

**IN THE ARCHES COURT OF CANTERBURY
CONSISTORY COURT OF THE DIOCESE OF CHELMSFORD**

IN RE ST PETER AND ST PAUL'S CHURCH CHINGFORD

**IN THE MATTER OF A CAUSE OF FACULTY RELATING TO THE
INSTALLATION OF A TELECOMMUNICATIONS INSTALLATION**

Before:

**THE RIGHT WORSHIPFUL SHEILA CAMERON QC, DEAN OF THE
ARCHES,
THE WORSHIPFUL ROGER KAYE QC, CHANCELLOR AND
THE WORSHIPFUL GEOFFREY TATTERSALL QC, CHANCELLOR**

JUDGMENT

Appearances

*Mr Charles George QC and Mr Philip Petchey instructed by Lee Bolton & Lee
appeared for the appellants, QS4 Ltd, and the Rector and Churchwardens of St Peter
and St Paul, Chingford*

Mr Stephen Turner, Respondent, appeared in person

*Mr Mark Bishop, instructed by Winckworth Sherwood, appeared as the friend of the
Court*

Hearing dates: 9-10 May 2007

Judgment Delivered: 31 July 2007

IN THE ARCHES COURT OF CANTERBURY

CONSISTORY COURT OF THE DIOCESE OF CHELMSFORD

Appellants: QS4 Limited; the Revd Tom Page, Ted Cooke and Gordon Hughes

Respondent: Stephen Turner

Judgment

Introduction

1. This is an appeal from the order made by Chancellor George Pulman QC in October 2006 in the consistory court of the diocese of Chelmsford whereby he dismissed a petition for a faculty seeking permission to install a mobile phone base station in the upper part of the tower of St Peter and St Paul, Chingford.
2. The church of SS Peter and Paul is a Victorian nineteenth century grade II listed church. It is situated in the centre of Chingford and lies in a conservation area.
3. On 18 October 2005 the Rector and Churchwardens, supported unanimously by the Parochial Church Council (“the PCC”), and specialist installers of the telecommunication equipment, QS4 Ltd (“QS4”), presented a petition seeking to install a mobile phone base station in the tower “to enable the operator to meet its licence obligations and service its customers without having any impact on the character of the locality”.
4. The proposals, in effect, were that QS4 should be able to install a mobile phone base station and antennae in the church tower to be operated by a single mobile phone company, T-Mobile, for the purposes of their 3G network coverage.
5. 3G network coverage is the network operated by holders of Third Generation Mobile Licences granted pursuant to the Wireless Telegraphy Acts 1949 and 1998. It is this licence which is referred to in the petition, but any faculty would have to approve a separate licence to be entered into for the use of the church for the purposes of the mobile phone installation. This second licence would usually be in the form of the Model Licence approved by the Archbishop’s Council of the Church of England (“the Archbishop’s Council”) in June 2002. However, no Chancellor is precluded from requiring this Model Licence to be modified, if there is some good reason for doing so in relation to the circumstances affecting the church in question. Consequently, the need for any modification of the licence, or the attachment of any condition to the faculty, are matters which the Chancellor has to consider separately in each case involving an application for a telecommunication installation in a church.

6. The initial fee payable to the PCC under the proposed Model Licence to be used in this case was to be an annual fee of £10,500 reviewable every 5 years. The entire cost of installation would be borne by QS4. The PCC proposed to use the rental money for the future upkeep of the church and to fund training for parishioners to learn bereavement counselling and other pastoral and community work.
7. Because this church is listed both English Heritage and the Victorian Society were consulted but neither had any objection to the petition. The Local Planning Authority was also consulted and confirmed that planning permission in addition to a faculty was not required for the proposal. The Diocesan Advisory Committee similarly raised no objection.
8. Although the Chancellor recorded in his judgment that at a Directions Hearing a number of people attended who had objections “substantially on the grounds of a perceived safety hazard caused by radiation” (paragraph 4) only one person pursued a formal objection by becoming a party opponent. This was Mr Stephen Turner, the Respondent to this appeal. Mr Turner is a resident in the ecclesiastical parish in which the church of SS Peter and Paul is situated and on that ground he had standing to object as an “*interested person*”: see rule 16 (2) (a) of the Faculty Jurisdiction Rules 2000. Mr Turner’s status is not mentioned in the Chancellor’s judgment but he told this Court that he did not attend SS Peter and Paul’s church but worshipped at Tottenham Baptist Church.

The Hearing in the Consistory Court

9. The Chancellor held a hearing of this opposed petition on 17 and 18 July 2006. Mr Turner did not give evidence or call any witnesses but he asked some questions of the Petitioners’ witnesses and placed a written submission consisting of 6 pages of typescript before the Chancellor. Most of this submission concentrated on the issue of safety relating to the use of mobile phones. However, he mentioned additional features which he argued should be taken into account by the Chancellor, namely
 - “The fact that modern mobile phone masts can be used to transmit signals that can provide pornography to peoples’ mobile phone receivers;
 - The fact that modern mobile phone masts can be used to provide internet services such as gambling;
 - The fact that mobile phone mast transmissions through text messaging can have extremely harmful effects on children through “text bullying”;
 - The fact that mobile phone masts transmission can have extremely harmful effects on adults through “text harassment”.”

He argued that none of these features was consistent with the teachings of Christ.

