

Neutral Citation Number: [2021] ECC Swk 6

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

IN THE MATTER OF ST BARTHOLOMEW'S CHURCH, LEIGH

AND IN THE MATTER OF A PETITION BY REVD JONATHAN WILLANS, MR PETER STEVENS AND MS EILEEN WINSTANLEY

JUDGMENT

Introduction

1. This is the petition of Revd Jonathan Willans, Mr Peter Stevens and Ms Eileen Winstanley, the Vicar and Churchwardens respectively of St Bartholomew's Church, Leigh. By it they seek permission for the construction of an extension to the south west of the church and to make internal alterations in order to provide a WC and tea point. The petition is supported by a resolution of the PCC dated 9 November 2020. By advice dated 18 September 2020, the DAC recommended the proposals to me.

2. The Petition was subject to publicity in the usual way and details were also posted on the Diocesan website.

3. There are six objectors to the petition, namely,

- B M Boustred
- Clare and Desmond Gwynne
- Nicholas Lane
- Brenda Lewis
- Dr R Anthony Vere Hodge.

4. Mr and Mrs Gwynne and Mr Lane and Dr Vere Hodge live in the village and are on the electoral roll. Dr Vere Hodge is the captain of the bellringers. Mr Boustred and Ms Lewis both live in the village but are not on electoral roll nor are regular worshippers. Mr Boustred is a Chartered Engineer; Ms Lewis's qualifications are Dipl Cons AA, IHBC (retd) and MRTPI (retired).

5. In accordance with the rules, the Registrar wrote to each of the objectors asking whether they wished to become a party opponent. None did¹.

6. Historic England responded to consultation by a letter dated 1 July 2020 written by Alma Howell, an Inspector of Historic Buildings and Areas. It states:

Historic England accepts the need for kitchen and cloakroom facilities in churches due to changing patterns of worship and the need to accommodate more diverse uses. We also recognise that the parish has looked at a number of options of providing these facilities which would either not be easily accessible, or would cause more harm to the significance of the church, than the scheme that is now being proposed.

Historic England is therefore supportive in principle of the proposals as we consider that the chosen location is sympathetic and that the proposed extension would also not cause undue harm to the setting of the church. This is due to its modest nature, that it does not affect the main frontage and

¹ Mr Boustred and Dr Vere Hodge expressed views critical of the process. I consider these at paragraphs 57 to 64 below.

that the southern elevation already has other projections along its length. While there will be some loss of historic fabric, this is not original but an area that was rebuilt in the Victorian period.

Historic England emphasised that the work should be finished to a high standard.

7. Mole Valley District Council granted planning permission for the works on 5 November 2020. The report of the Planning Officer to the Committee concluded as follows:

7.31 The proposed extension is modest in size and carefully designed to respect the historic character of the listed building ...

7.32 The proposed extension would involve opening up a section of the southern external wall which dates from the Victorian era, as well as lifting and re-laying the clay tiles on the west porch to provide level access to the building. The proposed works are considered to cause “less than substantial harm” to the listed building heritage asset. The public benefits of the work – including providing level access to the church building together with an indoor, fully accessible WC and kitchenette for members of the congregation, together with the associated versatility of the building itself – are considered to outweigh any harm arising to the heritage assets.

8. The Society for the Protection of Ancient Buildings and the Victorian Society were both consulted. Neither wished to make any representations.

9. I visited the church on 21 June 2021. I am grateful to the Petitioners for showing me round the church; it was also helpful that the project architect, Mr Roderick MacLennan² was able to be present to explain the proposals to me and to answer my questions. Mr Stevens took the time and trouble to provide a detailed written reply to Directions which I gave on 17 February 2021 and answer the many questions which I had raised, together with supporting documentation; I am very grateful to him.

