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Ecclesiastical Buildings: Constraints and Opportunities

Charles Mynors
Barrister
Chancellor, Diocese of Worcester

This paper looks at the systems available for the control of works to churches, and considers the arguments for and against the ecclesiastical exemption from the secular system of listed building control. It also examines the principles underlying the exercise of the faculty jurisdiction in relation to works to churches, both those that are listed and others, and relates this to the most recent policy guidance from English Heritage.[1]

INTRODUCTION

It is probably inevitable that the Church (in the sense of the worshipping community of Christians in particular places) will accumulate buildings, within which they will both worship and meet for fellowship and other specific activities. The form of those buildings will vary widely between different cultures and times; and the ways in which they are used will also vary. Moreover, the more 'successful' the church, in the terms of the world at large, the more this will be so. This is not something about which to be concerned, or of which to be ashamed. It is not always practical to meet in a tent, or to rent buildings from others.

More positively, church buildings can be a spiritual resource for the Christian community – speaking of God's presence in visible and symbolic form – as well as, of course, places within which worship can take place and bases for mission. And they can be a witness to the wider community, who may have lost touch with any faith, or may at best believe that there is probably not a God. They may also be a practical resource for that wider community, as one of the few larger spaces within a particular locality.

There will be many ideas as to how – and for what – new church buildings should be designed. But, for a very large number of Christian congregations, the issue will be much more how to deal with the buildings we already have. Whether to keep them or replace them; whether to alter or extend them; whether to re-order their interior, or to rethink how they should be used.

1 This article is based on a paper delivered at the Ecclesiastical Law Society conference in Cardiff in January 2009.

However, this leads to potential problems, because various groups will have differing agendas, and we have to consider how such differences can be resolved.

With many buildings, especially (but by no means only) older ones, there may be a number of practical problems – limited or non-existent heating, faded decoration, and outdated or even dangerous wiring; poor sight lines and erratic sound systems; no space for the equipment associated with modern music; an inability to gather round the communion table instead of in rows, or to experiment with other forms of liturgy; inadequate space for meeting before and after the worship, or for children's work, or counselling, or administration; no suitable toilet or kitchen accommodation; inappropriate facilities for those who are disabled or simply less mobile; unattractive approaches on the outside; and poor signage, to name but a few. Some of these restrict the ability of the Church to continue efficiently with existing activities; some limit the possibility for fresh expressions of worship and mission.

Just as significant in practice as the challenges presented by a building itself will be the difficulties arising from the perceptions, needs and wishes of those who use it, or who feel that they have a stake in its future. The regular members of the worshipping community are those principally involved, but they may not all agree on their priorities. They will know what they like – which will probably, to a large extent, be what they know – and what they think they want. But particular people and groups within the congregation will feel more strongly about those problems that directly concern them. And some will resist all change.

As for the wider community, they may share some of these concerns. However, they may also be focussing on such issues as ensuring the maximum use of the building – both the main worship space and any associated buildings, halls and open space – and resolving problems over car parking and noise. They are also likely to have a general urge to resist inappropriate changes to what may be a familiar and cherished landmark building (even if they never enter it until their funeral), especially where it is perceived to be of special architectural or historic interest.

And, of course, everyone – both within the church community and outside it – wants someone else to maintain and manage the building, at no charge.

So how are these tensions to be resolved? And are church buildings different from any others?

THE PLANNING SYSTEM

External works

The planning system exists as one mechanism for resolving disputes of this kind, in relation to any building. Planning permission is required for the construction of any significant new building and, more significantly, for carrying

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out any works to alter the exterior of any existing one (whether of special interest or none), or to extend it, and for the making of any significant change to the way in which it is used.[2]

This applies to church buildings (including halls) just as to any other, and means that all material alterations to their exterior (and extensions) need planning permission. If the building is of any interest, almost any external work – even as trivial as new window guards – could be considered to be material.[3] Further, while there is a mechanism by which the Secretary of State can grant automatic planning permission for some relatively minor works, such as small extensions to houses,[4] no such permission applies in the case of places of worship. Permission, where required, has to be obtained from the local planning authority – generally the district or borough council or national park authority – or on appeal from a planning inspector appointed by central Government.

