". Mrs Walker (the architect advising the petitioners in connection with this proposal) described it as:

> "a fine piece of craftsmanship….The chancel screen has rich architectural detailing, including flowing naturalistic tracery at its upper level with linenfold panels to match pews and choir stalls below".

EH's letter of 20 June 2011 refers to "the importance of the chancel screen in Scott's restoration", and continues:

> "It is inescapable that the chancel screen was meant to occupy the central position between the nave and the chancel and its extremely high quality and degree of decoration directly reflect its important position".

The VS in its letter of 15 March 2011 described it as:

> "a major element in the interior of this Grade l-listed building and integral part of a high quality set of chancel furnishings by a late Victorian ecclesiastical designer of major importance".

10. The screen was designed to separate the chancel from the nave. Whilst it does have the effect of concealing the leaning pillar on the right and to the south, there is no historical evidence to support the assertion in the Church Visitor Booklet that this may have been the reason the screen was added.

11. The rear of the screen is slightly simpler in design than the front, but its overall appearance is very similar. The screen appears to be self-supporting, being wedged into the pre-existing space in the chancel arch.

12. Visual appreciation of the screen at the present time is diminished by the erection on its top, on the left-hand (north) side, of a rickety apparatus supporting a retractable projection screen, used during services. As mentioned above, in the event that the chancel screen were to be removed, the intention is to replace the projection screen with new apparatus hidden above and inside the chancel arch, from which a screen will be unfurled downward.

The proposal in respect of this screen

13. The original proposal was to remove the chancel screen from the church. When opposition to this was voiced during consultations before the petition was lodged, the petitioners amended their proposals to include its relocation to the Bradshaw chapel which lies at the east end of the north aisle. This chapel is used for prayer and is currently separated off by a curtain and rail of no aesthetic merit. The proposal is to remove this curtain and rail, and replace them with the chancel screen, which would be placed on the inner side of the existing arch into the chapel. In order for it to fit snugly, the screen would need to be reversed, so that its existing rear faced outwards.

14. Removal of the screen could take place without any alteration or damage to the screen itself, and without structural damage to the chancel arch. Should there ever be a desire to move the screen back to its original location, this could readily be accomplished without damage to the screen and without any structural implications.

Procedural matters

15. As the chancellor explained in para 3 of his judgment:

> "As to **the adjudication process**, the petitioners would have been content to have the case decided on the written materials available, and…none of the bodies objecting to the proposal wished for a hearing. However, it seemed to me that this was a case where there ought to be 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. It would not have been satisfactory in my view, simply to put questions to them in writing, although they expressed their willingness to answer any queries I had. In the result we were able to have a hearing in the church just before Christmas…"

The judgment goes on to record at para 10 that he "heard evidence from Mr Kim Jeffery, who was managing the project, Mr Pickles [the Vicar; he is actually Dr Pickles], the two wardens [Mr Holmes and Mr Stanier], and Mrs Taulbut, a long-standing member of the congregation". (Mrs Taulbut was also the Hon PCC Secretary). The chancellor announced his decision by letter to the registrar of 3 January 2012, stating that he would give his reasons later. This occasioned further communications from the petitioners seeking to re-argue their case, as described in paras 75-76 of his judgment.

16. There are five procedural matters to which it is worth drawing attention:

(i) A Statement of Significance is required under rule 3(3)(a) of the FJR "where significant changes to a listed church are proposed". The definition of Statement of Significance in rule 2(1) of the FJR is:

> "a document which summarises the historic development of the church and identifies the important features that make major contributions to the character of the church".

Mere description, including copying out the listing description, is insufficient, and there should be some analysis of the character of the church in the Statement, drawing on architectural expertise where appropriate. In this case both the CBC (letter of 26 January 2011) and VS (letter of 15 March 2011) criticised the content of the Statement of Significance, because there had been a failure to comply with the guidance of the CBC, contained now in "Statements of Significance Guidance for Parishes" (CBC, March 2011), that the document should include in Part II "a more detailed description of the significance of the particular part of the church…affected by the proposed scheme, and the potential impact of the proposed works". Whilst this guidance goes beyond what is strictly required by the FJR, the chancellor's, and our own, task would have been simplified if the CBC guidance had been followed We therefore strongly encourage all would-be petitioners for faculties where a Statement of Significance is required to follow the CBC guidance, which also accords with secular guidance in para 128 of the National Planning Policy Framework (DCLG, March 2012) ("NPPF") that "local planning authorities should require an applicant to describe the significance of any heritage assets affected, including any contribution made by their setting [so as to be] sufficient to understand the potential impact of the proposal on their significance".

(ii) The chancellor appears to have considered that he would have been entitled to grant or refuse the permission without a hearing, and without going through the written representations procedure under rule 26. However, that is not the legal position, since rule 17 (Unopposed petitions) merely allows the chancellor to grant the faculty, and not to

refuse it. We suggest that extending the ambit of rule 17 to cover refusals is something the Rule Committee should consider.

(iii) In a case such as this where the chancellor considers a hearing to be appropriate, the normal course should be for the chancellor to give directions in writing, covering amongst other things the identification of "the issues which will need to be resolved at the hearing" (rule 19(2)(iii) of the FJR) and "how any evidence may be presented, whether by written statement or report followed by oral evidence at the hearing, or otherwise" (rule 19(3)(i)), the question of expert witnesses being addressed by rule 19(3)(iii) and (iv). In this case, without making any directions, the chancellor appears to have considered it appropriate simply to hear oral statements, largely by way of answers to his questions, and in this he may have been influenced by rule 21(1) which provides, with certain exceptions, that "the evidence at the hearing of any proceedings for a faculty shall be given orally…". Where there is to be an oral hearing, parties who do not have lawyers to guide them need to appreciate what the issues are that the chancellor has focused on as being critical to the determination of the matter and to this end need to be directed as to what material they need to present to the court. We consider it to be highly desirable that witness statements, with statements of truth as in civil proceedings, are available at the hearing (and, where appropriate, for consideration on appeal).

(iv) Although what he was told was described by the chancellor as "evidence", none of the witnesses were sworn, whereas in the ecclesiastical, as in the civil and criminal courts, and subject to certain exceptions which have no application here, "oral evidence must in all cases be given under the sanction of an oath or solemn affirmation" (*Phipson On Evidence* (17th ed. 2010), p.264. The forms of oath and affirmation are prescribed in sections 1 and 5 respectively of the Oaths Act 1978. Indeed, save for the alternative of an affirmation, this has been the practice in the ecclesiastical courts ever since the old mode of procedure, framed upon a system which proceeded on written evidence taken before an examiner on oath (Coote *The Practice of the Ecclesiastical Courts*, p.241 (1847), a practice which still survives under rule 21(1)(a)), was "entirely altered by the statute which introduced *viva voce* evidence into the Ecclesiastical Courts (17 & 18 Vict. c.47) and proceedings have been since conducted in substance as cases at nisi prius are conducted" (Phillimore *The Ecclesiastical Law of the Church of England*, vol. II, p. 959 (2nd ed., 1895)). Because the chancellor had proceeded (in our view improperly) on the basis of unsworn oral statements, we allowed an application by Mr Negus under the Faculty Jurisdiction (Appeal) Rules 1997, rule 12, to admit evidence, in the form of witness statements with statements of truth, from the five persons who had addressed the chancellor. We also admitted witness statements from Mr Lindop (the vice-chairman of the PCC and a Reader in the Church of England) and from Mrs Walker, the project architect. None of this evidence satisfied the first test for the admission of fresh evidence in *Ladd v Marshall* [1964] 3 All ER 745, 748 (evidence which could not have been obtained with reasonable diligence for use at the trial), but the guide-lines in *Ladd v Marshall* are subject to the overriding objective of dealing with cases justly (*Voaden v Champion* [2002] EWCA Civ 89 para 45), a principle equally applicable in this court.

(v) Once the chancellor has announced his decision (even if as here he has not yet stated his reasons), no attempt should be made to persuade him to alter that decision, as happened here. The same applies after judgment has been delivered (for a recent review of the case-law in the comparable jurisdiction of the Court of Appeal, see *Mercedes Travis Brewer v Stanley Mann & Ors* [2012] EWCA Civ 246 at paras 19-28).

17. Before we come to the crux of the present appeal it is appropriate to turn to a matter of considerable importance to the petitioners, but which is not determinative of the outcome of this appeal.

The theological symbolism of screens

18. Two related, but distinct, arguments have been advanced by the petitioners in relation to the doctrinal significance of this chancel screen.

(i) Alleged inconsistency with the Thirty-nine Articles of Religion

19. The first argument was that "in considering potential alterations to the building…theological considerations are primary", the presence of this chancel screen being contrary to "the orthodox, traditional theological position of the Church of England", which "is still legally defined by the 39 Article of Faith [sic]". This was how the matter was stated in Appendix 2 to the petitioners' Statement of Needs. Particular reliance was placed on Articles 7, 11, 15 and 28.

20. The chancellor dealt with this argument at length and with an abundance of scholarship in paras 48 to 73 of his judgment. At para 50 he said:

> "The argument goes like this:
>
> - Christian men and women are not bound by the rites and ceremonies of the Mosaic law, but only by those parts that are 'moral' [Article 7].
> - The screen is placed as it is, on an Old Testament understanding of the Temple, i.e. rites and ceremonies that have now passed away.
> - It reflects the view that the chancel is more 'holy' because the 'altar' is placed there, upon which the sacrifice of Christ is re-enacted by the priest.
> - The work of Christ upon the cross was a *'sacrifice once made'* [Article 15] by which we are justified by faith [Article 11].
> - 'Transubstantiation' is *'repugnant to the plain words of Scripture'* [Article 28].
> - The Lord's Supper is not a 're-offering of Christ but the remembrance of Christ's death once for all' – hence the curtain being torn in two when he died."

In the above quotation we have inserted the references to the relevant Articles.

21. The chancellor's overall conclusion at para 73 was that:

> "….Mr Pickles's submission rested on too narrow a view of the Anglican doctrine of the Lord's Supper. I do not doubt the views Mr Pickles put forward are within the wide spectrum of Anglican teaching on the subject, but they are not the sole or only views that can properly be held. They are certainly too narrow for me to treat them as definitive such as to justify the removal of the screen. Furthermore, Bishop Kemp's judgment [*In re St Stephen's, Walbrook* [1987] Fam 146, particularly at 170 F-G where he said that "It is clear, in my view, that a doctrine of the Eucharistic sacrifice which is not that of a repetition of the sacrifice of Calvary can lawfully be held in the Church of England"] is binding on me as a matter of law, and I cannot go behind it even if I were otherwise minded to do so".

