

09 MAY 2016

Neutral citation: [2016] ECC Swk 11

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

IN THE MATTER OF THE CHURCHYARD OF THE CHURCH OF ST NICHOLAS,  
CHARLWOOD

AND IN THE MATTER OF A PETITION FOR A FACULTY TO FELL FIVE TREES AND  
PRUNE TWO TREES

## DIRECTIONS

### Introduction

1. These directions relate to a petition by Paul Mount (Churchwarden), Peter Anderson (Secretary of the PCC) and Patrick Cox (Treasurer of the PCC) to fell five trees and to prune a two other trees. It appears that consent to these works has been given by Mole Valley District Council (on 11 March 2015)<sup>1</sup>.
2. I need to set out some of the background to this matter<sup>2</sup>. In November 2013, the then Rector<sup>3</sup> and Churchwardens petitioned to fell 7 trees in the churchyard and to prune one tree. Mole Valley District Council, the local planning authority, were notified and did not object. On 11 December 2013, I granted a faculty for these works. When the Petitioners came to carry out the works, Dr Cuthbert objected in person at the site. The police were called and work was suspended. On being notified of the situation, I asked the Rector not to carry out the works for the time being. There then ensued an extended period in which representations were made. In the event, the faculty granted on 11 December 2013 lapsed without the work having been carried out. Further, on 9 September 2014, Mole Valley District Council made a tree preservation order covering the trees in the churchyard. Against this background, I decided to take no further action on the petition. I said that if the Rector and Churchwardens decided to pursue the matter it would need to be by a fresh petition.
3. On 23 February 2016, the petition was received in the Registry. However notice of the Petitioners' intention to apply for a faculty had been given in the required form, namely by being displayed (i) on a noticeboard inside the church and (ii) on a noticeboard outside the church, in each case between 1 and 31 December 2015.
4. Dr Cuthbert first wrote to the Registry objecting to the proposals on 3 December 2015<sup>4</sup>, but at that stage no petition had been submitted. The Registrar wrote to her on 8 December 2015 explaining this. Following submission of the petition on 23 February 2016, on 3 March 2016 the Registrar wrote to her in accordance with the Faculty Jurisdiction Rules asking whether she wanted to become a party opponent to the petition (and serve formal notice of objection in accordance with Form 5). She decided that she did want to become a party opponent, serving a Form 5 on 29 March 2016.

---

<sup>1</sup> I need clarification of the terms of the consent; see further below

<sup>2</sup> A full account of the previous petition is set out in Directions dated 19 September 2014 a copy of which I annex hereto.

<sup>3</sup> He has since retired.

<sup>4</sup> In her objection she also submits that a petition cannot validly be made.

### **Dr Cuthbert's application**

5. Since 3 December 2015 Dr Cuthbert has copied to me some of the letters that she has sent to the Registry. She has also written two letters addressed to me, one dated 22 March 2016 and one dated 4 April 2016. In them she asks me to recuse myself from the case on the basis of what she compendiously describes as my "unscrupulous conduct" in the way that I dealt with the petition that was presented in 2013. I need not set out in more detail what she alleges but in order that the position may be understood by someone reading these directions, I should make it clear that both letters attack my integrity in strong terms.
6. I reject Dr Cuthbert's criticism of my conduct of the petition that was presented in 2013.
7. The further question arises whether, my conduct of that matter having been attacked in such forceful terms, I can properly hear the present petition. I am confident that I can. I have taken a judicial oath. As a matter of principle, it would be wrong if a party could cause the removal from a case of the judge appointed to hear the case by making offensive comments about them.
8. I do recognise that if there were merit in Dr Cuthbert's criticism of my conduct of the petition that was presented in 2013, it would be inappropriate for me to hear the present case. Further, she may consider that I am not an appropriate judge of my own conduct in that matter. However that is as it may be; the decision as to whether to recuse myself falls to me to take.