Planning permission is also required for building operations (such as new paths or car parking areas) in churchyards. Works to churchyard trees need to be notified to the authority if they are in a conservation area, and specifically permitted if they are subject to a tree preservation order.[5] And signboards above a certain size need consent under the advertisements regulations.[6]

Many church buildings have, of course, been 'listed' by the Secretary of State in recognition of their special architectural or historic interest.[7] Generally, carrying out works to extend a listed building, to alter its exterior or for external alterations needs listed building consent; but the ecclesiastical exemption means that no such consent is required where a listed building is in use for ecclesiastical purposes.[8] However, that is of little significance in the case of external alterations and extensions, since the need for planning permission means that the planning authority still has control over such works. Furthermore, the policy test that it must apply – to have regard to the desirability of preserving (that is, keeping safe from harm) a listed building and its special features, and the character and appearance of any conservation area – relates to determining applications for planning permission just as it would if listed building consent were required. Thus the exemption is of no consequence whatsoever in relation to external works.

2 Town and Country Planning Act 1990, ss 55(1), 57(1).
3 *Burroughs Day v Bristol CC* [1996] 1 PLR 78.
4 Town and Country Planning Act 1990, s 59(2)(a); Town and Country Planning (General Permitted Development) Order 1995, SI 1995/418, art 3.
5 Town and Country Planning Act 1990, ss 198, 211; Town and Country Planning (Trees) Regulations 1999, SI 1999/1892.
6 Town and Country Planning (Control of Advertisements) (England) Regulations 2007, SI 2007/783, Reg 6, Schedule 3, Class 2C.
7 Planning (Listed Buildings and Conservation Areas) Act 1990, s 1.
8 Ibid, s 60; Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994, SI 1994/1771.

The Court of Arches, in *Re St Luke the Evangelist, Maidstone* – its first judgment since it was reconstituted in its present form – therefore recognised that:

> Planning permission, as well as a faculty, must be obtained for any alteration or extension which materially affects the external appearance of a church, but this measure of state control has not been opposed. The Church recognises that parish churches are focal points of the community, and it is right that the state should have in mind not only the interests of the established Church but also those of the wider community.[9]

This will mean that the authority will have control over alterations to the exterior of church buildings and halls, whether listed or not, and over changes of consequence in the churchyard. In practice, this does not seem to have caused any significant problems.

Internal changes

The planning system generally does not concern itself with what goes on inside buildings, subject to two exceptions.

First, material changes of use require planning permission – which applies to church buildings just as to any others. This means that the local authority, and those whom it consults, have a significant input into any scheme that might amount to a change of use, which may affect proposals for community use of churches and halls. And it may impose conditions on any permission granted, controlling matters such as parking and hours of operation.

Second, alterations to the interior of a listed building generally require listed building consent if they affect its character as a building of special architectural or historic interest. However, this does not apply in the case of an ecclesiastical building that is in use for ecclesiastical purposes, again due to the ecclesiastical exemption. The Court of Arches, in *Maidstone*, noted that:

> The majority of churches are [listed], and form an important part of our national heritage. . . . Because of the existence of the alternative jurisdiction in the form of the faculty jurisdiction Parliament has seen fit for the past 80 years . . . to exempt churches in use from the need to obtain listed building consent for alterations.
>
> The recognition that the Church should control the internal ordering of buildings used for worship is in itself a recognition of the freedom to worship. A degree of flexibility to meet liturgical requirements is essential for effective ministry. To impose too rigid a restriction upon internal

9 *Re St Luke the Evangelist, Maidstone* [1995] Fam 1, Ct of Arches, p 5D.

> alterations is to run the risk of crossing the dividing line and interfering with that freedom. Respect for the past and for the fabric of the building has an important part to play when a decision is to be made about proposed changes to any listed building, secular or ecclesiastical, but preservation does not preclude all alteration; otherwise no listed building consent would ever be given. Whilst taking full account of the characteristics of the building, which have justified the listing, it is always necessary to bear in mind that the primary purpose of a church is for the worship of Almighty God, and the making of changes to meet the justifiable requirements of the present generation of worshippers can sometimes be the best way of securing the continuing use of the building for that purpose.[10]

In other words, the exemption is said to be necessary to enable freedom of worship. This argument seems somewhat tenuous, since all owners of listed buildings would doubtless appreciate freedom from control by the state, to enable them to use their property as they wish: it is no doubt extremely irritating for the manager of a bank that happens to be housed in a listed building to be forced to obtain listed building consent to re-order the interior. However, while that may be a perfectly legitimate criticism of the listing system, it is not a justification for excluding from control any particular category of building. Owners of listed buildings routinely seek to justify proposed alterations to them on the basis of changing operational requirements – sometimes successfully, sometimes not; there would seem to be no reason why a church congregation could not similarly seek to justify a re-ordering to accommodate changing patterns of worship. 'Freedom of worship' does not mean 'freedom to worship in any particular liturgical pattern'.