22. Ground 5 in the Notice of Appeal states that:

> "The Chancellor misunderstood the arguments advanced by the [unrepresented] petitioners in that he dealt with the theological aspect of their argument as if it were a point of doctrine *per se".*

However, we are satisfied that there was no misunderstanding. Indeed, we note that a very similar argument to that which the chancellor rejected is contained in para 4 of Dr Pickles' witness statement on appeal where he stated:

> "The formal position of the Church of England is enshrined in the 39 Articles which clearly articulate a Reformed, Protestant understanding of the Christian faith which once again emphasise the 'once-for-all' nature of Christ's death".

23. In opening the appeal, Mr Negus made it clear that he was not arguing that the chancel screen was contrary to the Thirty-nine Articles. This accorded with the understanding of the chancellor on 3 April 2012, when, having noted that in the proposed appeal the appellants did not wish to challenge the part of his judgment which dealt with their doctrinal arguments, he correctly certified, under section 10(3) of the Ecclesiastical Jurisdiction Measure 1963 ("the EJM"), that the cause did not involve a question of doctrine, ritual or ceremonial. Therefore strictly it is not necessary for us to engage with this matter. Nonetheless, we believe it appropriate to do so, because, for reasons very similar to those given by the chancellor, we consider that the stance taken by Dr Pickles, and which has inevitably influenced members of his congregation, is misconceived. In doing so we recognise that any appeal from "judgments ... of consistory courts of dioceses given, made or pronounced in causes of faculty involving matter of doctrine, ritual or ceremonial" must be made to the Court of Ecclesiastical Causes Reserved and not to the Arches Court of Canterbury and Chancery Court of York (see sections 7(1) and 10(1) of the EJM, and the transfer provision in section 10(3)). That does not, however, mean that this court does not have jurisdiction to determine the legal meaning of the Revised Canons Ecclesiastical, Canon C 15(1) of which is concerned with the Declaration of Assent made by all clergy in the Church of England and to which the

chancellor referred in para 66 of his judgment and in his detailed Note on Subscription, contained in the First Appendix to his judgment.

24. The historical and legal position is as follows:

(a) The Thirty-nine Articles of Religion reached their present form in 1571 and in the same year their subscription was made mandatory for all ordination candidates and those presented to benefices: see the Ordination of Ministers Act 1571 and *Subscription and Assent to the Thirty-nine Articles A Report of the Archbishops' Commission on Christian Doctrine*, para 1 (London, SPCK, 1968); Gibson *Codex Juris Ecclesiastici Anglicani* vol I, at p.148, note *bb* (Oxford, 1761). Thereafter Canon 36 of the *Constitutions and Canons Ecclesiastical* 1604 stated:

> "No person shall hereafter be received into Ministry, except he shall first subscribe to these three Articles following, in such manner and sort as we have appointed:
>
> 1. [Royal Supremacy]
> 2. [Book of Common Prayer]
> 3 That he alloweth the Book of Articles of Religion agreed upon by the Archbishops and Bishops of both Provinces, and the whole Clergy in the Convocations ...: that he acknowledgeth all and every the Articles therein contained, being in number Nine and Thirty, besides the Ratification, to be agreeable to the Word of God.
>
> To these three Articles whosoever will subscribe, he shall, for the avoiding of all Ambiguities, subscribe in this Order and Form of Words, setting down both his Christian and Surname, *viz. I N.N. do willingly and* ex animo *subscribe to these three Articles above-mentioned, and to all things that are contained in them....*"

(b) In 1865 this Canon was replaced by a Canon made and published by the Convocations of Canterbury and York, and confirmed by Royal Letters Patent (see Bullard *Constitutions and Canons Ecclesiastical 1604*, (1934) p.40):

> "No person shall hereafter be received into Ministry ... except he shall first make and subscribe the following declaration, which, for the avoiding of all ambiguities, he shall subscribe in this order and form of words, setting down both his Christian and surname, viz.
>
> "*I A.B. do solemnly make the following declaration; I assent to the Thirty-nine Articles of Religion ...; I believe the doctrine of the ... Church of England .., as therein set forth, to be agreeable to the Word of God* ...."

This subscription was also made mandatory by the Clerical Subscription Act 1865, sections 4, 5, 7 & 8 (although the relevant provisions in relation to the declaration of assent have since been repealed).

(c) In 1964, when all the Canons were reconsidered by the Convocations of Canterbury and York, the new Canon C 15 (as well as setting out by whom and when the Declaration of Assent had to be taken) continued the same requirement:

> "(2) For the avoiding of all ambiguity every person required to make and subscribe the ... declaration shall make and subscribe in this order and form of words, setting down both his Christian names and surname, viz.:
>
> *I, A.B, do solemnly make the following declaration: I assent to the Thirty-nine Articles of Religion .... I believe the doctrine of the Church of England as therein set forth to be agreeable to the Word of God ....*"

However, the Ordination of Ministers Act 1571 was repealed five years later by the Statute Law (Repeals Act) 1969, section 1, Schedule, Part II.

(d) Thereafter Canon C 15(1) was amended on 4 July 1975 (by Amending Canon No. 4). This states:

> "1(1) The Declaration of Assent to be made under this Canon shall be in the form set out below:
>
> **PREFACE**
>
> The Church of England is part of the One, Holy, Catholic and Apostolic Church worshipping the one true God, Father, Son and Holy Spirit. It professes the faith uniquely revealed in the Holy Scriptures and set forth in the catholic creeds, which faith the Church is called upon to proclaim afresh in each generation. Led by the Holy Spirit, it has borne witness to Christian truth in its historic formularies, the Thirty-nine Articles of Religion, *The Book of Common Prayer* and the Ordering of Bishops, Priests and Deacons. In the declaration you are about to make will you affirm your loyalty to this inheritance of faith as your inspiration and guidance under God in bringing the grace and truth of Christ to this generation and making him known to those in your care?
>
> **Declaration of Assent**
>
> I, A B, do so affirm, and accordingly declare my belief in the faith which is revealed in the Holy Scriptures and set forth in the catholic creeds and to which the historic formularies of the Church of England bear witness; and in public prayer and administration of the sacraments, I will use only the forms of service which are authorized or allowed by Canon.
>
> (2) The preface which precedes the Declaration of Assent in the form set out above (with in each case such adaptations as are appropriate) shall be spoken by the archbishop or bishop or commissary in whose presence the Declaration is to be made in accordance with the following

> provisions of this paragraph and shall be spoken by him before the making of the Declaration.
>
> (3) Every person who is to be consecrated bishop or suffragan bishop shall on the occasion of his consecration publicly and openly make the Declaration of Assent in the presence of the archbishop by whom he is to be consecrated and of the congregation there assembled.
>
> (4) Every person who is to be ordained priest or deacon shall before ordination make the Declaration of Assent in the presence of the archbishop or bishop by whom he is to be ordained.
>
> (5) Every clerk in Holy Orders who is to be instituted, installed, admitted or licensed to any office in the Church of England or otherwise licensed to serve in any place shall first make the Declaration of Assent in the presence of the bishop by whom he is to be instituted, installed, admitted or licensed or of the bishop's commissary unless he has been ordained the same day and has made the Declaration.
>
> (6) Where any bishop, priest or deacon ceases to hold office in the Church of England or otherwise ceases to serve in any place the Declaration made under this Canon shall continue to have effect in so far as he continues to minister in the Church."

(e) For present purposes the relevant parts of the latter Canon are the Preface and the Declaration itself. It should be noted that this Preface draws a distinction between on the one hand the Holy Scriptures and the catholic creeds in which the Christian "faith [is] uniquely revealed" and on the other "the historic formularies" in which, led by the Holy Spirit, the Church of England has "borne witness to Christian truth". It then calls upon the cleric to affirm "loyalty to this inheritance of faith". In the Declaration the cleric thereafter makes that affirmation and "accordingly declare[s] belief" in the faith revealed in the Holy Scriptures and set forth in the catholic creeds "and to which the historic formularies of the Church of England bear witness".

(f) This new wording of Canon C 15 is a clear change from the previous wording of the Canon, namely, "I believe the doctrine of the Church of England as therein set forth to be agreeable to the Word of God ...." However, this is not the end of the matter as Canon A 2 states:

> "The Thirty-nine Articles are agreeable to the Word of God and may be assented unto with a good conscience by all members of the Church of England".

Canon A 5 then states:

> "The doctrine of the Church of England is grounded in the Holy Scriptures, and in such teachings of the ancient Fathers and Councils of the Church as are agreeable to the said Scriptures.

> In particular such doctrine is to be found in the Thirty-nine Articles of Religion, *The Book of Common Prayer*, and the Ordinal."

(g) The critical words of Canon A 5 are the words "grounded in". Although the Canon goes on to state that the doctrine of the Church of England is "to be found in the Thirty-nine Articles" etc. (emphasis added), that does not necessarily mean *solely* "to be found in" the historic formularies and Canon C 15, para. 1(1), merely speaks of the Thirty-nine Articles, etc. "bearing witness to Christian truth" (emphasis added). For these reasons in *Re St Thomas, Pennywell* [1995] Fam 50 at 58 Chancellor Bursell QC said:

> "Although according to Canons A2 and A5 the Thirty-nine articles are "agreeable to the Word of God and may be assented unto with a good conscience by all members of the Church of England" and the doctrine of the Church of England is, inter alia, "to be found in the Thirty-nine Articles of Religion," the declaration of assent made by the clergy under Canon C15 now only affirms that the Thirty-nine Articles are part of "the historic formularies of the Church of England;" as such they are to be seen as part of the Anglican "inheritance of faith."

Then in *Re Christ Church, Waltham Cross* [2002] Fam 51 at para 25 the same chancellor said:

> " ... the Articles of Religion are now to be seen primarily in the same way as the other historic formularies, although Canon A 2 of the Canons Ecclesiastical 1969 states: "Of the Thirty-nine Articles of Religion. The Thirty-nine Articles are agreeable to the Word of God and may be assented unto with a good conscience by all members of the Church of England." They are no longer a definitive formulation of Anglican doctrine, even though they bear witness to that faith."

(h) In other words, "the Articles of Religion are no longer seen as definitive arbiters of the doctrine of the Church of England" (*per* Chancellor Bursell, QC in *Re Christ Church, Waltham Cross* at para 24). With this we agree and would point out that the view expressed by Sir Jenner Fust in this court in *Gorham v Bishop of Exeter* (1849) 2 Rob. Ecc. 1, 55; 163 ER 1221, 1241 ("Prima facie, ...the Thirty-nine Articles are the standard of doctrine; they were framed for the express purpose of avoiding a diversity of opinion, and are, as such, to be considered, and, in the first instance, appealed to, in order to ascertain the doctrine of the Church.") preceded the repeal of the 1571 Act and was necessarily based upon the wording of the relevant Canon then in force.