The Church of St Bartholomew

10. The church is an attractive village church which is listed Grade II*. Of mediaeval origin, it has a single aisle, with a porch to the south. It was restored in 1855 by H Woodyer and a stone belfry installed. This proved insufficiently strong to carry the weight of the bells and it was demolished in 1890. At this time the church was extended 15 feet to the west and a new wooden tower built. The tower is supported by buttresses: two to the north, two to the west and two to the south. A new porch was built at the west end; it extends across the width of the church and consist of an open wooden frame supporting a shingle tiled roof. The floor of the porch consists of plain red tiles, contemporary with the porch. The wooden frame of the external porch is replicated by an internal wooden screen which encloses the area underneath the tower and supports the front of a western gallery. The 1890 work was by FC Lees. The bells are rung from the gallery, which also contains the organ. The church is pewed, the area beneath the gallery and tower forming an open narthex. A fine Victorian font³ is on the south side of the church, just in front of the screen. Both Pevsner and Nairn *Surrey* (1962) and M Blatch *The Churches of Surrey* (1997) are very critical of the architectural quality of Victorian work⁴. The visitor will understand what they mean, but the building retains historical and architectural merit as is demonstrated by its listing⁵.

² Mr Mclennan is a member of the DAC. He took no part in the consideration of the proposals by the DAC.

³ It is in the same form as the mediaeval font, which survives, albeit damaged.

⁴ The former describes the church as follows: *Small un-aisled Perp church in Reigate stone, with good simple details. Two- and three-light windows, some square-headed and some segment-headed. This pleasant design was spoiled in 1855 by Woodyer and in 1890 by FC Lees – when the original timber belfry was replaced first by a stone tower, then by a bellcote and extended w end and a lean-to porch added, all fussily picturesque with the wrong sort of stone dressings. The interior was killed off at the same time.*

⁵ Only 8.3% of all listed buildings are listed Grade I or Grade II*.

11. The church has just completed a project of repairs to the stonework of the tower and its wooden louvres and including re-gilding the weather vane.

12. In the churchyard is a building dating from 1895, known as the Old Morgue. It is a bit of a puzzle as to why it was built in the first place; it has not been used for its original purpose for many years and is currently used to store equipment used to maintain the churchyard.

13. There are 61 people on the electoral roll. On two Sundays each month there is a prayer book communion service at 8 am. The form of the 10 am service varies from week to week, seeking to provide something that will be appropriate for a congregation which has members of all ages. Once a month it is a communion service. Once a month there is sung evensong⁶. The average weekly attendance is between 20 and 30. Attendance at Christmas and Easter is significantly greater.

The proposals

14. The proposal is to form an extension of the tower to the south by moving its lower external wall between the buttresses so that it extends towards but not beyond the southern extent of the buttresses. This provides space within the narthex beneath the gallery to provide a WC. It also provides room within the narthex to provide a tea point.

15. It is proposed to take the opportunity of these works to provide access to the church via the west door for those whose mobility is impaired. At the moment such access is impeded by the existence of a step. The provision of such access will involve lifting and relaying the tiling of the porch.

The justification for the proposals

16. In 2021 the need for a church to have a WC needs little exposition. Of course there still are many churches without a WC and, for a variety of reasons, no reasonable prospect of installing one, but this does not mean that this is a good idea. Without a WC attendance at church is made more difficult for a lot of people, particularly the young and the old. Those attending an occasional service⁷ will often come from further afield and arrive looking for WC facilities. Often a parish is able to devise some expedient. In the present case, there is a public house within a short distance of the church and the present licensee is hospitable; however the facilities are not “on site” and there cannot always be certainty that the facilities will be available at the required time. Further, the church will always wish to facilitate community use of its building and this is made much more difficult if there is not a WC⁸.

17. The tea point (what is elsewhere described as a kitchenette, although that perhaps makes it sound grander than it is, being a sink, a facility to boil water and some limited storage) is required to facilitate the provision of tea and coffee after services. At the moment, it is necessary each week to bring flasks of hot water and milk and the necessary cups and saucers and take them away again after use. This is do-able but obviously it would be much easier if everything could be done on site.

18. Step free access via the west door will enable those whose mobility is impaired to enter via the same route as everyone else.