As for the wider issue of principle, it is noticeable that even the Crown itself is now subject to planning control.[11] The churches are thus the only significant bodies still outside the general planning system – even though the Church of England, in particular, is responsible for around half of all the Grade I listed buildings in the country. This is slightly surprising in view of the scriptural approach to the relationship with secular authorities, as set out by St Paul:

> every person must submit to the supreme authorities. There is no authority but by act of God, and the existing authorities are instituted by him; consequently anyone who rebels against authority is resisting a divine institution, and those who so resist have themselves to thank for the punishment they will receive. For Government, a terror to crime, has no terrors for good behaviour. You wish to have no fear of the

10 *St Luke, Maidstone*, pp 5E–6A.
11 Since the coming into force of the Planning and Compulsory Purchase Act 2004.

> authorities? Then continue to do right, and you will have their approval, for they are God's agents working for your good.[12]

That injunction would seem to extend to local planning authorities as much to the various manifestations of the Emperor Nero.

THE FACULTY SYSTEM

If the ecclesiastical exemption, however convenient, cannot be justified in the name of freedom of worship, what about the other argument – secular planning control is not needed because of the existence of the parallel faculty system? That is, after all, the way in which works to Church of England places of worship have been controlled for centuries, long before the invention of the planning system. In other words, to have two systems of control would be cumbersome, and the faculty system does the job just as well.

We must therefore re-examine the principles that govern the determination by consistory courts of all petitions for the alteration of church buildings, and in particular those that are listed.[13]

Basic principles

Many faculty petitions relating to alterations to churches come before consistory courts every year. No doubt as a result of the valuable input of the Diocesan Advisory Committees, helping parishes to refine their proposals so that they are generally acceptable, only a few of them are the subject of unfavourable observations by amenity societies or by private individuals, and only a very few result in formal objections. That in itself is noteworthy, since it is sometimes perceived that the interests of the church and those of the wider community – amenity societies and local people – are in conflict.

In this paper I focus on the more recent judgments of the Court of Arches, particularly in the *Maidstone* case. That judgment was revisited by the Court in *St Mary the Virgin, Sherborne*, but it was not overturned and is still binding, at least in the southern province – and is, in practice, equally followed in the north as well.[14] However, in view of the passage of time since those two judgments were issued – during which a number of judgments of consistory courts have appeared,[15] some taking apparently differing stances – and in

12 Romans 13: 1–4.

13 The analysis here reflects the judgment in *Re Great Malvern Priory*, handed down by post on 24 February 2009.

14 *Re Wadsley Parish Church* (2001) 6 Ecc LJ 172, Sheffield Cons Ct.

15 See for example *Re St Gregory, Offchurch* [2000] 1 *WLR* 2471, Coventry Cons Ct; *Re Holy Cross, Pershore* [2002] Fam 1, Worcester Cons Ct; *Re St Thomas Stourbridge* (2001) 20 CCCC No 39, Worcester Cons Ct; *Re Wadsley Parish Church*; *Re St Peter, Walworth* (2002) 7 Ecc LJ 103, Southwark Cons Ct; *Re Dorchester Abbey* (2002) 7 Ecc LJ 105, Oxford Cons Ct; *Re All Saints,*

view of the issue of new policy guidance relating to works to secular listed buildings, it is perhaps appropriate to go back to first principles.

The nineteenth-century cases

The starting point is generally considered to be the decision of the Court of Arches in *Peek v Trower*. This was a case relating to a relatively modest re-ordering of a church in the City of London. The Chancellor remarked that

> The grounds of opposition fall under three heads. First, that the proposed alterations are wholly unnecessary having regard to the comfort or convenience of the parishioners; secondly, that they are not in harmony with the architectural design of the church . . . but, thirdly and principally, that the expenditure of £480 on the alterations, or of any sum on any alterations of the church, is a wasteful expenditure of the parochial funds, owing to the circumstance of the diminution of the population . . .[16]

It may be noted that, although, on its facts, this was an unusual case – in that it related to a City church – the feelings being expressed were those that commonly arise in disputes of this kind, with alterations being criticised for being unnecessary, badly designed or simply too expensive. It may also be noted in passing that objections purporting to be based on the grounds of excessive cost need to be treated with a degree of caution: willingness to spend money on a project is often closely related to the extent to which that project is considered to be either necessary or desirable.

