

24 MAY 2011

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

AND IN THE MATTER OF THE CHURCHYARD OF ST BARNABAS, DOWNHAM

JUDGMENT

1. This is an unopposed petition by the Vicar, the Reverend Jonathan French, and the churchwardens, Mr Michael Hollingshead and Mrs Daphne Raggott for a faculty for the erection of a prefabricated storage shed in the north-east corner of the churchyard for the use of the 12th Lewisham South Scout Group. If permission is to be given for the works it will also be necessary for there to be permission for the Vicar to enter an appropriate licence agreement with the Scout Group, and indeed my papers do contain a draft licence. However the petition has not as yet been amended to include a prayer to permit the Vicar to enter such a licence.

2. The shed is 5.093m x 5.842m x 2.390m (the latter measurement to the eaves). It has the benefit of planning permission. The proposal is recommended by the DAC. It is proposed to be built in what I may describe as a "tucked away" part of the churchyard, behind a hedge. It is not laid out as a garden, or anything of that kind. The Church was built in 1929 and is unlisted. The churchyard has never been used for burials.

3. The background to the matter is set out in a letter from Mr French to the DAC:

12th Lewisham South Scout Group used to meet at Downderry School in Downham. In 2007 the Scout Group were unable to meet at Downderry due to major building work which involved an asbestos risk. Their storage hut had to be dismantled and stored until a new location could be found. During that time the group met in St Barnabas Church Hall in 2008.

A good relationship developed during that time between the Group and the Church and we have made storage space available to them in the hall. The Scout Group expressed an interest to make a more permanent home at the Church Hall and as a Church we have been delighted that this development has come about. It has brought life and a vital income into the Church and Hall.

As the Scout Group have now made a more permanent home here they need to find further storage space particularly for those things that were in the storage hut at Donderry School. The Church is unable to provide further space in the Hall. The hut would not be for meetings (it is not big enough) but entirely for the extra storage space the group needs.

4. The shed would be erected by the Scout Group (at a cost of about £4,500). The Group would not pay rent.
5. I begin by noting that the reason why I have jurisdiction in this matter is because the churchyard is consecrated ground: in the language of Halsbury's *Laws of England*¹ it is *separated for ever from the common uses of mankind and set apart solely for sacred purposes for all time.*²
6. The building is evidently necessary to facilitate the use of the 12th Lewisham South Scout Group of the Church Hall. Although the Group are not a Church sponsored scout group, the petitioners very properly want to assist them.
7. The proposed building would not be ancillary to the Church: it would be ancillary to a (secular) use of the Church Hall. The use of the building would be for secular use.
8. I am confident that historically a Consistory Court would not have entertained an application for a proposal such as that now before me; it would have been viewed as

¹ (4th edition (1975).

² See paragraph 1069.

inconsistent with the consecrated status of the land on which the hut was to be built and as articulated at paragraph 5 above. Nonetheless what has happened over time is that a more relaxed attitude to secular use has been taken. The process was well charted by my predecessor (now Dean of the Arches) Charles George QC writing extra-judicially in 2002 in the Ecclesiastical Law Journal: see *Shared Use of Church Buildings or Is Nothing Sacred?*³ He focused on the shared use of existing church buildings, so that (for example) part of a church might be entirely devoted to the provision of a secular restaurant⁴ or for a doctor's surgery⁵. Somewhat different, but frequently encountered, is the case of a faculty granted for the installation within a church of a telecommunications aerial.

9. In 2003, the Review Group on the Pastoral and Dioceses Measures published its Report *A Measure for Measures*. It was debated and accepted by General Synod in February 2004. Recommendation 39 was as follows:

*Section 56(2) of the 1983 Measure should be amended to allow a lease of part of a church in use*⁶.

The reasoning behind the recommendation was as follows:

4.08 One of our key aims is to facilitate the extended use of church buildings without the current need in some cases to use the redundancy procedures as a 'device' to achieve this. Our consultation highlighted this as a matter of some uncertainty and concern to dioceses and one particularly deserving attention.

4.09 Many parishes are seeking to accommodate wider uses while retaining part of their churches for worship. This is a matter of outreach and response to social and community needs, but also a means of raising revenue to help maintain the church building and support the Church's wider mission. Two potential restrictions on the extended use of consecrated

³ (2002) 6 Ecc LJ 306.

⁴ See *Re St Mary-le-Bow*, London [2001] 1 WLR 1507 (London Consistory Court).

⁵ See *Re St Nicholas's, Guildford* (1985) 6 CCCC No. 25 (Guildford Consistory Court).

churches are the act of consecration itself (setting the building aside for 'sacred purposes', and section 56(2) of the Pastoral Measure which prohibits the sale or lease of any part of a consecrated church other than under the Measure.

