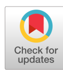

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COMMENT

In defence of the Chancellor: a personal perspective

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Introduction

The origins of this comment lie in Charles George KC's article: 'Do we still need the faculty system?'[1] which came towards the end of his tenure of office as Dean of the Arches and Auditor (2009–2020). George himself acknowledged that his conclusion, namely that a no-holds-barred review of the faculty system would now be appropriate, might come as 'rather a surprise' and that some might have expected his answer to his own question to be in the affirmative: namely, that *we do* still need a faculty system.

The article gave me considerable pause for thought.[2] Despite the explicitly defensive title of this comment piece, I agree entirely that the ecclesiastical jurisdiction – the faculty jurisdiction – has no right to be shielded from review and nor should it bask confidently in the warmth of self-appreciation. The survival of any institution depends upon its ability to adapt and renew. Everything around it, including the people that it serves, must be ready to adapt to a changing world. This is a personal perspective on the debate.

It is important to reflect on these issues, not least in light of the issues surrounding contested heritage, which has resulted in direct criticism of the faculty system by people inside and outside of the Church: the *casus belli* in the ecclesiastical division was one particular case surrounding the fate of the

[1] C George, 'Do we still need the faculty system?' (2020) 22 Ecc LJ 281.

[2] It came as possibly less of a surprise to me than to others that Charles had asked this question. Apart from the kindness and encouragement Charles has given me personally, and the help and support he has given to all of us despite an incredibly heavy workload, what has always drawn me to him is his astonishing intellect combined with an equally extraordinary modesty and humility. Anyone that has ever sat on a committee or working party with him will recognise my picture. He sits quietly most of the time listening carefully until his opinion is sought. He raises a finger and will say 'just one small point' and will then mention the single most vital thing that we had all collectively not considered. His mind is eternally curious and meticulously analytical. As I say, therefore, I was not surprised.

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memorial to Tobias Rustat in the chapel of Jesus College, Cambridge[3] and, more recently, the contributions of Professor Mike Higton[4] and Janet Berry[5] in the *Third Biannual Report of the Archbishop's Commission for Racial Justice*.[6]

The reach of the court

To outsiders who have never heard of the consistory court, except perhaps distantly from an almost forgotten history lesson or perhaps from a piece in *The Telegraph* about an outraged chancellor, petitioner or objector; their first encounter with the system can be quite a shock. It may occur because of responsibility for a wall that is partly on consecrated ground; or involve someone who confuses the right to burial in a churchyard with a right to have any kind of memorial or inscription created and to place anything upon it, or a family wishing to exhume the remains of their loved ones to be transported to a new location when they move house – what some of us call a *Pickfords* exhumation.

Even those who are better acquainted with the existence of the court, may not understand its reach. That rather battered piece of communion plate which turns out to have been created in the reign of Elizabeth I and is too valuable for a cash-strapped rural parish to keep in the church itself but which cannot simply be sold to pay for a kitchenette in the south aisle without the court's permission. Or the introduction and removal of items from churches that churchwardens thought, with the time-honoured excuse, 'did not require a faculty'.

In his article, George illustrated that in some ways the powers of the consistory court have actually grown over recent years, in contrast to the sharp contraction of the jurisdiction that occurred, particularly in the Victorian era, and more recently with the removal of clergy discipline from its reach. He cites two examples of this growth:[7] buildings licensed for public worship by a diocesan bishop which come under the jurisdiction of the court whether they are consecrated or not and, since 1991, the power of the court to grant injunctions and restoration orders. Likewise, where licences are granted under faculty it is customary for disputes arising under the licence to be determined by the consistory court.

The Faculty Jurisdiction Rules, as amended in 2022, now require the Diocesan Advisory Committee (DAC) to give its opinion on the adequacy of the explanation given by Petitioners as to how due regard has been given to net zero guidance where works or proposals involve matters to which net zero guidance applies.[8]

It can sometimes prove a surprise to chancellors (or perhaps more accurately this chancellor) to discover when faculties are required. When reviewing the authorities in respect of removing items unlawfully introduced into a

[3] *In the matter of the Rustat Memorial, Jesus College, Cambridge* [2022] ECC Ely 2.

[4] M Higton, 'Revisiting the *Rustat* Case', *Third Biannual Report of the Archbishop's Commission for Racial Justice* (Summer 2023), 59–70. See also *Re St Giles, Exhall (Conradh na Gaelige I Londain intervening)* [2021] PTSR 1622; [2021] EACC 1 on a different but related issue.