The Consistory Court granted a faculty for the works. However, on appeal, the Court of Arches firstly noted that a consistory court has an absolute discretion to grant or refuse its permission, but that that discretion is to be exercised upon defined and reasonable principles, not capriciously or arbitrarily. It then held that:

> All presumption is to be made in favour of things as they stand. If you and others propose to alter them, the burden is cast upon you to shew that you will make things better than they are – that the church will be more convenient, more fit for the accommodation of the parishioners who worship there, more suitable, more appropriate, or more adequate to its purposes than it was before.[17]

Crondall (2002) 6 Ecc LJ 420, Guildford Cons Ct; *Re* St *Mary, Longstock* [2006] 1 *WLR* 259, Winchester Cons Ct; and *Re St Mary, Newick* (2009) 11 Ecc LJ 127, Chichester Cons Ct.

16 *Peek v Trower* (1881) 7 PD 21 at 22, Ct of Arches.

17 Ibid, p 27.

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It found that there was no such justification in that case, and accordingly refused to grant a faculty.

The simple rule to be drawn from this decision is that there is a presumption in favour of 'things as they stand.' However, that is immediately qualified by the court saying that the burden lies on those promoting a proposal for carrying out alterations to a church to make the case in favour of it; it is not for those opposing it to make the case against. But another way of looking at that is to say that, although there is in theory a presumption against change, that presumption can be overturned provided that there is a sufficiently convincing justification offered in support of the benefit that will result from the proposed change. As to the nature of the benefit to be proved, this is to be that 'the church will be more convenient, more fit for the accommodation of the parishioners who worship there, more suitable, more appropriate, or more adequate to its purposes than it was before'. This is not just a test of practical utility – the addition of a beautiful monument, the replacement of serviceable but worn furnishings or the augmentation of a ring of bells might all perfectly properly be said to provide a benefit of the kind there described.

The decision of the Court of Arches in *Peek v Trower* might be said to be based on the unusual facts of the case, in particular those relating to City churches. The logical basis for it is also not entirely straightforward, in that the Chancellor at first instance found that the works would be beneficial; his decision was seemingly overturned in the Court of Arches only because of his erroneous assessment of the degree of support for them.

However, the matter was reconsidered by the Court of Arches a few years later in *Nickalls v Briscoe*, a case which concerned the insertion of a new east window in a parish church in Surrey. The Court held that the question to be asked in relation to any proposed works to a church should be:

> Is the proposed alteration an improvement? Does it render the edifice more commodious or more fit for its purposes? Or, if not this, does it add to its architectural beauty or suitable decoration? If the proposed alteration cannot be supported upon any of those grounds, those who propose it should at least be able to assert that it is supported by a very general desire on the part of the parishioners.[18]

Again, it may be noted that there is little if any distinction between alterations that are necessary and those that are 'merely' desirable. The test is simply 'will the alteration be an improvement?' The reference to general support from the parishioners – both in this case and in *Peek v Trower* – is slightly

18 *Nickalls v Briscoe* [1892] P 269 at 283, Ct of Arches.

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unclear, since it is difficult to see why there should be support for a proposal that does not amount to an improvement or confer a benefit.

Those nineteenth-century cases were of course decided long before the coming into existence of the present procedures.[19] The chancellor of each diocese is now assisted in his or her assessment of a proposal by the opinion of the Diocesan Advisory Committee, a body whose members have much experience of practical, architectural and aesthetic considerations. There now exists a system of elected church government that enables the views of the parochial church council on every petition to be known and taken into account. Furthermore, the requirement to advertise petitions, and to notify them to appropriate specialist bodies, means that there is an opportunity for other parishioners – whether members of the worshipping congregation or those living in the vicinity – and specialist groups, whether local or national, to express their views in support or opposition.

The guidelines in *St Luke, Maidstone*

In more recent times, the principles to be considered by chancellors in determining petitions for alterations to churches have been set out by the Court of Arches in *Re St Luke the Evangelist, Maidstone*, a decision relating to a scheme for the major re-ordering of a listed church building. The Court first outlined the historical background, noting the decision in *Nickalls v Briscoe*, and summed up the position as follows:

> This appeal is concerned with two potentially conflicting and, from the viewpoint of the proponents, perfectly valid arguments.
>
> i. The first is that a church is the House of God and that any alteration which is seen by the incumbent and congregation to be desirable in order to encourage and assist true worship should be permitted without outside restraint.
>
> ii. The second is that most of the churches in this land are national treasures of which the present incumbent and the present congregation are merely temporary occupiers and custodians with no right to make unnecessary or, as some would seem to argue, any alterations.
>
> As in the realm of liturgy so also in relation to church buildings it has been the wisdom of the Church of England to keep the mean between the two extremes, of too much stiffness in refusing, and of too much easiness in admitting change.[20]

19 Under the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 and the Faculty Jurisdiction Rules 2000.

20 *Re St Luke the Evangelist, Maidstone*, p 4E; list numbering added.