4.10 The latter is in reality a greater bar to extended use than the act of consecration itself. Wide interpretation of "sacred purposes" by some chancellors has resulted in parts of churches being converted to provide various parish facilities and benefits, with tenure for non-parish groups being achieved by licence. Making too hard a distinction between sacred and non-sacred is difficult, and new generations have different understandings. However it remains a matter for interpretation of individual diocesan chancellors and our view is that it would be helpful to have a clearer steer in the legislation on what can be achieved by extended use under faculty, while decisions in individual cases continue to rest with the chancellor.

4.11 In some cases an extended use is only practicable if the new occupier acquires a legal interest in the part of the building in question (for example, because of funding requirements). Licences may be made under faculty but leasehold or freehold interest can only be granted by declaring all or part of the church redundant. In a number of instances parishes have proceeded with the faculty route in mind, only to become aware at a fairly advanced stage that their proposals would necessitate partial redundancy and would need to be pursued under the Pastoral Measure. We have heard of imaginative schemes which have been jeopardised or delayed because of confusion and concern over the processes involved.

10. Accordingly section 56 of the Pastoral Measure was amended by the Pastoral (Amendment) Measure 2006. By virtue of subsection (2A), section 56 now provided for a lease to be granted in respect of part of a church. Sub section 2A provided as follows:

(2B) On an application by [the incumbent of the benefice comprising or including the parish in which the church is situated or, where the benefice is vacant, the bishop in the name and on behalf of the incumbent in the corporate capacity of the incumbent under sub-section (2A)] the court may, whether or not it grants a faculty under that subsection, grant a faculty for the lease of any land belonging to or annexed to a church.

11. In January 2007, the Legal Office of the National Institutions of the Church of England⁷ issued a guide to the amended section 56 *Wider use of parts or parts of a church*. I shall set out three paragraphs of it:

6 The purpose for which a church is built is for the worship of Almighty God. This is so whether it was built centuries ago or in more recent times. Use for worship is its essence or 'primary purpose'. A church is recognised in law as "a local centre of worship and mission"⁸ with the word worship rightly coming first. The building may be capable of being used for other purposes in addition to worship, but if the consequence of such other use would be that worship is reduced to a mere token, then the church would have ceased to fulfil that primary purpose.

7 Any parish contemplating entering into an arrangement with a person or body desiring to occupy and use part of the church must from the outset of discussions keep in mind the 'primary purpose' of the church. As explained above, a lease is an alternative procedural means of facilitating the use of part of a church where a licence is not appropriate. However, the principles determining whether a proposed use is acceptable will be the same whether the chancellor is asked to grant a faculty authorising a licence or a lease. In the case of a lease the chancellor is expressly required⁹ to "ensure" that, where part or parts are to be let, the building as a whole will still be used primarily as a place of worship.

8 How the balance between use for worship and 'non-worship' can properly be kept is a question of fact to be decided in an individual case depending upon the size and layout of the building, the scale or extent of the subdivision proposed and the part or parts intended to be licensed or let for 'non-worship' purposes. The number of days each week during which outside bodies may use parts of the church will be relevant to this question of balance. For example, use during normal working hours from Monday to Friday may be acceptable but use on seven days a week, particularly if there is no separate access, could interfere with both regular worship and the use of the church for occasional services such as marriages, and could thus be unacceptable as interfering with the 'primary purpose'.

12. The Guide also gave examples of wider uses of churches:

11 Many such wider uses are consistent with the mission of the Church. Examples of successful arrangements which have already been adopted include:

7 In conjunction with the Council for the Care of Churches, the Pastoral and Redundant Churches Department of the Church Commissioners, the Ecclesiastical Judges Association and the Ecclesiastical Law Association. It should be noted that the members of the EJA are Chancellors and Deputy Chancellors.

8 Section 1 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991.

9 By section 56(2A) of the 1983 Measure inserted by the 2006 Measure.

- *the use of crypts for a variety of alternative purposes such as rehearsal space, for classes and social groups, nurseries and drop-in centres;*
- *a similar variety of uses for vestries, including club rooms for teenagers, and use as a village community shop;*
- *the use of a room attached to a church (with its own external access) as a community police base where surgeries are held regularly;*
- *the use of other rooms in churches for a variety of charity and community groups and as community or internet cafes; and*
- *(following reordering), multipurpose community spaces within the nave, used by schools and community groups and for exhibitions etc. (In one case the nave is used as a school hall, gymnasium and dining hall; in another the west end of the nave has been converted to provide two storey accommodation housing a charity shop, library and exhibition space; and in a third the altar has been placed centrally in the nave, with a kitchen installed in the south porch and the tower developed to provide a disabled access WC and vestry in its base and a meeting room at first floor level, thus enabling greater use of the church for meetings, a summer play scheme etc.)*