25. It follows that, although Dr Pickles believes and is entitled to affirm (as he does) that his own theological position is still defined by the Thirty-nine Articles of Religion, other clergy of the Church of England may equally affirm that those Articles are not for them the definitive arbiters of the doctrine that they are required to believe. This is of importance not only for all clergy who have to make the Declaration of Assent with a clear conscience but also in relation to the jurisdiction of the consistory court. In so far as it may, the consistory court must strive in the exercise of its faculty jurisdiction to ensure

that any decision it makes permits the proper reflection of the doctrinal beliefs of the priest and congregation. Equally, however, it must strive to ensure that nothing is done in the exercise of that jurisdiction which may limit the proper reflection of the doctrinal beliefs of a different priest and congregation within the confines of the same ecclesiastical building.

26. It is also to be noted that, even prior to the revised status given to the Thirty-nine Articles in 1975, the legality of chancel screens does not appear to have ever been an issue. This is unsurprising since the presence of chancel screens remained a familiar feature of parish churches and cathedrals after the English Reformation. As explained in Addleshaw & Etchells *The Architectural Setting of Anglican Worship*, p. 30 (1956):

> "The first feature in the Elizabethan arrangement of churches is the continuation of the idea that they are made up of self-contained cells… [C]hancel screens were not destroyed, only, to use the official word, 'transposed'. Full and explicit instructions on what was to be done with the screens was given in the Royal Order of 1561. The part of the screen to be removed was that above the large beam….The rest of the screen was to remain *in situ*…The parish were at liberty to remove the screen as well as the rood-loft; but in this case a new screen had to be built to the height of the breast-summer in the one that had been taken down".

The history thereafter has been traced in Yates *Buildings, Faith and Worship: the Liturgical Arrangement of Anglican Churches 1600-1900*, p.33 (1991):

> "The conflict over the position of the altar allowed a greater degree of flexibility over other liturgical arrangements, of which perhaps the most important were the retention of the rood-screen and the provision for the conduct of services in the nave. The Anglican attitude towards screens seems to have been very similar to the Lutheran one. On the whole there seems to have been a preference to retain existing screens or to erect new ones in most churches up to the end of the seventeenth century. Thereafter new screens became less common but they are far from unknown. There are screens dated 1727 and 1729 respectively at St Paul's, Walden (Herts) and Crowcombe (Som). At Thorpe Market (Norf.) the church of 1796 has a screen of 'very thin woodwork, the diapering of iron, the panes of glass painted with the figures of Moses and Aaron. A similar screen at Parham (W.Sussex) dates from a refitting of the church in about 1820. On the eve of the Oxford Movement the remote Devon church of Haccombe was provided with a handsome stone screen and matching pulpit and reredos by Kendall of Exeter in 1821. In some churches the screen supported a tympanum which filled the gap between the top of the screen and the curve of the chancel arch. Churches with this arrangement included two in Devon, Molland and Parracombe, Baddiley (Ches)., and Warminghurst (W.Sussex) where both screen and tympanum were erected in 1770."

27. Writing of the legal status of screens, Phillimore, *op.cit*., p. 1402 said that:

> "Where the proper consents have been obtained, no doubt seems to exist at the present time [1895] as to the legality of erecting chancel screens without gates, whether in a new or old church…"

The position in respect of chancel gates or screens with gates was differentiated by Phillimore, since these were regarded as legally controversial at that time. Cripps *A Practical Treatise on the Law related to the Church and Clergy*, p. 235 (8th ed., 1937) states:

> "A dwarf wall or openwork screen separating the chancel from the body of the church is a legitimate part of the fabric or decoration of the church, and though the numerous decisions as to chancel gates are conflicting, there would appear to be no serious objection to them *per se*, if a case is made out as to their necessity or utility for the protection of valuable property or decorations in the chancel. They are to be found in most cathedrals and many parish churches".

Nevertheless, the position of rood screens was distinguished by Cripps at p.236:

> "A rood screen with loft adapted to carry a rood (as distinguished from a mere chancel screen) and the rood or crucifix with or without attendant figures on the rood beam have been generally held to be illegal on the ground of the likelihood of superstitious reverence".

In the present appeal we are concerned with "a mere chancel screen" the lawfulness of which, subject to the necessary consents for its introduction, we consider to be incontestable, both before and after 1975. Anything we were to say on the position of chancel gates or rood screens would necessarily be *obiter*. However, we would not wish our quotation of the latter reference in Cripps to be taken either as any endorsement by this court that it is necessarily a correct statement of the law as it then stood or, particularly, for the view that those types of screen are unlawful today

(ii) The theological symbolism of Tractarian screens

28. The point argued before us by Mr Negus was not one of conflict with the Thirty-nine Articles, but rather the more general contention that church architecture and church furnishings are seldom, if ever, theologically neutral. This, he argued, was particularly so in the case of a late-Victorian screen, installed at the same time as a general beautification of the church, but especially of the chancel. Recognition needed to be given to its theological and doctrinal symbolism, and the impact that had on the present worshipping congregation. Such a screen was not a mere piece of furniture, however good its craftsmanship or aesthetics, and it was contrary to the mission this church was seeking to project.

29. The second part of Ground 5 in the Grounds of Appeal was that:

> "The Chancellor misunderstood the arguments advanced by the [unrepresented] petitioners….[T]he [theological] argument was (and is) advanced by the petitioners by way of explanation of the removal of the chancel screen being necessary for the pastoral well-being of the church. The true question that the Chancellor should have asked, but didn't, is whether the theological position of the congregation and clergy of this church is such that the chancel screen represents a hindrance to its desire to worship in a contemporary fashion and in accordance with its understanding of scriptural teaching".

We have already stated that we do not accept that the learned Chancellor misunderstood the theological argument placed before him.

30. There appear to have been two main reasons why screens were much favoured by the Tractarians. The first lay in an emphasis on the specialness and secrecy of the chancel where what they described as "the altar" was situated. The Tractarian poet, Isaac Williams, curate to Thomas Keble and author of the controversial Tract 80 *'On Reserve in Communicating Religious Knowledge'*, wrote an extraordinarily long poem entitled "*The Cathedral, Or, the Catholic and Apostolic Church in England*" (1838). This is prefaced by a reference to "thy holy temple" (Psalm 65 v.4), and the "Advertisement" (or Introduction) which includes reference to "the Tabernacle in the Wilderness". The section of the poem entitled "The Choir" commences with lines devoted to "The Skreen" [sic] with the sub-heading "Disciplina Arcani", representing the holding back of the most sacred truths and mysteries of the Faith until the catechumens had shown themselves worthy to receive them. Williams' attitude to chancel screens can be seen from the language he uses:

> "Nature withdraws from human sight
> The treasures of her light;
> In earth's deep mines, or ocean's cells
> Her secret glory dwells.
> 'Tis darkly thro' Night's veil on high
> She shows the starry sky;
> And when of beauty aught is found,
> She draws a shade around;
> Nor fully e'er unveils to sense
> Steps of bright Providence".

("Night's veil" and "shade around" appear to be metaphorical allusions to the role of a chancel screen in partly concealing the chancel and altar beyond.)

31. The second, and related, strand concerned the role of screens in separating the clergy from the laity. According to John Shelton Reed *Glorious Battle, The Cultural Politics of Victorian Anglo-Catholicism*, p. 140 (1996):

> "Although secular rank was to be put aside at the church door, it was to be replaced by stratification of a different order. The symbolic obliteration of worldly distinction was accompanied by a heightened emphasis on ecclesiastical status, symbolized architecturally by the distinction between nave and chancel
> ….
> Since the [Cambridge] Camden Society taught that the distinction between nave and chancel "preach[es] to posterity the sacredness of Holy Orders, and the mutual duties arising from the relation in which the flock stand to their shepherds", the "ABSOLUTE NECESSITY" of a "DISTINCT AND SPACIOUS CHANCEL" followed. The society even argued that the medieval rood screen was an appropriate symbol of the distinction, although its campaign to restore rood-screens was not particularly successful." (capitals in original).

32. Such an attitude is, of course, very different from the open approach to worship and mission espoused by the present incumbent and congregation at St Alkmund. Dr Pickles' witness statement states that the existence and situation of the screen has become increasingly problematic as it directly contradicts the message that is preached week in week out at the church:

> "The wonderful message of the cross is that the barrier between us and God has been removed through Christ's death – the imposition of the screen is regrettable in that it reflects a 'Temple' architecture, (re-erecting the curtain, re-establishing a 'holy of holies') thus undoing the message of the cross".

This passage immediately precedes his reference to the Thirty-nine Articles and their emphasis on "the 'once-for-all' nature of Christ's death", which we have set out above. Other witness statements expressed the matter slightly differently. Mr Holmes described the chancel screen as acting as a barrier to visitors as well as to the church congregation in that it cuts off that area of the church. Mr Stanier complained that the screen created a physical barrier between the chancel and the congregation. Mr Lindop, based on his experience as a Reader in this church, stated:

> "When I first joined the church, worship was led from behind the screen, which put an obstacle between the leader and the congregation – I felt as though I was the wrong side of the fence. We moved to standing in the opening in the screen, which felt like being the gatekeeper, before the dais in front of the screen was built to allow the service leader to interact more effectively with the congregation. However, that has left the chancel effectively cut off from the rest of the church. This gives the impression that the chancel is special and it becomes a wasted space."

33. These views echo those of the Essex clergyman, William Harrison, who in 1577 dismissed chancel screens as "now altogether needless – since the minister saith his service commonly in the body [i.e. nave] of the church, with his face toward the people" (quoted in Whiting *The Reformation of the English Parish Church,* p. 5 (2010)). There is

a further similarity between the stance taken by Dr Pickles and that of the Elizabethan Puritans. As recounted in Addleshaw & Etchells, *op.cit.,* p. 40:

> "Under Elizabeth the Puritans complained that the retention of the screens made churches like the Jewish Temple and continued the separation of the people from the holiest place of all, characteristic of the old covenant which Christ had brought to an end."

However, such a view was then in turn rebutted in Richard Hooker in his Works, vol. II, p. 53 (ed.1888).

34. Whilst, therefore, for the reasons already given we differ from Dr Pickles' understanding in respect of the current status of the Thirty-nine Articles, we nevertheless appreciate the concerns of the petitioners about the theological symbolism of this particular chancel screen. Moreover, perhaps because the argument was presented to the chancellor differently, we consider that he too readily dismissed this theological aspect of the petitioners' case. The theological/doctrinal stance of a particular congregation cannot of itself determine whether or not a faculty should issue, and it is not a basis on which, taken alone, we would have allowed this appeal. Nevertheless, it is certainly a matter which needs to be taken into consideration in assessing the totality of the petitioners' case.