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It may be noted at this stage that this even-handed approach is already departing significantly from the earlier dictum that 'all presumption is to be in favour of things as they stand'.

The Court noted that, subject to the limited involvement of the secular planning system, Parliament has seen fit to entrust to the consistory courts the control of the internal ordering of buildings used for worship, and the carrying out of the necessary balancing exercise between the two views outlined above. The Court also noted that the relevant Government advice then in force indicated that a similar balancing exercise had to be carried out in relation to works to secular listed buildings.[21] After that introduction, the Court held as follows:

> we consider that in deciding upon alterations to a church a chancellor should have in mind that:
> (i) The persons most concerned with worship in a church are those who worship there regularly, although other members of the church who are not regular worshippers may also be concerned.
> (ii) Where a church is listed, there is a strong presumption against change which would adversely affect its character as a building of special architectural or historic interest; in order to rebut that presumption, there must be evidence of sufficient weight to show necessity for such a change for some compelling reason, which could include the pastoral wellbeing of the church. . . .
> (iii) Whether a church is listed or not, a chancellor should always have in mind not only the religious interests but also the aesthetic, architectural and communal interests relevant to the church in question.
> (iv) Although the present and future needs of worshippers must be given proper weight a change which is permanent and cannot be reversed is to be avoided wherever possible.[22]

It may be noted that these principles were said to be not rules of law but 'guidance'; and that they were designed to assist in any case relating to alterations to a church – whether or not it is listed, or indeed of any architectural or historic interest at all – where there are valid but clearly conflicting interests and arguments.

Works to unlisted churches

Guidelines (i) and (iii) are straightforward – and seem to supersede the judgments of the Court of Arches in the earlier cases such as *Peek v Trower* and

21 Department of the Environment Circular 8/87, para 4.
22 *St Luke, Maidstone*, p 8.

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Nickalls v Briscoe, insofar as they differ from them. They do not undermine the need for petitioners to make the case in favour of proposed alterations and to show the benefits that would arise. However, they do emphasise

i. the need to give preference to the views of regular worshippers (rather than, as in the earlier cases, simply 'parishioners' at large); and
ii. the importance of taking into account a wide range of issues – including 'communal' issues, whatever they may be.

The fourth guideline (emphasising the desirability of ensuring, where possible, that alterations are reversible) is not stated to be applicable only in relation to listed buildings – although it may be particularly relevant in such cases. In practice, many of the most successful alterations are those made with confidence and integrated seamlessly into the existing fabric of the building. But this guideline may occasionally be significant – where, for example, it is proposed to introduce an item (such as a new screen or floor covering) into a church.

The position in relation to proposed alterations to non-listed churches therefore remains that the burden is on those who promote them to show why they would be an improvement, either rendering the church more commodious or more fit for its purposes, or adding to its architectural beauty or suitable decoration – or, of course, both. The chancellor, in considering whether they should be allowed, will take into account and evaluate any representations by those in opposition (either at a hearing or, more normally, in writing). Where a proposed alteration renders a church more useful but less beautiful, or vice versa, that is a matter for careful consideration of the evidence – no doubt paying particular regard to any views expressed by the Diocesan Advisory Committee – before a balanced view is reached.

Works to listed churches

The three guidelines already considered clearly apply in the case of works to a historic church just as to any other, although the emphasis in guideline (iii) on the need to consider aesthetic and architectural interests will be particularly relevant in such a case. However, the Court in *Maidstone* made it abundantly plain that, in relation to a church that has been listed by the Secretary of State, there is in addition a strong presumption against change that would adversely affect its character as a building of special architectural or historic interest – guideline (ii). However, there is no presumption against change as such – indeed, as the Court noted earlier in the judgment, 'it is the joy, although sometimes the sadness, of many English churches that they have undergone substantial change in most, if not all, centuries since they were originally erected'.[23]

23 *St Luke, Maidstone*, p 5B.