10. The Petitioners called three witnesses to give evidence in the Consistory Court. Professor Ramsdale, as his witness statement produced for the court below makes clear, was called to give evidence on the safety issue only. The Chancellor found his evidence “measured, reasonable and internally consistent” (paragraph 24 of judgment). Mr Cooke, one of the petitioning churchwardens, dealt with the proposed works, the consultation process, the specific advice of the DAC given in connection with the proposed works (no objection) and the PCC resolutions in support. Mr Horsley, QS4’s Church Relationship Manager, also gave evidence. He too dealt with the proposed works. He set out the lengthy and detailed consultation process. He noted the primary concern of those responding was one of health. He also dealt with consultation with English Heritage, the amenity societies and the local planning authority. He dealt with alternative sites considered by QS4.

The Chancellor’s judgment

11. In his judgment dated 30 October 2006 Chancellor Pulman identified three issues which he had to determine: “1. The safety issue: What is the risk to human safety caused by the radio frequency waves emitted from the antennae and going to the antennae from mobile phones? 2. The transmitted material issue: Will the material transmitted through the antennae be consistent with the Christian use of the church? 3. The louvres issues: Is it appropriate to replace the louvres with GRP? Where and how should the replaced louvres be stored?” (paragraph 2 of judgment, underlining added). On issues 1 and 3 he found in favour of the petitioners.
12. The safety issue : Most of the Chancellor’s judgment addresses this issue but surprisingly there is no reference to the decision of this Court *in re Emmanuel Church Bentley* [2006] Fam. 39 although the main issue in that case was how to deal with local concern about the possibility of health risks from radiation. (see in particular paragraphs 48 to 52). Having considered the evidence the Chancellor concluded that “the works proposed cause no risk to people.”
13. The Louvres issue: The Chancellor had “no hesitation” in concluding that the louvres could be replaced with GRP (glass reinforced plastic) subject to a provision for the storage of the slate louvres beneath the church floor in case they were needed in the future.
14. The Transmitted material issue: Although he heard argument on this issue the evidence before him appears to have been very limited and his conclusion “that some of the material to be transmitted through the antennae is not consistent with the Christian use of the church” (paragraph 3) amounted to a decision of principle. He decided (paragraph 43) that it was “no part of the work or the mission of the Church to facilitate the transmission of pornography whether from the internet or privately created”, whether lawful or unlawful (in the sense prohibited under the provisions of the

Telecommunications Act 1984 as amended). Either way he intimated it was wholly inappropriate for provision by a church. He concluded (paragraph 50) that it was wrong for a church to facilitate transmission of pornography, or to gain financial advantage thereby, however, slight or modest. Accordingly he dismissed the petition.

The Appeal

15. On 5 December 2006 Chancellor Pulman refused to give permission to appeal against his judgment.
16. On 14 February 2007 this Court gave conditional permission to appeal on “the transmitted material issue” only. There was no application for permission to appeal against the Chancellor’s decision on the other two issues, which he had determined in favour of the petitioners. The condition attached to the permission to appeal was that an *amicus* should be appointed to assist the Court. Mr Mark Bishop of counsel has fulfilled that task. At the hearing of this appeal Mr Charles George QC and Mr Philip Petchey represented the appellants and Mr Turner appeared in person.
17. This appeal raises a single issue of some sensitivity and importance: assuming that the potential transmission by such equipment of inappropriate material such as pornography cannot be ruled out, or cannot be entirely appropriately controlled, should a church court nevertheless permit the installation of such equipment? Chancellor Pulman held not.

Further Evidence

18. Both parties applied for permission to adduce further evidence under rule 12 of the Faculty Jurisdiction (Appeals) Rules 1998¹. It is clear from the rule that the appellate court has discretion whether or not to admit such evidence. After considering the applications and any response from the other party the Court allowed further evidence to be admitted on behalf of the Appellants and the Respondent.
19. The Court allowed the Appellants to recall Professor Ramsdale particularly to enable him to give evidence on the subject of filtering techniques, since he had not been asked to do so in the consistory court and the Chancellor had remarked in his judgment (paragraph 49) that he had not heard evidence on the point.
20. Mr Turner applied for permission to introduce a large number of extracts from documents and various articles from journals and newspapers. This Court pointed out that newspaper cuttings are not acceptable by themselves as evidence in an ecclesiastical court, nor are extracts from publications which are unsupported by oral evidence. Save in respect of two official public

¹ S.I. 1998 No. 1713

documents his application was refused. The documents which were admitted are a Home Office Report published in January 2003 entitled *Home Office task force on child protection on the internet* and a copy of the United Nations Convention on the Rights of a Child brought into force on 2 September 1990.

The Legal Framework

21. All consecrated buildings and land, all parish churches and land, and all buildings licensed by the diocesan bishop for public worship according to the rites and ceremonies of the Church of England² and the articles relating thereto are subject to the jurisdiction of the consistory court: *Re St John's Chelsea* [1962] 1WLR 706,708; section 6 Ecclesiastical Jurisdiction Measure 1963; section 6 Faculty Jurisdiction Measure 1964; section 11 Care of Churches and Ecclesiastical Jurisdiction Measure 1991.
22. A faculty grants permission for something to be done; it does not compel that thing to be done. Moreover, it can only be granted for a purpose which is consistent with, and within the bounds of, the existing law.
23. Against this background the task of the Chancellor, as this court emphasised in *re Emmanuel Church Bentley* and has said in previous cases such as *re St Luke the Evangelist Maidstone* [1995] Fam.1 at p.7, is to conduct a balancing exercise. This involves considering all the relevant factors both for and against the grant of a faculty and exercising the court's discretion in a fair way, but also bearing in mind the principle that a church must be treated in a reverent and seemly manner consistent with its use as a place of worship. It is for these reasons that a cautious approach has to be adopted to permitting something which might reflect adversely on the Church and why any permission has to be subject to having in place such safeguards as are reasonable and proper. As this court said in *re Emmanuel Church Bentley* (paragraph 10)

“Thus the public has been allowed to benefit from public clocks on church towers, and in parts of the country a light may be fixed to the church to act as a navigational aid in the interests of safety for sections of the public. The presence of telecommunications equipment in a church can bring benefit to the public and providing it is subject to appropriate controls, does not violate the principle of these Canons.”