[5] J Berry, 'Recent Developments in Contested Heritage', *Third Biannual Report* (ibid), 25–27.

[6] The report is available at: <https://www.churchofengland.org/sites/default/files/2023-08/rjr3_digital-final-version.pdf>, accessed 7 February 2024.

[7] George (note 1), 282.

[8] Faculty Jurisdiction (Amendment) Rules 2022, r 2.

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churchyard – a petition concerned with the removal of trinkets placed on tombstones[9] – I was struck by how strict the authorities were on the topic. In *Vincent v Eyton*,[10] for instance, military colours had been affixed as church ornaments to the walls of a chancel in a parish church. The colours had originally been granted by George III and placed in the church without a faculty. They had then been removed by a subsequent incumbent who had no idea of their history but who had noticed that they had been placed there without faculty permission. Subsequently they were restored, again without a faculty application, at a service of re-dedication attended by a large congregation including the then Speaker of the House of Commons. Then they were removed a second time. This was noticed by parishioners who wanted them replaced. Canon Eyton, by then the incumbent, refused. The consistory court of London found that they had been placed there with the approval of the original rector but without a faculty for their introduction. Once there, however, the court ruled that they could not then be removed without a faculty. The court resolved the matter by granting a confirmatory faculty for their reinstatement which Canon Eyton, who doubtless wished by then that he had never become entangled with the issue, did not oppose.

This is not an unsurprising feature of a jurisdiction that has existed for many hundreds of years. The range of the ecclesiastical courts had once been extremely wide and varied. Some of its work related to issues surrounding religious conformity, albeit what was orthodox in the sixteenth and seventeenth centuries could become heretical in a disturbingly rapid time frame.[11] Other aspects related to work which the church courts undertook that was later transferred elsewhere.

Historic malcontent

Robert Collier, the Member of Parliament for Plymouth, foamed and frothed in the House in 1853 about the iniquities of the ecclesiastical jurisdiction. The then Solicitor General commented that the abuses of the ecclesiastical courts were intolerable and could no longer be suffered to exist. Outhwaite quotes the diatribe of Mr Collier in 1856 whilst trying to bring in his own Bill:[12]

> 'At present we have 372 ecclesiastical courts in this country: episcopal, archiepiscopal, diaconal, archdiaconal, rectorial, manorial, and peculiars of every description – presenting such a grotesque and motley array as was disgraceful to the country. The characters of the judges [Outhwaite clarifies that Mr Collier later confirmed that he had meant registrars] were equally varied comprising bishops, lawyers, old women, rectors, lords of manors, colonels in the army and boys and girls, exercising their functions by deputies and deputies' deputies and with their office settled in remainder two or three deep.'

[9] *Re St Edmund, Kessingland* [2020] ECC Nor 4.

[10] *Vincent v Eyton* [1897] P 1.

[11] cf. M Ellis KC, '"Juristecture" and the regulation of normative space' (2024) 26 Ecc LJ 129–146, at 130–131.

[12] R Outhwaite, *The Rise and Fall of the Ecclesiastical Courts 1500–1860* (Cambridge, 2006), 168–169.

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Collier cited the case of *Nicholls v Remigo*[13] where the testator was found to be 'insane' in the ecclesiastical court but 'sane' at common law by the verdict of the jury.[14] Nicholls accordingly received the real property in question and Remigo the personal property. Apparently it mattered little, as the legal fees for a panoramic tour of the Victorian ecclesiastical and secular courts exhausted any actual benefit. Robert Phillimore, then the Honourable Member for Tavistock and a moderate in politics, was of the view that the ecclesiastical judicial system was capable of reform. He is known to us as the author of *Ecclesiastical Law of the Church of England*[15] and, some time after his defeat in the 1857 General Election, as the last judge of the court of the Lord High Admiral of England. The name Phillimore has a long and distinguished connection with ecclesiastical law. Collier, whose father was a member of the Society of Friends but who was tutored as a teenager by the man who became rector of St James', Piccadilly came to early public notice as a barrister and the stellar defender of a group of Brazilian pirates, securing a full Pardon for them all from an original death sentence, and himself became in turn both Solicitor General and Attorney General, ennobled as Baron Monkswell a year before his death in 1886.

