IN THE ARCHES COURT OF CANTERBURY

Sheila Cameron, QC, Dean of the Arches,

Chancellor Bursell, QC, and Chancellor Briden

On appeal from the Consistory Court of the Diocese of Lichfield

IN RE EMMANUEL CHURCH, BENTLEY

Appearances:

Mr Charles George QC : Counsel for the Appellants instructed by Lee Bolton & Lee, 1 The Sanctuary, Westminster, London SW1P 3JT

Ms L. Machin (in person) for the Parties Opponent

JUDGMENT

Introduction

1. This is an appeal from the decision of Chancellor Shand given on the 18th January 2005 in the Consistory Court of the diocese of Lichfield by which he refused to grant a faculty. The Chancellor did not hold a hearing but determined the matter upon written representations from the parties. The faculty was sought by the churchwardens as first petitioners (there being no incumbent) and QS4 Limited as second petitioner. The work for which a faculty was sought was the installation of mobile telephone aerials both on the outside and the inside of the tower of the church of Emmanuel in the parish of Bentley. A formal objection using Form No.4, as prescribed by the Faculty Jurisdiction Rules 2000, was made jointly by Mrs Ince, the chair of governors of King Charles Primary School, and Ms Machin, the head teacher, although throughout the proceedings Ms Machin has acted on behalf of both objectors. The second petitioner lodged the notice of appeal against the Chancellor's decision but is supported on the appeal by both churchwardens. Leave to appeal was granted by Chancellor Shand on 28 February 2005.

2. *Procedure on appeal*

The procedure to be followed on appeal to the Arches Court of Canterbury or the Chancery Court of York is contained in the Faculty Jurisdiction (Appeals) Rules 1998. The appellant petitioners complied with the requirements of rule 7 in respect of lodging their appeal, and they served copies of the notice of appeal

on the registrar of the diocese and upon the objectors as required by rule 7 (3).

3. The diocesan registrar was then required to arrange for the display of a copy of the notice of appeal for a period of two weeks on a notice board outside the church. This was done. Next the registrar was required by rule 7(7) (b) to 'send or deliver to the registrar of the appellate court the court file maintained by the registrar of the diocese relating to the proceedings in the consistory court'. For reasons that we do not understand the file sent to the Provincial Registrar was incomplete. Some of the documentation came to light piecemeal and at a late stage in the hearing of the appeal: other documentation came to our notice only after the hearing had been completed (necessitating distribution to the parties so that they were made aware of it and had an opportunity to comment on it if they wished to do so).
4. We consider this piecemeal approach to the provision of documents relating to a petition for a faculty as wholly unsatisfactory. In the interests of justice it is important on every appeal that the appellate court has the opportunity to consider the whole file relating to the progress of a petition. It is doubly important where, as in this case, the chancellor has not held a hearing but has determined the matter on the basis of written representations alone.
5. If there is any general uncertainty about the meaning in rule 7 (7) (b) of the words 'the court file...relating to the proceedings in the consistory court' we wish to make it clear that they mean the totality of the documentation relating to a petition notwithstanding that for practical reasons some of the items may be kept in separate folders; for example, correspondence with the Diocesan Advisory

Committee (the DAC) may be kept separate in the Registry from correspondence with the parties. All folders form part of the 'court file' generated by the petition in question and all should be sent to comply with rule 7 (7) (b). It has to be remembered that a petition for a faculty is addressed 'To the Consistory Court of the Diocese of...' The registrar is the officer of the court with responsibility for maintaining, on behalf of the consistory court of the diocese, a full and complete file relating to the petition. This includes all documentation placed before the chancellor.

6. We are confident that registrars, in general, do in fact maintain files properly marked with the name of the parish and the petition so that documents can be readily identified if there is an appeal. It is this court file that has to be sent to the appellate court under rule 7 (7) (b). Finally on this subject, we point out that rule 7 (8) gives the parties to an appeal the right to inspect the court file and to copy documents from it. This demonstrates that transparency is a feature of faculty cases. There is a corresponding expectation of orderliness in court files.

7. *The Appellant QS4 Limited*

   In June 2002 the Archbishops' Council announced that it had entered into an agreement with Quintel S4 Limited (QS 4) giving the company approved status for telecommunication installations in churches. QS4 was described as a specialist installer of aerials and associated infrastructure and a subsidiary of Quintel Group Ltd, which is a joint venture between the Government's Defence Evaluation and Research Agency and Rotch Property Group, one of Britain's leading property and investment companies.

8. The Archbishops' Council approved a model form of licence for use between a parish and QS4 but the obtaining of a faculty

remains a pre-requisite to any installation in a church. 'Best Practice Commitments' were built into the agreement and in summary these require QS4

(1) *To take a precautionary approach*

(In line with the recommendations of the Stewart Report, the standard licence will require the regular monitoring of emission levels in and around the church. A periodic report will be made to the incumbent and parochial church council);

(2) *To proceed only through rigorous controls*

(Each installation will require permission from the Chancellor of the diocese who will be advised by the Diocesan Advisory Committee. Aerials will be required to be out of sight or otherwise unobtrusive);

(3) *To hold meaningful consultation*

(Consultation material will be provided and consultation that embraces the local community and is based on up to date information will be encouraged.)

The appellants' argument is that the requirements of best practice, as so summarised, have been or will be complied with in this case and that a faculty should be granted for their scheme.

9. *Telecommunication Installations in Churches: General Principles*

The judgment under appeal has to be considered in the context of increasingly frequent applications for parts of churches to be put to secular use by the introduction of telecommunication equipment. Since the first reported case of this kind, *Re All Saints' Harborough Magna* [1992] 1 W.L.R. 1235, twelve judgments on the topic (helpfully brought to our attention by Mr. George) have been given by Consistory Courts. This figure has doubtless to be

increased significantly to reflect the volume of unopposed cases in which no full judgment was delivered.