Effect on the character of the listed building as a building of special architectural or historic interest

35. At the heart of the present dispute lies the objection of EH, SPAB and VS to the proposal to relocate the chancel screen. Those bodies have each been notified of this appeal and offered the opportunity to become parties to it but they have all chosen not to do so. On the other hand we do have their detailed written comments before us, as did the chancellor.

(i) Statutory frame-work

36. Section 1(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the LBA") provides:

> "In this Act "listed building" means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purpose of this Act –
>
> (a) any object or structure fixed to the building;
>
> (b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before July 1, 1948,
>
> shall be treated as part of the building".

Section 7 of the LBA provides:

> "Subject to the following provisions of this Act, no person shall execute or cause to be executed any works for the …alteration …in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorized."

Then section 16(2) of the LBA provides:

> "In considering whether to grant listed building consent for any works, the local authority or the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

37. In the present instance, those provisions are not directly applicable, because, pursuant to article 5 of The Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (England) Order 2010:

> "The ecclesiastical exemption is retained for church buildings within the faculty jurisdiction of the Church of England".

Mr McGregor, for whose submissions as *amicus curiae* the Court is extremely grateful, reminded us that the Church of England does not have the faculty jurisdiction in order to benefit from the ecclesiastical exemption; it 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 issued by the relevant department of state in relation to the ecclesiastical exemption. That exemption is of importance to the Church as it permits it to retain control of any alteration that may affect its worship and liturgy.

38. The current relevant departmental guidance is contained in *"The operation of the Ecclesiastical Exemption and related planning matters for places of worship in England"* (DCMS July 2010). This states at para 1, in a passage much relied on by Mr Negus:

> "We recognize that, in order to survive and continue to serve their local communities, listed churches might need to adapt to meet changing liturgical preferences, and to meet the needs of today's worshippers and other users".

Para. 30 continues:

> "The requirements for internal denominational consent procedures are set out in the Code of Practice at Annex A to this document. The essential requirement of such procedures is equivalence with secular listed building consent in terms of due process, rigour, consultation, openness, transparency and accountability. To

remain within the Ecclesiastical Exemption, denominations will have to demonstrate that they are complying with the Code of Practice…"

Amongst the matters in Annex A are:

"1. All proposals for internal and external works to a listed church…which would affect their character as a building of special historic, archaeological or artistic interest should be submitted for approval to a body or person independent of the local congregation or community proposing the works in question.

2. The decision-making body, when considering proposals for works, should be under a specific duty to take into account, *along with other factors*, the desirability of preserving ecclesiastical listed buildings, the importance of protecting features of special historic, archaeological, architectural or artistic interest and any impact on the setting of the church. (emphasis added)

…

4. The decision-making process should make provision for:

(i) …

(ii) the formal notification of proposals to the local planning authority, English Heritage and the national amenity societies after an application has been made to the denomination, together with supporting information, at as early a point in the consent process as possible, allowing them (except in case of emergency) 28 days in which to comment on the proposed works. Any representations made by those bodies or any other person in relation to such proposals should be taken into account before the decision on works is made…

6. There should be a clear and fair procedure for settling all disputes between the local congregation or community and the decision-making body as to whether proposals shall proceed.

…"

39. It is apparent from this guidance that the concept of "equivalence" does not necessarily require that the same result will be achieved as if the proposal were being determined through the secular system, nor that listed building considerations should necessarily prevail. What is essential, however, is that these considerations should be specifically taken into account, and in as informed and fair a manner as reasonably possible. In particular, the guidance contains no reference to any test of necessity before works which would affect the special character of a listed church are carried out. This is a matter to which we return below.

(ii) The arguments of EH and the amenity societies on effect on the character of the listed building

40. EH set out its views in five letters, sent between 2009 and June 2011.The following extract from EH's letter of 27 January 2011 will suffice to show its position:

> "…[T]he removal of the chancel screen from its current location would cause substantial damage to the significance of the church, and its architectural and historic interest, by removing a key element of the important late nineteenth century restoration by JO Scott, and there is insufficient justification for its removal.
>
> ….
>
> The main focus of the furnishings of Scott's restoration is the chancel and the east end of the church.
>
> We do not agree that the screen detracts from other features in the church. It is a key element of the church's architectural and historical interest. It is deliberately located in a position of prominence in the church at the east end of its central axis and at the junction of the nave and chancel. The exceptional quality of the chancel screen's design and craftsmanship, which is recognized in the Statement of Significance, reflects its importance, its prominent position and its designed relationship with the other elements of the Scott restoration, particularly those in the chancel.
>
> …
>
> …[T]he removal of the chancel screen (which is central to the Scott restoration), including relocation within the church, would damage the significance of the church by causing substantial harm to the architectural and historic interest of this important late 19th century restoration.
>
> ….
>
> ….[T]he strongest justification would need to be made for the removal or relocation of the chancel screen and we do not consider that the reasons provided are sufficient to justify the substantial harm caused.

41. The references to "significance" and "substantial harm" derive from "*Planning Policy Statement 5: Planning for the Historic Environment*" (CLG, 2010), which was replaced (although in very similar terms) shortly after the chancellor's judgment was issued by chapter 12 of the same department's NPPF. Both documents put a gloss on the words of the relevant provisions in the LBA in four particular respects by emphasising:

(i) the need to "identify and assess the particular significance of any heritage asset that may be affected by a proposal" (NPPF para 129).
(ii) that "[t]he more important the asset, the greater the weight should be [given to its conservation]" (para 132).
(iii) the distinction between cases where there would be "less than substantial harm to the significance of a designated heritage asset" (where "this harm should be weighed against the public benefits of the proposal") and cases where there would be "substantial

harm or loss" (where a proposal should only be allowed exceptionally, or in the case of Grade I and Grade II* listed buildings, wholly exceptionally) (paras 132 and 134).
(iv) that in all cases of "substantial harm to or total loss of significance", this must normally be "necessary to achieve substantial public benefits that outweigh that harm or loss …." (para 133).

42. SPAB submitted three letters of objection between November 2010 and May 2011, having first raised concerns at a site meeting in May 2009. Its position appears from its letter of 7 March 2011:

> "Whilst we note that the chancel screen would fit across the arch to the Bradfield [sic] Chapel on its north side and that it would be reversible, we would regret its relocation. The SPAB defers to the Victorian Society in terms of the quality and importance of the screen but we consider that in its present position, the one for which it was designed, it is a major feature of the church and contributes significantly to the character of the interior. To move it would, we consider, have a serious impact on the interior".

43. VS submitted four letters of objection between November 2010 and September 2011. Its position is conveniently summarised in its letter of 8 September 2011:

> "…[W]e maintain our strong objection to the relocation of the screen. We believe that this would be highly detrimental to the special architectural and historical interest of the building and none of the arguments advanced to date by either parish or architect has convinced us that it is justified or that the importance of this high quality item and the impact of the proposals have been properly considered".

(iii) The approach of the petitioners on effect on the character of the listed building

44. The chancellor did not have the benefit of oral evidence from Mrs Walker, though he had the Statement of Significance for which she had been largely responsible, and copies of her correspondence with the DAC, EH, the amenity societies and CBC. In the Statement of Significance she argued that:

(i) removal would "open up the body of the church";

(ii) whilst the screen was of high quality, it detracted from other features of the church, in particular the view of the Kempe window, so that if there were to be an application to install a chancel screen now, in this location, "there would be an uproar";

(iii) that the screen was not being disposed of, but re-sited without any cutting-down "in an appropriate location within the same church and where there was most likely a screen at some earlier date"; and

(iv) that the process was totally reversible.

45. To this Mrs Walker has added in her witness statement on appeal that the proposal would:

(i) unite chancel and nave, bringing a feeling of openness to the building;

(ii) give an unrestricted view of the east window and of the chancel itself, making the building feel more spacious;

(iii) make the body of the church seem lighter in daylight;

(iv) improve appreciation of the simplicity of the stone chancel arch, which was currently detracted from by the screen's upper tracery which "is extraordinarily busy');

(v) improve the nature of the space at the interface of nave and chancel;

She also says that the re-sited screen would sit in close proximity to the other items of furniture of which it was a part, without alteration to screen or arch, and where it would look well and provide a useful purpose.

46. Mr Jeffery in his witness statement says:

> "It strikes [my wife and me] constantly that although the stonework we can see, varies through the 12th to the 14th and the 18th and 19th centuries, it takes a trained eye to see the difference, and most would probably say that it had Tudor overtones rather like Haddon Hall. Amongst this ancient general impression, rises this extraordinarily ornate Victorian screen, beautifully carved, but rising rather uncomfortably juxtaposed against everything else which is of a much simpler style. To us the screen's presence also has the effect of obscuring the chancel, together with the fine Kempe window in the West [sic]. We are convinced that the aesthetic view of the whole will be greatly enhanced when the chancel is connected to our rather oddly shaped nave, which is wider than it is long."

Mrs Taulbut makes a similar point in her witness statement:

> "I think the screen is a Victorian intrusion into a Mediaeval building which does neither the building nor the present congregation any favours. The 'aspect ratio' of the church is unusual. That is, the nave plus side aisles is wider than it is long. 17m wide by 14m long. The chancel is 12 m long and, if clearly part of the main church as it was for six centuries, would greatly improve the aspect….The screen's removal to the Bradshaw Chapel would improve the appearance of the chancel as it would make it and the fine Kempe East window more accessible and more visible".

Although both these individuals addressed the consistory court, it seems from the registrar's note of the proceedings, and from the chancellor's judgment, that only some of these points were made to him.

(iv) The chancellor's approach and conclusions on effect on the character of the listed building

47. Understandably the chancellor's approach was governed by the *Bishopsgate* questions, approved by this court in *In re St Luke the Evangelist, Maidstone* [1995] Fam 1, the second of which is:

> "Will some or all of the works adversely affect the character of the church as a building of special architectural and historical interest?".

We have more to say about the *Bishopsgate* questions below. However, there can be no doubt that this second question is an entirely apt one to ask when a chancellor is considering proposals such as these which may affect the character of a listed building.

