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In the Consistory Court of the Diocese of Chichester   Petition No. 1280

In the matter of St Michael and All Angels, Berwick

Judgment on Preliminary Issue

1. At a telephone directions hearing held on 15 June 2022, I dismissed the petitioners' application to vary or set aside some or all of a Directions Order dated 1 June 2022, for reasons to be given thereafter. These are those reasons.

Background

2. This case has an unfortunate history. An appeal from the decision of the Deputy Chancellor was upheld by the Court of Arches and the case was remitted for redetermination to this Court, which issued directions of its own initiative. For convenience the Directions Order is reproduced in full at the conclusion of this judgment. The suite of directions sought to bring the matter to a resolution within a matter of weeks by convening a hearing. Importantly, the Order stated on its face that it had been made of the Court's own initiative and that any person or body affected by it might apply within ten days to have it set aside, varied or stayed.

3. The petitioners entered into correspondence with the Court on a number of matters. They asked for an estimate of the costs; they sought leave to introduce fresh evidence; they invited the Court to direct live-streaming of the hearing; and they confirmed that they would file a position statement as directed.

4. Mr Lewis Grey (on behalf of the petitioners) queried whether the Consistory Court of its own volition could order a new hearing (the detail of which is fully set out below), which the registry referred to me. My reply to the registrar was communicated to the petitioners:

> My understanding is that the matter has been remitted to the Consistory Court to determine (or re-determine) whether or not a faculty should be granted. In the exercise of my case management powers, having regard to the troubled history, and the need for transparency, I have directed that the most expeditious means for the matter to be determined is at a hearing. I have so ordered.

5. I proceeded to draft Directions in reply to the nine numbered paragraphs of Mr Grey's email. When this draft was complete, but before it had been sent to the petitioners, an email was received from Mr Justin Gau of counsel on the evening of 8 June 2022. It stated that he had been instructed by the petitioners on a direct access basis and was appearing pro bono. He stated that there was a degree of concern and upset about the petition and attached an unsigned letter drafted by the petitioners.

6. He requested that the following be done.

> The learned Chancellor set out in a short, written Judgment, how he has jurisdiction to order a new oral hearing in this case bearing in mind the order of the Court of Arches,
>
> The learned Chancellor direct that the petitioners be not liable for the Court or Registry costs of any such hearing.

7. Mr Gau's email concluded,

> The petitioners have already agreed appropriate directions if such a hearing is to go ahead.

8. In the circumstances, I took the view that in the interests of justice the Court should treat Mr Gau's email as an application to vary or set aside the Directions Order. I was concerned that there was a marked dissonance between the petitioners' requests of the Court and those of Mr Gau, who was now representing them. Acceding to Mr Gau's first request would have added to the costs of the petition in circumstances when the petitioners had already affirmed the hearing and even asked for it to be live-streamed. On the second point, although in exceptional cases, a chancellor or registrar might waive his or her fees, I was not aware of any power in the court to direct that petitioners 'be not liable' for the costs. I therefore directed that the matter be determined at a telephone hearing on the first available date. Mr Gau was on holiday overseas, and I am grateful to him for making himself available.

9. Mr Gau emailed written submissions, which were succinct and helpful. However, paragraph 6 included the following:

> The petitioners are concerned that the response to their raising of their inability to pay any further costs, was the Chancellor ordering a directions hearing with a further possible costs order.

The implicit suggestion that the directions hearing was listed in order to ramp up the petitioners' costs liability is without foundation. A one line reply would have been sufficient to be dispositive of the costs issue. My consistent priority since this petition was remitted by the Court of Arches has been to keep costs to a minimum. The hearing was necessary because of the inconsistencies between the petitioners and their counsel, and to address the issue of unlawfulness, which was now being pursued. The history of this case is a cautionary tale of miscommunication between counsel and the bench, and I was anxious to avoid any repetition. I had hoped that one or more of the petitioners would have attended the telephone hearing but they did not. I was alerted to the fact that the registrar's email may not have made this explicit, and I further delayed the start of the hearing so Mr Grey could be invited to join the call. The invitation was declined.

Breach of natural justice

10. Two matters of procedural unfairness arise for determination. They formed no part of Mr Gau's written submission, although they were neither withdrawn nor abandoned. He informed me that they were concerns of the petitioners. They formed part of an email to the Court which travelled over his signature. They can be dealt with fairly briefly.

11. One complaint is that the Court's 'further order' (reproduced in full at paragraph 4 above) was made 'without requesting representations'. The quoted passage is not a further order but a clarificatory response to an email enquiry from the petitioners. It is not understood why and from whom the Court should have sought representations when directly answering a question from the sole party to the litigation. There had been no indication at that stage that the petitioners were legally represented, and (in any event) under the Bar's Direct Access Scheme, the litigants themselves remain the principal correspondents with any court or tribunal.