10. The proper approach to such petitions is illustrated by *Re St. Margaret Hawes and Holy Trinity Knaresborough* [2003] 1 W.L.R. 2568. At paragraph 12 of his judgment (page 2571 H of the report) Grenfell Ch. said,

> "In my judgment, there is no reason as a matter of ecclesiastical law why a faculty should not be granted for wholly secular and commercial use of part of a church building. Each case must be considered on its own merits. It is for the petitioners to show that there is good reason why a faculty should be granted, and once the issue of whether it involves risk to human health has been raised, it is for the petitioners to satisfy the court that the grant of a faculty will not give rise to a real, as opposed to a fanciful, risk to human health. In my judgment a real risk is properly described as being measurable or, put another way, significant."

Nothing in the Canons of the Church of England conflicts with this statement of the law. Canon F15, "Of churches not to be profaned" and Canon F16 "Of plays, concerts, and exhibitions of films and pictures in churches," both deal with instances of secular use. The principle underlying these Canons is that a church building must be treated in a reverent manner, which is consistent with its sacred character. The primary consideration is that the secular use is not unseemly. Thus the public has been allowed to benefit from public clocks on church towers, and in parts of the country a light may be fixed to the church to act as a navigational aid in the interests of safety for sections of the public. The

presence of telecommunication equipment in a church can bring benefit to the public and, providing it is subject to appropriate controls, does not violate the principle in these Canons.

11. Ms Machin brought to our attention a news report, dated 3 February 2001, summarising a circular issued to the Roman Catholic Church in Italy and prohibiting the presence of mobile telephone masts in church buildings. The circular, signed by Bishop Ennio Antonelli, secretary general of the Italian Bishops' Conference, is reported as stating

"Use of church buildings for purposes unconnected with worship would violate church law and could jeopardise the fiscal exemptions and other privileges currently granted to churches by the Italian government..."

This pronouncement, assuming it to have been summarised correctly, was however made in relation to the national fiscal laws in Italy, and the principles of a system of Canon Law which do not apply to the Church of England.

12. The arrival on the scene of the present appellants as approved installers has not brought about any change in the law. Their approved status does not prevent a parish from dealing with other telecommunication providers in the free market. Whoever the provider may be, the chancellor has to decide in each case (whether opposed or not) if a faculty ought on the merits to be granted. Where a faculty is to issue, the chancellor must also consider what conditions, if any, need to be attached to it. The appellants produced the model licence (referred to in paragraph 8 above) and wish to use it at Emmanuel Church, Bentley. This licence addresses many of the issues which previously caused concern such as the duration of the agreement, rights of access to

the building, and the provision of insurance. Although chancellors are not bound by the model licence, consistory courts are likely to find its existence helpful in dealing fairly and appropriately with cases in which QS4 are petitioners. Particular circumstances relating to a church or its location may require some modification of the model licence, or the imposition of a faculty condition. Moreover, as a general rule faculties should be granted subject to a condition that the parties to the licence, together with any assignees or sub-licensees, comply with the terms of the licence. A condition of this nature will ensure that the court retains control over all aspects of the installation.

13. *'Out of sight or otherwise unobtrusive'*

We turn next to the aesthetic considerations, which were before the Chancellor.

The church of Emmanuel Bentley was built in 1956 and is unlisted. Nonetheless it is a good example of the work of the architects Lavender, Twentyman and Percy. It is clear from the DAC's deliberations that the church is regarded by English Heritage, and others, as being of considerable architectural merit. However, it has to be recognised that the church is not in fact listed. We agree with the Chancellor that the burden rests on the petitioners "to establish a case for the granting of a faculty on the balance of probabilities." That the burden of proof is upon those proposing change has been accepted in faculty cases since the statement to this effect by Lord Penzance, Dean of the Arches, in *Peek v Trower* (1881) 7 P.D. 21 at 27. The Chancellor went on to say "considerations closely analogous to the establishment of a case for necessity inevitably arise". If this was intended to be a reference to the approach to be adopted in relation to listed

buildings, as explained *in re St Luke the Evangelist Maidstone* [1995] Fam.1 at 8/9, then we would have to disagree with him. We issue a note of caution because it is important to recognise the distinction between listed and unlisted churches in dealing with them under the faculty jurisdiction. The rigorous system applied by the Church of England to all its churches results in the DAC looking carefully at proposals for change to unlisted as well as to listed churches. But having received the views and recommendation of the DAC in respect of proposed work to an unlisted church, there is no requirement to consult external bodies, such as English Heritage, nor to do the kind of analysis explained in *St Luke's Maidstone*, which is required in relation to listed churches. In this case the DAC took commendable care to arrive at an appropriate solution for the installation of the aerials within louvre openings and on the brickwork on the north side of the church. In the light of the DAC's recommendation the Chancellor found the proposal aesthetically acceptable. Ms Machin told us that no objection had been or was taken on aesthetic grounds. It is clear that QS4 has satisfied the 'Best Practice Commitment' of making the proposed aerials unobtrusive, and we find that the Chancellor was correct in his conclusion on this issue.

14. *'Local Consultation'*

The church is situated on top of a prominent hill; save for the vicarage there are no houses in its immediate vicinity, although the surrounding area is fairly densely populated. King Charles Primary School is at the bottom of this hill and across one road. Children from the school join the church for Harvest Festival and Christmas celebrations. Ms Machin told us that the previous vicar had been one of the school governors. A similar type of aerial had

been situated on a block of flats a few streets away to the west of the church but that block of flats is due to be, or has recently been, demolished. Close to this block of flats is the Bentley West Primary School. In the general vicinity there are other schools, namely, County Bridge Primary School, Jane Lane Special School and the Alan Well Nursery, Infant, Junior and Secondary School. There are apparently other schools nearby, but Ms Machin informed us that it is believed that those schools will not be affected by the proposed work.

15. The Chancellor had before him the petitioners' *Summary of Public Consultation* dated the 13th October 2004. It reads:

"A key stakeholders meeting was held on Thursday 27th May 2004. Leaders of groups at the church, local councillors and the heads of local schools were invited. The heads of the schools attended as well as some members of the PCC. A Drop-in Session was held on 10th June 2004. Two church members and three local residents attended. As the drop-in session had been held on election day and the school was closed, an additional meeting for parents was held at the school on Monday 14th June. This was attended by members of staff and up to a dozen parents. Letters of objection and a petition were received. The letters were responded to. These are enclosed. The Head teacher of the school also wrote to the Bishop of Wolverhampton. His reply is enclosed."

