Neutral Citation Number: [2018] EACC 3

IN THE ARCHES COURT OF CANTERBURY

**APPLICATION FOR PERMISSION TO APPEAL
FROM THE CONSISTORY COURT OF THE DIOCESE
OF LONDON
(CHANCELLOR JUNE RODGERS,
SITTING AS DEPUTY CHANCELLOR)
[2017] ECC Lon 1**

IN THE MATTER OF A BUILDING IN THE CHURCHYARD OF CHRIST CHURCH, SPITALFIELDS AND AN APPLICATION FOR RESTORATION ORDER AND A PETITION FOR A CONFIRMATORY FACULTY

Between:

(1) Spitalfields Open Space
(2) Christine Whaite

"Open Space Parties":
Applicants for a Restoration Order & Respondents to the Application for a Confirmatory Faculty

(3) Professor Kerry Downes
(4) Martin Lane
(5) Alan Williams
(6) Jessie Sloan

Parties opponent to the Application for a Confirmatory Faculty

Applicants/Proposed Appellants

- and –

(1) The Governing Body of Christ Church Primary School
(2) The Reverend Andrew Rider, Kim Gooding and Richard Wasserfall (Rector, Church Wardens and former Church Warden)
(3) The London Diocesan Board for Schools
(4) London Borough of Tower Hamlets

"Building Parties":
Applicants for a Confirmatory Faculty & Respondents to an Application for a Restoration Order

**Respondents to the application/
Proposed Respondents to the appeal**

On consideration of the deputy chancellor's Judgment, her reasons for refusing permission to appeal, the Applicants' renewed application for permission to appeal (and supporting materials), the Respondent's Response and the Applicants' Reply

ORDER OF THE RIGHT WORSHIPFUL CHARLES GEORGE QC, Dean of the Arches

1. Permission is given to appeal on Ground 1 (alleged absence of jurisdiction under s.18A(1) of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 as amended ("the CCM")).

Reasons:

a. Both the Applicants and the Respondents agree with the determination of the deputy chancellor (para 787) that any faculty pursuant to s.18A of the CCM cannot authorise the original unlawful erection of a building. At issue are questions of statutory interpretation (a) whether a confirmatory faculty can be granted at all under s.18A(1) (on which the position of the Applicants is not entirely clear); and (b) whether, even if a confirmatory faculty can be granted in respect of a building erected after 1 April 2015 (when s.18A came into force), a confirmatory faculty can be granted in respect of a building erected before that date (as the deputy chancellor held at para 787 of her judgment, and which the Applicants strenuously resist, see in particular paras 1-2 of the Reply).
b. The language of s.18A(1) ("a faculty permitting the erection of a building"), which is materially different to that of, for example, s.73A of the Town and Country Planning Act 1990 as amended, prima facie suggests a negative answer to both (a) and (b). On the other hand, the ecclesiastical case law (see, for example, *Mynors: Changing Churches* (2016) pp.228-232) is to the effect that confirmatory faculties can generally be granted, and it might be surprising if a similar concept did not apply under s.18A despite its wording.
c. There appear to be difficulties in the "fall-back" position principally relied upon by the deputy chancellor (para 787) and in the Response (paras 7-8), not least for the reasons cogently advanced in para 3 of the Reply.
d. An appeal on Ground 1 stands a real prospect of success under rule 22.2(a) of the Faculty Jurisdiction Rules 2015 ("the FJR 2015"). Additionally, these are issues which could arise in other cases and constitute a compelling reason for an appellate decision, so that the application also satisfies the test in rule 22.1(b) of the FJR 2015, notwithstanding the contrary arguments in the Response.
e. See also 4a. below.

2. Permission to appeal on one aspect only of Ground 4 (alleged other legal and procedural errors), namely alleged sufficient interest of Spitalfields Open Space ("SOS").

a. Sufficiency of interest to participate in faculty proceedings must primarily depend on the facts of each particular case, including here the deputy chancellor's findings (para 808) that "SOS was the creature of Ms Whaite" and "was at all times a front company without assets". Nevertheless, if, as is asserted in para 53(1) of the Statement in support of application for permission to appeal, there was evidence that

"SOS had originally been formed as a bona fide umbrella group, representing Spitalfields Society, Spitalfields Trust, FOCCS and others in 2012", then, arguably more reasoning was needed for the deputy chancellor's finding (also, 808) that "SOS never did have sufficient interest to become a party".

b. In any event, there is a compelling case for an appellate decision on the more general question of "sufficient interest" to participate in faculty proceedings.

3. Permission to appeal on Ground 2 (alleged breach of s.10 of the Open Spaces Act 1906 under the 1949 agreement) is refused.