So, when we consider our own time, and the great debate (now settled[16]) over whether a decision of the Chancery Court of York (headed by its Auditor) binds the Arches Court of Canterbury (headed by the Dean of the Arches) or vice versa, it all sounds rather tame by comparison, even though Collier would no doubt have delighted in telling his fellow MPs that the Dean on the one hand and Auditor on the other were in fact one and the same person.

Churches and places of worship in England

The Church of England has approximately 16,000 churches and 42 mainland cathedrals in England;[17] 12,500 church buildings are listed buildings.[18] As of 2017, 45% of all England's Grade I listed buildings are cathedrals and churches.[19] By comparison, the Methodist church had around 4,000 chapels in 2021.[20] In 2017, Historic England estimated that there were around 3,000 Roman Catholic churches and chapels for public worship[21] and although there are a small number of mediaeval churches that have returned to Roman Catholic use, the

[13] Unreported.

[14] HC Deb 7 February 1856, vol 140 c388.

[15] R Phillimore, *The Ecclesiastical Law of the Church of England* (London, 1873).

[16] Ecclesiastical Jurisdiction and Care of Churches Measure 2018, s 14A(1).

[17] See <https://www.churchofengland.org/about/our-churches>, accessed 15 February 2024.

[18] Ibid.

[19] *The Taylor Review: Sustainability of English Churches and Cathedrals* (Department for Culture, Media and Sport, 2018) 11, available at: <https://assets.publishing.service.gov.uk/media/5a829d3840f0b62305b93708/Taylor_Review_Final.pdf>, accessed 15 February 2024.

[20] See <www.methodist.org.uk/statistics>, accessed 7 February 2024.

[21] See <https://historicengland.org.uk/research/current/discover-and-understand/faith-and-commemoration/roman-catholic-heritage/>, accessed 7 February 2024.

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majority are 19th and 20th century constructions.[22] Some are, of course, striking creations. Perhaps more poignant, however, are those Roman Catholic churches built by necessity out of cheap materials. Of course, that a proportion of these churches are listed is true as it is with most denominations. The Union of Baptist Churches estimates its number of places of worship at around 2,000;[23] the United Reformed Church has around 1,200 congregations.[24]

As well as just the simple numbers, George sets out graphically why the position for the Church of England is a daunting one. I am particularly conscious of this. In 2015 in the dioceses of St Edmundsbury and Ipswich where I had the privilege to be both deputy chancellor and chancellor, respectively, only 5% of Anglican churches are unlisted and 80% are Grade I listed. Likewise, 80% of churches in the diocese of Norwich, where I am presently chancellor, and in the diocese of Ely where I am deputy chancellor, are Grade I listed. The parish churches in rural areas are often struggling financially to pay for repairs and alterations which buildings of that age will frequently demand and require; and, particularly in the smaller churches, there will be the inevitable 'fixes' and clutter that any working building will face. Parishes trying to keep churches open and to encourage people to come to the church, are forced to re-think how they can be used in the community without compromising their sacred purpose as places of worship.

The status of the Church of England as the established and episcopal church and its particular role in national life and significance in our country's history means that even in the modern age its legal structure and reach is very considerable indeed. I am, therefore, initially wary of comparison with other denominations who have neither the extent of the Anglican estate nor those special features I have mentioned.[25] Comparisons with cathedrals also have to be considered carefully; the resources and expertise they enjoy and the public expectation with regard to them is different from that of a struggling rural church, however high its listing. Footfall is also very different. Opportunities to generate money are much more restricted for churches; and as the present Dean and Auditor notes in the pages of this *Journal*, decision making for cathedrals has its own disadvantages in that it is 'not undertaken by judicial process and determinations are not accompanied by detailed reasons, meaning that they are less transparent than decisions in the secular and faculty frameworks'.[26] It is difficult to level the charge that the present faculty system lacks transparency given the growing corpus of published decisions coming fom the consistory courts.

[22] See further *19th- and 20th Century Roman Catholic Churches: Introductions to Heritage Assets* (Historic England, 2017), available at: <https://historicengland.org.uk/images-books/publications/iha-19th-20th-century-roman-catholic-churches/heag159-roman-catholic-churches-iha/>, accessed 15 February 2024.

[23] See <https://www.baptist.org.uk/Groups/220484/Who_are_Baptists.aspx>, accessed 15 February 2024.

