

## Re St Peter, Racton

The First Petitioner, the Venerable William Filby, Archdeacon of Horsham, in person.

Mr David Tinsley, Honorary Treasurer of the Parochial Church Council of St Peter's Racton with Lordington, for the Second to Fifth Petitioners.

Mr Berry Holding-Parsons, solicitor, of Holding-Parsons, 4th Floor, 2/3 Cursitor Street, London EC4, for the Sixth Petitioner.

Mr Marcus Trinick, solicitor, of Bond Pearce, 22 Kings Park Road, Southampton for the First Party Opponent, English Heritage.

The Second Party Opponent, the Georgian Group, did not appear and was not represented.

Mr Jonathan Goodchild for the Council for the Care of Churches.

## Judgment

1. The matter before me is one of unusual complexity with a long and involved history. This judgment is perforce more lengthy than might otherwise be the case. I should wish at the outset to thank all those who appeared before me for the care and clarity with which they presented their cases and for the open and constructive manner in which this litigation has been conducted.

### *Background*

2. The church of St Peter, Racton is a grade I listed building and lies amidst a cluster of houses in a most attractive part of rural West Sussex. It is a simple structure without aisles, whose nave dates from the twelfth century and chancel from the thirteenth with details of the later Middle Ages and onwards. The church is well maintained as is the churchyard which surrounds it. The electoral roll numbers some 35. The church is a credit to the incumbent, the Parochial Church Council and the inspecting architect. The listing citation is composed with a brevity which drew strong critical comment during the hearing from Mr David Brock of English Heritage. Barely five lines in length, it concludes with the statement 'three good monuments'. The monuments lie on the north side of the chancel and are of Hugh Gounter (early sixteenth century), Sir George Gounter (died 1624) and Sir Charles Gounter Nicoll (died 1733). It is with the latter of these that this case is concerned.

3. The memorial to Sir Charles Gounter Nicoll is a fine piece of work. It is built up of variously coloured marbles from white to dark grey. It consists of a pedestal with a lengthy Augustan inscription supporting a small casket on which stands a bust. The architecture of the monument is prolonged behind the bust to frame it and to support an achievement of arms. Sir Charles' helm and gloves hang over all from staples in the rafters. The exact date of the monument is unknown, as is the identity of the designer although it strongly resembles the designs of the architect James Gibbs, responsible for monuments in Westminster Abbey and elsewhere, as well as the churches of St Mary-le-Strand and St Martin-in-the-Fields.
4. The carver of the bust is also unknown. Since publication of the Sussex volume of *Buildings of England* (Nikolaus Pevsner and Iain Nairn, 1965), it has been supposed that he may have been Peter Michael Rysbrack. The more detailed investigation prompted by this case suggests that the sculptor was more likely to have been not Rysbrack himself but someone familiar with his work. Marjorie Trusted, Deputy Curator in the Department of Sculpture at the Victoria and Albert Museum, from whom I heard, considered that the bust was most probably carved by Sir Henry Cheere, a contemporary and probably friend of Rysbrack who was acquainted with Sir Charles Nicolls' daughter. I accept this as the best attribution.
5. In the early part of 1998 the parish began to feel concerned about the security of the bust. It is free-standing and not secured to the casket otherwise than by its own weight. A valuation from Christies' indicated that it was worth in the order of £100,000, such valuation being predicated upon a Rysbrack attribution. With the knowledge and a degree of encouragement from the Archdeacon of Horsham the bust was removed to a place of safety in the vault of the National Westminster Bank in Chichester. At the same time a replica bust of fine quality was fabricated in resin by Plowden and Smith Limited of 190 St Ann's Hill, London. Such replica was duly placed on the casket. The driving force behind these matters was the late Sir Michael Hamilton who, as Fifth Petitioner, took on the responsibility of pursuing the petition until he became too ill to continue. The cost of the replica was borne by Sir Michael whose work and witness in the parish was remembered in prayer in the course of the hearing.
6. I am in no doubt that the parish acted with the highest of motives and in consultation with the Archdeacon throughout. They were concerned with the theft of so valuable an artefact. They sought and obtained the consent of English Heritage for the substitution of the bust, although English Heritage later revisited that decision. Equally they were mindful that the sale of the bust would generate a large capital sum which, properly invested, would provide a fund from which the cost of repair and maintenance of the fabric of the church could be met. This parish has consistently taken a responsible approach to its finances, has paid its diocesan contribution in full, and has sought to make provision for the increasing demands which will fall on them in the years ahead.

7. However, with the benefit of hindsight, the actions taken in 1998 might be considered a little less wise than they then appeared. First, the doubts as to whether the bust is a true Rysbrack calls into question the valuation, as to which I heard evidence. Secondly, and more significantly, the parish learned that legal title in the bust might lie not in the incumbent or the Parochial Church Council but in the heir at law of Sir Charles Gounter Nicoll. Thus any proceeds of sale on a disposal would be of no benefit to the parish.
8. Enquiries revealed that William Legge FCA, Tenth Earl of Dartmouth, is the heir and senior representative of William, Second Earl of Dartmouth who in 1755 married Frances Catherine, only daughter and heiress of Sir Charles Gounter Nicoll KB. Lord Dartmouth expressed a wish to take the bust into his own possession and place it in his London home alongside a portrait of Frances and another family picture. He therefore sought and obtained leave to be joined in the subsisting faculty proceedings as Sixth Petitioner.