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It should also be noted that, although the guidelines quoted above display a clear and strong presumption against adverse change to a listed church, and consequently a requirement to prove why such a change is said to be needed, there is no requirement to prove a need for *any* change. Nor should there be – there will be many proposals for alterations that are either arguably not needed at all (such as the insertion of a new window[24]) or are only just necessary, or only necessary when considered from a certain viewpoint, or are arguably needed but perhaps not in the form or at the location proposed. Indeed, it might be difficult to argue that the introduction of under-floor heating into a mediaeval church is altogether 'necessary' in some absolute sense, since the church will presumably have been used satisfactorily for many years without it – but it may of course be highly desirable.

The reference to the need for evidence as to the necessity for a proposal thus applies only in the context of rebutting the 'strong presumption' against *adverse* change. The true test in relation to works for the alteration of a listed church is therefore to consider whether they would adversely affect its character as a building of special architectural or historic interest. If they would, it is then for the petitioners to show why they are nevertheless justified for some compelling reason – which may include the pastoral wellbeing of the congregation. So, for example, it might on that basis be possible to justify the insertion of a toilet, or the alteration of an entrance to the church to make it more accessible for the less mobile, provided it can be demonstrated that the resulting benefit outweighs any aesthetic or architectural harm involved. The situation would therefore be different depending on whether that harm is found to be severe or very slight – a greater benefit being required in the first case than the second. But there is no need to show that a particular change is in some absolute sense 'necessary'.

We must also consider what is meant by the phrase 'change which would adversely affect [the character of the church] as a building of special architectural or historic interest'. This will be a matter of fact and degree, to be determined by the chancellor on the basis of the evidence. However, under the provisions of the Listed Buildings Act 1990, which would apply in the absence of the ecclesiastical exemption, the decision-maker, in considering whether to grant listed building consent for any works, is to have special regard to 'the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses'.[25] The same provision applies in relation to applications for planning permission for exterior works.[26] Those statutory

24 As in *Nickalls v Briscoe* (to commemorate the daughter of the benefactor) and *Re St Gregory, Offchurch* (to celebrate the start of the new millennium).
25 Planning (Listed Buildings and Conservation Areas) Act 1990, s 16(2).
26 Ibid, s 66(1).

provisions are not directly applicable to the exercise of the faculty jurisdiction, but they suggest that it is appropriate to consider not just the effect of proposed works on a listed church as a whole but also their effect on any features of special architectural or historic interest that it possesses, and on its setting.

Finally, under this heading, it may be noted that in practice there are relatively few cases that raise major heritage issues of significance. Many churches are listed, but most proposals affecting them are sufficiently trivial that they would not require listed building consent if there were no exemption; or else they are either necessary or desirable, such that consent would be readily forthcoming.

It would appear to be no coincidence that the requirements in the Faculty Rules as to which petitions should be notified to heritage bodies – 'alterations or extensions that would affect the character of the church as a building of special architectural or historic interest' – are framed in identical terms to the provisions of the Listed Buildings Act as to which works to secular listed buildings require listed building consent. Diocesan Advisory Committees should perhaps be more stringent in their identification of such proposals.

However, while there is a right for the bodies notified in relation to such works to insist on an oral hearing, it is a right that is almost never exercised. That suggests that, purely pragmatically, the heritage lobby is not overly concerned about the way in which the faculty system operates in practice; and this may perhaps be some sort of justification for the exemption from secular control – although not a particularly strong one.

The *St Helen, Bishopsgate* questions

In its judgment in *Maidstone*, following the passage quoted above, the Court of Arches continued:

> In [*St Helen, Bishopsgate*], Sheila Cameron QC, Ch identified three questions to be addressed on an evaluation of the evidence:
> (1) Have the petitioners proved a necessity for some or all of the proposed works, either because they are necessary for the pastoral wellbeing of St Helen's or for some other compelling reason?
> (2) Will some or all of the works adversely affect the character of the church as a building of special architectural or historic interest?
> (3) If the answer to (2) is yes, then is the necessity proved by the petitioners such that in the exercise of the court's discretion a faculty should be granted for some or all of the works?

> We accept that those questions indicate the correct approach not only in that and this case, but also *in other similar cases*. The answer to the third question will require a balance.[27]

Regarding the order in which the *Bishopsgate* questions should be asked, this seems on reflection not to be particularly significant. There is no suggestion – either in *Bishopsgate* itself or in *Maidstone* or in *Sherborne* – that if the answer to the first question is 'no' it is not permissible to go on to ask the second question. The Court indicated otherwise in its most recent decision, in *Re St Peter, Draycott*,[28] but that was arguably *obiter*; it was certainly not justified.