[24] See <https://urc.org.uk/who-we-are/what-is-the-urc/>, accessed 15 February 2024. I have also omitted a number of different Christian denominations for the sake of brevity alone.

[25] cf. George (note 1), 297–298.

[26] Ellis (note 11), 144.

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The philosophy of change

I freely confess that I am a conservative with a small 'c' when considering the question of change, but I do not embrace the philosophy of simply saying 'do not mend something that is not broken'. There may often be very convincing reasons for changing something for a better alternative. There are nearly always better ways of doing things we are already doing – the Faculty Jurisdiction Rules and their regular updating being a particular example.

So, I suppose my mantra would relate more to not changing for changes' sake and not throwing out babies with the bathwater rather than sitting indolently and effecting no change until the structure of an institution or building collapses around you. Contested heritage is an example. I have not yet had a contested heritage case come before me. I accept, however, that when it occurs it can clearly be very significant and I have read with interest Chancellor Hill's[27] and Chancellor Arlow's[28] decisions as well as Teresa Sutton's thought-provoking article in the pages of this *Journal,* which faces the wider question of whether consistory courts should be asked to wrestle with decisions where the legacies of enslavement have not been, in Sutton's view, considered in a timely way by the Church of England in the first place.[29] The problem is not confined to ecclesiastical cases. The secular courts, too, have struggled in cases involving contested heritage with too great a burden of expectation sometimes being laid upon them in dealing with fact-specific situations, and with individual decisions sometimes being seen by some to form a template for dealing with all cases involving these issues.

Suggestions from any quarter as to how our training to deal with such cases generally may be more focused are always welcome. Training in respect of vulnerabilities and diversity is common throughout the legal profession. You meet it as a Recorder or judge, on the Bar Council, at your Inn of Court and in your chambers – particularly if you serve on committees related to education and training. Provided the proposed training understands properly the task that is being performed and the nature of the decision any ecclesiastical judge is being called upon to make, there are very few people who would not benefit by having their assumptions and pre-conceptions analysed, tested and, where necessary, challenged. Contested heritage has been a hugely significant topic for many people and institutions and has been increasingly in the minds of many of us for some time now.

Patterns of work

The pattern of work of a chancellor is varied. In the week before I finished drafting the lecture upon which this comment is based, I had petitions requesting alterations to a crypt, a replacement boiler, organ renovations, the re-opening of a long blocked doorway of what is originally a Saxon church, a large-scale

[27] *Re St Margaret, Rottingdean (No 2)* [2021] ECC Chi 1.

[28] *In the Matter of Dorchester, St Peter, Holy Trinity and All Saints* [2022] ECC Sal 4.

[29] T Sutton, 'Contested Heritage and the Consistory Courts' (2023) 25 Ecc LJ 171. See also A Taylor, 'The Case of the Rustat Memorial – Does *Duffield* Pose all the Right Questions?' (2023) 25 Ecc LJ 38.

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re-ordering of a very famous church, a request for exhumation following a death in tragic circumstances, new heating and lighting proposals in a Grade I listed church, a petition concerning conservation of two spectacular decalogue boards dating back to the 1730s and two proposals for licences under faculty. There were enquiries from my diocesan registrar as well as calls with the registry clerks in both of the dioceses in which I am presently chancellor. There was a request for an Additional Matters Order to be considered, and guidance sought on the temporary use of consecrated soil. That was a quiet week.

The authority of office

A diocesan chancellor is the official principal judge of the consistory court and usually the diocesan bishop's vicar general. The role is a deliberately wide one, even though the area of jurisdiction has narrowed since the mid-Victorian period; a river with a number of tributaries, some of which have been blocked off. One of the things that struck me most forcibly when I first occupied that office in Suffolk was that the chancellor is also highly visible and quickly becomes known. There is no hiding place. You discover that the moment that the local or national press takes an interest in an ecclesiastical case. The largest postbag I received was over a case which produced the headline in *The Times*, 'Church sees red over bright pink chairs'. I fear, had it not post-dated George's article, that it might have featured somewhere in it.

I feel strongly that, particularly where a very important matter is being dealt with, or the issue is contentious and emotions are raw, the authority of the office of chancellor is often a critical feature in getting the attention of various bureaucracies and of keeping order in proceedings and reassuring participants that matters are being considered with the appropriate degree of seriousness. When performing a task for the Ordinary in the office of vicar general which may include seeing, speaking to and interviewing people and compiling a report, again the authority of the office, far from intimidating people, is often key to gaining their trust and confidence because you are seen as an independent legal figure of some significance, not beholden to anyone.