*Petition*

9. Thus it was that the issues which were raised for adjudication at the hearing differed significantly from those on the face of the original petition dated 1 May 1999. My predecessor as chancellor, His Honour Quentin Edwards QC, had issued a memorandum on 22 May 1999 raising the issue of title and requiring the Georgian Group to be specially cited and the Council for the Care of Churches to be served with the papers. He issued a further memorandum on 7 June 1999. The matter was thereafter referred to me and I issued directions on 27 October 1999, 13 December 1999, 30 May 2000, 30 July 2000, and 15 January 2001. The matter came on for hearing on 25 June 2001 and was adjourned at the request of Lord Dartmouth in order that he might be legally represented, he having dispensed with the services of those previously acting for him. At the resumed hearing in the parish church on 28 September I heard evidence, the detail of which I summarise below. Submissions took place a week later on 5 October 2001.
10. The petition, in its amended form, sought a faculty confirming the removal of the original bust into a place of safety, authorising its transfer to the London home of Lord Dartmouth, and sanctioning the introduction of the replica bust in substitution for the original in the church. The positions adopted by the various parties may be summarised as follows:
  - (a) The First Petitioner, the Venerable William Filby, Archdeacon of Horsham considered the parish to be in an invidious position. He had authorised the place of safety order and encouraged the fabrication and introduction of the replica when he was perhaps not fully aware of the legal position on ownership. He took no active part in the hearing but was present during the evidence and spoke in support of the parish.
  - (b) The Second to Fifth Petitioners were respectively the Reverend Andrew Stamp, incumbent; Philip Anthony Cooper, churchwarden; Joyce Turnell, secretary to the Parochial Church Council; and the late Sir Michael

Hamilton, former churchwarden, who had died before the matter came on for hearing. They were ably represented by Mr David Tinsley, treasurer of the Parochial Church Council. They considered that the security risks were such that the original bust could not safely remain within the church and that they were agreeable for it to be removed into the custody of Lord Dartmouth whom, by implication, they conceded was the lawful owner of the bust. They were content for the original bust to be kept at Lord Dartmouth's London home where arrangements could be made for viewing by interested persons. For convenience, I shall refer to these petitioners collectively as 'the parish'.

- (c) The Sixth Petitioner, joined at his own request, was Lord Dartmouth. He asserted ownership of the bust and wished for it to be removed to his home where he was agreeable to provide access to interested members of the public by prior arrangement through his secretary. He was implacably opposed to having the bust secured to the casket by means of a stainless steel dowel as proposed by English Heritage and the Council for the Care of Churches. He expressed no view on the alternative means of fixture which emerged in the course of evidence, namely some form of glue.
- (d) English Heritage, the First Party Opponent, having at an early stage approved the substitution, now strongly objected to the removal of the original bust. Mindful of the security risk, they commended the use of a stainless steel dowel drilled into the bust and the casket to protect the bust from theft.
- (e) The Georgian Group, the Second Party Opponent, failed to serve any witness statements in accordance with my directions of 30 May 2000. Indeed its dealings in correspondence with the Registry left a great deal to be desired. The involvement of the National Amenity Societies in the faculty jurisdiction is of considerable importance and I very much regret not having had the benefit of the Georgian Group's undoubted knowledge and expertise in this instance. Equally, I deprecate the publicity given to this pending matter on the Georgian Group's website which has been perceived by the parish and the Diocesan Advisory Committee as heightening the risk of theft.
- (f) Chichester District Council, the local planning authority, noted that English Heritage and the Georgian Group had expressed expert opinion. In the light of this it did not wish to express a view.
- (g) The Council for the Care of Churches strongly opposed the removal of the original bust and, through cross-examination and submissions, raised questions as to the issue of ownership. The Council commended the insertion of the stainless steel dowel.
- (h) The chairman of the Diocesan Advisory Committee, Mr John Ebdon, supported the petition and expressed strongly held concerns with regard to the drilling of the bust.