### **Mr Cox's application for an extension of time to respond to Dr Cuthbert's Objection**

9. I need now to turn to an application which has been made by Mr Cox, who is dealing with the matter on behalf of the Petitioners. The position is that he received Dr Cuthbert's Form 5 and submissions via the Registry on 6 April 2016<sup>5</sup>. He has written to the Registrar as follows:

*We spoke yesterday on the telephone about our application for the tree works and Dr Cuthbert's submissions which I received under cover of Mr Morris's letter of 6th April. Form 6 requires me to submit the PCC's response within 21 days of receipt.*

*As I explained, as well as being the petitioner who is dealing with this application I am also the Church Treasurer and I was fully engaged with the preparation of the Church's annual accounts when the package arrived and I will be engaged all this week with finalising the accounts and agreeing them with the Independent Examiner. I have my own work to do and as a volunteer I will have to fit the preparation of our response in to my spare time. Given that Dr Cuthbert's submissions are over 200 pages it is going to be impossible to complete this task within 21 days and accordingly I request an extension of the time allowed to 8 weeks.*

10. I directed that Dr Cuthbert be given the opportunity to comment, asking her to do so before 3 May 2016, when the 21 days for the Petitioners' response would expire. Her position is that she requires further information from the Registrar before she can express a view about the matter.<sup>6</sup> I am not sure what further information she would like, but it is a simple matter for a person to say whether or not she objects to an extension of time being granted. I shall

---

<sup>5</sup> It seems that he did not receive a copy direct from Dr Cuthbert.

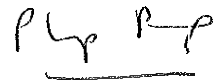
<sup>6</sup> See a letter dated 29 April 2016 to the Registrar.

accordingly approach the matter on the basis that Dr Cuthbert does object to an extension of time being granted.

11. It seems to me that Mr Cox has explained why he needs extra time and I think that it is appropriate that he should have it. I appreciate that Dr Cuthbert would like the matter determined as soon as possible but the matter is not intrinsically urgent, and of course the works cannot be carried out until a faculty has been granted (if it is).

**Other matters**

12. These directions give me the opportunity to raise some other matters
13. This is a case where permission to fell trees which are protected by a tree preservation order has (I think) been granted by the local planning authority. In a case where there were no objections, I would attach considerable weight to such a consent and to the DAC's recommendation<sup>7</sup> and would not require any further arboricultural evidence.
14. However in the present case there is an objection. I still attach considerable weight to the TPO consent and to the DAC's recommendations but I would be further assisted if there were an arboricultural report prepared by a suitably qualified person. I would therefore be grateful if the Petitioners would consider preparing such a Report.
15. It seems to me that the copy consent that I have received from Mole Valley District Council only by implication gives consent for the works which are the subject of the faculty; formally, all it does is refuse permission for the removal of a holly tree. I would be grateful if I could receive documentation which makes it clear that consent for the proposed works has been given.
16. Finally, I note that three of the trees which it is proposed to fell are yews. I would be grateful if the Petitioners will send the Petition and supporting documentation, together with these Directions, to the Ancient Yew Group. They are to have 28 days to comment, if they wish.
17. Copies of these directions should be sent to the Petitioners, Dr Cuthbert and the Archdeacon.



PHILIP PETCHEY  
Chancellor  
5 May 2016

---

<sup>7</sup> The DAC in the present case have recommended the works.



### Charlwood, St Nicholas (No 2592)

This matter relates to a faculty which I granted on 31 October 2013 for the felling of some trees in the churchyard of St Nicholas's Church, Charlwood.

I should begin by setting out the basic facts.

In May 2013, the PCC prepared a report entitled *Trees in the Churchyard*. The trees were all numbered.