Reasons:

a. The Applicants contend (see in particular para 7(2) of the Reply), that, assuming the New Building was, at the relevant time, unlawfully occupied and used in breach of s.10, the deputy chancellor was thereby precluded from jurisdiction to grant a confirmatory faculty and of jurisdiction to withhold a restoration order". Neither of these contentions are properly arguable. The confirmatory faculty might not be implementable unless the 1949 agreement was varied or terminated, but it would not be a nullity; and the discretion not to make a restoration order would remain.

b. In any event, at the date of the consistory court's original order of 22 November 2017 and later revised order of 17 December 2017, either the scope of the 1949 agreement had been varied by agreement of the parties under the 2009 agreement to exclude the relevant land from s.10, as the deputy chancellor found (para 839), now supported by the Building Parties in their Response, albeit without any further exposition of the argument, contrary to the rival submissions summarised in 3.4-3.5 of the Statement in Support); or it had been terminated in its entirety by the Rector by his notice of 22 June 2017 to the London Borough of Tower Hamlets, which is now the "primary submission" of the Building Parties (who include the London Borough of Tower Hamlets). There is not therefore a real prospect of the appeal on Ground 2 succeeding. In particular the contentions of the Applicants in respect of the later termination are not considered to be even arguable.

c. As the Response states, "this proposed ground is otiose and academic" and "the grant of permission to appeal on a ground that relates to a "*continuing*" breach of s.10 in circumstances where there is no longer, if there ever was, such a breach would be disproportionate and wasteful of costs".

d. The Open Space Parties have separately issued a protective application for judicial review against the Rector and the London Borough of Tower Hamlets to the Administrative Court challenging the Rector's decision to terminate the 1949 agreement (CO/4434/2017, filed 22 September 2017); and their Statement of Reasons to the Court of Arches states an intention to invite this Court "either (a) to extend permission to the determination of the issues arising as to termination or, failing that, (b) to permit a separate application for such permission to be made at, or before, the appeal hearing". There may well be insuperable problems facing the challenge by way of judicial review, but that is not a reason why the Rector's decision should be subjected to legal challenge in the present proceedings, when it is considered unarguable.

e. The Open Space Parties' contention that the acting deputy chancellor acted unfairly in the way she reached her decision in respect of the 2009 variation of the

1949 agreement is unarguable for the reasons she gave at page 5 point 18 of her decision refusing permission to appeal.

f. Given the highly specific factual background to the Open Space issue in the present case, and in the absence of a real prospect of the appeal succeeding, there is no other compelling reason under rule 22.2(b) of the FJR 2015 why the appeal should be heard. This is notwithstanding that the proposed appeal "relates to a churchyard which constitutes the setting of a church of special architectural and historic importance and world renown" (para 56(2) of the Statement in support of application for permission to appeal).

g. In particular, the possibility that the deputy chancellor's order in relation to costs between the parties might have been different, but for her conclusion in relation to the effect of the 2009 agreement to vary, is not considered sufficient to permit the appeal, although the particular argument in this respect in the Response para 17 are coherently rebutted in para 7(3) of the Reply.

4. Permission to appeal on Ground 3 (alleged fundamental or material errors of approach or law in relation to the exercise of discretion) is refused.

Reasons:

a. If the appeal proceeds and were the Appellants successful under Ground 1 in establishing a narrow, literal interpretation of s.18A(1), so that no confirmatory faculty could or should have been issued, the Court of Arches will (or at least may) need to consider anew both (a) whether the erection of the building "was unlawful under ecclesiastical law", so that it has jurisdiction to make a restoration order under s.13(5) of the CCM (as held by the acting chancellor at para 778 of her judgment); and (b) if so, how it should exercise the court's discretion under s.13(5) on the facts as found by the deputy chancellor.

b. But none of the three matters identified as (A), (B) and (C) at paras 4.2 to 4.9 of the Statement of Reasons stands a real prospect of succeeding, whether alone or cumulatively, or raises a compelling reason for hearing the appeal.

c. As to (A) (Consequences of Breach of Section 3 of the 1884 Act), the deputy chancellor adequately addressed all relevant matters, and had regard to the Open Spaces Parties' submissions on breach of statute. The deputy chancellor was not required to determine, for the purposes of the proceedings, whether a breach of s.3 was indictable as a criminal offence, although she considered the matter in some detail at paras 495-6 and 771 of her judgment. Nor was she required to give more detailed consideration to what the Statement of Reasons describes as "the serious ecclesiastical and civil law consequences of refusing a restoration order and granting a confirmatory faculty". The contention in the Reply at para 9 that there was a "substantive failure" is unarguable.

d. As to (B) (Mandatory Injunction where erected in face of objection), as the Response points out, the deputy chancellor had regard to the letter of 15 October 2012 and to the Open Space Parties' submissions on breach of statute. The cases cited and relied upon by the Open Spaces Parties in this connection, which were not referred to in the judgment, could not realistically have led her to a different conclusion. Nor is it realistically arguable that in this respect the deputy chancellor "erred in her basic approach to jurisdiction" (para 10 of the Reply).

e. As to (C) (Court's Approach to Confirmatory Faculty), as the Response correctly contends, the Open Spaces Parties' position is, at its core, one of

disagreement with the deputy chancellor's conclusions as to the significance of the setting of the churchyard and her finding that the harm caused through the retention of the New Building would be at the "lower end" of the scale (para 795). There was no "fundamental error in approach"/"fundamental errors in the approach to jurisdiction" nor irrationality by the deputy chancellor (contrary to what is asserted in paras 12-13 and 15-16 of the Reply), nor is she properly open to legal criticism for her description of Nicholas Hawksmoor as a "strange and wayward" architect (para 719 of the judgment; para 14 of the Reply).

f. Further the Applicants' approach entirely ignores that a valid planning permission was given by the local planning Authority for the New Building.