This same line of thought is why I wear robes when hearing a case which involves an oral hearing in a church or public building. It would be much easier not to. In robing I am aware that I am treading a thin line between solemnity and something else. I remember a number of years ago going to a splendid church in East Anglia to hear an application for a restoration order. I had some difficulty parking and assumed everyone in the village was using the church car park to access the adjacent Sainsbury's. In the vestry I was undecided about whether to robe, but asked the vicar light-heartedly if he charged the village for the parking. He looked puzzled. I mentioned Sainsbury's and light dawned. 'No, no,' he said, 'they've all come for this, but we are not letting anyone in until 10:30. It's very important to them all'. It was also very important to the professional who had allegedly authorised something against the advice of the contractor without obtaining a variation of faculty. I put on my robes. I recently explained, in answer to a question from a psychologist at a dinner, why counsel and judges do not wear robes in some courts, whilst we do in others. He looked

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across at me and said: 'whenever we dress, we are always in costume'. This symbolism should not be under-estimated.

Is the system fit for purpose?

The need for, and drive towards, efficiency

George describes the process for determining faculty applications as 'unduly complex and cumbrous, and questionably fit for purpose'.[30] In response I think it is important to note that great strides have been taken to improve the accessibility of the consistory court's processes: the Online Faculty System (OFS) has made a huge difference both in speed of communication and in allowing petitioners to see the progress of their faculty petitions. London is not on this system for historical reasons, but I have to say that the Offline Hastings System (OHS) operates as effectively and is a tribute to the court's registry clerk, Richard Hastings. It is all a far cry from suitcases and rucksacks full of paper petitions.

It is true that the vast majority of petitions never become contested although there are a proportion of those where objectors do not wish to become parties opponent (possibly for fear of an award of costs against them in favour of the petitioners which is in fact a very remote risk) or where an amenity society or statutory consultee simply has to refuse because their time and resources have limits. In these cases, although the element of a suit between parties is lost, the objectors' views have to be taken into account by the chancellor. This may result in the petition not being granted at all or granted with amendment or conditions.

It is important also to remember that the final decision as to whether a case will be contested may not be clear until quite late on in the process. Sometimes, there is a clear clash that will never be resolved outside of an oral hearing and where, in any event, the air needs clearing. On other occasions, the calling of oral evidence is not necessary and throughout the faculty process there are efforts to seek common ground. Frequently, I read reports from consultees which make suggestions and, on some occasions, criticisms – sometimes trenchant criticisms – of the proposals which then in turn prompt a response from the petitioners. Not infrequently, after a few exchanges, sometimes fiery, amendments are made to the plans which causes the consultee in question to withdraw the opposition. Likewise, the OFS (or its equivalent in London) will contain exchanges in the form of questions from the DAC with answers from the petitioners or their advisers and all that is visible to the chancellor. With the welcome introduction of pre-consultation where appropriate there is a general desire on all sides to reach a final set of proposals that is likely to command support. Now that the Faculty Jurisdiction Rules have bedded-in, the comprehending of the rules has become much improved. There will always be unusual situations – applications for injunctions or restoration orders for example – where, because of the nature of the power and the rights with which the proposed order may interfere, the language has to include detail and technicality. It seems to me that, even if these powers

[30] George (note 1), 289.

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were reserved for the secular courts, the observance of technical detail and the application of appropriate procedures would necessarily have a similar tone.

I would be very interested to know how a system that was altered, for instance towards decision-making by a version of the DAC or some such other administrative body, would work in practice, and how its independence would be ensured. I can see in many instances that it may make little or no difference and the decision would be the same. Statistically, I most often accept the recommendations of the DAC. There are rare occasions where I may grant a faculty when its acceptance has not been recommended to me by the DAC or refuse one that has been recommended. Likewise, I may not always accept that a particular proviso to its advice should be made a condition. This is more common. Similarly, I sometimes impose conditions that were not recommended (or even mentioned) to me. A proviso may not always be able to be translated into a legally binding condition. It may simply be advice, or an exhortation, or a wish. Sometimes, I may agree that the spirit of the proviso should be placed in a condition but that the wording needs to be fine-tuned to achieve legal certainty.