Tree 1 was described as follows:

#### *Large oak*

*This is a fine oak tree at the entrance to the churchyard. Nevertheless a few of the lower branches are obscuring the view of the church. This is an important view: it has appeared on the cover of Country Life, and it frequently appears on TV programmes on Charlwood (usually in connection with runway proposals). Opening up the view would show the Church as being at the centre of village life.*

*The Parish Council has expressed concern that some of the upper branches are rotten, and that they may present a safety hazard. They have commissioned a report from an arboricultural expert, Paul Collis, and he recommends some pruning, perhaps more than is needed. The Council have agreed to pay for this, and have also offered to include the pruning we need.*

*Recommendation: prune a few branches to open up the view of the church also a minimum number of rotten branches.*

Tree 2 was described as follows:

#### *Undistinguished Yew*

*This yew tree, behind the sign board, seriously obscures the view of the church. The tree is dwarfed by the fine Irish yew on the right. It has no merit.*

*Recommendation: remove it.*

Tree 6 was described as follows:

*This small evergreen tree serves no useful purpose. It merely makes this end of the churchyard over gloomy.*

*Recommendation: remove it*

Tree 8 was described as follows:

#### *Large scruffy holly*

*This large scruffy self-sown holly is besides the church path. It serves no useful purpose. On the contrary it obscures an attractive view of the church, previously much photographed.*

*ReCommendation: remove it*

Tree 12 was described as follows:

*[Small ornamental cherry]*

*[This tree is] pretty when in flower. [It] was planted in memory of a visit by Americans from Houston in 1980. It is beginning to obscure the important view of the east end of the church, and should be removed before it gets any larger.*

*Recommendation: remove tree 12.*

Tree 17 was described as follows:

*The four Gibson bushes*

*These four evergreen bushes surround the grave of Revd EM Gibson, former Rector. They cast a scruffy gloom over the west end of the church.... Gibson has a very large tombstone, and doesn't need scruffy bushes as well.*

*Recommendation: remove.*

Tree 22 was described as follows:

*Two small evergreens in hedgerow*

*Situated at the west end of the new churchyard, these two trees are slightly incongruous in a rural scene and will become more so as they grow larger.*

*Recommendation: remove the more southerly tree.*

Tree 32 was described as follows:

*Old cherry*

*This tree, behind the ash, is obviously very old. A large branch has fallen into the glebe field, and the parish council have kindly offered to have this removed without charge. But the whole tree has reached the end of its life.*

*Recommendation: ask Parish Council to remove it.*

I should add that the Report also considered the other trees in the churchyard; the reason I refer specifically to trees 1, 2, 6, 8, 12, 17, 22 and 32 is because it was for the felling (and in one case, pruning) of these trees that I was subsequently petitioned for a faculty (see below).

The report was shown to the Mole Valley Tree Officer who said that he had no major issues with the works proposed. The (secular) Parish Council has agreed to pay for the work (or, it may be, contribute to the cost).

None of the trees concerned were subject to tree preservation orders. However they are within a conservation area. This means that before felling any of the trees, the PCC had to notify the local planning authority, which might have objected. The local planning authority did not object and on 23

May 2013 issue a notice of non-objection under section 211 of the Town and Country Planning Act 1990.

On 15 November 2013, the Rector and Churchwardens petitioned for a faculty to fell trees 2, 6, 8, 12, 17, 22 and 32 and to prune tree 1. Following the recommendation of the works to me by the DAC, on 31 October 2013, I granted a faculty for these trees to be felled. The faculty was issued on 11 December 2013.

Dr Cuthbert did not object to the grant of a faculty for the works. However having discovered that the works were going ahead she made a complaint to Mole Valley District Council. By a letter dated 17 March 2014, the Council responded as regards the trees that were the subject of a faculty as follows:

*1 Large oak*

*It is proposed that this tree is pruned. I have read your comments on this and discussed them with the applicant and the council has no objection to the proposed work.*

*2 Yew tree*

*The main issue with this tree appears to be its age. It is a multi-stemmed tree and having measured the girth of the largest stem, we calculate it is approximately 120 years old. That is consistent with the date of the headstones which have been placed near the tree when it was much smaller or newly planted and which are now affected by the tree. I do not accept your claim that the tree is 300 – 500 years old. If the applicant wishes to remove this tree then the Council will not object.*