Leigh

19. The village of Leigh lies about 5 miles south of Reigate and has a population of 943⁹. 90% of the parish is agricultural, with some woodland. There are 29 buildings with Grade II or Grade II* status. There is a primary school and two pubs but the last shop closed in the 1960s. The parish magazine

⁶ This is the pattern of the service that was established before the pandemic and to which it is hoped to return.

⁷ By which, principally, I mean a baptism, wedding or funeral.

⁸ In normal times, the church is open during the day for private prayer and for people to visit. I am always pleased where this proves possible.

⁹ This is the figure from 2011 census.

witnesses a lively community life – for example, there is a branch of the WI, a garden society and a cricket club.

Earlier proposals

20. As sometimes happens, there is a “history” to the current proposals. In 2004 the Rector and PCC developed proposals for a substantial single storey extension providing a multi-purpose meeting room, a kitchen and WCs. This was highly controversial. Planning permission having been refused by the District Council the matter went to a planning inquiry. After a hearing, the planning Inspector refused planning permission. In his decision, having contemplated the possibility of the construction of detached meeting room elsewhere in the churchyard, the Inspector observed:

... I think it possible that lavatory facilities might be sensitively constructed, either within or in a very minor addition to the church structure; the south porch might be a starting point for investigation.

The objections

21. The objectors raise eight matters of concern which I summarise below.

Structural integrity of the tower

22. It is suggested that the extension would compromise the structural integrity of the tower (Mr Boustred, Mr and Mrs Gwynne¹⁰, Mr Lane, Dr Vere Hodge). Dr Vere Hodge is also concerned about the loss of Victorian fabric of the tower.

Need

23. The need for a WC is met by facilities being provided by the Plough Inn (Mr Lane).

Location within the church

24. All those entering and leaving the church will have to pass in front of the WC door. There is no sound proofing between the door and the body of the church (Mr Lane) “We do not think it all appropriate that these facilities are situated just inside the west door of our lovely listed church – an area used to congregate after services and where the priest stands to bid farewell” (Mr and Mrs Gwynne). There would be a loss of natural light (Dr Vere Hodge, Mr and Mrs Gwynne). Dr Vere Hodge considers that the WC will be inadequately sound proofed.

Alternatives

25. The Old Morgue could be converted to provide WC (Mr Lane). A considerable saving and a more suitable site should be possible with external facilities (Mr and Mrs Gwynne)

Inadequacy of the plans

26. The plans are basic and not suitable for a Grade II* listed building (Ms Lewis).

Loss of Victorian tiles

27. This is a concern of Dr Vere Hodge.

Cost

28. The works will cost a large sum of money which would be better spent on other things (Mr Lane) or is disproportionate to the benefit to be derived (Ms Lewis) or will waste precious cash reserves required for maintenance (Mr and Mrs Gwynne).

¹⁰ Mr and Mrs Gwynne are concerned about the increased costs which addressing this issue is likely to cause.

Consultation

29. It is suggested that the consultation on the proposals has been inadequate (Mr Lane, Ms Lewis, Dr Vere Hodge).

Consideration of the Petitioners' case

30. I start where the Petitioners will have started, namely with the question of the need for a WC.

31. I accept the need for a WC for the reasons set out in paragraph 16 above.

32. If there is to be a WC, the question arises as to where it might go. The south porch is an obvious option. Although it is no longer the main entrance to the church, it is not redundant. Thus it is still used for weddings and funerals and serves as a fire escape. It is visibly part of the mediaeval fabric of the building with a fine timbered roof. In one of the windows there is some interesting seventeenth century graffiti. Although one might say that such loss would be mitigated by the works being reversible, there would be in practice a heritage loss by utilising the south porch as a WC: part of the interesting historic fabric would no longer be used for its original function and could no longer be appreciated save from what I might describe as an antiquarian point of view¹¹. Moreover the siting of the entrance to the south porch – half way down the chancel – makes the south porch less than ideal for locating a WC because, with a congregation in place, people would see and be seen when making their way to the entrance to the WC.

33. A northern extension to the church would evidently be difficult in the light of the previous refusal; more specifically, it would to a greater or lesser extent spoil that aspect of the church.