12. The other criticism is that the Directions were made 'without notice'. This too is misplaced. The Faculty Jurisdiction Rules 2015 not only permit, but I think encourage, case

management orders being made of the Court's own initiative. Rule 18.3 provides as follows (emphasis added):

> **Court's power to make order of its own initiative**
> 18.3.—(1) Except where a rule or some other enactment provides otherwise, the court may exercise its powers (under this or any other Part) on an application or of its own initiative.
> (2) Where the court proposes to make an order of its own initiative—
> (a) it may give any person likely to be affected by the order an opportunity to make representations; and
> (b) where it does so it must specify the time by and the manner in which the representations must be made.
> (3) Where the court proposes—
> (a) to make an order of its own initiative; and
> (b) to hold a hearing to decide whether to make the order,
> it must give each party likely to be affected by the order at least 3 days' notice of the hearing.
> (4) The court may make an order of its own initiative, without hearing the parties or giving them an opportunity to make representations.
> (5) Where the court has made an order under paragraph (4)–
> (a) a party affected by the order may apply to have it set aside, varied or stayed; and
> (b) the order must contain a statement of the right to make such an application.
> (6) An application under paragraph (5)(a) must be made–
> (a) within such period as may be specified by the court; or
> (b) if the court does not specify a period, not more than 7 days after the date on which the order was served on the party making the application.
> (7) Paragraphs (3) to (6) do not apply where the court makes, or proposes to make, an order of its own initiative under rule 3.7(4) (determination of question whether a particular matter may be undertaken without a faculty) or rule 16.7 (injunction or restoration order issued of court's own initiative).

13. The Directions of 1 June 2022 contained the following, headed 'IMPORTANT NOTE' and in bold type:

> This Order has been made of the Court's own initiative pursuant to r 18.3(4) of the Faculty Jurisdiction Rules 2015 (as amended). Any person or body affected by this order may apply to have it set aside, varied or stayed. Such application must be made to the Registrar in writing (including by email) within 10 days of the service of this order.

14. Both allegations of procedural impropriety or breach of natural justice therefore fall away.

Unlawfulness

15. The kernel of the petitioners' application to set aside or vary the Direction Order is to be found at paragraph 5(a) of their written submissions, settled by counsel. It is said that this Court (the Consistory Court of the Diocese of Chichester) has no power to direct a further oral hearing, in consequence of the order of the Court of Arches. To follow how the argument is put, it is necessary to consider the terms of the Order made by the Court of Arches, read in the context of rule 27.8 of the Faculty Jurisdiction Rules 2015.

16. The Order of the Court of Arches is dated 17 May 2022 and states:

> (1) Under Rule 27.11(2)(b) of the Faculty Jurisdiction Rules that the appeal on ground (a) is upheld on the ground that the decision of the Consistory Court was unjust because of a serious irregularity in the proceedings;
> (2) That the case be remitted to the Consistory Court of Chichester to re-determine the petition in accordance with rule 27.8(2)(b) of the Faculty Jurisdiction Rules;

(3) That the Appellants shall meet the costs of this Court and of the Registrar of this Court (other than those statutory costs already paid) arising from the Appellant's Application for Leave to Appeal and the Appeal, subject to the Appellants having liberty to make written submissions as to why they should not bear the said costs within 14 days of the date of this Order.

17. Rule 27.8 of the Faculty Jurisdiction Rules 2015 reads in full as follows:

Appeal court's powers
27.8.—(1) In relation to an appeal, the appeal court has all the powers of the lower court.
(2) The appeal court also has power to—
(a) affirm, set aside or vary any judgment, order or decree of the lower court,
(b) refer any issue for determination by the lower court,
(c) order a new hearing;
(d) make an order for costs.
(3) The appeal court may exercise its powers in relation to the whole or part of a judgment, order or decree of the lower court.

18. The petitioners' argument turns on the fact that Court of Arches directed a re-determination of the petition in accordance with rule 27.8(2)(b), rather than 'ordering a new hearing' under rule 27.8(2)(c).

19. No authorities or canons of construction were relied upon. The argument was short and simple: because the Court did not expressly direct a new hearing, then it would be unlawful for one to be convened.

20. For completeness, I should also mention something relied upon by the petitioners in Mr Grey's email of 6 June. He states:

> Whereas the Dean in her Directions of Christmas Eve thought that success on the first of eight points of our Grounds of Appeal would be "determinative", this has proved not to be so, somewhat to the Petitioners' regret.