*6 Irish yew/unknown tree*

*This is identified as an Irish yew tree and it is not in good condition. If the applicant wishes to remove this tree then the Council would have no objection.*

*11, 12, 13 Cherry Trees*

*No further action is proposed for these trees*

*17 Gibson bushes x 4*

*These have been removed and the tombstone is now more visible. The stumps will be removed in due course.*

*22 Hedgerow*

*There is no objection to the action that is proposed for this hedgerow.*

*32 Cherry tree*

*The Council has no objection to the removal of this tree.*

On 24 April 2014, Collis Tree Services attended at the churchyard to carry out the works. Dr Cuthbert objected to the works being carried out and the police attended. The work ceased for the time being. On 24 April 2014, Dr Cuthbert telephoned my clerk expressing her concern about the felling of

the trees and telling him that there was in existence an arboriculturalist's report suggesting that it was not necessary to fell them.

Against this background, I requested that Mr Campen not to fell the trees for the time being, giving him the opportunity to make representations about this (there might, for example, have been an urgent need to fell the trees on safety grounds). Subject to this, what I had in mind was consideration of whether it was appropriate in the circumstances that the faculty should be revoked. Although this is a course that is only exceptionally taken, it always remains possible for a faculty to be amended or revoked after it has been granted in the light of additional information and further consideration. Mr Campen undertook not to fell the trees and, since that time, I have received representations from both Dr Cuthbert and Mr Campen and the churchwardens. These proved to be rather more extensive than I envisaged and the process of exchange took rather longer than I envisaged. At a very early stage of the process, the faculty expired i.e. the six month period provided for the execution of the works came to an end. However the faculty (as is standard practice) after the definition of the implementation period included the words "or such further period as the Court may allow". If I had been satisfied that circumstances had not been demonstrated whereby the faculty should not have been revoked, I would have granted an extension of time for the implementation of the faculty.

Mr Ron Howe, Mole Valley District Council's Tree Officer had the opportunity of reading Dr Cuthbert's representations to me submitted on 5 May 2014. By an e mail to the Registry dated 12 May 2014, he responded as regards specific trees as follows:

*[Tree1] Oak: The crown lifting of the Oak to remove some lower branches, although not necessary in the interests of the trees health or for ecological reasons as noted in the Wychwood report, is perfectly reasonable for amenity reasons and not something that the could normally be refused on the basis of visual amenity. I note that when I recently met on site with the Rector et.al, Surrey Wildlife Trust also had no concerns with the pruning of the Oak on the basis of wildlife. The removal of the lower branches would have no detrimental affects on bats or birds as none of the branches provide roosting or nesting features according to the wildlife experts thus far.*

*[Tree 2] Yew: The Yew is not over 300 years old and the Forestry Commission did not in fact confirm that age. If everyone has read the FC's letter correctly they would see that the FC used that age as an example in the early part of their letter but later in that letter they confirmed the Yew to be about 140 years old which, is consistent with the Council's own assessment of 120 years. Again the age of a tree is somewhat irrelevant to the Councils determination on the basis of the visual impact of proposed tree-works. If a tree genuinely was an ancient veteran specimen then we might take a different view.*

*[Tree 8] Holly: Again, the Holly was not estimated much above 80 years old by the Council or the FC and there seems to be agreement by all and the Wychwood report that the Holly is not a bird or bat habitat.*

By an e mail dated 24 June 2014, Mr John Parker, the tree adviser of the Diocese of Southwark commented on all the documentation thus far as follows:



*The quantity (and quality) of documents relating to this matter make it rather difficult to untangle, but it seems that we are currently in a position where seven trees are proposed for removal. One - T25<sup>1</sup> - is dead, and requires removal for purely arboricultural reasons. The PCC have requested that they remove the other six for different reasons; this request has been granted by the Local Authority Tree Officer who has responsibility for identifying and protecting any trees of particular merit in his area. His decision has been approved by the Chief Executive of Mole Valley.*