It was presumably in the light of that information that the Chancellor described the consultation process as commendable.

16. However, at the hearing of the appeal we were told by Ms Machin that, although QS4 sent letters addressed to the relevant heads of each of the schools that we have named, those letters were incorrectly addressed. This was accepted by QS4. Apparently, the only head teacher to receive a copy was that of Bentley West Primary School. She rang Ms Machin and Ms Machin contacted the two others. The Jane Lane School was already aware of the proposals because the school secretary is a member of the Emmanuel Bentley congregation. It was felt that the Alan Well School was too far away to be affected.

17. Letters were apparently also sent to houses in the parish giving notice of the consultative presentation but some roads were not included in this posting and the exact location of the meeting was not given. The meeting was held at the church and the presentation was well made. However, Ms Machin informed us that, when the question of inadequate posting was raised, the response on behalf of QS4 was merely: "You're here now. Does it matter?" If this was indeed the reply, we regard it as very unsatisfactory. In our view, 'meaningful consultation', as described in the Best Practice Commitments given to the Archbishops' Council, means the giving of proper notice of the date, time and place of a public meeting so that local people are sufficiently informed to decide whether or not they wish to attend. Many of those who attended did so as the result of the efforts of Ms Machin and her colleague, but others, kept in the dark due to the lack of notification, were not given the appropriate opportunity to attend and may consequently have been disadvantaged.

18. Ms Machin remained concerned and therefore arranged a meeting at her school between interested local parties and Mrs Noble from

QS4 and a representative of T4 Mobile (T4 Mobile will be a user of the aerial if a faculty is granted). A number of older school children also attended the meeting. Unfortunately the T4 Mobile representative arrived three quarters of an hour late and the meeting was therefore delayed. We do not know if some people had to leave but, not surprisingly, those kept waiting were disgruntled and gave the representatives a hard time. Ms Machin told us that the T4 Mobile representative was asked what would happen if the aerial was not placed on the church and that his reply was to the effect: "You'll get four or five others and you won't know where they are, so you may as well accept these". The petitioners are not directly responsible for the employees of T4 Mobile, but if that which Ms Machin told us is accurate (and it was not disputed by Mr Charles George QC on behalf of the appellants), the consultation process was far from commendable. Indeed, we are not at all surprised if local feeling was thereby inflamed rather than allayed.

19. It was argued that any deficiency in the consultation process had been cured by the presence of local people at the two meetings, one organised by Ms Machin. The local consultation was not required by law, so that the question of 'curing a deficiency' in a technical sense is not strictly relevant. It was 'Best Practice' which was not complied with, although we consider that thanks to Ms Machin those directly interested were in fact given a fair opportunity to hear about the proposal and to express their views. We hope that lessons will have been learnt in this case and that rigorous steps will be taken by QS4 to ensure that such communication errors do not occur again elsewhere. We consider that the deficiencies we have identified here underline the advisability of publishing details

of meetings by way of notices in local newspapers in addition to properly addressed individual notification to those living in the close vicinity of the church. If such advertisements are not placed voluntarily by petitioners in cases such as this, which may give rise particular concerns in the locality, the petitioners should be ordered to do so by the chancellor under rule 13(2) of the Faculty Jurisdiction Rules 2000.

20. *Public Notice under the Faculty Jurisdiction Rules 2000*

The Faculty Jurisdiction Rules 2000 prescribe the procedure to be followed in faculty cases. Many of the requirements are mandatory and have been devised to protect the interests of petitioners and objectors and to ensure that the consistory court operates under a procedure which is fair to all. We have concerns about aspects of the procedure followed in this case.

21. The public notice required by law was apparently displayed from the 1 to 29 August 2004 (although the Certificate of Publication is dated the 1 August, this is presumably an error for 1 September). However, the public notice is required by rule 6(1) to be displayed 'as soon as the petitioner is ready to submit a petition'. The petitioners were not ready to do this in August because the DAC did not give its certificate until 17 September 2004 (see rule 4) and the PCC did not vote in favour of the application until the 14 October 2004. Moreover, in spite of the provisions of rule 6(3)(a), the petition (which is dated 19 October 2004) was not "immediately" sent or delivered to the Registry once the public notice was filled in. Mr George told us that this latter error arose because Form C (the public notice) was sent to the petitioners by the DAC with instructions to go ahead and display it, in spite of the fact that the matter was still under consideration by the DAC. The

letter from the DAC is dated 21 July 2004. Having set out various possibilities as to the siting of the aerial still under consideration it continued:

> "While the architect and Quintel talk, I think there is mileage in you displaying the Public Notices for the aerial so that we can move forward if and when there is a green light. Would you display these as the instructions and then return the certificate you will find on the back ....?

22. Those directions from the DAC were no doubt well-intentioned but, regrettably, what was recommended was entirely contrary to law. The whole purpose of such public notice is to enable a member of the public to know what proposals are being made and then to consider whether or not to object. If the proposals are not finalised, that is impossible. No notice should, therefore, be given until a final decision has been reached as to what works are to be sought by way of faculty. In the present case the public notice merely described the proposed works as:

> "Installation of a mobile phone aerial and associated machinery within the tower."

It is true that any enquiries would have been likely to have elicited the fact that no plans had yet been finalised, but that can in no way excuse the failure properly to follow the Faculty Jurisdiction Rules.

23. Our remarks are directed to the DAC and to the Registrar and not to the petitioners, who understandably assumed they were given the correct advice as to procedure. Rule 3 of the Faculty Jurisdiction Rules 2000 sets out the duties of the DAC, which are limited to the provision of a certificate. Rule 4 enables a petitioner to submit a petition for a faculty describing the works referred to in the DAC certificate. Rule 6 requires the public notice to describe

the works in the same manner as they are described in the petition. This sequence is essential to ensure that parishioners who are interested members of the public are accurately informed of the proposed works. In this case the chronology should have made it obvious to the Registrar that the petitioners had published their notice too soon, and he should have directed that a new public notice be displayed following the submission of the petition to the Registry on 19 October 2004.