21. This is a reference to the grant of permission to appeal, which was procedurally a little unusual. Various potential grounds were advanced in the application to the Deputy Chancellor and he refused permission to appeal on each of them. When the application was renewed before the Dean, an additional ground was added, namely that the matter had been determined under a mistaken understanding as to the scope of the petition. In the exercise of her case management powers at appellate level, the Dean directed that permission to appeal be granted on that single ground, which would then be determined, using the written representations procedure, as a preliminary point in the appeal, while the other grounds were left in abeyance. The Dean referred to 'the potentially determinative nature' of the ground so identified.

22. It is unfortunate that the petitioners alighted upon the Dean's use of the word 'determinative' and ascribed to it a meaning that it cannot bear. As I sought to explain in my order listing the petitioners' application for a telephone hearing, they seem to be labouring under the misapprehension that the outcome of the appeal is in some way determinative of the outcome of the underlying petition. It is abundantly clear from the context of the grant of leave that when referring to 'the potentially determinative nature of ground (a)', the Dean was referring to this ground as being potentially determinative <u>of the appeal</u>, and so it has transpired. The Court of Arches has not been required to determine any of the remaining

grounds. It is axiomatic that when an appeal is allowed on the basis that the lower court or tribunal determined a matter on a false premise (for whatever reason), the underlying substantive issue will require redetermination. The inevitable consequence of a successful appeal on ground (a) would always have been the redetermination of the original decision.

23. I do not read the Court of Arches directing a re-determination of the petition in accordance with rule 27.8(2)(b), as operating to prohibit or inhibit this court from conducting that re-determination at a hearing. The fact that the Court of Arches did not order a new hearing, as it could have done under rule 27.8(2)(c), does not, in my judgment, prevent or preclude this Court from so doing in the exercise of its case management powers. Correctly, and understandably in my view, the Court of Arches declined to place any fetter on this Court. It could, for example, have directed that the Deputy Chancellor did or did not re-determine the matter. But it consciously chose to be silent on the matter leaving that, and all other case management powers, to my discretion. I decided the appropriate course was for me to make the re-determination, but afforded all interested parties the opportunity to make representations on recusal. So far at least, neither the petitioners, nor anyone else have objected to my doing so. Indeed, in an email of 23 May 2022, Mr Grey seemed to express a preference to the matter being re-determined by me, commenting 'we certainly appreciate the chancellor's economy of style in this matter'.

24. In the circumstances, I reject the submission that this Court does not have the power to order an oral hearing, and the application to vary or set aside the Directions Order on the ground of unlawfulness must therefore fail.

Discretion

25. The petitioners' written submissions continued at 5(b) as follows:

> If, contrary to the former submission, the Consistory Court rules that it has the power to order a further hearing they would adopt the directions made by the learned Chancellor [subject a minor caveat not relevant for present purposes]

26. At the telephone hearing, it was not argued (in the alternative) that if the Court had the power to direct a hearing (as I so found), then the power should not be exercised in the particular circumstances of this case. I had anticipated such a submission, as it was foreshadowed in Mr Gau's email to the Court of 8 June 2022 which included the following:

> I, on behalf of the petitioners, fail to see how the calling of witnesses (with attendant costs and inconvenience), the holding of a Consistory Court (with attendant costs), the provision of live screening, [*sic*] (with attendant costs) and the closure of the Church for worship is the 'most expeditious' way of dealing with this matter. Nor do I see how it is a lawful process bearing in mind the Court of Arches judgment.

27. Mindful of the interests of justice, and in case this matter goes further, I reviewed (of my own initiative), whether the re-determination of this matter should be by way of a hearing, and I came to the conclusion that it should.

28. As I explained at the telephone hearing (regrettably in the absence of any representative of the petitioners) my principal concern in the exercise of my discretion had been the best

interests of the petitioners, particularly keeping costs to a minimum. Only having visited this church once before, and many years ago, a site visit to inspect the church would have been inevitable for the fair disposal of the matter. Under the current Fees Order that would have cost the parish £244 per hour (chancellor and registrar). An order for disposal on written representations would have cost £108 and the writing up of a judgment would have cost £136 per hour. I considered there was the possibility of further directions having to be made at a cost of £247 each, and I could not rule out the possibility that having had the site inspection, it might still have been necessary convene a hearing. It is not my practice to conduct informal hearings while visiting a church: too many chancellors have come to grief trying to do so: see *Re Holy Trinity, Eccleshall* [2011] Fam 1, Ct of Arches; *Re St Peter, Shipton Bellinger* [2016] Fam 193, Ct of Arches.