5. Save as permitted under para 2 above, permission is refused in respect of the other matters relied on under Ground 4 (alleged procedural and other legal errors).

Reasons:

a. The other alleged errors relied upon appear primarily (at least) to be the matters identified in paras 51-53 and 55 of the Statement in support of application for permission to appeal.

b. In paras 51 and 52 of this Statement criticism is directed at the deputy chancellor's "approach to Open Space Parties, Objectors and FOCCS". Whilst there may be justification for the contention that deputy chancellor's criticisms of FOCCS involved matters strictly outwith her jurisdiction in the proceedings, she expressly stated in para 754 of her judgment that she ignored these concerns in reaching her conclusions (in respect of the confirmatory faculty and restoration order), and, though her language was robust, there is not a real prospect of showing that what is described as her "subjective and hostile attitude" towards the Open Space Parties and to FOCCS "tainted the exercise of discretion".

c. In para 54 of the Statement complaint is made that the deputy chancellor failed to address the Open Space Parties' amended application that the 2012 faculty be set aside on grounds of material and reckless mis-statements. The deputy chancellor criticised the conduct of the application for the 2012 faculty in her judgment (paras 339, and 342-343), and, as conceded in para 54 of the Statement, "the Court's primary decision was that the 2012 faculty was of no effect to authorise the New Building in breach of Section 3 of the 1884 Act". In these circumstances it was unnecessary for the deputy chancellor to consider and determine whether the 2012 faculty should be set aside. No arguable error of law has been here identified.

d. In para 55 of the Statement complaint is made that the court failed to rule on whether the Council's purported decision in 2013 to authorise the retention of the New Building was valid or of no effect. As the chancellor stated in point 30 on page 6 of her decision refusing permission to appeal, the issue of the conduct of the London Borough to Tower Hamlets in 2013 was not relevant to the matters she was deciding. Again no arguable error of law has been here identified.

e. Further, there is no compelling reason why the appeal should be heard on these matters.

6. Each party shall bear its own costs of the application for permission to appeal, and the court costs thereof shall be paid by the Applicants, who shall each be jointly and severally liable, in any event. The Provincial Registrar shall notify the Applicants'

solicitor of the court costs; and such costs shall be paid within 21 days thereafter, failing which the appeal shall be dismissed.

Reasons:

A discretion is conferred on the Dean of the Arches under rule 23.5(1)(b) of the Faculty Jurisdiction Rules 2015 in relation to costs. On most of the matters contained in the renewed application, permission has been refused.

7. It shall be a condition of the grant of permission to appeal that if this appeal proceeds to a hearing, then whatever the outcome of the appeal (and absent any unreasonableness hereafter by the parties in their participation in the appeal), no party shall seek to disturb the order for court costs below. All matters relating to the costs of the appeal shall be determined at the conclusion of the appeal.

Reasons:

It is desirable to control the issues and time taken on appeal, including not re-opening issues of costs relating to the hearing below. The condition is designed to achieve this.

DIRECTIONS

Without prejudice to the requirements of rules 24.2(1)(b) and (2), and 27.2 of the Faculty Jurisdiction Rules 2015:

1. If they intend to proceed with the appeal, the Applicants (hereafter the Appellants) shall give notice to the Provincial Registry and to the Respondent within 14 days of issue of this Order, accompanied by a revised Notice of Appeal, limited to the two Grounds for which permission to appeal has been granted in paras 1 and 2 of the above Order.

2. Any Respondents' Notice or Notices shall be filed within 14 days of receipt of a revised Notice of Appeal under direction 1, as provided by rule 24.4(3) of the Faculty Jurisdiction Rules 2015.

3. Any application for permission to intervene in the appeal under rule 27.7 shall be made to the Provincial Registrar within 42 days of issue of this Order, and if permission is given, further directions will also be given. In particular, it appears likely that the Court of Arches might be assisted by representations from the Church Building Council in respect of both Grounds on which permission has been given. See also para 4a. above.

4. Within 42 days of issue of this Order, the Appellants shall file and serve agreed, indexed and paginated, trial bundle (limited to a maximum of 100 pages, excluding the Judgment).

5. Within 56 days of issue of this Order the Appellants shall file and serve a Skeleton Argument (limited to the two Grounds for which permission to appeal has been granted).

6. Within 70 days of issue of this Order the Respondents shall file and serve a Skeleton Argument or Arguments (similarly limited).

7. Within 84 days of issue of this Order the Appellants shall file and serve an agreed, indexed bundle of authorities (from the law reports, wherever possible).

8. Subject to compliance with direction 1 above, the matter will be set down for hearing (time estimate one day, excluding judgment) at a place and at a date and time, to be notified to the parties (and any interveners) by the Provincial Registrar.

1 June 2018 **CHARLES GEORGE QC, Dean of the Arches**