24. The Registrar appears to have overlooked the fact that the only public notice (that displayed prior to submission of the petition) gave the address for inspection of plans as that of QS4 in Malvern. This was possibly understandable on a literal reading of the Public Notice form by QS4, because a note on the form requires plans to be 'available for inspection at either an address of a petitioner or in the parish and/ or on display inside the church'. Commonsense might have indicated that the note envisages that plans should be available locally, in this case possibly at the address of one of the churchwardens who were co-petitioners. In any event, a registrar can in such circumstances rely upon rule 4(2) which requires a copy of the designs, plans, photographs and other documents to be 'displayed in the church to which the works or other proposals relate and shall remain on display until the petition for a faculty has been determined'. We trust that in future the Rules will be observed by this DAC and this Registry (as well as by all other DACs and Registries) and that QS4 will familiarise themselves with them for any other scheme of theirs in a church.

25. It is, of course, for all petitioners to ensure that the Rules are followed and this duty cannot be delegated to others. Although some petitioners may find them difficult to follow they may,

nonetheless, always "consult the registrar for advice prior to completing any petition or public notice": see rule 6(2).

26. *Objections prior to petition*

At the school meeting Ms Machin enquired how to raise objection to the proposal and was told by Mrs Noble that a form of petition of objection would be the normal way to proceed. Ms Machin was aware of the pitfalls of such petitions. Therefore, after consultation with those present, she herself drafted the heading to the petition presently before us. Its heading states that it is from the parents of children at King Charles Primary School and reads:

> "We, the undersigned, wish to object to the installation of telecommunications equipment in the tower of Emmanuel Church. As there is contradictory evidence in the public domain, with regards to health issues connected with the frequency of emissions from this type of equipment, we do not wish to expose our children (or other members of the local community) to any potential hazards or risks. We therefore feel this equipment should not be installed in the church tower."

27. Ms Machin was concerned that no fictitious names or names of persons who were not parents of the school, or (in spite of the heading) not local residents, should appear on their petition. She therefore checked each name and signed the bottom of each page. There are 172 signatories. A Mrs Hakesley also wished for another 12 to be added; this list too is signed by Ms Machin. Mrs Hakesley also wrote a separate strongly worded letter of objection to Mrs

Noble of QS4 Limited on 16 June 2004. The signed petition and Mrs Hakesley's letter were quite properly forwarded in due course by QS4 to the Registry.

28. As to general petitions of objection or memorials, the law is set out in a footnote to paragraph 1324 in 14 *Halsbury's Laws of England (4th ed.)*. This reads:

> "Supporting or opposing memorials purporting to be signed by petitioners as to which there is no proof of the signatures or evidence of the representations made to those who sign are inadmissible: *Rector and Churchwardens of Capel St Mary, Suffolk v Packard* [1927] P 289; *Re Christ Church, Chislehurst* [1973] 1 WLR 1317 at 1321."

Such proof will often be provided by way of affidavits. In this case Ms Machin authenticated the petition by checking the names and signing each page. Here the petitioners accept the admissibility of the memorial. We consider that they are right to do so. Without ourselves hearing any detailed argument about their admissibility we accept that such memorials or petitions of objection are admissible in any case (contested or uncontested) as long as they are properly proved.

29. After the meetings Ms Machin wrote to the Bishop of Wolverhampton on 9 July 2004 expressing her concerns about the quality of consultation and the unfortunate consequence that the church was being blamed for the deficiencies of QS4

> "As a governing body of a local school, which has always had a good working relationship with Emmanuel Church, we were concerned that you needed to be made aware of the local situation. We do not want to see the local church

placed in a difficult position due to no fault of its own and hope that you can offer them some support."

In reply on 29 July 2004 the Bishop of Wolverhampton referred to the misaddressed letters for which he said Mrs Noble had apologised and he went on to explain his understanding of the church's position. He stated:

"Under the licence which QS4 issues when equipment is sited in a church, the operators are obliged to measure the level of emissions if requested by the Parochial Church Council, which is not the case with mobile phone base stations at other sites. I shall certainly recommend to Bentley PCC that they do request these measurements every three months if and when the mast is installed. I understand that T-Mobile have a legal obligation to provide cover for 80% of the population by 2007, and Bentley is sure to be included in this figure. So the question is not whether, but how, this coverage is achieved. It is my understanding that, because the church is so well above the residential area of Bentley, it is a much better site from the point of view of both coverage and health risks than antennae being placed on much lower buildings or lamp posts, which would be the case if the church tower project does not go through. The antennae in the church will be hidden, and some 30 metres above the ground, and apparently the congregations within the church will be in the safest possible place. Given these considerations, I do not think that the PCC of Bentley can justifiably be accused of being irresponsible in the matter, and I will support their decision, if it is positive, with the

strong request that they require quarterly measurements of the emissions."

We can see no reason, if a faculty is granted, why the provision of such measurements both to the PCC and interested parishioners should not be made a condition of the faculty.

30. The correspondence between Ms Machin and the Bishop of Wolverhampton took place shortly before the erroneous display of the public notice by QS4 from 1 to 29 August 2004 upon which we have already commented. When a petition was eventually submitted on 19 October 2004 both the Registrar's assistant and the Chancellor noted that the public notice had been displayed during the school holidays. The Chancellor decided to give an extension of time for objections, but apparently did not consider ordering a fresh display of the public notice despite the premature display of the notice in breach of the Faculty Jurisdiction Rules 2000. The Registrar was aware of the possibility of local objections because of the signed petition and letter from Ms Machin, plus the letter from Mrs Hakesley, which had all been forwarded by QS4. Following the Chancellor's direction the Registrar's assistant wrote to Ms Machin on 21 October 2004 asking whether she was "still opposed to the installation of these aerials." There is no suggestion that a similar letter was sent to Mrs Hakesley; it was certainly not Ms Machin's duty to coordinate all opposition to the proposed works. Ms Machin replied to the Diocesan Registrar's assistant on the 1 November stating that the Governors of her school wished to object and enclosing a copy of her letter to the Bishop of Wolverhampton dated 9 July 2004.