48. The relevant part of the chancellor's judgment reads:

> "38. … Whether a change will have *'adverse'* consequences, is not to be decided by the Chancellor on a personal evaluation of the proposal, or whether (s)he thinks it is a good idea. It has a narrower focus. When a church is listed as being of special architectural and historical interest, the listing encompasses not only the walls and roof and floor, but also the fixtures and fittings – pulpit, font, pews, choir stalls, windows and so forth – as they are at the time of the listing. It is not to the point to say that the pews or chancel furnishings are a recent addition in the evolving history of the building, as compared with other older features. The fact of listing in one way 'fixes' the appearance and state of the building at that point in time, and thereafter proposals for changes have to be evaluated against the Bishopsgate questions. It is obvious that there have been many changes, some of considerable effect, to the fabric of St Alkmund's over the centuries, and we know the present pews and screen were only installed fairly late on in the process, in the last years of the C19th. Nonetheless, the pews and screen were part of the fixtures and fittings at the time when the listing took place. At that point, it seems to me the particular form and layout of the church took on a particular character, not inviolable or immune from any subsequent change (as the introduction of the dais and changes to the south and north aisles, among other changes, convincingly demonstrates), but so that any proposed change must meet the Bishopsgate tests.
>
> 39. An *'adverse'* effect is one that alters or affects *in a material way*, the appearance of form and layout of the listed building at the time it was listed, or as it has become by subsequent authorized changes. The change may be made by the introduction of some item, or by its removal, as well as by alteration of existing features. The petitioners place emphasis on the fact that the screen is not

to be removed from the church, but re-located and used elsewhere, and that they have not also, quite deliberately, pressed for the removal of the chancel furniture which serves no present purpose. Both these things are relevant and so need to be taken into consideration, but the re-location of the screen to another place within the building, is not the simple equivalent of the position where it is now. The listing 'fixes' the contents of the building wherever the items are; they are not thereafter simply movable, provided they remain in the building. They are not to be seen therefore as a random collection of items, deployable like pieces in a chess-board, but as a systematic whole.

Conclusion

40. It seems to me clear on the evidence of EH and VS in particular that the screen is an important part of the whole ensemble of furnishings in the nave. **To move it will undoubtedly be 'adverse' in the sense above, and would be so, on a broader and more natural reading of 'adverse'. It damages the appearance of the chancel, and cannot in any sense be regarded as a minor or trivial interference with part of the furnishings**." (emphasis in original)

49. In relation to the question of need, but not in relation to any effect on the character of the listed building, the chancellor said at para 41:

> "…[T]he argument about the [Kempe east] window is a non-starter because it is contemporaneous with the screen, and has not been subsequently obscured by its introduction…"

(v) Does the chancellor's approach and conclusions on effect on the character of the listed building demonstrate any error of law?

50. In the original grounds of appeal, three criticisms were made of this aspect of the chancellor's judgment with which we can deal shortly:

> "Ground 1: In assessing whether or the extent to which, the proposed removal of the chancel screen would adversely affect the character of the building the Chancellor gave insufficient weight to the fact that the screen is a relatively late introduction in the context of the history of the building."

The difficulty here for the petitioners is that the chancellor expressly considered the fact that the chancel screen was a late introduction, and arguments based on "insufficient weight" have to be distinguished from cases where either factors have been left out of account altogether or wrongly taken into account. Furthermore, as the *amicus* submitted, the fact that part of a listed building is a relatively late addition cannot of itself be determinative of whether the removal of that part would affect the character of the listed building; nor does its relative lateness mean that it is, for that reason, necessarily of less importance than more ancient features in terms of the significance of the building as a

whole. In this regard the *amicus* drew our attention to a passage in "*New Work in Historic Places of Worship*" (EH 2012):

> "Many older places of worship have grown by processes of accretion and re-building over centuries and it is important to try to establish the building sequence. Each of these developments will be of some significance. Changes to places of worship and their furnishings may be of historic interest because they illustrate changing styles of worship and architectural design…"

The *amicus* also referred to a passage in the judgment of Chancellor George QC in *Re St John the Evangelist, Blackheath* (1998) 5 Ecc LJ 217 at para 13(3):

> "It is part of the joy and interest of listed buildings, and in particular churches, that they include accretions, many of which are not entirely consonant with what was there before. If the accretion has merit, then normally it should not be removed, even in the interests of historical or architectural purity."

(On the facts of that case the chancellor permitted the removal from a Grade 2 listed building of a screen of far less merit than the one with which this court is concerned).

> "Ground 2: The Chancellor gave undue weight to the inclusion of a description of the screen in the listing particulars and did not consider (or did not sufficiently consider) the extent, if any, to which the existence of the screen contributed to the decision to list the building and/or the decision to categorise the listing as Grade 1."

There is nothing in the judgment to suggest that the chancellor had even seen the listing particulars, which Mr Negus only made available to the court shortly before the appeal hearing. The chancellor's reasoning (in para 38 of his judgment) is not related to the screen being mentioned in the listing description, but rather to the fact that the screen was in place at the time the building was listed. Even had the screen not been specifically mentioned in the listing particulars, it would have been part of the listed building by reason of section 1(5) of the LBA. The relevant question, however, was not the extent to which the screen contributed to the decision to list the building (which would require an examination of the motives behind the listing which in its turn would require examination of documentation contemporary to the listing that is not available to the court); nor was it the extent to which the screen contributed to the Grade 1 listing (to which the same considerations would apply). The only relevant question was what would be the effect on the architectural character and historic interest of the building of re-locating the screen.

> "Ground 3: The Chancellor did not consider the guidance given to assessing whether the changes to a listed building could be considered acceptable contained with [sic] *Conservation Principles, Policies and Guidance* published by English Heritage April 2008 (specifically paragraphs 138 and 149)."

We do not see that the chancellor can fairly be criticised for not considering a document which was not placed before him, nor referred to in any of EH's five letters of objection. In any event, as the Foreword to the document explains, the _

> "main purpose in producing the *Principles, Policies and Guidance* is to strengthen the credibility and consistency of decisions taken and advice given by English Heritage staff, improving our accountability by setting out the framework within which we will make judgments on casework".

In other words it was not a document directed to actual decision-makers (whether local planning authorities, the Secretary of State or diocesan chancellors) but, rather, to EH's own staff.

51. Two of the other original Grounds of appeal also relate to the listed building aspect, and do in our opinion point to errors of law made by the chancellor.

> "Ground 4: The Chancellor gave insufficient weight to the fact that the proposed relocation of the screen preserves the feature itself and makes possible its reinstatement in its existing position should the pastoral needs of the congregation so require in future."

This ground needs to be sub-divided between relocation and reinstatement. The chancellor expressly addressed relocation in para 39 of his judgment, and described it as a relevant matter, needing to be taken into consideration. Moreover, earlier in the judgment, at para 19, he had said:

> "It has to be said that if the proposal were to be permitted, [the Bradshaw chapel] would be a very good place to re-locate the screen, which would thereby not be lost to the church".

There is therefore no error of law disclosed in the chancellor's approach to relocation. The position in relation to reinstatement is, however, slightly different. The Statement of Needs, required in this case under rule 3(3)(a), expressly stated that:

> "No structural changes are needed to either stonework or woodwork, and consequently future generations could reverse things if they wished".

Reinstatement was also specifically referred to in the correspondence from Mrs Walker to the DAC and to VS, which was available to the chancellor; indeed, in para 30 of his judgment he specifically referred to her letter of 12 May 2011 and that she had "pointed out that…the changes were reversible". However, in the critical paragraph of his judgment (para. 39), there was no mention of reinstatement, or of the ease with which this would be achievable. It is possible the chancellor regarded this aspect as so obvious that it did not need stating, but it nevertheless does not appear that he took it into account in his overall assessment, as we consider he should have done. We return to the issue of reversibility below.

> "Ground 8: The Chancellor drew and subsequently relied upon an unwarranted conclusion from the fact that the chancel screen and the Kempe east window were installed contemporaneously. There is a benefit to the pastoral well-being of the church in the manner of its current worship and practice by increasing the natural light from the window which is not negated by the fact that the window has been obscured ever since the date of its installation. Whatever pastoral reasons may have pertained originally for installing a window which for the most part could not be seen by the congregation and afforded it little light, no longer do so."

As appears from para 41 of the his judgment, the chancellor seems only to have addressed the issue of the Kempe window in relation to need, rather than as an off-setting consideration in relation to effect on the special character of the listed building. Ground 8 is similarly focused. However, in our view there is not only merit in Ground 8 as pleaded, but also in the point argued before us that in considering the effect on the listed building, the chancellor seems to have left out altogether any consideration of the potential benefit to the architectural character and historic interest of the listed building in opening up views of the Kempe window and benefiting from additional light therefrom. This was a matter specifically addressed by Mrs Walker in correspondence which was before the chancellor; indeed, in para 30 of his judgment the chancellor specifically referred to Mrs Walker's letter to the CBC "pointing out that [the screen] detracted from the Kempe east window". In our view the fact that the Kempe window was introduced at the same time as the screen, and has thus always been partially obscured, is not a reason to discount entirely (as the chancellor appears to have done) the benefit of opening up views to it. This was a further error of law by the chancellor.

52. During the course of argument, and in particular as a consequence of matters contained in the skeleton argument of the *amicus*, Mr Negus broadened his challenge to the chancellor's judgment, and we allowed a further ground of appeal relating to failure to apply, correctly or at all, the proper test as to whether a faculty should be granted in respect of this Grade 1 listed building. One of the particulars under this ground was:

> "He did not assess whether the change would 'adversely' affect the character of the church as a building of special architectural and historic interest."

Mr McGregor, whose submissions on this aspect were adopted by Mr Negus, suggested that there were a number of discrete errors in paras 38 to 40 of the judgment. These were:

i) In defining 'adverse' effect as "one that alters or affects *in a material way*, the appearance or form and layout of the listed building…." (para 39), the chancellor had asked a materially different question from that which arose under section 7 of the LBA and under the guidelines given in *In re St Luke, Maidstone* at p.8C-G and in the second *Bishopsgate* question, approved at p.9A-B. The focus should be on whether there was an adverse effect on the character of the church as a building of special architectural and historic interest. Not every change that alters or affects the appearance and layout of a listed building in a material way (the definition used by the chancellor) will necessarily adversely affect its character as a building of special architectural or historic interest.

Whether it does has to be determined on the particular facts of the case. We consider this point to be well-made. Indeed, applying the chancellor's approach, the answer was obvious, since plainly the relocation of the screen "altered or affected in a material way the appearance or form or layout of [this church]". We accept that (in para 40 of his judgment) in the alternative the chancellor said that:

> "To move it will undoubtedly be 'adverse'…on a broader and more natural reading of 'adverse'. It damages the appearance of the chancel".