29. I was tolerably confident that any hearing would be swift and likely to conclude in half a day (although I made provision for a full day), which would have cost £611, and I predicted that having had the hearing, the issues for determination would crystalise and a written judgment would accordingly be much briefer, and therefore much less costly, than one written after wading through all the papers. I invited Mr Gau's submissions on the relevant parts of the fees order but he said he left such 'heavy lifting' to the registrar.

30. I was mindful that, first time round, the petitioners had themselves insisted on an oral hearing; and I also took into account that one of the reasons the matter reached the Court of Arches involved a miscommunication between counsel and the Deputy Chancellor, which I was anxious not to repeat.

31. In addition, it should be remembered that the default position in faculty cases is that they are disposed of at a hearing. The power of a chancellor to order that proceedings are to be determined on consideration of written representations instead of at a hearing is contained in r 14 of the Faculty Jurisdiction Rules 2015. This power can only be exercised if the Chancellor, having regard to the overriding objective, is satisfied that such a course is 'expedient' having first invited the views of the parties. The instances of determination on written representations may well be numerically large, but the gateway criterion must be satisfied in each case and the expediency test properly applied, otherwise the proceedings default to a hearing.

32. In my assessment, all relevant features pointed to the most expeditious means of re-determination being at a hearing, and I so directed, whilst at the same time allowing the petitioners to apply to set aside that order if they wished. They chose instead to affirm my order and invite further case management directions for the hearing. This was subsequently overtaken by counsel's contention of unlawfulness.

33. Of the remaining points reproduced at paragraph 26 above (albeit not pursued in written or oral submissions), witnesses could have been excused or attended by video link, the brevity of the hearing would have had little impact on the daily round of liturgy, and Mr Gau, wisely, did not push the petitioners' application for the proceedings to be live-streamed. Consistory Court proceedings are not live streamed. Exceptionally some such arrangements were made during the Covid pandemic but the *status quo ante* has been restored.

34. The directions sought to make clear that the hearing would be short and procedurally undemanding. They indicated that legal representation was unnecessary and that robes would not be worn. Further clarification could have been given had it been sought, and indeed a set of explanatory directions had been drafted but not sent, as the matter was overtaken by the challenge to the lawfulness of the Directions.

Costs

35. On costs, the petitioners' written submissions contain the following:

> 3. In [its judgment determining the ground (a) of the appeal] the Court of Arches invited representations as to their own costs. Bearing in mind the petitioners believed that any further determination would be on the papers, the petitioners determined to pay the costs of the Court of Arches on the basis that the further determination by the Consistory Court would be on the papers in the usual way, and they had already paid the petition fee.
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> 6. The petitioners, having spent £16,000 on a petition so far are unable to afford further litigation. Their counsel, having admitted in writing to the Court of Arches that he had made an error, is advising and appearing pro bono. The Registry and the Deputy Chancellor also fell into error causing costs to be incurred. The petitioners are concerned that the response to their raising of their inability to pay any further costs, was the Chancellor ordering a directions hearing with a further possible costs order. They are also concerned that the Chancellor, in his original Directions dated 1.6.22, identified Counsel for the petitioners only as falling into error in this case.
>
> 7. In an email dated 13th June to the petitioners the Registry ask the Petitioners who is to be liable for the costs of the Consistory Court hearing, if not them? The petitioners submit that, if the Court of Arches is prepared to hear submissions about why costs should not be paid for their decision, the Consistory Court can do the same. To repeat, the Registry and Deputy Chancellor both fell into error in the original hearing.

36. The Court of Arches dealt with the issue of costs as follows:

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

37. It is clear from this passage:
    i. The Court of Arches found that there was a causal link between counsel's error and the Deputy Chancellor being led into error. Had the question been correctly answered the proceedings would not have been determined on a false basis and there

would have been no need for the matter to go to the Court of Arches. I sought to reflect this finding in the preamble to my Directions.

ii. The Court of Arches makes no criticism of the registry or registrar. Admittedly at an earlier stage there had been an administrative error within the registry which led to the registrar making a considerable abatement of his, and the Deputy Chancellor's fees. This was graciously and gratefully acknowledged by the petitioners. It does not appear to have any relevance to the current issues.

iii. I was taken to no part of the judgment which suggests that there was any representation by the Court of Arches that if the petitioners paid the costs of the Court of Arches then they would be entitled to a free ride for the costs of the re-determination. Even a determination on written representations would attract costs, possibly in excess of those for a hearing.

iv. Significantly, the Court of Arches was not inviting submissions on 'why costs should not be paid for their decision' (as the petitioners now suggest) but as to why the Appellants should not bear them (their provisional view). This is not the language of waiver but of considering payment from another source. On my reading, the Court of Arches was leaving the door open for (though not encouraging) an application that a proportion of the costs be borne by the petitioners' legal representatives or professional indemnity insurers. Mr Gau read it differently, but doubtless gave proper professional advice. I expressly make no finding on the matter. Mr Gau indicated that his clients could seek clarification from the Court of Arches, and if there is ambiguity, that would be the proper course.