The Further Evidence of Professor Ramsdale

24. Professor Ramsdale played a significant role in the development of the third generation of mobile communications and his further evidence to this Court at the hearing of the appeal, in summary, was that

² This is so for buildings licensed after section 11 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 came into force. For buildings licensed before that date the bishop may by order direct that the building be subject to the faculty jurisdiction: section 6 Faculty Jurisdiction Measure 1964.

- the initial technology referred to as 2G allowed its users to make voice telephone calls and to send and receive texts;
- subsequent 2.5G upgrades meant that customers have the ability to transmit/receive visual content including from the internet;
- operators have upgraded much of their networks to 3G which is a technology that gives a higher speed of access to content from the internet;
- 2G mobile phones are now obsolete so far as retailers are concerned, and nearly everyone has a 2.5G handset (there are more mobile phones in circulation than people in this country);
- recent figures (April 2007) show that 96% of mobile phone revenues are still generated from voice calls and texting and that there is very little use of the internet through handsets, the major use of the internet being through personal computers which have larger screens and faster download speeds through fixed telephone lines;
- as to the remaining 4% of mobile phone revenue it was unlikely that more than a small proportion of that figure would relate to access to adult content and he drew our attention to the T-Mobile home page which directs users to such services as games, news, information, music and sports.

25. As to filtering techniques his evidence was that

- all commercial content which has been identified as unsuitable for the under 18s by the Independent Mobile Classification Body is blocked and each mobile phone user has to be verified as being over 18 before the filter is removed;
- as for the internet, T-Mobile and other operators use “web crawlers” to identify suspect sites and then apply a filter by default so that content classified as unsuitable for customers under 18 is automatically blocked and can only be released on proof of the mobile phone user being over 18;
- sites containing potentially illegal material are identified by the Internet Watch Foundation, a regulatory body that works in partnership with Government Departments, and notifies internet service providers and mobile phone operators so that the sites can immediately be blocked;
- whilst no guarantee can be given that all illegal sites are blocked all the time because of the continual setting up of new sites, the Internet Watch Foundation has a good record of assisting law enforcement in respect of potential child abuse images hosted on servers outside the UK by reporting “to the relevant national hotline or appropriate UK law enforcement agency”(exhibit PAR 4 to his evidence);
- there is no technology enabling filtering to be applied to individual masts or to offer different degrees of filtering on a geographical basis;
- it is possible to ask T-Mobile to block access to the internet on a mobile phone supplied by T-Mobile so that a parent who is anxious about a child being able to access the internet from his/her mobile phone could prevent the phone having access to the internet.

26. Before we come to the implications of this evidence in relation to the Chancellor's judgment we turn to consider information provided by the parties in relation to the protection of children in their use of the internet and mobile phones.

The Internet/Mobile Phones and children

27. The Home Office Task Force on Child Protection on the Internet was established by the then Home Secretary in March 2001 "to consider what could be done to tackle serious child protection issues which were emerging with the increasing popularity of the internet, in particular the potential risk of paedophiles contacting children through chat rooms and other on-line communications" (foreword to report). The models of good practice contained in the report, and the education and awareness campaign run by the Taskforce, indicate the importance that the Government and other concerned bodies attach to child protection issues. Connectivity Providers were advised to provide information to their home users to help parents to

- "understand the risks of the technology their children may be using;
- take steps to communicate clearly with their children about possible dangers and safe ways of using the internet;
- take practical steps at home to help their children stay safe online for example by placing the PC in a common area in the home and monitoring their use of the internet and
- understand the availability, use and limitations of filtering and monitoring software, along with clear guidance on its use and the safeguards it does and does not provide."

28. The same theme appears in relation to mobile phones. Rachel O'Connell, the Director of Research at the Cyberspace Research Unit at the University of Central Lancashire, and an expert on on-line safety and child welfare, wrote in 2003 that in order to offset the impending risks from 3G technology it was necessary to adopt pre-emptive strategies and the key strategy was education. She pointed out that

"Communication technologies are becoming integral parts of children's lives and arguably this needs to be reflected in programmes of education which teach children how to recognise, establish and maintain the kinds of boundaries they ought to have with respect to, for example, recording and disseminating images using their handsets. Teaching strategies will have to include modules designed to enhance children's critical reasoning with a view to facilitating children making informed decisions about appropriate and safe use of communication technologies."³

29. Following the report of the Home Office Task Force the Government introduced legislation providing a regulatory framework for

³ *From Fixed to Mobile Internet: The Morphing of Criminal Activity On-line* ch.3 p.50 in *Child Sex abuse and the Internet: Tackling the new frontier* ed Martin C. Calder pub.2004

telecommunications and creating an offence if a person sends or causes to be sent “by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character” (section 127 Communications Act 2003). In addition, the scope of the Protection of Children Act 1978 was extended by amendments introduced by the Sexual Offences Act 2003, which in itself created a new offence if a person causes or incites someone under 18 “to be involved in pornography in any part of the world” (section 48).⁴ These provisions are not simply written in statute books but are actively used for the successful prosecution of offenders as this court is well aware,⁵ and as the Chancellor recognised in paragraph 40 of his judgment, “people, usually men, are regularly sent to prison for downloading these images, or for sending images to other people.”