Here again, however, the chancellor fell into a material error in failing first to identify what was the special architectural character and historic interest of this church as a whole (including the appearance of the chancel) and then to consider whether there would be an overall adverse effect by reason of the proposed change. In fact, the chancellor did not deal at all with "the character of the [church] as a building of special…interest" (section 7 of the LBA): nowhere did he identify its character other than by reference to the list description of the church at the time it was listed (see the last sentence of his para 38). Indeed, this is the only place where in his reasoning he uses the word "character" at all.

ii) In stating (in para 38 of his judgment) that "the fact of listing in one way 'fixes' the appearance and state of the building at that point of time", he was mistaken, since all the features of a listed building are equally "listed", including any new features that have been introduced since the building was listed, as a result, for example, of alterations or extensions. Accordingly, to use the *amicus*' own phrase, listing does not 'fix' a building at a particular moment in time; rather it "accords it a particular status on an ambulatory basis, for so long as the building remains listed". With this argument we agree. Nonetheless, since the chancellor (in the first sentence of para 39 of his judgment) included reference to the effect on the building "as it has become by subsequent authorised changes", we do not consider that this constituted a relevant error of law in the overall determination of the case.

iii) By applying his erroneous definition of "an 'adverse' effect" (in para 39 of his judgment) to a building only "at the time it was listed, or as it has become by subsequent authorized changes", the chancellor effectively ruled out any argument that the building's special character owed little to the chancel screen, which was only a relatively recent (and in the petitioners' view, regrettable) addition. We agree that this is something at least capable of being material to the question whether there would in fact be an adverse impact on the special architectural or historic interest of the church; and that the chancellor's approach was erroneous.

iv) While the chancellor was entitled to accept the opinion of EH and the amenity societies in relation to the significance of the screen, he ought to have explained why he did not on the facts of the case accept the petitioners' alternative view as to its significance which was essentially based on its being a relatively late feature. We agree that there was an absence of any such explanation. In our view the chancellor also failed to address other aspects of the petitioners' case in relation to the overall benefits to the appreciation of the special architectural interest of the church to be obtained by removing

the screen and thereby restoring the earlier relationship of chancel to nave. Thus the chancellor again fell into a material error.

Conclusion on the chancellor's approach to effect on the character of the listed building

53. For the reasons given above, and in particular because of the chancellor's erroneous approach to the assessment of adverse impact on the listed building, we consider that his judgment should be set aside. We reach this conclusion on the reasoning conventionally employed in this jurisdiction of finding an "erroneous evaluation of the facts taken as a whole" (see the review of authorities in *In re Holy Trinity, Eccleshall* [2011] Fam 1 at para 71). The *amicus* invited us to apply the language of Part 52.11(3)(a) of the Civil Procedure Rules ("the CPR") and simply find that the chancellor's decision was "wrong". In this regard the authoritative commentary in Civil Procedure, vol.1 (2012) ("the White Book") states at 52.11.4 that:

> "In r.52(11)(3)(a) "wrong" presumably means that the court below (i) erred in law or (ii) erred in fact or (iii) erred (to the appropriate extent) in the exercise of its discretion".

Whilst the Appeal Rules have no provision comparable to CPR Part 52.11(3)(a) and (b), in our view there is no practical difference between the conventional basis set out in *Eccleshall* and that which applies in civil appeals under the CPR.

Re-taking the decision

54. Under rule 16(1)(b) of the Appeal Rules, the appellate court can "give any judgment or direction which could have been given in the consistory court or remit the matter for rehearing and determination in the consistory court by the chancellor or a deputy chancellor, as the court considers appropriate".

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

Our analysis of the effect on the character of the listed building

56. The starting point must be that this is a Grade I listed building and in this regard we accept EH's assessment that the grading is "in recognition of its exceptional architectural and historic interest". (Of course, a building can be listed Grade I merely because it has special architectural interest, or because it merely has special historic interest). EH state that only about 3% of listed buildings are of exceptional interest, by

which we assume is meant are Grade I listed buildings. We also accept that the design and craftsmanship of this chancel screen is of a very high order.

57. In this particular case it is appropriate only to consider the interior of the building. Bearing that in mind, we first consider what is the special architectural interest of this church, and especially the character of that special interest. We recognize that the two rounds of Victorian alterations to the church (especially those of Scott) are of some special architectural interest in themselves, but in our view the special architectural interest and character of this particular interior lies primarily in the building's medieval elements and the spatial proportions derived therefrom, both of which are exceptionally pleasing. The Victorian alterations, and in particular those of Scott, had a significant impact on the church's character, which in our opinion was not wholly beneficial. Although there are four open panels in the chancel screen, and an opening in the middle, the remainder of the bottom third is entirely solid (the linenfold paneling) and the top third is distractingly ornate, notwithstanding the fineness of the carving. The chancel screen in our opinion impacts adversely on the overall character of the architecture. Although of a piece with the Victorian furniture in the choir and sanctuary, it severs and separates the choir and chancel from the nave of the church and it both concentrates attention on itself and creates a separation from the space beyond. This deprives the building of the spaciousness it formerly enjoyed, as well as exaggerating the building's width at the expense of its length, the point made by several of the petitioners' witnesses.

58. We consider next what is the special historic interest of this church, including the character of that special interest. This question, of course, includes a consideration not merely of the building's medieval elements, but also of the way in which the church has been altered over time, including the works to it undertaken during the two rounds of Victorian alteration. Scott's alterations are of considerable historic interest in showing how the Tractarians set about beautifying (as they saw it) churches, by focusing attention on the chancel and seeking to attach mystery and detachment to that part of the church. In that sense the Scott alterations are a valuable lesson in late Victorian architectural and ecclesiastical history.

59. Asking, third, what is the effect of the proposed alteration on the character of both the special architectural and historic interest of the church, and appreciating the danger of excessive sub-division, it is not in dispute that the relocation of the chancel screen will constitute a marked change. There will be some detriment architecturally to the overall Victorian ensemble of the choir and chancel. Nevertheless, prolonged study of the photographs (both before and after the Scott alterations), as well as our own observations at the church itself, lead us to anticipate that the screen's relocation is likely to benefit the church's architecture as a whole. We are therefore also satisfied that the special architectural character and interest of the building will not be harmed by the proposed relocation. So far as the special historic interest of the church, there will be greater detriment, because the Tractarian ensemble will no longer be intact. On the other hand, there will be benefit in revealing the leaning pillar to the south of the chancel arch; and with the screen repositioned in the Bradshaw chapel, it will require little imagination to envisage what the chancel and the chapel would have looked like when the screen was in

its original position. In this regard we hope that a photograph of the screen in its present position will be provided to visitors, perhaps in a revised Church Visitor Booklet, in order to assist with the necessary re-interpretation.

60. In short, if the screen is re-located, there will not be harm to the overall special architectural interest of this church, but there will be some harm to its special historic interest. If one asks the composite question, will there be a loss to the character of the building as one of special architectural and historic interest, the answer must be "yes", unless the view were taken that the architectural gain outweighs the loss of historic interest (which is a fine judgment which we do not feel qualified to make, nor do we feel it necessary to do so).

61. We do not think it necessary for chancellors (or for this court, when re-taking the first-instance decision) to go on to consider the refinements of approach contained in chapter 12 of the NPPF. Planning policy is in almost continuous flux, and chancellors cannot be expected to follow and apply to the letter the planning policies applicable from time to time to secular buildings. They are not government planning inspectors, though sometimes their task has similarities.

62. Since, however, EH has specifically raised the criteria in PPS5 (now contained in the NPPF), we have also considered the question there posed of what is the extent of any "loss of significance of a designated asset" (the phrase in para 133 of the NPPF). The present case is not one where there is a "total loss of significance of a designated heritage asset" (see para 133 of the NPPF), so that the answer depends on whether the proposal amounts to "substantial harm to … significance of a heritage asset" (the phrase in paras 132 and 133 of the NPPF), or whether there is harm that is "less than substantial harm to the significance of a designated heritage asset" (see para 134 of the NPPF). Despite the opinion of EH that the loss will be "substantial", we disagree, for the reasons set out above. Indeed, in our view any loss will be "less than substantial". On the facts of the present case we also consider it to be highly material that the screen will be relocated to what the chancellor described as "a very good place" (para 19), where its craftsmanship can continue to be admired, and where it will be a vast improvement on the curtain that is currently hung in that position. We will consider the question of 'reversibility' below.

63. In the case of listed buildings, and particularly those listed Grade 1, any adverse effect on its special character (whether or not defined in terms of loss to its significance as a heritage asset) requires justification. It is to this matter, therefore, that we now turn. This is an area where the petitioners contend that the chancellor fell into further legal error.

The justification for change

64. The Statement of Needs conveniently listed three reasons for the proposal before the chancellor:

"a. **Theological**….[R]emoving the 'Temple' symbolism of the screen …is one of our main reasons. (we are a missionary church, and constantly visited by strangers to Christianity, and the continuing presence of a region of our church depicting 'the holy of holies' requires constant 'explaining away' to our newcomers).

b. **Visual …**[A] unanimous feeling that opening the chancel … to the nave, would create a feeling of unity and space…With the addition of new lighting throughout the building, the chancel/nave combination will become a more glorious 'whole', as the eye is drawn into the chancel and towards the splendid Kempe east window….

c. **Practical** Four points…Our music group currently sing, almost out of sight, at the east end of the south aisle, and over recent years have spread over quite a large area. We are looking to them to come centre right on the dais, between the centerline [sic] of the nave and the organ. The 4 or 5 square metres extra in this space afforded them by removing the screen is small, but vital. Secondly, the space occupied by the music group will more than offset the loss due to removal of the two rear pews. Thirdly, the …preferred [option for the new audio-visual scheme] is the hidden screen…This is not compatible with the chancel screen in place….Fourthly, when at Easter and Christmas we are exceptionally full, congregation seated in the choir stalls in the chancel will feel more included."

65. The principal argument of EH and the amenity societies was that the justifications put forward were insufficient to justify what they regarded as substantial harm to the listed building. Between them they challenged the relevance of the theological justification, rejected the argument relating to the Kempe window, asserted that alternatives were available to meet the requirements of the petitioners, and argued that the amount of space gained by relocation was minimal.

The chancellor's approach to justification

66. The chancellor said that it was "in practice impossible to add the two different bases of argument (which he defined as "theological or doctrinal" and "practical or pragmatic") into a coherent whole", with the result that he dealt first with the latter and only later with the former.

67. We have already referred to the chancellor's conclusion on the theological justification. Since he was "not persuaded that [he] should find the screen [to be] contrary to Anglican teaching and should therefore be removed", he rejected this aspect of the petitioners' justification (see para 74 of his judgment).

68. In respect of the "practical and pragmatic" justification, the chancellor understandably considered himself bound by the first *Bishopsgate* question, which he set out in para 35 of his judgment:

> "Have the petitioners proved a necessity for some or all of the proposed works either because they are necessary for the pastoral well-being of [the parish] or for some other compelling reason?"