34. Against this background, it is not surprising that attention has focused on converting the Old Morgue into WCs. However in locational terms, this is far from ideal as it is separate from the church. It would not be very convenient for the able bodied and particularly inconvenient for those whose mobility is impaired. Children using WCs here would have to be accompanied. One guesses that there might be practical challenges in achieving the conversion; not least in terms of cost. These latter matters are not, however, issues which have not been explored in detail.

35. This leads to a consideration whether it is possible to find room within the church itself. Without some extension, it is not possible. However a modest extension to the south would provide enough room. Such an extension, which would be contained within the buttresses of the tower would replicate the external wall of the internal staircase on the north side of the tower, that staircase being similarly contained within the buttresses¹². Ideally, if the church is to be extended in this way, one would like to secure more space. However there is not scope to do this – a bigger extension would adversely affect the appearance of this side of the church; and would impinge upon the Memorial Garden¹³. The result is that it is not possible to provide a lobby to the WC with the door opening directly on to the space beneath the tower which will be used after the service as the area where tea is served¹⁴. Further, the WC will take up some of the circulation space currently available under the tower; and the outwardly opening door of the WC will be into that circulation space. Such drawbacks as this presents have, however, not led to the Petitioners preferring any other option or deciding not to pursue a scheme for a WC.

36. Many projects involve compromises and this is particularly the case where constraints are imposed because a building is listed. I should say at once that, of all the matters raised, it is the

¹¹ By this I mean it would physically survive and could be appreciated by an antiquarian as such.

¹² This was part of the original design of the tower.

¹³ I.e. that part of the churchyard where cremated remains are interred.

¹⁴ It should be recalled that with only one WC being provided, it is necessary that it should be fully accessible to those whose mobility is impaired. This requires a greater space than if this were not a requirement.

suitability of the WC in its proposed location which has given me pause. I deal below more fully with the other substantive objections that have been raised by the objectors but, for reasons, I explain, I do not find in them the basis for rejecting the proposals.

37. The view of the Petitioners is that what is proposed will work and does not involve excessive compromise. The DAC, who are very experienced in matters of this kind, and have recommended the proposals to me, evidently share this view. I now had the benefit of seeing the church and, having done so, I am of the same view. Like all things, it is necessary to see what is proposed in context. Although a valuable facility it will not receive excessive use. Occasional use before and during services will not cause any particular problem. One can however see that there would be issues if it were much used during the time when the circulation space under the tower were being utilised after services. However although one hopes that the congregation will grow, one is talking about comparatively small numbers and I think that there will be a natural inclination for larger congregations to spread back into the body of the church. As to the specific points raised by Dr Vere Hodge, the WC will be adequately ventilated by artificial means; and the specification of the door will provide adequate soundproofing¹⁵. There will be some loss of natural light but the proposals incorporate artificial lighting.

38. If there were a straightforward and satisfactory alternative it is obvious that the Petitioners would have pursued it. It is because there is not that I am carefully considering the drawbacks to their preferred proposal. It seems to me that those drawbacks are not so weighty that existence of possible alternatives must be further investigated.

39. The DAC floated whether the door of the WC might be better at the western end of the area enclosed rather than, as proposed, at the eastern end. My impression is that it probably doesn't make much difference but the Petitioners, who use the building on a regular basis are confident that it will be generally slightly less visible as proposed. I defer to their judgment. In turn, I floated the thought that it might be better for the hinging of the door to be reversed; I am content to leave this to the Petitioners' judgment.

40. I turn to consider the other specific concerns.

41. It is suggested that, given the slightly unusual design of the tower, and the pressures upon it of the bells, the construction of the extension proposed will render the tower unsafe. This is a matter on which the Petitioners have sought expert advice. Mr Stuart Tappin of Strand Consulting Engineers has considered the matter generally and in the light of the objections which have taken a point as to the integrity of the tower. His advice is that, the proposals are structurally feasible and that there is no reason why the work cannot go ahead provided that appropriate steps are taken to ensure the stability of the tower¹⁶.