30. All the measures set out above are to be seen as a response to the fact that “pornography” may harm children. This word is “conventionally used to refer to sexually explicit representations, whether in the form of a book, film, photograph or other image”.⁶ We use this word in this judgment in this sense. The measures are designed to counteract the downside of the new technology contained in the internet, namely that the whole world is connected in a way that has never happened before and those with evil designs on children are given a new means of pursuing their own gratification. However, it is the firm view of this Court that we must not lose sight of the great benefits that have flowed from the introduction of the new technology and must keep a sense of balance in assessing the risk from evildoers.

Freedom of Speech

31. In the course of his argument Mr George submitted that the consistory court, as a public authority for the purpose of the Human Rights Act 1998, might be in breach of Article 10 of the European Convention on Human Rights and Fundamental Freedoms in refusing to permit the distribution of lawful “adult material” by way of a mobile phone. Article 10 protects the right to freedom of expression but, as with many of the rights enshrined in the Articles in Schedule 1 to the Act, the right is not absolute. Article 10 (2) provides that the freedom may be subject to “such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society” amongst other things “for the protection of health or morals”.
32. Mr Bishop helpfully drew our attention to several passages in a recent case in the House of Lords, *Belfast City Council v. Miss Behavin’ Limited*.⁷ The appellant was a disappointed applicant for a sex shop licence and the House expressed opinions about the applicability of Article 10 to the sale of ‘lawful’ pornography. Lord Hoffman said that if Article 10 operated at all it did so “at a very low level. The right to vend pornography is not the most important

⁴ A person is involved in pornography “if an indecent image of that person is recorded” see section 51 (1)

⁵ See The Times June 19 2007 at p.9

⁶ See Eric Barendt *Freedom of Speech* 2nd ed. .2005 at p.352

⁷ [2007] UKHL 19

right of free expression in a democratic society and the licensing system does not prohibit anyone from exercising it. It only prevents him from using unlicensed premises for that purpose.⁸” He went on to point out that citizens could satisfy their demand for such products “by internet or mail order or going to more liberally governed districts like Soho.” Baroness Hale emphasised that a court is concerned with whether the human rights of a claimant⁹ have been infringed so it is the right of the citizen /customer rather than that of the purveyor of “adult material” which has to be considered. She agreed with Lord Hoffman¹⁰ when she said

“There are far more important human rights in this world than the right to sell pornographic literature and images in the backstreets of Belfast City Centre. Pornography comes well below celebrity gossip in the hierarchy of speech which deserves the protection of the law. No-one is suggesting that pornographic literature and images (always supposing it is lawful) should be inaccessible to those in Belfast who wish to gain access to them. The authors can publish their work in any other medium should they wish to do so, and the public can gain access to them there.”¹¹

33. In reliance on this authority Mr Bishop submitted that Article 10 is not engaged when the ecclesiastical court has to consider whether or not to grant a faculty in the present type of case Alternatively, if it is engaged then it is at such a low level that a condition on a faculty in the interest of protecting children could not be said to be in breach of the Article.
34. We bear in mind that under ecclesiastical law the consistory court has a discretionary power to grant a faculty with or without conditions. The exercise of that power involves consideration of all the circumstances of a particular case and the balancing of factors for and against the grant of a faculty. This may necessitate balancing the public interest against church-related interests. This well established principle has been reiterated in decisions of the appellate courts for the Provinces of Canterbury and York, namely the Court of Arches and the Chancery Court of York, which are binding on the consistory courts. For example, in 1961 *in re St Edburga's, Abberton*¹² the Dean of the Arches had to balance the argument of the Minister of Aviation for demolishing the spire of a church in Worcester, because it represented a risk to aircraft from a nearby airfield, against the argument for retaining the spire because of its aesthetic and architectural merit. He decided “on a balance of factors”¹³ that the discretion of the court should be in favour of the Minister and consequently allowed the appeal and authorised the demolition. In *re St Mary the Virgin, Woodkirk*¹⁴ the Deputy Auditor had to balance the argument of the local authority that part of the churchyard should be incorporated into improvements to the main road from Dewsbury to Leeds against the fact that this necessitated the disturbance of nearly 200 graves and

⁸ at paragraph 16

⁹ paragraph 31

¹⁰ as did Lord Neuberger at paragraph 95

¹¹ at paragraph 38

¹² [1962] P. 10

¹³ id. at p.19

¹⁴ [1969] 1 WLR 1867

the exhumation of a large number of human remains. He had to be satisfied that “that the public interest outweighs the interests of the objectors and the public interest that consecrated land should continue to be used for the sacred use to which it was dedicated.”¹⁵ He concluded that the appellants had shown that the public interest required the road and he allowed the appeal.

35. Recently *in re Emmanuel Church Bentley*¹⁶ where the appeal concerned the installation of mobile telephone aerials the Court of Arches (now consisting of three judges) repeated the need for a balancing exercise - “ A chancellor is required to consider the case for the petitioners and the objectors. In well known terms this necessitates a “balance of opposing considerations which are involved in the exercise of a judicial discretion: see Lord Penzance in *Nickalls v Briscoe* [1892] P 269,283”¹⁷.