Thus, if a particular proposal is found to be both unnecessary and harmful to the character of a listed church, it should obviously be refused. If it is both necessary and desirable (or at any rate not harmful), it should clearly be allowed. If it is unnecessary, but desirable or not harmful, it should probably be allowed – there is certainly nothing in the *Bishopsgate* questions that prevents that. The balancing exercise referred to is thus only necessary where a proposal is harmful but arguably necessary: that is the third of the *Bishopsgate* questions. But it is also of course, in essence, the second of the guidelines offered by the Court of Arches in *Maidstone*.

Thus, according to the Court in *Maidstone*, the *Bishopsgate* questions only apply to indicate the correct approach in other cases that are similar to those two. In *Sherborne*, it clearly considered that they applied also in that case. The common feature of the three cases seems to be that each related to a major, controversial proposal for works to a listed church that were said by some to be unnecessary or harmful or both. The questions, and the order in which they are asked (insofar as that is significant) thus strictly apply only in relation to such cases.

However, even if they are taken to apply more widely – for example, to all works affecting (for better or worse) the character of a listed church – the *Bishopsgate* questions add nothing to the key principle, as set out in the second of the guidelines in *Maidstone* itself, namely that there is a strong presumption against adverse change. I am also mindful of the wise observation of McClean Ch in *Re Wadsley Parish Church* that 'I do not think that it would be helpful to develop a *Bishopsgate* catechism and so impose an unduly prescriptive framework on the balancing process chancellors must perform.'[29]

What is perhaps unfortunate, therefore, is that the Court of Arches in *Sherborne* stated that 'for listed buildings, the presumption is heavily against change'. However, the following sentence seems to make it clear that the Court was not intending to alter the law in any way; the word 'change' in that

27 *St Luke, Maidstone*, pp 8H–9B, emphasis added.
28 Unreported, 3 March 2009.
29 (2001) 6 Ecc LJ 172, Sheffield Cons Ct, at para 24.

extract should thus be read as 'adverse change': assuming that the two terms are synonymous is a common mistake, but an unfortunate one; not all change is decay. Only on that basis are the two judgments of the Court, in *Maidstone* and *Sherborne*, reconcilable. It would, after all, be remarkable if the Court were to be suggesting that it is not permissible to make changes to a listed church that are universally agreed to be highly desirable.

POLICY RELATING TO ALTERATIONS TO SECULAR BUILDINGS

The approach indicated by the guidelines in *Maidstone*, as interpreted above, also accords with policy relating to secular listed buildings. The Secretary of State's current policy is still as set out in Planning Policy Guidance note PPG15, produced in 1994 (just after the judgment in *Maidstone*), which states that 'Applicants for listed building consent must be able to justify their proposals. They will need to show why works which would affect character of a listed building are desirable or necessary.'[30] It is thus sufficient to show that works to secular listed buildings are desirable; but, if they are not, it may be possible to justify them if they can be shown to be 'necessary' – again, not in an absolute sense, but simply to a degree sufficient to outweigh their undesirability.

More recently, in April 2008 English Heritage published a document entitled *Conservation Principles, Policies and Guidance*, setting out 'a logical approach to making decisions and offering guidance about all aspects of England's historic environment', commended for adoption and application by all those involved with the historic environment and in making decisions about its future.[31] It sets out sensible guidance in relation to various categories of works, including routine management and maintenance, periodic renewal, repair, intervention to increase knowledge of the past, restoration, new work and alteration, integrating conservation with other public interests, and enabling development. This guidance, albeit expressed in somewhat abstract terms, may well prove to be of assistance to all those with responsibility for historic churches.

In relation to new works to historic buildings, the guidance states the following:

> 138. New work or alteration to a significant place[32] should normally be acceptable if:
>
> a. there is sufficient information comprehensively to understand the impacts of the proposal on the significance of the place;

30 Planning Policy Guidance note PPG15, para 3.4. PPG15 is the successor to Department of the Environment Circular 8/87, noted above.

31 *Conservation Principles, Policies and Guidance*, paras 1 and 164.

32 'Place' is defined as 'any part of the historic environment, of any scale, that has a distinctive identity perceived by people'; and 'significant place' as 'a place which has heritage value'.