Whether removing the layer of the chancellor would result in a speedier or cheaper system, given the scale of the work, is something of which I remain to be persuaded. The likely effect, however, would be to cause a collapse in the ecclesiastical judicial system. I do not see the Church paying even modest stipends to chancellors just for decisions in those areas that might stand uneasily with a replacement body primarily designed to address listed building issues – for instance the churchyard, which is by no means a small area of our work and which frequently involves cases and situations where the temperature may become raised, whether finally contested or not. Without the registrar and chancellor, legal advice would have to be obtained privately from counsel or solicitors on an *ad hoc* basis and not as part of the work covered by a stipend. At present, fees for separate pieces of work within the faculty system but outside of the stipend, such as judgments, are often waived by chancellors or levied at a substantially reduced rate given the actual number of hours spent on them.

The churchyard can be the source of a number of difficulties. There are the requests for memorials which are not permitted under Churchyard Regulations (which will still arise even after simplification and rationalisation of the various diocesan rules) or which have inappropriate inscriptions or involve the erection or placing of memorials without any kind of permission as well as exhumation requests and the depositing of all kinds of memorabilia. These cases can be acutely sensitive and sadly can involve children and babies whose deaths will have caused immense suffering to their families who may be barely able to process the tragedy they have suffered. Those are just examples but to most families and loved ones of any deceased they are of intense importance, often approached in high emotional states and grief. This is before we get to burials in wrong plots, including someone else's plot, or family feuds about who should be buried where. Many of the saddest, most moving, exasperating, bewildering and fascinating cases come from the churchyard. My personal view is that incumbents and churchwardens often welcome the removal of some of these decisions from themselves as they can imperil a pastoral relationship and cause deep and abiding ill-feeling.

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There is another advantage of having a single point of decision making. It makes the system extremely flexible when there is an emergency. Emergencies vary: they include both deliberate damage such as burglary, ransacking and vandalism of churches, and accidental crises, not infrequently connected with water and, very occasionally, with fire. Over the night/morning of 26–27 January 2023 a very severe fire broke out at St Mark's, Hamilton Terrace, a wonderful London church designed by Thomas Cundy to which over 80 firefighters were sent. Initially the fear was that the church which survived being struck by a bomb in 1941 had been utterly destroyed but, in fact, the steeple and surrounding masonry held. Nevertheless, for the vicar and the community, it was a devastating blow. If you look at it in online photographs you will see the dreadful effect of the destruction. I was contacted at 10:32 am on 27 January 2023 and had granted an interim faculty (including provision for the removal of items to places of safety) as well as permissions under section 63 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 by 11:11 am, and was, of course, kept updated. That ability on the part of archdeacons and registrars and other diocesan officers to contact chancellors (or, where appropriate) deputies for decisions that need to be taken immediately can be essential in difficult times.

Qualifications

In his article, George also raises a serious concern with clarity and brevity: are chancellors, however conscientious and well-intentioned, imperfectly equipped to deal with some of the technical and conservation matters concerning church buildings?[31] If we are, then clearly this would be a major stumbling block to our deciding them.

In posing this question I am assuming that the point really being taken by the former Dean and Auditor is that, so central is the particular expertise of technical and conservation matters, and perhaps planning law, to a chancellor's duties that it is undesirable for those who are not equipped in that way to act in this role. Combining this with an argument that a judicial decision-making role in these areas is potentially unnecessary and unhelpful and the possibility that it will also prove difficult for those not versed in the law to follow the points with any real degree of comprehension then leads to the suggestion that the present system is simply the wrong one for the task in hand.

This does seem to me to be an important issue and is properly raised. An instinctive response may be that a judge has to deal with numerous factual issues in their caseload with which a judge may have no specific expertise. All judges – chancellors included – tend to accrue highly specialist knowledge in a whole variety of different areas, from planning and conservation, through to medical and engineering principles, by the sheer passage of time and through determining an array of similar cases. Assisted by expert evidence and focused submissions, it is the role of any judge to navigate such problems and apply the relevant legal framework to the facts of a case. I am sure every chancellor can

[31] George (note 1), 290.