36. We have noted that in the context of Article 10 the House of Lords stated clearly that the balancing of arguments is the correct approach. Baroness Hale (with whom Lords Mance and Neuberger agreed) said in *Belfast City Council v Miss Behavin’ Ltd*
“this is not a case in which the legislation itself attempts to strike that balance. The legislation leaves it to the local authority to do so in each individual case.....Had the Belfast City Council expressly set itself the task of balancing the rights of individuals to sell and buy pornographic literature and images against the interests of the wider community, a court would find it hard to upset the balance which the local authority had struck. But where there is no indication that this has been done, the court has no alternative but to strike the balance for itself.....”¹⁸

37. Provided the consistory court follows the correct procedure of balancing the arguments in the case before it, we do not consider that by the attachment of conditions to the grant of a faculty where the question of distribution of pornography arises there will necessarily be any engagement with Article 10. It is not every apparent interference with a person’s rights under Article 10 which necessarily amounts to a breach of those rights. There would still be plenty of other ways in which ‘customers’ can obtain “adult materials.” Alternatively, in view of the “very low level” (Lord Hoffman’s words cited above) of any such engagement a reasoned decision should make any argument of disproportionate limitation on a right to freedom of expression untenable.

Previous decisions in the Consistory Court

38. Mr Bishop provided the Court with a detailed analysis of the previous consistory court decisions involving telecommunication equipment. We agree with him that the earlier cases, which dealt with 2G mobile phones, are not of particular assistance in relation to a petition for a faculty in relation to

¹⁵ id. at p.1873 H

¹⁶ paragraph 12 above

¹⁷ op cit. at p.56 B

¹⁸ op.cit. at paragraphs 37, 47 and 90

equipment in connection with the use of 3G mobile phones. Those decisions demonstrate that the authorisation of the secular use of part of the consecrated land on which the church and churchyard are situated may be acceptable where the use will benefit the public and is seemly. They are consistent with even earlier instances where faculties were granted for facilities such as drains, water and gas pipes and electric or telephone wires being laid in a churchyard.¹⁹ Importantly such decisions strike a balance between the public benefit which mobile phones can provide and the risk of improper or unlawful communications being transmitted: see for example *St Peter Shipley* (15 August 1997: unreported) and in *re All Saints Harborough Magna* [1992] 1 WLR 1235.

39. There are two consistory court decisions relating to 3G mobile phones to be mentioned here. The first is *in re St Margaret's Hawes* [2003] 1WLR 2568 where one of the issues which Chancellor Grenfell had to consider was “Whether it is relevant to take account of the possible content of messages passing through the mast (the content issue).”²⁰ The Chancellor took the view that the “responsibility for the transmission of the signal or message is that of the person or body transmitting it and the receiver not that of the telecommunications provider.” He did not examine the matter in depth because Vodafone produced a formula for a condition on the faculty (not specified in the judgment), which would “so far as practicable, minimise the use of the network for inappropriate traffic.”
40. The second decision is that of Chancellor Walford *in re St Barnabas Heaton* (20 September 2004, unreported) where the provider, Hutchinson 3G, had entered a contract with Playboy pursuant to which people could access images from Playboy and other “top shelf” material using their 3G mobile phones. Objectors raised an ethical issue for his consideration. Chancellor Walford regarded it as disingenuous for Hutchinson to suggest that the firm should not be regarded as responsible for material which was made available as a result of their actions. However, “on the other hand it is an exaggeration to suggest that Hutchinson promote “top shelf” material in the sense of encouraging it merely because, amongst its many services it enables those who wish to do so to access Playboy images and the like” (paragraph 16).
41. We agree with this approach, which can be applied to T-Mobile in the present appeal. If T-Mobile used the church to enhance its network then it would be making material more readily available to people within its catchment area but it does not follow that they would thereby be actively promoting pornography. The responsibility for accessing the internet and the choice of site lies with the individual.
42. Chancellor Walford accepted the restrictions and safeguards which Hutchinson proposed and he added “Also, awareness of the problems of child abuse and of child pornography is now so great and the determination of the Government, the Police and the courts to deal with the menace is so strong

¹⁹ *In re St John's Chelsea* [1962] 1WLR 706 at 712-3

²⁰ at p.2570

that I do not believe that the new technology will make matters worse” (paragraph 18). That Chancellor Walford’s comment is justified is supported by the approach to such activities mentioned in paragraphs 27 to 30 above.