13. Two comments are appropriate on the material set out at paragraphs 9 to 12 above.
14. The first comment is that the Review Group identified two discrete restrictions on the extended use of churches: first, the effect of consecration and setting aside for sacred uses and, second, the inability to grant a lease of part of a church. The recommendation and amending measure expressly only addressed the second of these matters. However the Review Group evidently envisaged that the legislation could give, in its words, a *steer* to Chancellors on what was permissible. One can see how it would have envisaged that this would come about; there would be no point in Chancellors having power to grant leases of parts of churches unless it was for secular purposes. However as Charles George QC's article in 2002 showed there was no doubt that there was a power to permit the secular use of parts of churches; the issue was as to the extent of the power. Thus, although I think that one can see the legislation as legitimately

encouraging the use of the power, there is no reason to consider that section 56 was amending the existing discretion which Chancellors had in respect of the exercise of this power.

15. The second comment is that the discussion in the Guide is all about the use of parts of churches - it does not discuss any situation comparable with the facts of the case before me, and in particular the circumstances when the use of the specific power under section 56 (2B) might be appropriate.

16. It seems to me that the secular use of part of a church is rather different to the fact of the case before me. A church building may retain its overall character as a building set aside for ecclesiastical purposes – in the words of the Guide be primarily used as a place of worship - and yet part of it be used for secular purposes. Further, there may be potential “spin off” benefits to the ecclesiastical purposes as a church so used for a particular secular purpose may be generally used to a greater extent than might otherwise have been the case. The provision of an aerial within a church building has no practical effect at all on the continuing ecclesiastical purposes for which the church is used.¹⁰ It is the fact that permission is sought from me is for a new building which will be separate from the church and have no other purpose than a secular one that makes the case different. Thus it seems to me that if what were proposed were the use of part of the existing church for the Scouts’ storage requirements (if one imagines that it could accommodate them) then the grant of a faculty would be likely to unexceptionable. However what I am considering is the construction of a permanent building for a secular, non-ancillary use.

¹⁰ Such a proposal now has the sanction of the Court of Arches: see *Re St Peter and St Paul, Chingford* [2007] Fam 67.

17. There are examples of such use. They represent however a different stream of authority, and which tend to be complicated by the need to consider the application of the Disused Burial Grounds Act 1884.¹¹ A good example is *In re St Peter the Great, Chichester*¹² which was a case concerning the construction of an electricity sub-station in a disused burial ground. In the light of this, the focus of the discussion was on whether the proposal was permissible within the terms of the 1884 Act not on whether it was acceptable at all. I do not think that too much reliance can be placed upon this case save for the broad proposition that there is no absolute bar to secular use of a consecrated churchyard involving permanent works. Nonetheless although the proposal was apparently perceived as small scale in the context (since otherwise I think that there would have been discussion about the acceptability of the proposal independent of the point on the 1884 Act), it did take up 240 square feet of the burial ground.¹³
18. When shortly after the decision in the *Chichester* case, Newsom QC Dep Ch came in *In re St John's Chelsea*¹⁴ to articulate principles applicable to this sort of case, he would have limited the grant of a faculty to situations which (i) involved the use of small parts of a churchyard for a highway or a use in the nature of a wayleave or (ii) where the original purpose of consecration could no longer be carried out. Neither categorisation

¹¹ The 1884 Act does not have an application to the case with which I am concerned because the churchyard has never been used for interments.

¹² [1961] 1 WLR 907 (Chichester Consistory Court).

¹³ The precedents relied upon were an underground transformer station (the size of which does not appear from the report) in a closed churchyard and where there was nowhere else where it could be suitably located (*In re St Nicholas Cole Abbey* [1893] P 58) and a covered footpath (*In re St Mark's Church, Lincoln* [1956] Fam 336). In *St Nicholas Acons v London County Council* [1928] AC 469 *In re St Nicholas Cole Abbey* was held by the Privy Council to have been wrongly decided because it failed to have regard to the Disused Burial Grounds Act 1884. In *In St Nicholas Acons* the Dean of the Arches (Sir Lewis Dibden) expressly did not decide *whether even if there were no statutory prohibition of building on this churchyard, the securitisation of part of it by the proposed building could lawfully be sanctioned* (see [1928] P 102 at p112). There was also reference in *In re St Peter the Great, Chichester* to *In re St Swithin's Norwich* [1960] P 77 but it seems to me difficult to derive anything from this case.