42. I am not sure if the objectors have seen a copy of Mr Tappin's advice; I would be grateful if the Petitioners would supply them with copies of it.

43. As regards the tiled floor to the west porch, it is of course not proposed that these should be lost or damaged; Mr Vere Hodge's concern is that it will not be possible to lift and relay them without damage. I appreciate that concern and I would accept that there can be no guarantee at this stage that it will be possible satisfactorily to relay them. Certainly it will involve skilled contractors. However the intention is that skilled contractors will be instructed; and this is the sort of work of which Mr

¹⁵ The door could be made to open inwards but this would compromise the soundproofing.

¹⁶ I note that Mr Tappin is a member of the DAC. However he took no part in the consideration of the proposals by the DAC and his advice was sought by the Petitioners after the DAC had recommended the proposals to me. In its considerations the DAC flagged the need for a structural engineering assessment but did not predicate its outcome. In his advice Mr Tappin made clear he was a member of the DAC and that, if a matter in respect of Leigh arose in any future discussions of the DAC, he would declare an interest.

McLennan has considerable experience. I can be confident that the petitioners will take all reasonable steps to ensure the success of this part of the project. However this aspect of the matter has to be put in context. The tiled floor, while an example of good Victorian workmanship, is not in itself special¹⁷. If it were to come to it, it might be more important to secure access for those whose mobility is impaired than to preserve the floor. I say this fully appreciating that step free access is available via the south porch; it may be more important that those worshipping at the church should share a common access¹⁸. Similarly the use of a temporary ramp is best avoided if possible. All this said, it is a condition of the planning permission that

In the event that the floor tiles on the west porch cannot be removed as intended without being damaged, the applicant must cease works on the west porch and agree an alternative means of raising the floor level in writing, in consultation with the Council's Historic Environment Officer. Thereafter the works on the west porch shall only be carried out in accordance with those agreed methods.

If there were to be a problem with relaying the tiles, the Petitioners would first have to sort the matter out with the local planning authority and then seek an appropriate amendment to any faculty.

44. Another heritage issue is the effect of the extension on the external appearance of the church. It seems to me that because the original form of the building is being altered and the result is less simple than the original, it must be accepted that there is a degree of harm. But that harm is modest. The lack of simplicity was accepted in the original design of the north wall of the tower.

45. The plans were considered adequate in terms of detail for the purposes of planning permission and for consideration by the DAC. As I have noted, Historic England wish the works to be completed to a high standard. As far as I can see this will be achieved not by any further iteration of the plans but by the quality of the specification, the quality of the contractors involved and the supervision and certification of their work. The Petitioners intend to use experienced contractors and Mr McLennan is very experienced as regards projects of this kind. I think that Ms Lewis's concerns are misplaced in these circumstances.

46. The project will be an expensive one. However the Petitioners think that they will have the resources available. It is essentially a matter for them how they decide to spend funds available to them.

47. I turn to consider the adequacy of the consultation that has occurred.

48. By way of preliminary observation, I note that consultation has been rendered much more difficult by the pandemic. But I also note that it would not have been appropriate to put everything on hold during the pandemic and this is not something which this parish have done.

49. The generality is that consultation is better earlier rather than later. However what is appropriate invariably depends on the facts of the case. Here there has been a long standing desire to provide WC accommodation and the reasonableness of meeting that desire if possible is not a matter of dispute. The question that has been controversial has been whether it is possible to meet that desire. Unless there were worked up proposals it seems to me that those who have currently objecting would have the opportunity to make the same points as they do currently but against the background of the suggested possibility that that detailed design would demonstrate the correctness of their points. In the circumstances it seems to me that it was appropriate for the Petitioners to get on and produce a design. The Petitioners can reasonably have had it mind that if that work demonstrates a satisfactory design, planning permission will be obtained (which has happened) and faculty consent (which I am now considering). In these circumstances, I might have rejected the proposals on the basis of substantive

¹⁷ If it were exceptional, the Victorian Society would have been bound to have said so in its submissions.