Mr Turner’s objection

43. Mr Turner provided lengthy written statements in advance of the hearing, he made oral submissions to this Court and he handed in a written response to the arguments put forward by the Appellants. He has spent a great deal of time and effort collecting information to demonstrate that the internet is a medium which facilitates distribution of pornographic material (whether legal or illegal) involving abuse of children and the serious consequences of child abuse. We need no convincing about this since the facts are well known to each member of the Court from our involvement with the secular law. However, we have to remember, particularly in the light of Professor Ramsdale’s evidence to this Court, that we are not considering access to the internet through a computer using a landline but the use of a mobile phone used primarily for conversations and text messages.
44. Mr Turner’s principal submissions in support of Chancellor Pulman’s decision can be summarised as follows;
 - (i) To allow the proposed installation would profane the church and be inconsistent with the Church of England’s Child Protection Policy and the UN Convention on the Rights of the Child;
 - (ii) The fact that mobile phones are capable of beneficial use in the community is immaterial. The Church should engage with the Government and the industry to ensure that all pornography is excluded in conformity with biblical teaching on sexual matters before a facility such as that sought here is installed in any church.
45. We do not consider that it is correct to suggest that the installation which is to be discreetly positioned in the tower, and which has been approved by the Chancellor, can in itself profane the church. Mr Turner’s concern is that an unidentified number of people within the catchment area in Chingford will, when reception is improved in the area by this installation, use their mobile phones to access pornography by linking into the internet. By making this possible he argues that the church would be profaned. This argument does not take account of the filtering techniques referred to by Professor Ramsdale in his evidence, as summarised above, and so does not differentiate between children and adults, although the majority of his submissions relate to the protection of children.
46. Mr Turner drew attention to the House of Bishops Policy on Child Protection, ‘Protecting All God’s Children,’ which states that the Church of England is committed to championing the protection of children and young people “both in society as a whole and in its own community”. This admirable general

statement of policy is translated into possible actions which the Church can take by a later sentence in the same paragraph which reads

“The Church of England will foster and encourage best practice within its community by setting standards for working with children and young people and by supporting parents in the care of their children. It will work with statutory bodies, voluntary agencies and other faith communities to promote the safety and well-being of children and young people.”

It is clear from this passage that the Church expects to work with many other bodies in addressing many of the issues facing children nowadays. Amongst those issues must be the question of how to help them with the communication technologies which in Rachel O’Connell’s words “are now integral parts of children’s lives”. Children are now using the same technology as adults and their need for good quality reception is the same. The difference lies in the need to safeguard them from being exposed to information which society regards as unsuitable for those of tender years. So far as children and mobile phones are concerned we consider that the education recommended by Rachel O’Connell and the filters described by Professor Ramsdale are two obvious approaches to the problem, which could be supported by the Church at large.

47. Mr Turner mentioned several of the Articles in the UN Convention on the Rights of the Child which stress the need for States to protect children against abuse, sexual or otherwise. The Convention was ratified by the UK on 16 December 1991. Mr George accepted that this Court can have regard to the Convention and we have noted the various Articles mentioned by Mr Turner. He himself recognises that the Convention is addressed to the ratifying States and not the Church but he argues that the Church should have regard to the principles stated in this document.
48. We accept that the Articles all contain sound principles in relation to child protection, but we point out that Articles 13 and 17 of this Convention, which Mr Turner did not mention, also state important rights of the child, which have to be brought into the balance. Article 13 says “The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.” Article 17 requires State Parties to recognise “the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources...”, and shall encourage “international co-operation in the production exchange and dissemination of such information and material from a diversity of cultural, national and international sources”. The last paragraph of Article 17 requires States to “encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being” bearing in mind the provisions of articles 13 (freedom of expression) and 18 (parental responsibility). We regard the action taken by the Government in relation to criminal legislation against pornography involving children (paragraph 29 above) as consistent with Article 34 (to protect the child from sexual exploitation) and the Good Practice Models produced by the Home Office Task force are a form of guidelines as

recommended by Article 17. It would not be inconsistent with the Convention for a mobile phone installation to be placed in the tower of SS Peter and Paul's church subject to these existing safeguards with the addition of the filtering techniques mentioned by Professor Ramsdale.

49. In his second argument Mr Turner refuses to recognise that a balancing exercise has any relevance here. He takes a purist line that no mobile phone installation should be placed in the church unless and until all pornography is excluded. Whilst he is entitled to his view, it totally ignores the advantage to adults and children of having good reception when communicating by mobile phone. Between parents and children it is, for example, a valuable means of keeping in touch when travelling, and for adults it is time-saving and of economic value for that reason alone.

Grounds of Appeal

50. Mr George's principal and substantial ground of complaint was that the Chancellor's judgment on the Transmitted Material Issue was flawed. He had failed to carry out any kind of evaluation for and against the grant of a faculty. Specifically he made no reference to a number of relevant matters all of which served to show that the church authorities at almost every level had recognised that, although capable of misuse, the installation of mobile phone equipment on churches was something that could, subject to appropriate safeguards, be approved in principle.

51. In support of his argument Mr George referred to the following:

- (i) Precedent: Chancellor Pulman did not refer to the decisions of any other consistory courts such as *Re St Margaret's Hawes* or *Heaton St Barnabas* although he was provided with a large number of authorities, as was this Court for this appeal. We observe that although the decision of one Chancellor is not binding on another, it can be of assistance to refer to it where the facts are similar. In the interest of consistency between consistory courts, if another Chancellor's decision is not to be followed it is helpful to know for what reason this is so. Here Chancellor Pulman could have said that his was a decision in principle based on the evils of pornography and thus different from those of his fellow Chancellors. However, he simply said "in my judgment it is wrong in law for the church to facilitate transmission of pornography" without specifying what "law" he had in mind.
- (ii) Guidance issued by the Archbishops' Council: The Archbishops' Council noted the risk as with any communication medium that it can be used for ill, but the Council also recognised that this had to be

balanced against the enormous good that can flow from mobile communications such as “emergency calls or the simple pleasure of people keeping in touch with each other”, which can, of course, include children keeping in touch with their parents so that the latter may know that they are safe. We consider that it is important not to treat the comments of the Council as definitive, because their guidance always recognised that the ultimate decision as to whether or not to approve an installation was the responsibility of the Chancellor in an individual case. However, insofar as the Archbishop’s Council treated the matter as one for a balancing exercise this Court agrees with that approach, which is in accordance with the established principles already referred to above in this judgment.