In para 37 he said that "*'Necessity'* is a broad concept", and endorsed the interpretation of Chancellor George QC in *Re St John the Evangelist, Blackheath* ("something less than essential, but more than merely desirable or convenient; in other words something that is requisite or reasonably necessary"). The chancellor's conclusion at paras 41 and 42 then was:

> "41. Is there a proved need for [the screen's] removal? T**he reason for moving it is bound up with relocating the musicians and singers to a better, more central place,** which is certainly understandable. ..[T]he extra space for members of the congregation in the south aisle will be largely negated by taking out the seating in front of the Chapel; the argument about the window is a non-starter because it is contemporaneous with the screen, and has not been subsequently obscured by its introduction, and how the Chapel could be used for quiet prayer and reflection, is as result of, not the purpose behind, the removal. So it all comes down to the need to accommodate the music providers.
>
> 42. I can only say that the need for further space for this purpose falls well short of the sort of necessity that in my judgment is envisaged under the Bishopsgate tests. To remove the screen would be convenient or helpful or desirable, but it is not in any sense 'necessary'. It would increase the room available by a couple of square metres at most (and I think rather less), and still leave this as a crowded area. The idea of enlarging the dais to the north or west may have disadvantages, but has not, as far as I am understood it, been considered, let alone considered and rejected. **I do not therefore find that the petitioners have passed the 'necessity' test**." (emphases in original)

Alleged errors of law in the chancellor's approach to justification

68. We have already addressed Ground 5, and found that the chancellor did err in not considering whether the theological position of the congregation and clergy of this church was such that the chancel represented a hindrance to its desire to worship in a contemporary manner and in accordance with its understanding of scriptural teaching.

69. Ground 5 is closely related to Ground 6:

> "By failing to formulate correctly and consider the theological aspect of [sic] petitioners' arguments the Chancellor gave insufficient weight to the necessity of moving the chancel screen for the pastoral well-being of the church."

If the chancellor had accepted that there was a pastoral need of the sort claimed, but concluded that it fell short of the 'necessity' referred to in the first *Bishopsgate* question,

then (on the basis that he was bound to apply the *Bishopsgate* questions) there would be no error. However, we consider the chancellor erred in failing to address the question of pastoral need, which is where Ground 6 overlaps with Ground 5.

70. Ground 7 is a variation on the same theme:

> "The Chancellor further failed to consider the question of how the petitioners' theological argument when correctly framed might have been prayed in aid of the installation of the screen originally against the retention of the building as it existed at that time, such that the current pastoral well-being of the church is an argument in favour of the necessity of restoring the original status quo."

In support of this ground, the petitioners pray in aid the decision in *Re St Helen's, Bishopsgate* (1993) 3 Ecc LJ 256. In that case Chancellor Cameron QC allowed the relocation of a Tractarian chancel screen, where the clergy and congregation had returned "to an earlier form of ministry where the Holy Table has been brought forward into the church so as to be more centrally positioned for worship". We accept that the decision in *Bishopsgate* was based on pastoral need and that the chancellor took into consideration the fact that patterns of liturgy change. However, Ground 7 does not disclose any separate error to that identified under Grounds 5 and 6, and we agree with the submission of the amicus that the concept of an "original status quo" is highly problematic in relation to a church that is some 900 years old.

71. We have set out, and have already dealt with, Ground 8 in relation to the learned chancellor's treatment of the Kempe east window. We accept that he did not take into account this aspect of a possible benefit to pastoral well-being.

72. In the light of the skeleton argument of the *amicus*, Mr Negus obtained leave at the hearing to add additional grounds of appeal, including:

> "[The Chancellor] did not assess whether the 'theological' reasons advanced by the Petitioners together with their other grounds in the 'Statement of Need' [sic] constituted necessity for the proposed re-siting of the screen.

The criticism made is of the way the chancellor separated the petitioners' justification into two parts, despite recognizing (in para 30 of his judgment) that "[i]n principle, the petitioners are entitled to have their case taken as a whole". It is argued that by first deciding that the petitioners' pragmatic arguments did not constitute need, and only then going on to consider whether the theological and doctrinal points which were raised constituted on their own such a need, the overall approach was wrong. To quote the *amicus*, "In treating two aspects of the petitioners' case for necessity as effectively alternative rather than cumulative, the Chancellor's approach was wrong in principle". We consider that this point is well-made and constituted an error, even if, taking all matters together, the chancellor might still lawfully have reached the same conclusion.

The court's evaluation of the justification for change

73. Accepting that it is necessary to take the petitioners' justification as a whole, it is still necessary to examine the various components in order to assess their cumulative force.

74. As we explained earlier in this judgment, the petitioners did not help themselves by the way they presented the theological argument before the chancellor. Nevertheless, and assisted by the evidence placed before us (particularly that of the two church wardens) we consider that there is a genuine pastoral case for removing the screen, because its presence is regarded not only by Dr Pickles but also by his congregation as a hindrance not merely to worship but especially to mission. As Mr Negus expressed it, the screen is "a hindrance spiritually to their mission to the world"

75. Whether or not it is right that removal of the screen will positively benefit the architecture of the building, we are in no doubt that it will create what the Statement of Needs described as "a feeling of unity and space", and that "the chancel/nave combination will become a more glorious 'whole'", assisted by the opening up to view of the Kempe window (though this will still be partially obscured during services by the proposed new projector screen). These are matters to which the chancellor, in our opinion wrongly, gave little credence.

76. The chancellor regarded the relocation of the musicians and singers onto the central dais as "understandable" and as "convenient or helpful or desirable". However, he thought removal of the screen would increase the room available by a couple of square metres at most (and probably rather less) and would still leave a crowded area (see paras 41 and 42 of his judgment). The Statement of Needs states that the "4 to 5 square metres extra in this space…is small, but vital". We raised this discrepancy between the two measurements during the course of the hearing, and Mr Negus was able to take instructions from the architect, although she had not been responsible for the wording of the Statement of Needs. We were informed that the figure of 4 to 5 metres was considered to be correct, and this is consistent with what we ourselves saw during our site inspection before the hearing began.

77. Taking all these matters together, in our view they constitute "public benefits" and a "clear and convincing" justification for the proposal (to use the language of paras 134 and 132 of the NPPF). Whether they actually outweigh the listed building considerations is a separate issue, which we address below.

78. It is at this point that we return to the wording of the first *Bishopsgate* question. Is the removal of the chancel screen "a necessity"? Is it "necessary for the pastoral well-being of [the parish]" or is it less than necessary, being merely "convenient or helpful or desirable", as the chancellor held in para 42 of his judgment?

79. We readily understand why the chancellor, looking only to the musicians and singers, reached the conclusion that he did, and we suspect he would have reached the same conclusion even had he not underestimated the size of the space which would

become available by removal of the screen. However, when the petitioners' case is approached cumulatively, and proper account is taken of the commendable ambitions of this "large and thriving congregation" (the description in para 45 of the chancellor's judgment), we consider that the petitioners have in fact established the existence of a genuine pastoral need for the alteration under all three heads set out in the Statement of Needs. We do not consider that the church's present success in attracting large numbers of worshippers should then be used against them as if it were evidence that there is no real requirement to remove the chancel screen.

80. We reach this conclusion despite the chancellor's suggestion (see para 42 of his judgment) that the requirements of the musicians and singers could possibly be met by enlarging the dais to the north or west, a re-ordering which had not been considered by the petitioners at that time. We agree that such an extension appears possible, but it would not in our opinion meet the pastoral case being advanced by the petitioners to any significant extent.

81. On the other hand we appreciate that others, and particularly conservationists, will continue to argue that the high threshold of necessity in the first *Bishopsgate* question has not been met. This raises the question whether the test should actually be one of necessity.

82. Unprompted by any member of this court, the *amicus* in his impressively researched skeleton argument and oral submissions invited the court to consider whether it should revisit the *Bishopsgate* questions, but without suggesting that the result would necessarily lead to the petitioners obtaining what they desire from this appeal, namely, removal of the chancel screen. He pointed out that there has been criticism that:

i. the order of the first two *Bishopsgate* questions is illogical and unhelpful, given that the questions are only intended to be applicable at all in the case of proposals which would adversely affect the character of a listed building.
ii. the questions employ the concept of "necessity" (the meaning of which is not entirely obvious) in a way that is not employed in the secular context of listed building consent.
iii. the concept of "other compelling reason" in the first *Bishopsgate* question is not entirely helpful because a reason that is "compelling" might nevertheless not result in the grant of a faculty (for failing to satisfy *Bishopsgate* question 3).
iv. it is not clear from the judgment in this court in *St Luke, Maidstone* whether the *Bishopsgate* questions are to be applied instead of, or as well as, the criteria set out at [1995] Fam 1, 8C-G.

Although criticisms on the lines of the first three points were to some extent addressed in this court's judgment in *In re St Mary, Sherborne* [1996] Fam 63, 77-78, uncertainty and confusion have nonetheless persisted.

83. The *amicus* also made two more general points: first, that there is a sense in which the *Bishopsgate* questions, first formulated in 1992 and approved by this court in 1994, have become divorced from a more general understanding of the burden of proof in faculty proceedings, so that doubts have arisen as to the correct test to be applied where proposals would benefit, or be neutral, to the character of a listed building ; and, second, that the criteria by which listed building consent is to be considered in the secular system have changed quite significantly since 1992, and the *Bishopsgate* questions are not entirely apt to take account of the those criteria. In particular they do not expressly differentiate in their approach between different grades of listing or, we would add, between different degrees of harm and the assessment of significance.

84. We consider that these criticisms are justified, save that (as we have already indicated) we do not consider that chancellors should be required to apply precisely the same approach to listed buildings as is followed in the secular system. There is certainly no justification for applying to ecclesiastical buildings a stricter test than is applied in the secular system. Furthermore, it is the experience of all three members of this court that defining what is "necessary" so as to satisfy the first *Bishopsgate* question has caused practical difficulties in numerous cases: see, for example, *Re St Gregory, Offchurch* [2000] 1 WLR 2471 (a case concerning millennium windows).

85. Because this court expressly stated in *St Luke's, Maidstone* (at p.8) that it was merely "set[ting] out certain guidelines, emphasising that they are not rules of law", we are not constrained by the doctrine of judicial precedent (insofar as, if at all, that doctrine is strictly applicable in this court, a point we do not have to decide: see *Re Lapford (Devon) Parish Church* [1955] P 205, 208). In any event, as long ago as 1987, and well before the *Bishopsgate* questions were first formulated, the Court of Ecclesiastical Causes Reserved firmly rejected the applicability of any test of "necessity" in listed building applications (see *In re St Stephen's, Walbrook* [1987] Fam 146), although we accept that on the facts of that case the court concluded that the architecture of the church would be enhanced by the new altar, and was not considering a case such as this where there will be some loss of special historic interest. The matter there arose because in *In re St. Mary's, Banbury* [1987] Fam 136, 145D-E, Sir John Owen, Dean of the Arches, had said:

> "When a church is listed….a faculty which would affect its character as such should only be given in wholly exceptional circumstances, those circumstances clearly showing a necessity for change".