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think of like situations in ecclesiastical work and that will include chancellors with experience of planning law. I decided a faculty application when I first became Chancellor of London on which I had been originally appointed as an 'outside' deputy. It involved the introduction of a hybrid organ into a church with a strong musical tradition. The parties opponent were themselves distinguished musicians and expert evidence was called on behalf of the petitioners. Other than loving to listen to the organ as an instrument, I had and have no specific expertise in organ construction and had little knowledge of hybrid organs until I heard the case where I was enormously assisted by all those who did.

I am not conscious that I have ever failed to appreciate the particular issue being raised in any case involving either conservation or architectural arguments, but I accept that this may be one of Donald Rumsfeld's unknown unknowns: I am not conscious of it because I am not conscious of it.

Perhaps the key part of the question recited above is the phrase '*to deal with*'. One of the features of any legal decision making is that the judge is required to be properly equipped to deal with the legal issues involved in a case and to be able to understand the facts sufficiently to separate the relevant from the irrelevant in a large amount of material and reach a coherent and just decision. In one sense, chancellors are in a better position than secular judges, because they receive advice from the DAC which itself contains specialist advisers and assistance from bodies such as the Church Buildings Council, Historic England and the amenity societies as well as any expert witnesses called by the parties and can, under rule 13.4 of the Faculty Jurisdiction Rules 2015 as amended, call what is termed a judge's witness, whereas secular judges normally have to rely on the parties to call the expert evidence.

The possibility raised by George (citing concerns expressed by the Victorian Society) is that because of chancellors' backgrounds there is a subconscious tendency to lead them to fail to appreciate architectural arguments, thereby causing them to give too much weight to submissions on behalf of the petitioners relating to the reasons they offer justifying the need for change to the fabric of the building.[32] If this is, or may reasonably be thought to be happening, then I would welcome a detailed exposition of the evidence that supports it.[33] And any future review of the system would need to consider the following issues carefully: how often and in what circumstances is it said to be occurring? Perhaps most crucially, is it said to be happening more (or solely) amongst chancellors from one type of practising background over another? Is it absent from the alternative systems operated by different denominations if a 'like for like' comparison can be made? It is true, as George points out, that refusals of faculty in contested listed building cases remain surprisingly few.[34] But it does not necessarily follow that this is a symptom of rogue chancellors

[32] Ibid, 293–297.

[33] George acknowledges his own concern that the 'analysis of claimed need for change is generally more thorough in the case of secular buildings, leading to greater protection for secular listed buildings than is afforded by the faculty system to churches' is a 'hunch (not informed by detailed study of comparable instances)': ibid, 297.

[34] George (note 1), 296.

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failing to diligently apply the *Duffield* guidelines. It may just as equally be a sign that applications for faculties are increasingly well prepared, having been developed and refined in response to the outcome of the initial consultation stages (as required by the Faculty Jurisdiction Rules).[35]

Perhaps the point I understand least well in George's criticism is this: what is it about the particular knowledge of the specialists in this field that makes a chancellor unable to appreciate the architectural arguments when presented? Focusing the mind of ecclesiastical judges on the test that is to be applied was very successfully achieved in the well-known and leading case of *Duffield*.[36] The balancing exercise required by *Duffield* (together with consideration of whether a less damaging alternative will achieve the same, similar or sufficient benefit) is, however, still a testing process.[37] The consultees themselves do not invariably agree in the sense that one or more may object and one or more either has no observation or sees positive advantages in the proposals. If a chancellor errs and weighs serious harm to architectural or historical significance against (objectively considered) no strong need then that decision is clearly open to appeal. The stark choice in the most extreme situation posited in *Duffield* (namely serious harm to a Grade I or II* listed building with no exceptional need objectively demonstrated) is in my experience extremely rare. If it did occur, this might put me at a disadvantage when compared with a planning inspector, but given the importance of the decision, presumably I will have received advice (and considered evidence, expert or otherwise) from those who do not share my disadvantage. Should, nevertheless, an unconscious bias or weakness infect my judgment, then the case will almost certainly be important enough for it to be appealed.

There is a real danger that a sterile argument will develop characterised on the one hand by a belief on the part of amenity societies and statutory consultees that the process fails to take proper account of the significance of a building and on the other side a belief by the parishes that the consultees have insufficient understanding of their particular needs and resources.

My own experience of these bodies and societies is a favourable one. Each has its own characteristic way of expressing itself and its own focus. I find what they write and say important to the way I look at a petition, illuminating the really significant points with considerable expertise and directing my attention to the key issues.