### *Evidence*

11. At the hearing I heard from a number of witness each of whom had provided a witness statement which stood as evidence in chief. For the parish, Mr David Tinsley outlined the background to the petition and spoke of the duty of care owed by the Parochial Church Council in relation to safeguarding items of value. He explained how the church was kept open during daylight hours, a neighbour being keyholder. He referred to the breaking off and theft of two finials on another Gounter tomb and the theft of a credence table. Although the latter was subsequently recovered, replica finials had to be made and installed. He described his visit to Lord Dartmouth's home and the room where it was intended the bust be placed. He indicated that Lord Dartmouth and his staff had proved helpful and accommodating and that he anticipated that visits would be easy to arrange and execute. He produced a draft leaflet to inform visitors of how they might make contact with Lord Dartmouth, an amended version of which was submitted at the resumed hearing. In cross-examination by Mr Trinick for English Heritage, Mr Tinsley accepted that the primary motivation of Sir Michael Hamilton at the outset was fear of theft and related this to greater awareness of the artefact because of the publication of a Sussex Guide. He stated that the original bust, along with the rest of the contents of the church, had been insured for modern replacement value and not antiquarian value. He said that he had been given no indication that this was likely to change. He emphasised that Sir Michael's concern was that were the original to be stolen then it would prove impossible to make a replica, certainly not one of the quality as was produced by Plowden and Smith Limited. He also stated that were Lord Dartmouth to agree to the drilling of the bust and casket then the parish would have no objection. He dealt in some detail with the parish accounts pointing out the substantial income derived from a fête held in alternate years at Lordington House, the home of Sir Michael and Lady Hamilton. He accepted from Mr Trinick that although the demands on the parish were expected to become greater, there were no immediate income or capital concerns and that were the original marble bust fixed to the casket then the security risk and insurance consequences would be significantly reduced. He also accepted what I suspect was a statement of the obvious, namely that in an ideal world the parish would wish the original marble bust to be returned. He pointed out, what is equally obvious, namely that we do not live in an ideal world. Mr Tinsley informed me that to the best of his knowledge Lord Dartmouth has made no financial contribution to the upkeep of the church or the tombs. He said that he had not been asked to. An offer made whilst the petition was pending to pay for certain restoration works to the memorial in return for the withdrawal of opposition from English Heritage and the Council for the Care of Churches had lapsed. However Lord Dartmouth, through his solicitor, had undertaken to be responsible for the costs of the faculty application whatever the outcome.
12. Lord Dartmouth was not present to give evidence on 28 September 2001 and, on the application of his solicitor, Mr Holding-Parsons, I agreed to the introduction of his written statement, observing that it would carry less weight than had he been called and cross examined. At the resumed hearing on 5 October 2001, Mr

Holding-Parsons sought leave to re-open his case and call Lord Dartmouth. In the absence of objection from any other party I acceded to such application. Lord Dartmouth indicated that he only became aware of the existence of the family monuments in 1998 when he was contacted by Sir Michael Hamilton. He could not comment on what, if any, contact his family had had with St Peter's, Racton prior to that. He confirmed the proposed arrangements for viewing the bust were it to be removed to his London home and said that he would prefer communications to be by e-mail. He was resolutely opposed to the drilling of the bust. He indicated that even though the risk may be as little as 1%, it could result in the total (ie 100%) destruction of the bust. He also considered that fixing the bust to the casket would be likely to result in significant collateral damage to the monument were a determined thief to seek to wrench it off. He felt unable to give an opinion with regard to the use of some form of adhesive to secure the bust to the casket. He would want to explore this possibility with the advice of experts before consenting or ruling it out. It will be noted that Lord Dartmouth had not been present when this matter was canvassed with the witnesses on the first day of the hearing.

13. No other evidence -- lay or expert -- was adduced on behalf of Lord Dartmouth. An expert report from Mr Johannes Auersperg-Trautson dated 20 June 2000 had been served and was included in the trial bundle. I read it *de bene esse* and reference was made to it in the course of cross-examination of some of the other witnesses. No application was made by Mr Holding-Parsons to have the written report adduced in evidence, he doubtless making a correct judgment that its content would be of very limited probative value in the absence of its maker. Save to the extent that it was otherwise referred to in the hearing, I take no account of it.
14. The case for English Heritage was presented by Mr Marcus Trinick. He called Mr William Martin, Senior Architectural Conservator with the Building Conservation and Research Team of English Heritage. For ten years he was senior partner in Giudici-Martin Sculpture Conservation Services, responsible, amongst other things, for the stone sculpture collections of the National Trust. Mr Martin dealt with a number of points which arose from paperwork emanating from Lord Dartmouth. He distinguished precedents mentioned in Mr Auersperg-Trautson's report concerning, from Florence, Michelangelo's *David*, Donatello's *Judith* and his *Prophets*, Verrocchio's *Boy with Dolphin*, Ghiberti's reliefs from the *Doors of Paradise*, from Rome the ancient bronze of *Marcus Aurelius*, and from Brussels, Duquesnoy's *Manekin Pis*. He indicated that each of these were originally in an external environment and the originals were removed to a more benign interior site, and that in each instance the replicas were in the same material as the original, be it stone or bronze.
15. In relation to the resin from which the replica bust of Sir Charles Gounter Nicoll was fabricated, he described it as a polyester resin of general adhesive use. It degrades with light imparting translucency. It has ceased to be used for works of

surface repair and replication because of discolouration over time. All plastics, even those with filters, deteriorate on exposure to ultra-violet light.