¹⁸ I am not of course rejecting the provision of a different route for access for those whose mobility is impaired in all circumstances; only in the context of the facts of this case.

concerns; it would not be appropriate to reject them on the basis of a failure to consult before their preparation. I should add that the plans having been prepared there was certainly no failure to publicise either the planning application or petition. I do not think that there will be anyone in the village who keeps him or herself reasonably well informed of what is going on who will be ignorant of the proposals¹⁹.

50. It will be apparent from my consideration above that there being an identified need for a WC, a tea point and access for those whose mobility is impaired, I consider that the Petitioners have made out their case for the grant of a faculty and that I do not consider that the objections are of such weight as to justify refusal of a faculty. It will also be seen that the matters I have considered have ranged beyond the narrow issue of harm to the listed building. Although St Bartholomew's is a Grade II* listed building this is not really a case where heritage concerns are at the heart of the issue. However in reaching my conclusion I have applied the *Duffield* guidance²⁰. In the case of a listed building this requires five questions to be considered. I set out the questions and my answers below:

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

51. The answer to this question is "yes"

(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, 26-28; and the review of the case law by Bursell QC, Ch in *In re St Mary's Churchyard, White Waltham* (No 2) [2010] Fam 146, para 11. Questions, 3, 4 and 5 do not arise.

52. This question does not arise.

(3) If the answer to question (1) is "yes", how serious would the harm be?

53. The harm would be modest.

(4) How clear and convincing is the justification for carrying out the proposals?

54. It is clear and convincing. I do not consider that the possibility of providing WCs in the Old Morgue is a sufficiently strong reason for saying that the current proposals should not be permitted. On the material before me I consider that the solution to the issue of the provision of a WC at the church proposed by the Petitioners is the best solution. However I do not think that the Petitioners have to go that far. I think that considered as a free standing solution the Petitioners' proposals are satisfactory and that even if an alternative solution were better, that fact would not provide the basis for refusing the Petitioners' 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 *In re St Luke the*

¹⁹ I should add a note about the view of the Parish Council. The Council was a statutory consultee on the planning application. Recording that there were divided opinions within the village, it resolved to make no submission on the planning application. It subsequently wrote to the Archdeacon and PCC observing that there had been little if any consultation with the community. I can see that as a courtesy, the plans might have been shared with the Parish Council before their formal submission to the District Council for planning permission. But the Parish Council had the opportunity for comment in the context of the planning application; an opportunity which, in the event, it did not take.

²⁰ So called because it is contained in *In re St Alkmund, Duffield* [2013] Fam 158 (Court of Arches).

Evangelist, Maidstone [1995] Fam 1, 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 I or II*, where serious harm should only exceptionally be allowed.

55. The heritage harm seems to me to be so modest that the resulting public benefit clearly outweighs any heritage harm. I make this judgment recognising that the building is Grade II*²¹.

Conditions

56. The faculty shall be subject to the following conditions:

(1) In constructing the new wall of the extension as much existing material is to be re-used as possible. Samples of any new materials, along with the provision of a sample panel of the proposed stone work, are to be provided for approval by the DAC; in the event of disagreement the matter is to be referred back to the Court.

(2) Before works commence, the following are to be provided to the DAC (i) the results of at least one trial hole (to confirm the nature of the existing foundations), and (ii) the results of investigations into the existing wall construction (to confirm construction typology and bonding of masonry).

(3) Before works commence, the following structural engineering documents are to be provided to the DAC for approval: (i) calculations, (ii) specification / method statement, and (iii) design drawings; in the event of disagreement the matter is to be referred back to the Court.

(4) (i) The contractors should be briefed on the possibility of encountering intact / in situ burials or other graveyard features. In the event of such a discovery, they should halt works, and the DAC should be informed. A suitably experienced archaeological practice should be commissioned to attend on site and advise on the discovery, and to properly record the findings. (ii) In advance of commencement of works, a protocol should be agreed with the incumbent of the parish, as to how and where any disarticulated human remains (loose charnel bone) would be safely and reverently stored, and what arrangements would be made for their re-interment at the conclusion of the excavation works.