Furthermore, there is nearly always, in fact, a great deal of sympathetic understanding from the amenity societies and statutory consultees about the needs of churches and, particularly in rural areas, their lack of resources. The problem cases are more often those that do not lie at either extreme of the significance/need curve but lie somewhere in the middle. These encompass the vast majority of the actual cases. The damage which will be caused by the implementation of the proposals in such cases is often low to moderate; a need has been identified but it is not exceptional. The most frequent pattern is that there is a degree of compromise and adjustment of plans as the petition moves

[35] cf. Faculty Jurisdiction Rules 2015, Part 4.

[36] *In Re St Alkmund, Duffield* [2013] Fam 158.

[37] cf. Ellis (note 11), at 139–142.

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forward and, if there is a sticking point, it may often be about one issue such as church doors 'forbidding and unwelcoming with cold draughts' versus 'wonderful example of its type and so much part of the church's character'. Sometimes, the decision lies with me, and I have to make a judgment as in any other case; but more often the parties come to an agreement: in the case of doors for instance, perhaps an additional glass door but situated within.

Unlisted churches

Inevitably, given the title of this comment, I have been concentrating on issues where I am urging that any review of the role of the ecclesiastical jurisdiction and that of a chancellor should be approached carefully and with caution and where what would be lost needs to be considered as seriously as what would be gained. This should not mask the matters raised by the former Dean and Auditor with which I am in agreement: including the need for a sparing and light-touch in dealing with faculty permission for unlisted buildings, although I am conscious that (1) this category will include both those buildings that are unlikely ever to be so listed unless they survive to a great age and those that *may well be listed* at an appropriate point in the future, and (2) it is not to be forgotten that the diocesan bishop has a legitimate interest in all churches that fall within the jurisdiction of the court in the diocese.

Training and widening the pool

The message about using simple language and being conscious that we may be addressing a much wider audience than ourselves was clearly well-made and I am sure can be further improved.[38] It is a point made in all advocacy training and most lawyers are aware of the fatal lure of legalese even if they do not always succeed in avoiding it. Training itself is very well delivered by the Ecclesiastical Judges Association but there can be no complacency about such training keeping pace with the issues we are encountering or the need for it to be mandatory.

Encouraging interest in our work and widening the pool of candidates for chancellorships is vital and I know it is much in the mind of the present Dean and Auditor. I was encouraged at a recent call-night in my Inn to be approached by a diverse and enthusiastic group of newly called barristers who wanted to talk about ecclesiastical law. Any drift into grandfatherly advice was checked by one of them gently making it clear that he already knew something about it and indeed had studied Canon Law. It ended by my taking him into a corner and asking his advice hypothetically about a problem I had encountered in a particular area to which he gave me a very interesting answer. Indeed, one really marked feature of my fellow ecclesiastical judges from the Dean and Auditor to the most recently appointed deputy is the collegiate atmosphere when we meet at our study days or weekends, in answering each other's queries and having pooled comments, thoughts, anecdotes and warnings via email on novel or previously unencountered points of law or procedure. Our registrars,

[38] cf. George (note 1), 290.

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clerks and staff are also exceptionally helpful, knowledgeable and, on occasion, courteously candid. I was feeling rather pleased with myself on completing my first draft judgment in 2009. My registrar was very complimentary. 'It's excellent chancellor. Very detailed! Of course, most of them won't read it and the rest won't understand it.' I took it away for further work.

Conclusion

In conclusion, I still believe that the ecclesiastical courts serve an important purpose in a number of ways and carry it out well and that, in our national church, with its extensive history, whose stewardship over exceptional and significant buildings is an enormous responsibility, the authority of the office of an ecclesiastical judge is both valuable and indeed necessary. The role of a chancellor and vicar-general brings that person into wider contact with the community and provides important and justified reassurance of independence and impartiality which is valuable not only to them but to the Church itself. Most chancellors enjoy contact with their diocesan cathedrals and are known and visible to the Church and ready to help and advise where possible. We are given enormous help ourselves by our registries and staff and by the resurgence of academic interest in ecclesiastical law thanks to scholars such as Professor Norman Doe.

Believing in the system should not and does not mean we are not alive both to potential inadequacies and shortcomings and Charles George's article is in the finest tradition of that ability to ask difficult questions about the work that we do and not to be frightened of reviewing it or, when it is justified, making changes.

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