16. Mr Martin stated that the process of stainless steel doweling is an accepted practice. It is used in all National Trust stone sculpture and is the policy of English Heritage, the British Museum, the Metropolitan Museum of Art in New York, the Ghetty Institute, the Aphrodite Institute in Turkey, the Triform Gallery in Winchester Cathedral, and the MacDonald Institute in Cambridge. Mr Martin listed a number of churches and secular buildings where this technique had been adopted, the details of which I do not propose to rehearse in this judgment. He himself had undertaken the drilling and dowelling on a number of occasions whilst in private practice. He described in detail how he would undertake the process in this instance and, since it was unchallenged, I need not repeat it here.
17. Mr Martin reported the results of conversations between himself and the other experts involved in this case which had occurred following the abortive hearing back in June. He indicated that they all shared a certain amount of philosophical doubt in relation to any interference with an historic artefact. There seemed to be general agreement that doweling was the most effective way to deter theft. As to the alternative, namely an adhesive solution of polyester resin, Mr Martin considered that there may be problems as to the long term durability of epoxy. His professional opinion was that a glued joint would be vulnerable to break in the event of a twisting of the shoulders of the bust or under the chin. He nonetheless considered that even if unfixed the bust was reasonably secure because it would take two people to lift it and probably three or more to reach it down from the casket in the first place, since there was a risk of damage were only two people to be involved.
18. Cross-examined by Mr Holding-Parsons, Mr Martin readily conceded that intervention by drilling should be avoided wherever possible. He also accepted that replicas were appropriate in certain instances. He pointed out, however, that the resin bust would have a different appearance in twenty years' time. When pushed on the assessment of risk of damage to the casket, Mr Martin said there was 'virtually no risk whatsoever'. In answer to a question from me, he said that there was 'no risk at all for the bust'. It was fine grained and strong. He could not rule out altogether the possibility of damage but his assessment of the risk was very low. He also stated that when he was in private practice and involved in the drilling of stone statues, he carried insurance cover to the tune of £3 million.
19. The second witness called on behalf of English Heritage was Mr David Brock, Inspector of Historic Buildings for English Heritage since 1983 and a member of the Institute of Historic Building Conservation. He described the bust as part of a 'scheme of decoration' which, though secured only by its own weight, was part of the listed building. It was created for the location in which it was placed. On the issue of theft, he explained how the stolen finials were relatively easy to be removed, not so the bust due to its weight and location. He described the resin

bust as a skilful copy. At the door of the church, he said, the impact would be unimpaired although as one approached a difference would begin to appear. For example, the bust would not have any accidental soiling from candles. Equally, a person touching it would discover it was hollow. A replica indicates a lack of truth and authenticity. He stated that the removal of the original would substitute an inauthentic detail for an authentic detail being a substantial part of a listed building. In Lord Dartmouth's drawing room the bust would be in a domestic setting as opposed to its historic setting as an integral part of a funerary monument. He emphasised the importance of keeping the ensemble together, by which he meant the pedestal with its inscription, the casket, the rest of the monument and the helm and gloves above. Were the bust to be removed to Lord Dartmouth's home, Mr Brock considered that conditions should be imposed to include quinquennial inspection, the performance of any necessary works, and its accompaniment by a photograph of the complete monument together with a description of how the bust came to be removed as well as a verbatim transcript of the inscription.

20. In cross-examination by Mr Holding-Parsons, Mr Brock expressed regret that by letter dated 6 January 1999, English Heritage had indicated to the parish that it was agreeable to the substitution of the replica. He candidly accepted that a pressure of work had led to the matter not being as fully considered as it ought to have been. He stated that English Heritage does not hold to a principle that replicas should never be used. In some instances safety or physical preservation make them desirable. He gave an example from Chiswick House where the original was moved indoors and a replica put in its place. He referred to the contribution which the bust made to the monument and which the monument made to the church. He stated that the issue raised was one of balance and if security required physical intervention then this was more desirable than removal.
21. Mr Brock considered the risk of casual theft to be slight having regard to the weight and position of the bust. His experience was that church artefacts were rarely stolen to order or by specialists. Losses were generally of small items or those easily removed. He believed that the insertion of a stainless steel dowel would remove the risk of loss. Accepting that thieves, as well as those more benignly intended, research into the contents of churches, such items are generally difficult to sell to legitimate dealers.
22. I invited Mr Brock to compare the facts of this case with those pertaining in *Re St Mary and St Nicholas, Wilton* (1999) 5 Ecc LJ 211, in which English Heritage had given its blessing to the removal of a bust. He was not himself involved in that case but pointed out that here there was a coherence and unity which was evidently missing at Wilton and that in that instance there was the prospect of a sale or other payment to the parish which would be of considerable benefit. Mr Brock indicated that although the likely cost of the doweling would fall in the *de minimis* category in relation to which grants would not be made by English Heritage, he would do what he could to pursue the matter as an exceptional case.



23. Two experts, formally judge's witnesses, gave evidence for the Council for the Care of Churches and, at my invitation, they were tendered by Mr Jonathan Goodchild, its Casework and Law Officer. The first was Marjorie Trusted, Deputy Curator in the Department of Sculpture at the Victoria and Albert Museum. Her evidence as to the identity of the carver is summarised at paragraph four of this judgment. She stated how a number of church monuments had come into the possession of the Victoria and Albert Museum, particularly in the late 1960s. She was not aware of instances when monuments from demolished churches had gone to the heir at law of the person commemorated. She said that many busts in the Museum were doweled and that she had come across no evidence of any being damaged. In answer to questions from Mr Holding-Parsons, Ms Trusted said that in her opinion the sculptor would agree with the fixing of a monument. She was questioned at some length about a bust of James Gibbs, undoubtedly the work of Rysbrack, which was purchased by the Museum from the church of St Martin-in-the-Fields, of which he was the architect. She stated that the bust had not been created for the church nor was it part of a memorial. It had been given to the church in 1875. On the subject of drilling, Ms Trusted made plain that she was not a conservator and could not speak to the technical matters raised. However, based on the empirical evidence available to her and having heard Mr Martin, she considered there to be no risk. She was also of the opinion that having the bust available for private viewing in a private house was a very poor second best to public display in the setting for which it was designed.
24. The second expert was Mr Anthony Redman, a chartered building surveyor and managing partner in a firm of architects and surveyors based in Suffolk. He is joint vice-chairman of the Council for the Care of Churches with specific responsibility for conservation matters. He indicated the importance of the integrity of a monument within a place of worship. He said that there were very few losses of monuments. He had no evidence of the theft of a Rysbrack and little of thefts of busts generally from churches. He pointed out the need to carry out risk assessments on a quinquennial basis in relation to thefts and vandalism. In this instance he considered that the use of doweling was the most appropriate security measure. He also confirmed that the policy of the Council for the Care of Churches is to insure items of this nature for their modern replacement value.
25. Questioned by Mr Holding-Parsons, Mr Redman remarked how funerary monuments such as this remind one of a sense of eternity and of history. They add to a place of worship not merely aesthetically but spiritually as well. He described how, amongst other things, the Council for the Care of Churches, being a standing body of the Archbishops' Council, acted as a broker between the amenity societies and the parishes themselves. He was deeply conscious of the need to have regard to worship and mission in rural parishes and of the obvious worry which this parish, along with many others, has with financial constraints. He nonetheless considered that for little cost the parish could do much to mitigate the risk of loss. Mr Goodchild, during subsequent submissions, stated that he was