31. On 8 November 2004 the Registrar's assistant wrote to Ms Machin setting out in detail the relevant procedures in the Consistory Court

and including an outline of the possible procedure for a decision based upon written representations. On 25 November Ms Machin phoned the Registry stating that the school governors wished formally to object and that they were willing to proceed by way of written representations. Only then was a copy of Form 4 (Particulars of Objection) e-mailed to Ms Machin.

32. Mrs Ince and Ms Machin entered formal objection on 25 November 2004. The Particulars of Objection stated:

> "We are concerned that there is still no conclusive evidence that mobile phone masts are not a potential health risk. This mast is going to be located extremely close to our school, with 170 3-11 year olds on site every school day. The site is also used in school holidays to provide holiday play-schemes for local children. We feel while there is no conclusive evidence that there is no risk we should not be putting our children's future health at risk and would wish the diocese to exercise caution, as advised in the Stewart Report. I refer specifically to the summary para 1.18 and 1.19 and would like to see the diocese to (*sic*) adopt the precautionary approach as recommended in this report."

This was acknowledged by the Registrar's Assistant on 29 November.

33. *Procedure in respect of Determination of Petition for Faculty*

It is clear that Ms Machin was asked for, and gave, her agreement to proceeding by way of written representations before she had formally become a party to the proceedings; it is also clear that at no time did she give her agreement in writing. These were both breaches of rule 26(1).

34. For the avoidance of doubt we consider it necessary to draw attention to the procedural alternatives available to a chancellor under the Faculty Jurisdiction Rules 2000. First, the chancellor as the judge of the consistory court has to be satisfied that it is appropriate to determine a petition without a hearing. This discretion exists even when a petition is not the subject of an objection (rule 17). The chancellor may consider that the petition raises issues of law or fact, which need to be examined publicly notwithstanding that the petition is unopposed. Secondly, where formal written particulars of objection have been provided in Form 4 (rule 16 (4) (iii)) and an opportunity has been given to the petitioners to submit a written answer to the objection (rule 18) the Registrar should submit the pleadings to the chancellor for directions. At this stage rule 26 (1) provides that 'If the chancellor considers it expedient to do so and is satisfied that all parties to the proceedings have agreed in writing, then the chancellor may order that the proceedings shall be determined upon consideration of written representations instead of by a hearing in court.' This is subject to the proviso that a hearing in open court is not required by law (rule 26 (1)). The reason why the chancellor should consider whether it is a suitable case to be determined on written representations before asking the parties whether they agree is that the chancellor will have no opportunity to obtain any additional information, save that which is presented on paper, and the parties could be prejudiced because they will be agreeing to forgo their right to a hearing where questions could be asked of them. The written representation procedure was introduced by the Faculty Jurisdiction Rules 1992 to provide an alternative procedure in a suitable case where the issues are clear-cut. We believe that the

procedure has been found to be useful. However, if after making an order under rule 26(1) the chancellor concludes that a hearing is desirable after all, then the order may be revoked and an oral hearing ordered (rule 26 (5)).

35. Thirdly, an additional form of procedure for objectors was introduced by the Faculty Jurisdiction Rules 2000 to deal with the situation where persons wish to have their letters of objection taken into account but do not wish to became parties to the proceedings with the prospect of having to give evidence in the consistory court and becoming potentially liable to pay some of the costs. Such persons have to be informed that they will not be entitled to be heard in open court at any hearing which the chancellor may decide to hold (rule 16 (4) (i)). Here again the overriding discretion vested in the chancellor to hold a hearing is affirmed.

36. We infer that in this case the Chancellor did order a determination on written representations after the objectors became parties, although no written direction from the Chancellor to the Registrar was among the papers forwarded to this Court. On 9 December 2004 letters were sent by the Registrar's Assistant both to the Churchwardens and to QS4 requiring them to

"submit to the Court and serve upon the party opponent within 21 days a written statement of any representations you may wish to make in support of the petition".

(This, however, was only in partial compliance with rule 26(2)(a) as no mention is made of evidence to be relied upon by the petitioners.)

37. On 15 December 2004 QS4 wrote to the Registrar with a response to the Particulars of Objection; this was countersigned by one of the churchwardens and copied to Ms Machin. In this letter they set

out how QS4 intended to comply with the precautionary approach recommended by the Stewart Report and stated that the beam of greatest intensity would not fall on the school grounds. Ms Machin responded on the 5 January 2005 stating:

> "QS4 make reference to Paragraph 6.37 of the Stewart Report. The phrase "The balance of evidence to date suggests" does not give us surety in our minds that the health of our children may not be being put at risk by placing the mast at Emmanuel Church. This is reinforced by the penultimate sentence in that paragraph which states that "continued research is needed". If the Stewart report felt it was safe to install these items of equipment it would not be recommending further research. While further research is undertaken to remove any queries of risk to our children's health and future, the location of these masts near to schools should not be allowed to occur, whatever the intensity of output. We therefore ask the Diocese to withhold permission for the mast to be installed at Emmanuel Church, Bentley until we can be given **positive reassurance** that our children's health **will not be affected** rather than the **balance of evidence suggesting** that our children's health **may not** be affected." (original emphasis).

There is no suggestion in the documents before us that Mrs Hakesley herself was ever asked whether she wished to "leave the chancellor to take the letter of objection into account in reaching a decision without [her] becoming a party in the proceedings": (see rule 16(3)(a)), although the Chancellor directed that her letter was "acceptable" despite the fact that it was not written within the prescribed timescale (Registrar's letter to Ms Machin dated 8

November 2004). We regard it as doubtful whether that letter should have been taken into consideration by the Chancellor at all.

38. *The Judgment*

In his judgment the Chancellor found that QS4 had established a commercial case for placing an aerial on the church and that the parish had made out a case of need, although he said it "has not been properly articulated" (which we would attribute, certainly in part, to the deficiency in the procedural steps followed in this case). These findings are of importance when considering the matters which influenced his decision.