Process

57. As I have explained above, none of the objectors wished to become a party opponent. Rule 10.3 of the Faculty Jurisdiction Rules 2015 provides as follows:

(1) Following receipt of a letter of objection the registrar must send a written notice to the objector which states that the objector may—

(a) become a party opponent to the proceedings by serving the petitioner and sending the registrar particulars of objection in Form 5 within 21 days of receiving the written notice from the registrar; or

(b) leave the chancellor to take the letter of objection into account in reaching a decision without becoming a party to the proceedings.

²¹ In the light of the criticism of Pevsner and Nairn it may be that the building is not in the top rank of Grade II* buildings. There might be circumstances where that criticism might be relevant to the judgment to be exercised but not, I think, in the present case: here what is relevant to have in mind is simply that this is an important listed building.

(2) *The written notice must additionally contain—*

(a) *a statement that if the objector chooses to become a party opponent, the objector will be entitled to take part in the proceedings, either by being heard in court or (where an order is made under rule 14.1) by making written representations, and to appeal against any order or judgment of the court (subject to obtaining permission to appeal, if needed);*

(b) *a statement that if the objector chooses not to become a party opponent, the objector will not be entitled to take part in the proceedings (beyond having the letter of objection taken into account by the court) or to appeal against any order or judgment of the court;*

(c) *a summary of the principles which apply in relation to costs in the consistory court in a form approved by the chancellor;*

(d) *a statement that if particulars of objection in Form 5 are not received by the registrar within 21 days of the objector receiving the written notice from the registrar, the objector will be treated as having chosen not to become a party opponent; and*

(e) *the address at which any particulars of objection are to be served on the petitioner.*

(3) *The registrar must include a copy of Form 5 with the written notice.*

58. Thus the Registrar wrote to each of the objectors in accordance with the rule 10.3. The summary of the principles which apply in relation to costs which I have approved under rule 10.3 (2) (c) is a document entitled *Guidance on the Award of Costs in Faculty Proceedings in the Consistory Court* (January 2011) issued by the Ecclesiastical Judges Association.

59. In his response to the Registrar's letter, Mr Lane wrote:

I wish to take the course available to me of option (1): letter of objection to be taken into account in reaching a decision by the chancellor.

I would add that it is impossible for the private individual of limited means to enter the contest of (ii) formal proceedings. In that instance they would have no control over the costs, to them, which might be incurred. This system would seem to be censorship by wealth. Is this the intention of the rules governing the structure of the Church of England's court proceedings?

60. Dr Vere Hodge wrote:

I like the 2nd option which allows me to take an interactive part in the process. However I am not in a position to be put at risk of paying costs, especially as I could not see that there was any reasonable cap to such costs. I recall that Lloyds names found out the hard way what unlimited liability meant.

This leaves me with option 1 which seems to be unduly restrictive ... I understand that my letter will be sent to the applicants for their comment but it seems that I do not have a right to reply to those comments. To me, that seems grossly unfair.

61. The provisions of the rules whereby those objecting to petitions for faculties were warned of the potential costs implications date from 2000²². At that time, the rules provided that, if someone became a party opponent, he or she could require the matter to be considered at a hearing: requiring, of course, the giving of oral evidence²³. There are inevitably significant costs involved in respect of a hearing over and above those which would be incurred if the matter were determined on paper. One may see

²² See rule 16 (4) of the Faculty Jurisdiction Rules 2000 (SI 2000 No 2047).

²³ The norm was that there would be a hearing; the Chancellor could direct that the matter was to be dealt with by way of written representations but this required the consent of all the parties (including, of course, the party opponent).

that there was a particular concern that an objector should not become a party opponent without appreciating the potential liability for costs. On the other hand, looking at the matter from the point of view of the petitioner, if the matter were pursued to a hearing by someone who had become a party opponent and it was appropriate that an order for costs should be made in circumstances where such an award would otherwise be appropriate, the party opponent could not, after notice had been given to him of his potential liability for costs, resist such an order on the basis of ignorance of such potential liability.