¹⁴ [1962] 1 WLR 706 (London Consistory Court)

is apt to cover the facts with which I am concerned. I can see an argument which would say that it was not necessary for the churchyard of this modern church to be consecrated if burials were not to take place in it. However it does seem to me that it is usual and appropriate for such curtilage land to be consecrated, and I am not able to say that the original purpose of consecration can no longer be carried out. As regards the principles enunciated in *In re St John's Chelsea*, they obviously must be treated with great respect as indicative of the correct approach but I think they cannot now be tested as a comprehensive statement – in short, the law has developed since 1962.

19. As explained above, it seems to me that, since the Second World War, the Consistory Courts have approached the question of the secular use of consecrated ground with an increasing degree of flexibility. Thus I do not think that merely to identify the secular and separate use of the proposal before me is automatically to identify reasons for rejecting it. In this context I recognise the value to the community of assisting the Scout Group, and the importance the church generally, and this church in particular, places upon good community relations. Nonetheless on balance and as a matter of fact and degree I do not regard it as appropriate that part of church land should be permanently given over to a secular storage building of the dimensions proposed: even though the part of the churchyard proposed to be built upon is not “used” for anything else. If I were to hold otherwise I consider that I would be failing to give sufficient recognition to the consecrated nature of the land.

20. I think that different considerations would apply to a temporary building, and that, as a matter of fact and degree, a temporary building would be acceptable. The fact that what is permitted is temporary emphasises the very important point that consecration is not

temporary and that the secular use is subordinate to the permanent status of the land. Further I would hope that the Scout Group will find this acceptable: although ideally they might want a permanent building, they may well find a temporary one of use, and the Church would be “helping out” a valued community group¹⁵. There is also then a practical argument to be said for a temporary arrangement: the Scout Group might not always want to use the Church Hall, or their storage requirements might change, or even – though one would hope otherwise – the Group might cease to exist. Although in these circumstances no doubt alternative storage uses of the building could be found, they do not at this time provide any justification for a permanent building.

21. The period that I have in mind for a time limited faculty would be five years, which of course is the length of the proposed licence. I should make it clear that a grant in these terms would not preclude the extension of the period in due course. *Sub specie aeternitatis* I do not think that the precise period is the important thing – rather that it should be appreciated and emphasised that the faculty is not a permanent one. It could, if necessary, be renewed. However if the time comes when the Scout Group no longer require the hut, it should be removed.
22. Accordingly I am prepared to direct that a faculty should issue for the erection of the hut, but that it should be a condition that it be removed within a period of five years of its erection; and I would expect that the licence be amended to provide for the five year licence at the end of which period (or earlier termination) the hut should be removed.

¹⁵ It is proposed that the licence would be for a term of five years, terminable by the church upon notice if it required the land for development of its own. Nonetheless the petition does not seek to put a time limit on the building, and I imagine the parties envisage the arrangement continuing indefinitely until circumstances change. The licence as drafted does not provide for the removal of the hut at the end of the licence term – I am not sure whether this is a deliberate omission.

23. If the Petitioners wish to make submissions to me that the five year period should be longer, I would consider such submissions – the requirement that the faculty be time limited being a matter which has not before now been raised with them.¹⁶ I do not imagine that there will be any objection to a faculty for the grant of a licence (as distinct from a faculty for the erection of the building), but there will need to be the usual advertisement – I give leave for amendment of the petition accordingly, and direct public notice of the petition to be given in accordance with rule 6 of the faculty jurisdiction rules. There is this further complication in that since the petition was presented the Vicar has resigned. I will consider in due course how this practical complication should be addressed. In the meantime, the Area Dean should be made petitioner in place of Mr French.

24. Finally, I should note that before reaching a decision about this case I asked the Registrar to obtain a copy of the sentence of consecration of the church – it seemed to me that it was important to check that the relevant land was indeed consecrated. As I now understand the position, it appears that the Church Hall and Vicarage – separate buildings from the church – may have been built on consecrated ground. If so, this would not have been appropriate, although nobody is taking any point about it and I do not know the circumstances. I do not think that this fact can properly influence my determination of the main issue in the case even though I can see that the comment might be made that in these circumstances the effect of my judgment is to strain on a gnat while swallowing a camel. The point is that the appropriate use of consecrated ground is an important issue which is of general significance.

¹⁶ I did at an earlier stage indicate that the grant of a faculty in this case was not straightforward.

Philip Petchey

PHILIP PETCHY
Chancellor
18 May 2011