39. The Chancellor proceeded to identify three "potential objections." He decided in favour of the petitioners on the first and second but against them on the third. The first was an aesthetic and architectural issue upon which he accepted the recommendation of the DAC, and which we have already found complied with the Best Practice Commitment given to the Archbishops' Council (paragraph 8 above). The second potential objection was the issue of "objective health and safety risks". Here again the Chancellor found in favour of the petitioners. He recorded that the objectors were arguing that there is "no conclusive evidence that mobile phone masts are not a potential health risk" and quoted the request contained in Ms Machin's letter of 5 January 2005 for "positive reassurance." Having pointed out that QS4 installations use the precautionary approach, that the beam of greatest RF intensity would not fall on the school grounds and that "concerns can be met by an insistence on quarterly measurements of emissions" he concluded that "all else being equal" he would have "felt obliged to grant a faculty". We observe that his finding is consistent with QS4

having complied with the Best Practice Commitment given to the Archbishops' Council in relation to the precautionary approach (paragraph 8 above).

40. The third potential objection related "to a more subjective perception of hazard and its relation to the duty of the parish church (as opposed to QS4) to give primacy under the Faculty Jurisdiction Measure to mission (coupled with worship). This is a factor of great weight also for this Consistory Court". It was on the basis of this factor that he decided to refuse a faculty, having concluded "that for a parish, in the face of strong local opposition to permit the installation of an aerial in close proximity to a school, raised pastoral issues which go far beyond the commercial consideration of this case. I have already commended the parties opponent for their moderate and reasoned arguments. This cannot conceal, however, the depth of feeling locally against this proposal. As one lady put it, "Why not do us a favour and demolish the church, as very few people make use of it." To provoke this sort of response can only undermine the prime objective of the mission and worship of a church which, I fully understand, is already facing huge and demoralizing problems."

41. Before proceeding to consider the substantive grounds of appeal we think it necessary to comment in general on this third issue on which the Chancellor based his decision. It was in fact a matter that had never been raised by Ms Machin and which, therefore, had never been addressed by any party. The Chancellor had made findings in favour of the petitioners but then decided against them on this new issue. The petitioners might well have wished to challenge the statement of Mrs Hakesley that 'few people use [the church]'. In our view, if the Chancellor intended to consider such

a new argument based upon matters not addressed by the parties, it was incumbent upon him at the very least to warn the parties and to ask if they wished to make further representations. Indeed, in the interests of natural justice in this case the better procedure would have been a hearing in open court: see rule 26(5).

42. *Grounds of Appeal*

In his outline submissions Mr. George refined the appellants' grounds of appeal into three propositions. His first criticism was that, in referring to "the duty of the parish church to give primacy under the Faculty Jurisdiction Measure to mission (coupled with worship)," the Chancellor misdirected himself in law. This criticism is well founded. Although the Chancellor referred to the 'Faculty Jurisdiction Measure,' we read this as a reference to Section 1 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 which provides,

> "Any person or body carrying out functions of care and conservation under this Measure or under any other enactment or rule of law relating to churches shall have due regard to the role of a church as a local centre of worship and mission."

This section does not impose a legal 'duty' upon a church. Further, it is a misconception to treat the section as applying to the jurisdiction of the chancellor in the consistory court (as Grenfell Ch. suggested in *re St Margaret's Hawes Green* [2003] 1 WLR at paragraph 4, p.2570). The section applies to those discharging a function of 'care and conservation,' such as DACs and the Council for the Care of Churches, as this Court made clear in *re St Luke, Maidstone* [1995] Fam. 1 at p. 7. So far as chancellors are concerned, this Court said in that case (at p.7)

"in the absence of words expressly limiting the wide jurisdiction long enjoyed by chancellors section 1 cannot be said to apply to chancellors since they are not persons carrying out functions of care and conservation. Rather, in carrying out their functions under the faculty jurisdiction, the chancellors are to 'hear and determine..... a cause of faculty' (see section 6 of the Ecclesiastical Jurisdiction Measure 1963)'. This means looking at all aspects of a 'cause' and exercising the Court's discretion in a fair way.

43. It is, of course true that the primary purpose of a church is for the worship of Almighty God, and that the Church as a whole, and thence the local church, has a missionary role but this does not arise from a legal duty imposed by any Measure. The wording used by Chancellor Shand gives the impression that he was testing a "subjective perception of hazard" against a legal duty and this was unfortunate and incorrect. A chancellor is required to consider the arguments for and against a proposal assessing the weight of the case for the petitioners and the objectors. In well known terms this necessitates a 'balance of opposing considerations which are involved in the exercise of a judicial discretion' (see Lord Penzance in *Nickalls v Briscoe* [1892] P. 269. 283). Because he apparently started from the wrong premise we have concluded that that this led the Chancellor to attach disproportionate weight to the "subjective perception of hazard" on the part of the objectors and this resulted in an erroneous evaluation of the evidence, as we shall point out shortly.

44. Mr. George's second criticism is that the Chancellor took into account a factor, namely the scientifically unproven concerns of local residents about health risks, which he should have treated as

irrelevant. He argued that the description of the objections as "reasoned and moderately presented" did not alter the fact that the Chancellor had already found that there was no "objectively established risk." This then left the question of "public concern," and Mr George took us by way of illustration to a number of cases in planning law where the courts have considered the question of whether unjustified public concern can be a material planning consideration.

45. Because of conflicting views expressed in the Court of Appeal by differently constituted courts (See *Gateshead Metropolitan Borough Council v. Secretary of State for the Environment* [1994] 1 P.L.R. 85 as contrasted with *Newport Borough Council v. Secretary of State for Wales and Browning Ferris Environmental Services Ltd.* [1998] Env. L.R. 377, and *West Midland Probation Committee v Secretary of State for the Environment and Walsall MBC* (1998) 76 P & CR 589 where the conflict of these authorities was recognised but not resolved) Mr George had some difficulty in extracting any definitive principle from the various decisions cited to us. However, he later cited the case of *N. Smith v First Secretary of State and Mid-Bedfordshire District Council* [2005] EWCA Civ. 859 (21 July 2005) where the Court of Appeal, on the subject of 'material consideration,' drew from the *West Midlands* case the conclusion that

> "fear and concern must be real, by which I would assume to be required that the fear and concern must have some reasonable basis, though falling short of requiring the feared outcome to be proved as inevitable or highly likely."(per Buxton LJ at paragraph 9).