62. The guidance runs to six pages and, as far as I am concerned, accurately sets out the position as regards costs in the Consistory Court of the Diocese of Southwark²⁴. It might be summarised as saying that a party opponent will not be penalised simply because he or she has been unsuccessful and that the basis for an award of costs against him or her is unreasonable behaviour²⁵. I do accept that a lay person might, to a degree, feel intimidated; however, it seems to me that the core difficulty for a potential party opponent is that he does not know what standard of reasonableness will apply²⁶. He or she might guess that, although he or she might consider his or her actions to be entirely reasonable, an objective tribunal might take a different view. Ultimately, it seems to me that objectors such as Mr Lane and Dr Vere Hodge have to take a view²⁷.

63. It is however important to note that in 2019 a change was made to the rules which bears upon this. A party opponent can no longer insist upon a hearing²⁸. In an appropriate case, having considered submissions, a Chancellor may direct that the matter be determined on paper. Obviously, if such a direction be given, the scope for costs to be incurred is reduced. In the present case, on the material presently before me, I think that I would have directed that the matter was determined on paper, even if one of the objectors had opted to become a party opponent.

64. If I am right about that, there is not very much difference between what **has** happened and what **would have** happened had any of the objectors become a party opponent. Although I hope that the material on which I have relied²⁹ and my reasoning may on some points have persuaded the objectors, I recognise that generally it is unlikely that what I have said will have caused any of them to change his or her mind. However I hope that they do appreciate that their concerns have been carefully considered and conclude that they have not been prejudiced by the decisions that they took not to become parties opponent. In saying this I am aware that Dr Vere Hodge has made the point that, had he become a party opponent, he would have had the opportunity to comment on the Petitioners responses to his objection whereas, as matters stood, he did not. I think that Dr Vere Hodge has correctly identified what may now be the principal reason for wanting to become a party opponent. Nonetheless if an objector chooses not to become a party opponent and to rely on the simpler procedure of having his or her objection taken into account, I do not think that it is appropriate to describe the inability to comment on the Petitioners' comments as grossly unfair.

²⁴ And, I am confident, in the other dioceses of England.

²⁵ See in particular 5.6 and 5.7.

²⁶ Although it is important to note that the Guidance does helpfully give examples of unreasonable behaviour.

²⁷ A similar issue on costs arose in the recent case of *In re the Churchyard of St Giles, Exhall* [2021] EACC 1 in the Court of Arches. The Registrar had written to a **petitioner** about the costs implications of requesting a hearing; the petitioner said that this had a "chilling effect". The Court of Arches did not consider the Registrar's letter inappropriate; it did however say: *We would note, however, that such a hearing should not need to be complex or require legal representation; moreover, no does give the opportunity for useful clarification, both for the chancellor in determining a petition and for a family in understanding what the cause of any concern might be and addressing it as fully as they can* (see paragraph 1.10). This was in the context about the wording on a churchyard memorial. The petitioners principal concern in such a case would have been in respect of court fees, not inter party costs.

²⁸ This is the effect of Part 14.1 of the Faculty Jurisdiction Rule 2015 (SI 2015 No 1568) (as substituted by rule 15 of the Faculty Jurisdiction (Amendment) Rules 2019 (SI 2019 No 1184).

²⁹ I have in mind particularly Mr Tappin's report.

Conclusion

65. It would be absurd to think that the provision of a WC and tea point as something that will solve all the challenges presently facing the church in Leigh. It will however necessarily finally resolve the vigorous and sometimes divisive debate about the issue that has gone on for a long time and must have been a distraction from the mission and ministry of the church; and I hope of course that in due course everyone will see these works as a great benefit. It is always a pity when proposals like these become controversial but there is nonetheless something positive to be said about the situation. I have been impressed by the commitment of all within the church to the building of the church itself, for what it stands for in the community, and the further things that may be achieved in the future. The objectors will at the moment consider that a mistake is being made but they too care very much about the same things, as is evidenced by the strength of their opposition. Thus I hope very much that, in due course, the mission and ministry of the church will emerge strengthened with St Bartholomew's continuing to be at the centre of the community life of the village.

PHILIP PETCHEY

Chancellor

3 July 2021