*It seems as though the only person objecting to these removals is Dr Cuthbert. I have read the various submissions from Dr Cuthbert and contrasted them with the measured arguments made by the PCC and Local Authority and I am more than happy to give my full support to the latter. There are too many allegations spread across too many pages for a comprehensive rebuttal of every one of Dr Cuthbert's points. However, the letter from Yvonne Rees (Mole Valley) dated March 17th 2014 and the email from Ron Howe (Mole Valley) dated May 12th 2014 give a good assessment as far as I can tell from reading all of the documents. I do not see that there is anything which can be added other than to express complete support.*

*An awful lot of material has been submitted by Dr Cuthbert, but I think that a good summary which is representative of the whole can be found on page 11, section 13 of the first printed report - 'Conclusions.' The tone is rather abusive, the content inaccurate. Opinion is stated as fact. Allegations of the PCC breaking the law are made; as far as I can see this is simply not the case. Throughout the documents from Dr Cuthbert there are allegations of wrongdoing and assessments of tree condition and value which appear to be based on a misinterpretation of the evidence supplied. Some of the claims made by Dr Cuthbert are actually contradicted by the accompanying reports and statements which she provides.*

*The issue here is caused by the fact that the trees proposed for removal are not being removed for purely arboricultural reasons (with the exception of T25) but because of other considerations, namely the fact that by removing these trees will bring wider benefits to the churchyard. This opens the matter up for debate – as with any proposed tree removal for non-arboricultural reasons (i.e. trees which are not dead, dying or dangerous) there will be people who support the proposal and people who object. Because the argument is based in opinion (the churchyard would be better/worse without the trees) rather than fact (the tree is dead/dangerous) it is never going to be possible to reconcile all parties.*

*In this case the legal and procedural mechanisms put in place appear to have worked. The PCC want to remove the trees; the LA Tree Officer supports this desire and has decided that the trees are not worthy of protection. The LA Chief Executive has supported this position and the DAC Arboricultural Advisor has agreed that the tree removal is an appropriate course of action. It seems as though everyone involved is supportive of the proposal to remove the trees, including at least two qualified and experienced Arboricultural professionals who are specifically tasked by their organisations to evaluate trees and act to protect them where necessary. It is regrettable that a local resident does not agree with the wishes of the PCC but I do not believe that this should be allowed to take precedence over the extensive and balanced professional advice which has been provided.*

*In conclusion, I can only repeat my previous advice - that this work is carried out as soon as possible to ensure that the Local Authority permission does not lapse. All necessary steps should be taken to ensure that any associated legislation is adhered to (with particular regard for nesting birds, bats etc.) and works must be undertaken safely, by competent contractors, in accordance with best*

---

<sup>1</sup> This appears to be a reference to Tree 32.

*arboricultural practice. The work is completely reasonable, totally legal and is supported by the PCC, the Local Authority and the DAC Arboricultural Advisor; it should be undertaken without delay.*

In her latest submissions dated 18 August 2014, Dr Cuthbert included the following

- a letter dated 24 June 2014 to Dr Cuthbert from Dr Richard Jinks of Forest Research at the Centre for Sustainable Forestry and Climate Change. He suggested that the yew was already a significant tree at the end of the nineteenth century and is now a notable churchyard yew.
- a report from Mr IST Thompson BSc (Hons), MSc eFor, MArbA, Cert Arb. He recommended that four trees in the churchyard which are subject to faculty permission for felling should be made subject to tree preservation orders: T2, T6, T8 and T22.