Mr George relied upon this passage in support of his argument that the objectors' concern in the present case was not a material consideration or, alternatively, it was given undue weight by the Chancellor.

46. Whilst we note this latest dictum on fear and concern as a 'material consideration', we do not consider that it would be appropriate to incorporate a concept of 'material consideration' into the deliberations of the consistory court, since that terminology has a special function in planning law and the two jurisdictions should not become confused. The wide-ranging role of the consistory court, which we have referred to above, enables a chancellor to take account of concerns expressed by objectors. Provided they have some relevance to the issues before the court and are not merely fanciful, it is for the chancellor to make an assessment of their weight in each case.

47. Mr George properly drew our attention to the Government's policy on telecommunications as contained in PPG8. It was the Government, which instigated the production of the Stewart report into the health effects from the use of mobile phones, base stations and transmitters. Consequently PPG8, encapsulating the Government's approach to telecommunications and health, is relevant when the subject of possible health implications is raised in the consistory court in relation to a petition for a faculty involving telecommunication apparatus. The Appendix of Supporting Guidance in PPG8 reminds us that

> "Modern telecommunications are an essential and beneficial element in the life of the local community and in the national economy. Much of the telephone network is, of course, long established. However, the growth in the UK mobile

communications sector over the past 15 years has been remarkable. New communications technology has spread rapidly to meet the growing demand for better communications at work and at home, in business, in public services and in support of electronic commerce" (paragraph 1).

The Appendix goes on to explain that the Government's policy is

" to facilitate the growth of new and existing telecommunications systems whilst keeping the environmental impact to a minimum. The Government also has responsibility for protecting public health" (paragraph 5).

In relation to health and public concern about mobile phone base stations the guidance explains that

"In the Government's view, if a proposed mobile phone base station meets the ICNIRP guidelines for public exposure it should not be necessary for a local planning authority, in processing an application for planning permission or prior approval, to consider further the health aspects and concerns about them." (paragraph 98)

48. Chancellor Shand did not refer to PPG8 nor to *In re St Margaret's Hawes* where Grenfell Ch. heard expert evidence in relation to risk to health from radio waves from the three cross-polar antennae to be installed behind louvres in the church tower. Importantly, the two experts representing the petitioners and the objectors agreed that " there is no risk to health from thermal effects of radiowaves transmitted from a telecommunications antenna" (paragraph 24). Whereas one expert adopted the Government guidelines, the other argued that there should be lower levels "unless and until it can be

shown that there is no risk of non-thermal effects from radiowaves." As Grenfell Ch. noted this meant that "if Dr Hyland's theories are right, then nothing short of a complete ban on the use of mobile telephones would suffice" (paragraph 52).

49. The objectors in this case are effectively asking for a ban on any installation at Emmanuel church until it can be shown that there is no prospect of any risk from radiowaves at all. Whilst the concern of parents to protect their children is natural, we cannot overlook the fact that it is not possible to eradicate every element of risk before introducing some new feature into modern life. Technological advances have resulted, for example, in high performance cars, aeroplanes and sophisticated forms of medical or surgical treatments, which all carry an element of risk, but their advantages are generally regarded as outweighing any risk of injury or death which can come from their use. Here, as Chancellor Shand recorded in his judgment, QS4 complied with the Stewart report's recommendation. The evidence before him in Mrs Nobles' letter, dated 9 November 2004, was that "the beams of greatest intensity do not fall on the school grounds and that RF (radio frequency) levels are all well below the ICNIRP standard."

50. We agree with Grenfell Ch that "in the absence of compelling evidence of a real risk to human health as a result of transmitting radiowaves up to the levels set by the United Kingdom Government in their adoption of the ICNIRP guidelines, it would be wrong to adopt lower guidelines for a base station just because it happens to come under the jurisdiction of the consistory court in addition to planning requirements" (*In re St Margaret's Hawes* at paragraph 84). This applies with equal force to the suggestion that a faculty should be refused because of concern (however genuine)

about the possibility of a health risk, which cannot be substantiated in any way by evidence. Chancellor Shand referred to the use of mobile phones by children, which is a different point from the location of aerials, as he made clear. This topic was not of assistance on the issue before him. The question which he should have considered was whether in view of his findings in favour of the petitioners there was any reasonable ground demonstrated by evidence for refusing to let them have a faculty. We can find none and we consider that he misdirected himself in attaching so much weight to "depth of feeling locally."

51. Although the Chancellor mentioned the point, drawn to his attention by QS4, that "concerns can be met by an insistence on quarterly measurements of emissions," he apparently did not attach weight to this in his judgment. He did not mention any of the provisions to this effect in the model licence agreed with the Archbishops' Council and to be used by QS4 if a faculty is granted. We consider that Clause 6 of the licence is sufficiently important to justify quoting it in full. It reads

'Direct Monitoring of emissions

6.1.2. The Grantee shall:

(a) without prejudice to clause 6.1.1.comply with and oblige its authorised licensees to comply with all Legal Obligations and recognised industry standards regarding the notification and measurement of electromagnetic emission levels in the vicinity of telecommunications apparatus;

(b) (if requested by the Incumbent and Council but not more than once in any period of three

months) carry out direct radio frequency emission measurements in the vicinity of the Equipment and the Building and report to the Incumbent and the Council the results of such measurements; and

(c) co-operate with any body appointed by or on behalf of the Incumbent and the Council to monitor such emissions, and comment on the results of any such monitoring to the Incumbent and the Council.

6.2 The Grantee shall immediately notify the Incumbent and the Council if it becomes aware that radio frequency emissions from the Equipment are (or for any period during the term of this Licence have been):

6.2.1 in excess of the manufacturer's recommended level; or

6.2.2 at a level that would cause the Grantee to be in breach of its obligations in clause 5.1.6."