Whatever the aesthetic merits of the Henry Moore altar proposed for St Stephen's, Walbrook, it could not be said to be necessary and therefore counsel for the Archdeacon of London argued that the appeal must necessarily fail on that new ground. In his judgment Sir Ralph Gibson said (at p.191):

> "I do not accept this submission. The ecclesiastical exemption contained in section 55 of the [Town and Country Planning] Act 1971 could have imposed on the courts exercising the faculty jurisdiction a restriction in the form stated by Sir John Owen, Dean of the Arches, but Parliament did not do so, and I see no reason

> to impose it by judicial decision…..The extent of [the] obligation [to protect listed buildings] …is not, in my view, rightly defined by the concept of "proved necessity". The statute does not impose a limitation in such terms on the local planning authority or the Secretary of State in the exercise of the power to grant written consent for the execution of works of demolition or alteration, etc. to listed buildings (see section 56(3)); and I see no reason why the extent of the discretion to permit alterations to listed ecclesiastical buildings should be more limited than in the case of listed secular buildings.
>
> The right approach, in my view, is to exercise the discretion as I think Parliament intended that it should be exercised, namely, in accordance with established principles; and that includes the interest of the community as a whole in the special architectural or historic attributes of the building and to the desirability of preserving the building and any features of special architectural or historic interest which it possesses. The discretion, however, is to be exercised in the context that the building is used for the purposes of the Church, that is to say in the service of God, as the Church, doing its best, perceives how that service is to be rendered; and the weight to be given to the various aspects of the particular case is to be determined accordingly".

The same reasoning was given by Sir Anthony Lloyd (at p.198A-C):

> "The ecclesiastical exemption from planning procedures is, of course, of great importance to the Church of England. But I can find nothing in the relevant legislation to justify an approach so strict as that laid down in *In re St Mary's Banbury*, nor does the Dean of Arches cite any authority in support of that approach. Listed building consent is given every day in ordinary cases which fall short of "clearly proved necessity". I see no reason why a different standard should prevail in the case of ecclesiastical buildings….The fact that an ecclesiastical building is listed is a relevant consideration in deciding whether to grant a faculty. But I would respectfully, but firmly disagree with the view that a faculty should only be granted in cases of clearly proved necessity".

The Bishop of Chichester said (at p.173D-E):

> "Certainly this court is not bound by so strict a rule and, in my view, should not consider itself so bound".

86. Although the Town and Country Planning Act 1971 has been replaced by the LBA, and although there have been some changes in respect of the extent of the ecclesiastical exemption, there has been no attempt by primary or subordinate legislation to impose a test of "necessity". Nor does a test of necessity play any role in Chapter 12 of the NPPF, save that:

> "Where a proposed development will lead to substantial harm or total loss of significance of a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or loss is

necessary to achieve substantial public benefits that outweigh that harm or loss, or [various other considerations apply]." (emphasis added)

That is a different, and lesser, test than the first *Bishopsgate* question.

87. In our opinion chancellors should be freed from the constraints of the *Bishopsgate* questions. We have much sympathy for the view of Chancellor McClean in *Re Wadsley Parish Church* (2001) 6 Ecc LJ 172 at para 24 that there is a danger of imposing an unduly prescriptive framework on what is essentially a balancing process. For those chancellors who would be assisted by a new framework or guidelines, we suggest the following approach of asking:

1. Would the proposals, if implemented, result in harm to the significance of the church as a building of special architectural or historic interest?
2. If the answer to question (1) is "no", the ordinary presumption in faculty proceedings "in favour of things as they stand" is applicable, and can be rebutted more or less readily, depending on the particular nature of the proposals (see *Peek v Trower* (1881) 7 PD 21, 26-8, and the review of the case-law by Chancellor Bursell QC in *In re St Mary's, White Waltham (No 2)* [2010] PTSR 1689 at para 11). 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 (see *St Luke, Maidstone* at p.8), 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 l or 2*, where serious harm should only exceptionally be allowed.

Striking the balance

The chancellor's approach

88. Having found against the petitioners on the question of necessity, the chancellor said (at para 43 of his judgment):

> "On that basis, **there is no need for a balancing exercise.** If I am wrong about that, and I have underestimated the need for the proposed work, and should have embarked on the balancing exercise, I am clear that the 'adverse' effect on the building as a whole, plainly outweighs, the (hypothetical) necessity. On either basis, **the proposal to move the screen is rejected**." (emphases in original).

Then, separately (at para 74), he reached his conclusion that he should not find the screen contrary to Anglican teaching.

Alleged error of law

89. The final amended ground which we allowed Mr Negus to introduce was that:

> "[The chancellor] failed to balance whether any degree of 'adverse' effect should be outweighed by the degree of necessity proved by the Petitioners".

On its own this ground would not avail the appellants but, given the various errors of law we have already identified (both in relation to assessment of the petitioners' case and the question of adverse impact on the special character of the listed building), it is necessary for the court to reach its own evaluation of how the balance should be struck.

The court's evaluation

90. On the evidence before us we have concluded that there will not be overall harm to the special architectural character of the listed building, but that there will be some harm to its special historic interest. We have found that there is a strong and convincing case for change on the theological, visual and practical grounds advanced by the petitioners. However, the context is one of a Grade I listed building, so that there is a strong burden of proof on the petitioners as we perform the equivalent of the function which a secular planning authority would under section 16(2) of the LBA, of having "special regard to the desirability of preserving the building…or any features of special architectural or historic interest which it possesses".

91. The *amicus* drew our attention to what is said in "New Work in Historic Places of Worship" (English Heritage, 2012) at p. 7:

> "Chancel screens are generally important to the character of a church – as well as often being important objects in their own right – and we would encourage their retention in situ. Where liturgical change has left a significant chancel little used we recommend that it be retained as a chapel."

He also referred us to thirteen cases since 1986 where consistory courts have considered petitions for the removal of chancel screens in listed (or what were probably listed) churches. As is to be expected, in some cases the petition was allowed whereas in other cases they were refused (including in both instances Grade I and Grade 2* churches). However, as he agreed, the assistance to be derived from these cases is limited because each case turned on its own particular facts (including the aesthetic and historic merits of the particular screen). In at least one of the Grade 1 churches where the petition was granted, there was no objection from EH or the amenity societies (*Re St Michael, Aveley* (1997) 4 Ecc LJ 770). That, however, was most certainly not the case in *Re St Helen's, Bishopsgate*, where a petition for a major re-ordering, including repositioning the chancel screens, was allowed in a Grade 1 church, notwithstanding forceful objections from EH

and the amenity societies and where EH was represented by counsel at a very lengthy consistory court hearing.

92. One matter which does appear from examination of these cases, however, is that where the chancel screen could be relocated within the church in its entirety, and in particular where there remained a practical possibility that the screen could then be restored to its original position, this combination was regarded as desirable (see for example *Re Stoke St Michael's, Caludon* (1992) 3 Ecc LJ 61). *In re St Mary, Barcombe* (2009) 12 Ecc LJ 259, Hill Ch said at para 32: "The reversibility of the proposals [for a minor reordering] is a significant, and arguably determinative, feature in this regard". However, in *Re St Mary Magdalene, Reigate* (201l) 13 Ecc LJ 245), where a very rare, fifteenth century three part screen could not be relocated in its entirety, a faculty was refused, notwithstanding that re-instatement of the entire screen would have been possible.

93. The latest view of EH on reversibility, set out in its "PPS5: Planning for the Historic Environment PRACTICE GUIDE" (revised June 2012), is that:

> "Where possible it is preferable for new work to be reversible, so that any changes can be undone without harm to historic fabric. However, reversibility alone does not justify alteration. If alteration is justified on other grounds then reversible alteration is preferable to non-reversible".

That contrasts with the view expressed in *St Mary Magdalene, Reigate* at para 159, where Petchey Ch said:

> "I think that reversibility goes to the assessment of the adverse effect of the proposals; the harm is less now than it otherwise would be."

Another way of approaching the matter, which we prefer, is to treat reversibility as a factor when it comes in at the final stage of weighing the balance. If proposals are readily reversible (as here), then this makes it easier for petitioners with a clear and convincing case to discharge the burden of proof that lies on them to justify the harm to the special character of the listed building.

94. Were it our view that the harm to the special character of the listed building would be serious, then we might have found against the present proposal, notwithstanding the suitability of the Bradshaw chapel for its relocation and the practical possibility of re-instatement if liturgical fashions in this church were to change ("liturgical fashion" is the phrase used in both *In re St Mary's, Banbury* and *In re St Luke, Maidstone*, at p.145 and p.8 respectively). We bear in mind that the NPPF state that substantial harm to Grade 1 listed buildings should be permitted only very exceptionally. However, since we find the harm not to be serious (or substantial), the burden on the petitioners is more easily discharged. This is especially so in this particular case where we afford considerable weight to the factors of relocation and reversibility.

95. We therefore consider that on a proper evaluation of all relevant matters, the petitioners are able to rebut the strong presumption against change, and the appeal should be allowed.

Conditions

96. The following conditions shall be attached to the faculty:

(1) Prior to the relocation of the chancel screen to the arch leading into the Bradshaw chapel, a photographic record (both in black and white and in colour) shall be taken of the front and back of the screen in its present location, so as to enable the screen's role within the setting of the church to be properly appreciated by subsequent generations, including visitors to the church. This photographic record shall be kept securely with the church's records and copies sent to the Diocesan Advisory Committee.

(2) The relocation of the chancel screen to the Bradshaw chapel shall take place under the supervision, and to the satisfaction, of a qualified architect instructed by the petitioners for that purpose, and in such a way as to ensure that there is no damage to the screen itself or to the fabric of the building.

(3) The relocation shall take place within 6 months of the grant of faculty.

Costs

97. Since the appeal is unopposed, the only issue which arises in respect to costs concerns the court costs. Following the principles set out in *In re St Mary, Sherborne* at 70, the petitioners must pay the court costs both on appeal and at first instance, unless any written submission to the contrary is received by the provincial registrar within 14 days.

Charles George QC, Dean of the Arches

Rupert Bursell QC, Chancellor

Peter Collier QC, Chancellor

1 October 2012