38. Mr Gau conceded that there was no power in the Court to make a prospective order that a party be not liable for costs. On the basis that the petitioners had declared themselves unable to fund the litigation, he sensibly did not oppose an order for security for the costs of the re-determination. He accepted that the best the petitioners could hope for would be the benevolent waiver of a proportion of the court costs. However, up until the telephone hearing, when the tone mellowed somewhat, the representations received by the Court do not appear to have been constructed with the solicitation of benevolence as a primary objective.

39. I have reserved to the conclusion of the hearing the issue of the costs of and occasioned by this application to set aside or vary the Directions Order, which will include the costs of this necessarily lengthy judgment. It concerns me, and it should concern the petitioners, that the costs of this application alone are likely to be of a similar order of magnitude to those which would have been incurred had the original directions been allowed to run their course.

The Worshipful Mark Hill QC
Chancellor of the Diocese of Chichester — 20 June 2022

ANNEXE

In the Consistory Court of the Diocese of Chichester		Petition No. 2020-054425

In the matter of St Michael and All Angels, Berwick

Directions

1. On 17 May 2022, the Petitioners' appeal from the judgment of the Worshipful Robin Hopkins, Deputy Chancellor of the Diocese of Chichester, was allowed and the judgment was set aside. Due to an error by counsel, the matter had been decided on an erroneous basis. The proceedings have been remitted to this Court for redetermination.

2. The matter will be determined *de novo* and I propose to hear it myself. Although I am familiar with this church from other faculty proceedings in the past twenty years, I have had no prior involvement with the current petition or with the issues raised. Nonetheless there will be an opportunity to make representations on recusal which I will consider on their merits.

3. For obvious reasons, the sooner this petition is determined the better. The matter is unopposed, although the Victorian Society and Historic England raised a number of points of objection during the consultation period which will need to be taken into account in determining the matter, as will written objections from parishioners.

4. The following directions will apply.

   (1) The Petitioners, the Victorian Society and Historic England be afforded 7 days within which to make written representations on recusal should they wish.

   (2) Within 14 days the Petitioners are to file with the registry and serve on the Victorian Society and Historic England a position statement (not exceeding two pages) setting out precisely the order they wish the Court to make on the petition and their concise reasons for the same. This statement should make detailed reference to the pagination of the original hearing bundle.

   (3) Although neither the Victorian Society nor Historic England are parties to these proceedings and the Court has no power to make directions in this regard, the Court would be assisted by a position statement from them (not exceeding two pages) setting out their respective stance on the proceedings, particularly on the fact that the proposals are less extensive that the Deputy Chancellor was led to believe at the earlier hearing. If any such position statement is to be considered by the Court, it must be lodged and served on the other society and the Petitioners within 14 days of service of that of the Petitioners. The assistance of the societies in helping to narrow the issues for determination would be welcomed by the Court.

   (4) The matter will be heard during August 2022 with a time estimate of one day. The precise date is to be fixed promptly by Registrar.

(5) All those who have made statements should make themselves available for questioning by the Court if necessary.

(6) The hearing will convene in the church and will commence at 10.30 am.

(7) The Court is content for the one of the Petitioners to speak on their behalf, although they are at liberty to obtain legal representation should they wish. The Court will not robe.

(8) The matter will be determined on the basis of the documentation which was before the Court at the time of the Deputy Chancellor's decision, namely a hearing bundle running to 258 pages. Any application on the part of the Petitioners to adduce additional evidence is to be lodged within 7 days of the time allowed for the societies to lodge their position statements.

(9) A representative of the Diocesan Advisory Committee is to make him or herself available at the hearing for questioning by the Court and/or the Petitioners if necessary.

(10) Liberty to apply for further directions.

IMPORTANT NOTE

This Order has been made of the Court's own initiative pursuant to r 18.3(4) of the Faculty Jurisdiction Rules 2015 (as amended). Any person or body affected by this order may apply to have it set aside, varied or stayed. Such application must be made to the Registrar in writing (including by email) within 10 days of the service of this order.

The Worshipful Mark Hill QC
Chancellor of the Diocese of Chichester

1 June 2022