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b. the proposal would not materially harm the values of the place, which, where appropriate, would be reinforced or further revealed;
c. the proposals aspire to a quality of design and execution which may be valued now and in the future;
d. the long-term consequences of the proposals can, from experience, be demonstrated to be benign, or the proposals are designed not to prejudice alternative solutions in the future.

. . .

149. Changes which would harm the heritage values of a significant place should be unacceptable unless:

a. the changes are demonstrably necessary either to make the place sustainable, or to meet an overriding pubic policy objective or need;
b. there is no reasonably practicable alternative means of doing so without harm;
c. that harm has been reduced to the minimum consistent with achieving the objective;
d. it has been demonstrated that the predicted public benefit decisively outweighs the harm to the values of the place, considering
    - its comparative significance,
    - the impact on that significance, and
    - the benefits to the place itself and/or the wider community or society as a whole.

That is, in short, alterations to listed buildings will normally be acceptable if they are not harmful and of sufficient quality; but, if they are not, they may still be acceptable if they can be shown to be necessary. That of course precisely accords with the second of the guidelines laid down by the Court of Arches in *Maidstone*.

In fact, therefore, if there were to be no ecclesiastical exemption, the policy approach would be – or should be – much the same. The only difference from the present arrangement, at least in theory, would thus be the need to go through two systems of control.

CONCLUSION

No doubt many incumbents and congregations (and, perhaps especially, churchwardens) would be delighted if there was no system of control over works to churches. But, equally, no doubt all property owners would be delighted it there was no control over works to any buildings. That is not on offer. And certainly the secular system would not be any better than the faculty system.[33]

33 See 2 Chronicles 10: 14.

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The faculty system could undoubtedly be improved – not least, for example, by radically pruning the petition form. And all control systems inevitably take time to administer – 'delay' is thus merely the perception of those who know that their scheme is perfect and who are irritated at any time being spent in consulting those who consider that it could be improved. However, the principles that underlie the exercise of the control mechanism that does exist, whether under the faculty system or otherwise, are such that it should not undermine but should rather promote the role of the church as a local centre of worship and mission.

Thus there remains, first, a duty on anyone promoting an alteration to any church, whether listed or not, to show the benefits, practical or aesthetic or both, that would result. Where there is a disagreement, the views of the regular worshippers are to be given particular weight; and alterations that are irreversible should be avoided where possible.

Second, there is a strong presumption against alterations that *adversely* affect the character of a listed church as a building of special architectural or historic interest. But there is no presumption against works to a listed church that – for example, because of their scale or their location – have no effect at all upon its character. Still less can there be a presumption against works that affect the special character of such a church beneficially – either by the removal of an existing feature that detracts from that character or by introducing a new one that enhances it. Further, in determining the effect of works, it will be appropriate to have regard to their effect not just on the building as a whole but also on any features of special architectural or historic interest that it possesses, and on its setting.

Third, where proposed works to a listed church are found to have an adverse effect on its character as a building of special architectural or historic interest, it will be necessary for petitioners to produce evidence of sufficient weight to show 'necessity' for the change. That does not mean that it is necessary to show in some abstract sense that the works are necessary, but simply that the benefit resulting from them outweighs any architectural or aesthetic harm. However, where the effect of the works is either neutral or beneficial, there is no particular need to consider the necessity for them, since there is no adverse effect to be mitigated and thus no balancing exercise to be carried out. The only reason to do so is, as in the case of any faculty petition for proposed works, in order to save a parish from unwise expenditure or other impropriety.

And, finally, it is sometimes argued that a proposal should not be allowed because there is a better way of achieving the same or similar result. However, a faculty is merely a permission; it does not require the works permitted to be carried out. The test is thus whether the works that are now proposed meet the tests outlined above (and any others that are applicable). It is therefore generally not relevant that that there might be some other proposal

that also meets those tests – either to achieve the same purpose or indeed to achieve some other purpose, said to be more important. It is always open to anyone to submit a subsequent faculty petition for a different proposal; and it would be perfectly possible for two alternative schemes, each beneficial in its own way, both to be authorised. However, it might be relevant to consider alternative proposals where it is being argued that a proposal that is harmful is nevertheless necessary – for example, it would be difficult to argue successfully that a proposal is necessary if objectors to it were able to point to an alternative means of achieving the same result that was less harmful (albeit possibly more expensive).

All of which should operate as a reminder of the need not to promote change for its own sake, but only where it can be shown to be beneficial – and who could reasonably be against that?

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