- (iii) Guidance from Chelmsford Diocesan Advisory Committee: In the Appendix to their Guidance notes on Installation of Telecommunications Equipment in Churches issued in October 2000 to assist parishes, the DAC helpfully set out the terms which should be included in a licence, including an undertaking by the operator to prevent the equipment being used for unlawful or immoral purposes as referred to in section 43 of the Telecommunications Act 1984 (now section 127 of the Communications Act 2003). This was not referred to by Chancellor Pulman, but we do not consider that that this has any bearing on whether or not his judgment was flawed. The main role of the DAC, as appears from the Policy page of the Guidance, is to assess the merits of the proposal in terms of its likely impact on the building. In this case, as Mr Ted Cooke explained in his evidence to the Chancellor, the DAC visited the church to consider the effect on the tower before issuing their certificate of no objection. However, the ultimate decision on the suitability of the terms of the licence was and is always for the Chancellor.
- (iv) The Model Licence: Mr George drew attention to the fact that the ‘contents’ clause requires compliance by the Operator or anyone else with whom it has contractual relations “with all applicable law and all relevant regulatory standards, whether statutory or otherwise”. These did not satisfy the Chancellor since they did not totally prevent the transmission of pornography which was the standard he set. Here we consider that the Chancellor was in error in not evaluating the merits

of this clause instead of coming to a conclusion based on what seems to have been a preconceived personal view about pornography.

- (v) Planning Permission: It was argued that the Chancellor was in error in implying that the planning authority could impose some condition about content when granting planning permission for 'antennae' (paragraph 51 of judgment). We accept that the remit of a planning authority is to deal with planning issues and that it would not be a material planning consideration to refuse planning permission or to impose a condition on a grant of permission on moral grounds.²¹ Chancellor Pulman's comments about the apparent failure of the planning authority to take action were therefore unwarranted.
- (vi) Effect of refusal of a faculty: It was said that the consequence of refusal of a faculty would not be the suppression of adult material but, as Mr Cooke said in evidence, the relocation of the antennae elsewhere in less suitable locations with possible damage to the conservation area. This was something which the Chancellor had ignored. In *re Emmanuel Church Bentley* the positioning of the aerials was a factor which this Court recognised as being relevant when weighing the argument for and against the grant of a faculty.²² We consider that this should have been one of many factors to be taken into account in the balancing exercise which was clearly not carried out in this case.
- (vii) Loss of valuable income: It was argued that the licence fee was to be put to the purpose of upkeep of the church and other uses consistent with Christian mission, namely training in bereavement counselling and other pastoral and community work, and its loss would be regrettable. It is, of course, important not to put financial gain as the first priority because churches are resilient in finding imaginative ways of raising money. We regard the first question as the suitability of the proposal. If the petition fails at that hurdle then the question of money will not arise. If, however, on a balance of the evidence the proposal is found to be acceptable then the secondary question is whether the financial sum proposed is fair. Provided that a parish has taken appropriate advice then the consistory court should not usually enter into an analysis of how the

²¹ see M. Grant *Urban Planning Law* (1982) at p. 285

²² op. cit. see paragraph 54

figure has been arrived at, and should simply accept that the PCC is content with it. In this instance the Chancellor's view that a church should not gain from a licence fee was coloured by his view of the proposal and his failure to carry out any balancing exercise.

Conclusion

52. Matters of primary fact are matters for the judge of first instance. But where the decision is based on an erroneous evaluation of the facts or on a balancing exercise in which the Chancellor has failed to evaluate the facts correctly such as by taking into consideration matters he/she should not, or ignoring relevant considerations which should have been taken into account, then it is well settled that this court can set the Chancellor's decision aside and consider the matter anew: see *St Edburga's Abberton* [1962] P 10 and *re Emmanuel Church, Bentley* cited above. Self-evidently, if the Chancellor fails to carry out any balancing exercise at all then this court can and should consider the matter afresh.
53. One of the difficulties confronting Chancellor Pulman was lack of evidence on the issue of the Transmitted material. The weight of evidence was directed to the health issue, which was the principal concern of local people and of Mr Turner's objection as presented on paper. On the health issue the Chancellor gave a balanced judgment. However, as the Chancellor himself recognised in paragraph 49 of his judgment, he had heard no evidence on filtering techniques and he relied on his own understanding of the subject. Professor Ramsdale has shown this to be faulty, because it is not possible to attach a filter to one set of antennae as the Chancellor suggested in his paragraph 49.
54. It would have been possible for the Chancellor to ask for further evidence but he did not do so. His judgment was thus based to a large extent on his personal experience of abuse cases in the secular courts, because he was not able to carry out a balancing exercise without relevant material before him. Inevitably his judgment gives the impression that his decision is the result of his personal (albeit understandable) dislike and horror of pornography. However, judges every day have to face and decide issues where personal likes and dislikes should not intervene. Part of the role and duty of a judge is to act with complete impartiality however strongly he or she feels about a particular subject or issue. This applies no less in consistory courts than elsewhere.
55. Thanks to the parties to this appeal we have had the benefit of hearing detailed evidence from Professor Ramsdale and the opportunity to examine the documents laid before us, many of which we have already referred to earlier in this judgment. Although the Chancellor did not differentiate between children and adults we believe that it is necessary to do so. The major consideration is the risk to children from using a mobile phone to access pornography on the internet.