52. Clause 5.1.6 of the licence calls for compliance both with current safety standards and, for the future, with any more stringent requirements, which may be imposed in the light of further research. These obligations are of importance. The arrangements for direct monitoring in clause 6.1.2 enable the parochial church council to maintain an independent check on the level of radio emissions. Mr. George confirmed, on instructions from the appellants, that once the relevant information had been passed to the parochial church council it would be in the public domain and might be shared with other interested parties.

53. Although they fall short of the virtual guarantee of safety sought by Mrs Ince and Ms. Machin, these safeguards offer reassurance that a close check will be kept on the use of the QS4 aerials on the church to ensure that they comply with standards set from time to time by the bodies which are expert in these matters.

54. We now turn to the third ground of appeal, which was that the Chancellor attached undue weight to the level of local opposition, the existence of which in his view was likely to undermine the mission and worship of the church. We have already stated earlier in this judgment that in this respect we consider that the Chancellor made an erroneous evaluation of the evidence. He did not explain how he weighed the case for the petitioners against that of the objectors at the last stage in his judgment. For the petitioners he had evidence that

- there would be a beneficial and steady income stream, of at least £6,250 per annum for a period of 20 years, which would be derived from the licence. For a church facing financial problems, and struggling to pay off its arrears of diocesan quota, such an additional source of income would inevitably be welcome. Weight should have been attached to the fact that improved financial health in relation to the substantial costs of maintaining the church would enable its role of worship and mission to be enhanced;
- there would be benefit to the local community in (a) providing the means of improving the quality of transmission, and (b) in positioning the aerials on the church tower rather than on much lower buildings or lamp posts (as was pointed out by the Bishop of Wolverhampton in his letter of 29 July 2004 to Ms Machin)

- there was substantial support for the proposal as demonstrated by the supportive resolution of the eighteen strong parochial church council and the absence of opposition from the parishioners, some ninety in number, who were registered on the electoral roll. The Chancellor had before him an e-mail dated 16 December 2004 from the Archdeacon of Lichfield, who was also acting as Archdeacon of Walsall, in which he said that "many of the congregation live very close to the church and expressed no concerns themselves for the siting of this equipment." Regrettably this e-mail was not disclosed to the parties as it should have been in accordance with the principles of natural justice (see *Bow Spring (owners) v. Manzanilol II (owners)* [2004] 4 All ER 899 at paras 57-58 where the Court of Appeal stressed "the need for the court to know, before it reaches a conclusion, what the parties have to say about the issues and the evidence which goes to them"). However, we directed disclosure of this e-mail and invited the parties to comment on it if they wished to do so, and we believe that this cured any injustice that might otherwise have been done;
- in response to the chancellor's request for information regarding the pastoral implications of the proposal and whether the parish had taken full account of these, the Archdeacon in the same e-mail gave a supportive answer saying "My enquiries seem to reveal that the parish honestly believes that it is not only finding a source of income, but also providing a service to the community by taking the mast away from most of the population! In saying that, because the church is in a relatively isolated position, it is further

away from people's homes, albeit somewhat nearer to the school than the radio masts formerly were, on top of the block of flats. The frustrating part for the parish is to witness members of the school coming in and using the facilities and yet also feeling free to use their own mobile phones on the church premises".

55. By contrast the grounds of objection, even though expressed in moderate terms, did not receive the close analysis which the circumstances demanded once the Chancellor had concluded that the objectors' case was not made out on scientific grounds. It became clear from Ms. Machin's submissions to us that the flawed consultation process had engendered a lack of trust in the proposals and provoked much of the opposition to them. The opposition was thus directed as much, if not more so, to QS4 and T Mobile than to the church. The Chancellor would have heard this if he had asked for further submissions from the parties.

56. As to the letter from Mrs Hakesley (even if procedurally he could properly take it into account) he did not assess it in context. She expressed concern that the introduction of the aerials would affect the value of her property and then went on to make the comment quoted by the Chancellor about demolition of the church "as very few people make use of it". Viewed objectively, Mrs. Hakesley's reaction, borne of personal grief arising from the recent loss of relatives, did not carry matters further. Neither is there evidence that Mrs. Hakesley's isolated letter was representative of local feeling generally.

57. We are satisfied that when weighing the opposing arguments the balance comes down firmly in favour of the appellants.

Conclusion

58. For the reasons we have already given we have concluded that on a proper evaluation of the evidence the Chancellor should have exercised his discretion in favour of the petitioners and granted a faculty. Consequently, as his decision was based on an erroneous evaluation of the facts taken as a whole this court is justified in setting it aside in accordance with the well known principles in *re St Edburga's Abberton* [1962] P. 10.

59. Accordingly, the appeal is allowed and we direct that a faculty be issued out of the Consistory Court of the Diocese of Lichfield, authorising the minister (if in post) and the parochial church council to enter into the licence agreement, as amended in one respect, and permitting the appellants thereafter to proceed with the installation and use of the apparatus. The proposed terms of the licence are appropriate to the requirements of the parish, save that in clause 3.1.3 (a), which concerns the appellants' rights of access to the church, Ascension Day should be added to the list of holy days excluded from the usual ambit of those rights. The licence must be amended accordingly. Subject to this amendment of the licence the faculty will be subject to the following conditions:-

    i. all parties to the licence and any assignee or sub-licensee thereof shall observe and perform its requirements as if they were conditions of the faculty;

ii. the parochial church council shall exercise their right under clause 6.1.2(b) of the licence to receive reports at three-monthly intervals of direct radio frequency measurements, and shall communicate the contents of such reports to the parties opponent and any other person in the parish requesting them.

60.Finally, we express our appreciation to Ms Machin for the clear and helpful way she presented the case for the objectors who could not have been better represented, and to Mr George for his helpful presentation for the appellants, including his assistance on matters of law and procedure.

61.The Appellants will pay the court costs including correspondence fees for the Registrar and the expenses incurred by the Court.

Dated 22 November 2005