reasonably confident that the Council for the Care of Churches would be in a position to make a grant towards the costs of the doweling operation.

26. The Archdeacon of Horsham addressed me emphasising his concern for the parish as a local centre for worship and mission and stressed that his primary concern was with the financial threat to the parish. Mr John Ebdon, recently appointed chairman of the Diocesan Advisory Committee, was critical of the Georgian Group. He spoke of his forty years in the building industry and expressed serious reservations about drilling which he thought would be dangerous to the bust and the casket. It might cause irreversible damage. He considered that there was an increased risk of snatching as the diameter of the drill hole was increased. Mr Ebdon's observations were really made in a personal capacity and I was not referred to minutes of any committee meeting nor, as I would have expected, was the report of an expert submitted for my consideration.

#### *Ownership*

27. Section 3 of the Faculty Jurisdiction Measure 1964, which bears the sub-heading 'Faculties affecting monuments owned by persons withholding consent thereto' provides, *inter alia*, as follows:

'3(4) For the purposes of this section 'monument' includes a tomb, gravestone or other memorial and any kerb or setting forming part thereof, and 'owner' means the person who erected the monument in question and, after his death, the heir or heirs at law of the person or persons in whose memory the monument was erected and 'property' shall be construed accordingly'.

The parish never formally conceded that Lord Dartmouth was the owner of the monument but the manner in which the amended petition was pursued made this implicit. No direct evidence was led on the point but the matter was explored in questions put to Lord Dartmouth by Mr Goodchild, when I gave leave to Mr Holding-Parsons to re-open his case. It was conceded by Lord Dartmouth that he had known nothing of the monuments until they were brought to his attention by Sir Michael Hamilton. He had made no financial contribution towards their maintenance nor had he insured them. It was unclear whether they featured amongst the property of his late father for the purposes of inheritance tax.

28. Mr Goodchild, in his submissions, invited my consideration of a recent opinion of the Legal Advisory Commission of the General Synod of the Church of Commission, *Ownership of Monuments and Trees in Churchyards* (LAC(2001)9). This opinion was produced prior to my appointment to the Commission and considers the effect of section 45 of the Administration of Estates Act 1925 upon the transmission of title to monuments. The rôle of the Council for the Care of Churches in relation to the built heritage of the Church of England is of immense value to the consistory court and I am indebted to Mr Goodchild for the thoroughness of his submissions. However, in this instance, whilst not conceding the issue of title, neither the parish nor the incumbent has sought to maintain any contrary argument. Accordingly, whilst not expressly deciding the point, I am compelled in this instance to deem Lord Dartmouth to be the legal owner. I make no finding of fact nor on the legal issues raised by Mr Goodchild.

*Fixture or chattel*

29. Much argument was devoted to whether the marble bust was properly classed as a chattel or as a fixture. Both Mr Trinick and Mr Goodchild took me to the decision of the House of Lords in *Elitestone v Morris and another* [1997] 1 WLR 687 and, in particular the speech of Lord Lloyd of Berwick approving a long line of authority to the effect that the test to be applied 'depends on the circumstances of each case, but mainly on two factors, the degree of annexation to the land, and the object of annexation'. See 692A. I was also referred to *Leigh v Taylor* [1902] AC 157, *Berkley v Poulett and others* [1977] 1 EGLR 86, and to *Regina v Secretary of State for Wales ex parte Kennedy* [1996] EGCS 17.
30. Discussion was also directed to the decision of the late Chancellor Ellison sitting in Salisbury Consistory Court in *Re St Mary and St Nicholas, Wilton* (1999) 5 Ecc LJ 211, a copy of the otherwise unreported judgment being provided for the benefit of the parties. That case concerned a portrait bust of the ninth Earl of Pembroke made by the artist Roubiliac in 1751, and introduced into the church in 1845 from another church where it had previously been sited. At paragraph 26 of his judgment, Chancellor Ellison said this:

'Lord Pembroke owns the bust personally. It is presently free-standing and its temporary or permanent removal has and will cause no damage. The rector and churchwardens have no title to it. Their position is simply as custodians to ensure it is protected and not removed without faculty authority. In reality it is no part of the heritage of this church. On the contrary it is part of the heritage of Lord Pembroke and the Herbert family. In my judgment therefore, the petitioners are entitled to their faculty enabling Lord Pembroke to recover the bust into his personal possession. It follows that in my judgment the dicta in *Tredington, Brant Broughton* and the many other cases following have no application to this instant case. That line of authority applies to articles and property owned by the church authorities. ... [and at paragraph 27:] I repeat, it is not a case involving goods or articles which belong to the church and are part of its heritage. The bust belongs to Lord Pembroke and he is the person to decide what to do with his own personal property.'
31. I consider that the facts of this case are distinguishable from those in *Wilton*. Here the bust is an integral part of what Mr Brock styles 'a scheme of decoration', an expression I am happy to adopt as accurately reflecting the reality. The mere fact it is secured only by its own weight does not prevent it from being a fixture as the secular authorities cited above clearly show. Mr Holding-Parsons' assertion to the contrary is unsupportable. The bust is not an *objet d'art* but the centrepiece of a carefully designed and crafted funerary monument. Were the ecclesiastical exemption not to apply I am confident that listed building consent would be required for its removal. It is a question of fact and degree. I take the view that with a weight in excess of 2 cwt, at the very least, the degree of annexation is sufficient, and that the object of annexation was as the crowning glory to a

monument designed for the site where it still rests to mark the life and witness of Sir Charles Gounter Nicoll.

32. To the extent that the decision of the late Chancellor Ellison in *Wilton* is perceived as justifying the removal of items in private ownership from listed churches without reference to the balancing exercise to be carried out within the faculty jurisdiction, I must respectfully differ. In fact, I do not consider that it goes so far, the chancellor expressly stating that 'this case is as special as could be'. The judgment in *Wilton* does not sit comfortably with that of Chancellor Fitzwalter Butler in the Peterborough Consistory Court in *Re St Andrew's, Thornhaugh* [1976] Fam 230 concerning the sale of a helmet which hung above and formed part of the accoutrements of the tomb of a distinguished Elizabethan soldier. The chancellor stated at 237F,

'As I have already indicated, apart from the *Broadwater* case [1976] Fam 222, I can discover no case in which the sale of a monument or an accoutrement of a monument has been ordered. I hold that as a matter of principle a monument and its accoutrements should be regarded as one entity and that a case in which justification could be found for their separation by an order for the sale of an accoutrement would be exceptional indeed.'

There is no mention of *Thornhaugh* in the *Wilton* judgment and it may be that the Chancellor Ellison was not referred to it.

#### *Drilling of the monument*

33. A substantial amount of the evidence was given as to the practice of inserting stainless steel dowels into monuments such as these and as to the risks inherent in the operation. I am entirely satisfied on the basis of the evidence tendered that the use of dowels is commonplace in both secular and ecclesiastical contexts and that it is a practice recognised not merely in this country but in many other places in the world. Indeed all of the evidence points in this direction. The second, though related, question concerns risk. Even though the report of Mr Auersperg-Trautson was not admitted in evidence, Mr Trinick invited Mr Martin to comment upon those parts which touched on risk. I was impressed by the manner in which Mr Martin gave his evidence, being thoughtful, thorough and non-partisan. I am confident that even were Mr Auersperg-Trautson to have been called and come up to proof, the response of Mr Martin adequately addressed the technical concerns raised. Mr Martin was not challenged on his proposed *modus operandi*, the detail of which need not be restated in this judgment. I found this highly compelling and persuasive. Furthermore Mr Brock, Ms Trusted and Mr Redman, whose collective experience is considerable, could produce no example of a sculpture or its setting being damaged in the course of drilling for the insertion of a dowel. The only contrary comment was from Mr John Ebdon, chairman of the Diocesan Advisory Committee. While I have full regard to the anecdotal evidence of his considerable experience in the building trade, I have to take into account that the Diocesan Advisory Committee did not place before me any minutes dealing with the matter nor any written report from an expert. When the committee issued its certificate

the issue of drilling had not arisen. I am therefore compelled to accept the expert evidence tendered by English Heritage and the Council for the Care of Churches in spite of the expression of concern voiced by Mr Ebdon. The risk of damage by drilling is to be regarded as negligible.

*Jurisdiction*

34. As noted above, Lord Dartmouth is implacably opposed to the drilling of the bust or the casket which, for the purposes of this judgment only, are regarded as his property. The question then arises as to whether this court has jurisdiction to order the such drilling against his will. Mr Trinick concedes the lack of jurisdiction so also, by implication, does Mr Goodchild. The relevant provision is section 3 of the Faculty Jurisdiction Measure 1964 which reads:

- '3(1) This section shall apply to faculties for the moving, demolition, alteration or execution of other work to any monument erected, whether before or after the passing of this Measure, in or upon any church ...
- (2) Subject to the provisions of the succeeding sub-section a court may grant a faculty to which this section applies:
  - (i) although the owner of the monument withholds his consent thereto or cannot be found after reasonable efforts to find him have been made; and
  - (ii) in respect of a monument erected under a faculty or affecting which any faculty has been granted, whatever the date of such faculty.
- (3) No faculty to which this section applies shall be granted if the owner of the monument in question withholds his consent thereto but satisfies the court that he is, within a reasonable time, willing and able to remove the monument (or so much thereof as may be proved to be his property) and to execute such works as the court may require to repair any damage to the fabric of any building or to any land caused by such removal. The court may, upon a petition for a faculty to which this section applies, grant a faculty authorising such removal and for all purposes connected therewith and may make such orders as may be just as to the execution and cost of all necessary works.'