56. The need to protect a child against danger starts from birth. The dangers in life have to be drawn to their attention primarily by parents but also by teachers and others who have responsibility for their safety and well-being. This, for example, necessitates early instruction on road drill, on never accepting lifts from strangers and, later on, appropriate guidance in connection with sexual matters.²³ As this Court pointed out in *re Emmanuel Church, Bentley* “Whilst the concern of parents to protect their children is natural we cannot overlook the fact that it is not possible to eradicate every element of risk before introducing some new feature into modern life”²⁴.
57. The risk associated with the internet is of children viewing pornography, or even being drawn into sexual abuse, and this has been clearly identified by the Government and by mobile phone operators and action has been taken to counter the risk, as we have explained above. The Government has tightened the law and there is evidence of active enforcement of it. We found Professor Ramsdale’s evidence to this Court helpful and persuasive. The mobile phone operators have introduced filtering techniques for those under 18 and there is continuous monitoring of websites by the Internet Watch Foundation so that sites with potentially illegal material can be blocked. We regard these steps as a reasonable and welcome public response to countering the risk to children. Parents and teachers also have their part to play in educating the young about some of the unpleasant and potentially dangerous features of the internet. This is a pressing need as children are introduced to technology early in primary school and even before that stage. As Professor Ramsdale confirmed, it is open to a cautious parent who provides a child with a 3G mobile phone to arrange for a block to be placed on access by the phone to the internet. It will then be available only for its original function for voice calls and texting.
58. As for adults, the risk is that some adults benefiting from the improved transmission in the Chingford area may somewhere use a mobile phone to access pornography which is not classed as unlawful by the criminal law. Christian standards of morality are rightly high on biblical authority, but human beings are imperfect and the Christian message is one of forgiveness and encouragement to lead better lives in the future. To bar something which will be of benefit to the public generally because there is a risk that some will be able privately to access material, which many Christians and others deplore, is to take an unbalanced approach. A more balanced view in relation to pornography would be for Christians to work in conjunction with others at improving standards of sexual morality in society generally.
59. It follows that we have concluded that the appeal should be allowed because the Chancellor failed properly to evaluate such evidence as was before him and did not attempt to conduct any balancing of the arguments for and against the grant of a faculty. Accordingly, we have ourselves considered matters afresh and have concluded for all the reasons previously set out above that subject to the points made below a faculty should be granted.

²³ There is some evidence that children themselves appreciate the need for instruction: see *The Times* 25 July 2007 p.5

²⁴ *op.cit.* at paragraph 49.

60. In addition to the general controls of the criminal law the contractual commitment in the licence which QS4 and then the operator, T-Mobile, as sub-licensee, have to enter into constitutes a reasonable system of control. The relevant Clause provides that

‘(e) before the commencement of any agreement/licence to an Operator the Grantee shall procure that the Operator concerned covenants separately with the Incumbent the Council and Grantee

- (i) to use all reasonable endeavours to ensure that the services provided or made available by the Operator insofar as they involve or may involve the use of the Operator’s Equipment, comply with all applicable law and all relevant regulatory standards, whether statutory or otherwise, and do not facilitate or encourage any act which is unlawful or contrary to any such standards.’

61. Mr Bishop submitted that this clause does not incorporate the important ‘UK Code of practice for the self-regulation of new forms of content on mobiles.’ This contains valuable undertakings by the operators such as that they will ‘work with law enforcement agencies to deal with the reporting of content that may break the criminal law’ and the application of a filter to content unsuitable for those under 18. Mr George responded that the Code is covered by the words ‘regulatory standards,’ but this phrase could be interpreted to mean standards set out in regulations rather than in a Code of Practice agreed to voluntarily by the Operators. We therefore consider that it is desirable for a condition to be attached to the faculty requiring compliance with the Code and in particular requiring the application of a filter by default which Professor Ramsdale told us is applied in practice, although it is not spelt out in the 2004 version of the Code placed before us.

62. We therefore direct that a faculty be issued out of the consistory court of the diocese of Chelmsford authorising the works proposed and authorising the incumbent and the PCC to enter into the proposed licence agreement save that as in *re Emmanuel Church, Bentley* it should be amended in clause 3.1.3 (a) (concerning QS 4’s access to the church) by including Ascension Day in the list of Holy days excluded from such access.

63. Further, the licence will be subject to the following conditions:

- (i) all Parties to the licence and any assignee or sub-licensee thereof shall observe and perform its requirements as if they were conditions of the faculty;
- (ii) the operator shall at all times comply with the UK Code of Practice for the self-regulation of new forms of content on mobiles (19 January 2004), as amended from time to time, and shall in particular apply a filter by default on internet content identified to the operator as unsuitable for customers under 18;

- (iii) the PCC shall exercise their right under clause 6.1.2(b) of the licence to receive reports at three monthly intervals of direct radio frequency measurements, and shall communicate the contents of such reports to any other person in the parish requesting them;
- (iv) the slate louvres shall be stored beneath the church floor near the back of the church, a note about their position shall be placed with the parish records, and a small permanent notice recording their position shall also be displayed in the church tower adjacent to the new GRP (glass reinforced plastic) louvres.

64. Finally, we express our thanks to all counsel and to Mr Turner for their extensive research and the assistance they have given us on this appeal.

65. QS4 will pay the court costs including correspondence fees for the registrar and the expenses incurred by the court.

Sheila Cameron

Roger Kaye

Geoffrey Tattersall

Dated 31 July 2007