This material was forwarded to Mole Valley District Council. Whether in the light of it or independently of it, on 9 September 2014, the District Council made a tree preservation order in respect of all the trees in the churchyard. The reason for making the order was stated to be:

*The majority of the trees are essentially in a healthy condition and are considered to be of public amenity value to the Conservation Area and character of the historic churchyard and are subject to a section 211 Conservation Area Notice to remove several of the trees.*

By article 3 of the order, it came into force immediately although it is still subject to confirmation. It may or not be confirmed and, if it is confirmed, that does not mean that any particular tree cannot be felled: only that it cannot be felled without permission.

As the account of the facts set out above makes clear, in this matter the Vicar and Churchwardens have not sought external advice, save from the Tree Officer of the District Council with whom they agreed the works, leading in due course to the District Council not objecting to the felling of the trees in Conservation Area. The position of the District Council was evidently important to the Vicar and Churchwardens in pursuing the grant of a faculty, to the Diocesan Tree Adviser in advising on the grant of a faculty (see below) and to me in granting the faculty. Thereafter it will have been noted that the District Council did not change its mind following a complaint by Dr Cuthbert (see its letter dated 17 March 2014); that the Tree Officer of the District Council raised no concerns in an e mail dated 12 May 2014; that in his e mail dated 24 June 2014, the Diocesan Tree Adviser placed considerable reliance on the views of the District Council.

The making of the tree preservation order fundamentally alters the legal position because permission is now required if the trees are to be felled; since it also seems to reflect a change of approach as to whether the felling of the trees ought to be permitted, it is at least possible that the Vicar and Churchwardens and the Diocesan Tree Adviser will no longer be able to pray in aid the support of the District Council for the felling.

Against this background I do not think that it is appropriate for me to continue to consider the appropriateness of the felling of these trees in the context of the possibility of extending the time for completion of the works under the faculty granted in October of last year and which has now expired.

Thus for the time being no tree felling should be carried out in the churchyard: both because the trees are now all covered by the tree preservation order and also because no faculty now exists for their felling. There may be some scope for the sort of modest tree works which do not require a faculty— but these may require consent from the District Council. In any case of doubt, the Vicar and Churchwardens should check with the Registry and with the Council.

What the Vicar and Churchwardens need to do next is to consider whether they wish to object to confirmation of the tree preservation order.

If the position is that they do object, the tree preservation order is ultimately not confirmed and they still wish to fell the trees, they should petition again. If in these circumstances I needed as a matter of law a new statement of non-objection to the felling of trees in a Conservation Area, I would expect it to be obtained; in any event, I would expect to have the view of the District Council on the matter in some form.

If the position is that the tree preservation order is confirmed but the Vicar and Churchwardens still wish to fell the trees, before petitioning they will need the appropriate consent from the District Council (I would not expect to grant a faculty absent such a consent).

If the Vicar and Churchwardens do bring a fresh petition, I will of course have the advice of the DAC.

If a further petition is brought, I will direct that Dr Cuthbert is specifically notified of it; in these circumstances she will have the opportunity to object, if so advised.

It will be possible for the material that has been submitted to me since April by the Vicar and Churchwardens and by Dr Cuthbert to be resubmitted if and insofar as it is relevant in the context of any future petition. I hope that it may have led at any rate to some narrowing of the issues between the Vicar and Churchwardens and Dr Cuthbert.

It has been suggested in the past that decisions relating to trees in churchyards should be those of the local planning authority alone; and there is some attraction to that view. However that view was rejected in the Church of England's last review of the faculty jurisdiction and the retention of the faculty jurisdiction does serve to underline the importance and sensitivity of trees in churchyards. The dual jurisdiction does however add a layer of complication to contentious tree cases such as the present. This, I am afraid, has to be accepted by those involved with decisions in respect of trees in churchyards.

Finally, I should add for completeness that since my last directions in this matter I have received further representations from Dr Cuthbert dated 1 September 2014, 3 September 2014, 4 September 2014 and 13 September 2014. They should be copied to the Vicar and Churchwardens.

PHILIP PETCHEY  
19 September 2014