Even though the parish does not object to the insertion of a dowel, it is not seeking an order in the amended petition that one be inserted against the will of Lord Dartmouth. Equally there do not appear to be grounds for an injunction or restoration order to be made. The question raised is therefore largely academic. It seems to me, however, that were an application to be made, Lord Dartmouth would be unable to rely upon the provisions of section 3(3) because he is unwilling to remove the entire monument, merely the marble bust. He is not assisted by what appears in parentheses as it is designed to meet a quite different case. Further, he may be regarded as unable to remove the monument if a faculty is refused.

35. Mr Trinick sought to persuade me that the alternative possibility of using a glue to affix the bust to the casket was not covered by section 3(1). He suggested, with no great enthusiasm, that it did not amount to the 'execution of other work' to the monument. When I indicated I was unimpressed by his inventive statutory interpretation, he did not appear surprised. However, there is currently no application before me for the fixture of the bust with adhesive.

*The Bishopsgate questions*

36. Mr Trinick, Mr Goodchild and Mr Holding-Parsons all invited me to approach the exercise of my discretion adopting the *Bishopsgate* questions as expressly approved by the Court of Arches in *Re St Luke the Evangelist, Maidstone* [1995] Fam 1. Mr Tinsley did not seek to persuade me otherwise. I am satisfied that this is entirely the correct approach when a listed building is concerned irrespective of the ownership of the bust. I take the questions in turn:
- (1) *Have the petitioners proved a necessity for some or all of the proposed works either because they are necessary for the pastoral well-being of the parish or for some other compelling reason?*
37. In addressing this question I adopt and approve the definition of 'necessary' furnished by Chancellor George in *Re St John the Evangelist, Blackheath* (1998) 5 Ecc LJ 217, namely 'something less than essential, but more than merely desirable or convenient; in other words something that is requisite or reasonably necessary'. The petitioners advance their case on the joint bases of security and finance. I regret, however, that I do not consider that the case of necessity is made out on either basis.
38. Whilst there is evidence of certain thefts from the church in recent years, notably the credence table and finials, the empirical evidence suggests that the actual risk is far lower than the perceived risk. In a letter from Ecclesiastical Direct dated 20 July 2000, Mr Kevin Thomas, an area manager, states 'on a national level our experience indicates that at least one in five Anglican churches sustained theft related attacks during 1999. Also, approximately 10 churches were attacked every day'. There is no indication of the size or of the value of the items stolen and, in that regard, I must accept the evidence of the experts suggestive that an item as bulky and as weighty as this bust is unlikely to be stolen. Mr Holding-Parsons raised the spectre of the bust being spirited away to Europe by professional thieves but he produced no evidence on this matter nor did he seek to challenge the empirical evidence of the experts.
39. However, I must bear in mind that it is possible to improve the security of the bust. Only the refusal of Lord Dartmouth stands in the way. It is undeniable that the use of a stainless steel dowel will render the bust immune from casual theft and virtually immune from more organised theft. Mr Holding-Parsons in his questioning of witnesses and in his submissions referred to a potential scenario which he styled the 'Colditz option'. His questions were premised on a determined thief with a hacksaw or file visiting the church on several occasions for hours at a time, slowly cutting his way through the dowel, clearing away as he went, then returning with one or more accomplices to remove the bust. I consider this to be utterly fanciful and a distraction from his better submissions. I also bear in mind the possibility of an adhesive being used which would also improve security. I fully appreciate the fears of the parish but such fears must be assessed and evaluated objectively. Indeed, I am also mindful of what Mr Tinsley told me was

the original fear on the part of Sir Michael Hamilton, namely that the original might be stolen and the parish would not be in a position to fabricate a replica. That situation no longer pertains.

40. Furthermore, I am unpersuaded as to any financial necessity. This parish, in common with many, is struggling financially. I applaud all it does to pay its way in the diocese and to budget for an increasingly heavy burden to fall upon it to cover contributions to clergy pensions and salaries. Nonetheless, the disposal of the bust will do nothing to improve the parish finances. Here I note the amendment of the petition which originally sought to sell the bust in the open market place. I note also the very different position in *Wilton* where the parish was set to benefit significantly. On the question of insurance, Mr Tinsley accepted that the parish had only ever insured the original bust for its modern replacement value, a practice commended by the Council for the Care of Churches. He accepted when questioned by Mr Trinick that such practice would continue. In closing submissions Mr Tinsley referred to a letter from Mr Thomas of Ecclesiastical Direct dealing with insuring the replica bust were it to be secured by a resin based glue. He stated that Ecclesiastical Direct would not insure the original at all. The letter does not support this nor does it really accord with what Mr Tinsley had said in evidence. I am not satisfied that the original bust is uninsurable for its modern replacement value, and I also have regard to the additional security which doweling or even adhesive would provide.
41. I therefore conclude that whilst recognising the legitimate subjective worries of the parish, no case of necessity is made out. Equally, Lord Dartmouth advances no case of necessity separate from that of the parish. Any advantage resulting to him would be in the nature of a windfall. This finding on necessity is sufficient to dispose of the petition. However, in deference to the submissions advanced on the other two questions I propose to deal with them.

(2) *Will some or all of the works adversely affect the character of the church as a building of special architectural and historical interest?*

42. I was referred by both Mr Trinick and Mr Holding-Parsons to an article *Re-Ordering Historic Churches* by Chancellor Sheila Cameron QC (as she then was) at (2001) 6 Ecc LJ 26. Mr Holding-Parsons referred me in particular to page 32 in which Chancellor Cameron stated that the *Bishopsgate* questions 'have become the standard questions to be addressed by any chancellor faced with a petition proposing re-ordering or the making of changes to the interior of a listed church which will make a significant difference to its appearance' (emphasis added). A footnote refers to the paragraphs 2.4 and 8.1 of the document *Making Changes to a Listed Church*, Guidelines for Clergy, Churchwardens and Parochial Church Councils (January, 1999). Mr Holding-Parsons submitted that because the substitution would not be noticeable from the door of the church and because an uninformed layman might be unable to discern the difference save by touch then

there would be no difference at all to the appearance of the listed church. He prayed in aid the decision of the Court of Arches in *Re St Mary the Virgin, Sherborne* [1996] Fam 63. He suggested that if Chancellor Ellison, as the first instance judge in that case, could conclude that the removal of the Victorian window would not adversely affect the character of the church, then it was not open to me to decide that the substitution of the bust would have such an effect here.

43. I consider that this argument was flawed for two reasons. First, it is impossible to reason by analogy from cases in different dioceses which are not comparable on the facts. In the *Sherborne* case evidence, both expert and lay, was led as to the poor quality of the Victorian window and the chancellor made findings on that evidence. His findings were not interfered with by the Court of Arches. Here, however, there was strong expert evidence as to the very high quality of this funerary monument to Sir Charles Gounter Nicoll. Secondly, I do not believe that in her paper on re-ordering Chancellor Cameron was intending to suggest that the word 'appearance' should be substituted for 'character' in the second of the *Bishopsgate* questions. The mere fact that a change is not readily discernible to the eye does not mean that it cannot amount to an adverse effect on the character of the church. I must take fully into account the integrity of the building as a whole and the monument in particular. I entirely accept the comment of Mr Holding-Parsons that whether the bust is of resin or of marble does not impinge upon the liturgical use of the building. Those walking to and from the communion rail will be indifferent to the material from which the bust is fabricated. However, the duty to have due regard to the role of the church as a local centre of worship and mission under section 1 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 does not work to exclude consideration of other factors such as aesthetics and integrity.
44. In any event, even if the consideration were to be limited to appearance alone, I would have no hesitation in this instance in concluding that the introduction of the resin replica would adversely affect the character of the church. I fully accept that to the untrained eye there is no identifiable difference between the original and the replica bust. Arrangements were made for them to be placed side by side for the hearing scheduled for June. I could not tell the two apart from sight alone. However, the expert evidence of Mr Martin and Mr Brock, which was not challenged in this particular, was to the effect that in twenty years or so the resin bust would have deteriorated to such an extent that it would be visually distinguishable from the marble bust which it is to replace and, *ex hypothesi*, from the marble of the casket and the remainder of the monument. This church has a history of many hundreds of years. My consideration of any change in appearance cannot be limited to the present but must also have regard to the future.

(3) *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?*



45. Since, in my judgment, the necessity is not proved and the adverse effect is made out, this final balancing exercise becomes otiose. The petitioners, on whom the burden of proof falls, have failed to discharge such burden.

*Conclusions*

46. Since the petition for the removal of the original to the London home of Lord Dartmouth and its substitution with a resin replica fails, it follows that the original must be returned to its place on the casket where, until 1998, it had previously stood. I do not order its immediate return. The parties need to reflect on my judgment and the publicity attendant on this decision must be allowed to pass. A date will be arranged in consultation with the Registrar. It also follows that the replica must be removed and I so order. The date for removal will likewise be arranged through the Registrar. What is to happen to the replica will be a matter for the Parochial Church Council, doubtless in consultation with Lady Hamilton.
47. Since I have given my findings on the issue of drilling and adhesive fixture, were Lord Dartmouth and/or the parish minded to review the stance adopted at the hearing, I am happy to entertain an application to amend the faculty. The evidence is that a steel dowel will secure the marble bust against theft. In all likelihood the entire cost of this work will be met either by the Council for the Care of Churches or by English Heritage or by a combination of both. If Lord Dartmouth is not prepared to permit the drilling of the bust or casket then he must live with the consequence that his refusal serves to increase the risk of theft and may jeopardise any insurance cover. As I understand the law, Lord Dartmouth cannot prevent the parish from drilling the bust and casket and inserting a dowel if it so wishes and a faculty issues. Were the free-standing marble bust to be stolen then the parish will not be prejudiced as a replica has already been fabricated.
48. This has not been an easy case and I anticipate a degree of disappointment in the result. However the evidence, as it emerged in the hearing and the law as very fully explored and argued, point inexorably to the conclusions I have reached. The court costs will be borne by the petitioners. I am pleased to record the generous undertaking on the part of Lord Dartmouth to meet them.

The Worshipful Mark Hill  
Chancellor



19 October 2001

