

KENARDINGTON, ST MARY

JUDGMENT

1. INTRODUCTION

1.1. The Petition in this matter was lodged on 15 April 2013. It sought authorisation for the following works:

"A reordering of the building and the provision of an external structure to house toilet facilities in accordance with a Specification of Materials and Workmanship by Purcell Miller Tritton dated November 2012 with supporting drawings nos. 231937 100C, 101A, 103A, 105A, 300A, 301, 305, 305, 310, 311, 320, 321, 322, 323, 324, 325, 326, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 350, 351, 352, 353, 354 and 355, a Schedule of Pre-Construction Information by Purcell Miller Tritton dated 16 July 2012, a Specification for Electrical Services Installation dated 16 October 2012 and a Specification for Mechanical Services Installation dated 26 October 2012 by PCS Consulting Services Ltd with supporting drawings nos. PCS12642/E01A, E02A, E03A, E04A, E05A, E06A, E08A, M01A, M02, M03, M04 and PH01, a Structural Specification by the Morton Partnership dated October 2012 with supporting drawings nos. 12674/03B, 04B, 05A, 06A, 07, 10B and

11B, a Specification by CTP Consulting Engineers dated November 2012 with supporting drawings nos. A1237-500 and A1237-501, a Bat and Barn Owl Survey Report dated September 2012 and a Tree Survey Report dated October 2012 by Jill Tardivel."

- 1.2. Planning permission was granted by Ashford Borough Council on 14 February 2012 for the following development:

*"Construction of pentice extension to link nave and tower, construction of new single storey services building in churchyard, new water and electricity mains services and treatment plant."*¹

- 1.3. I decided that it was necessary to visit the church, partly on account of my difficulty in following, from the wording of the Petition, the nature of the proposal. The description of development in the planning permission gives a much clearer idea of what is involved, save for the use of the unusual word '*pentice*', which does not appear in the Oxford English Dictionary. On site I met the Rector, the Revd Rod Whateley, who is one of the Petitioners. The other Petitioners are Mr Dan Woods and Mrs Elizabeth Whateley, Hon Secretary to the PCC, whom I also met at the church on the visit which I made on 18 May.
- 1.4. On 18 January 2012 I authorised exploratory archaeological investigations in the expectation that a Petition for works would be forthcoming thereafter. This authorisation followed a request which came via the Diocesan Advisory Committee ("DAC") for such works to be authorised.

¹ A minor amendment consent was issued in February 2013 authorising, amongst other changes, the use of brick rather than stone for the pentice plinth

There was no further contact with the Registry until 6 March 2013 when a copy of a DAC Certificate issued on that date was sent. The Certificate related to the proposals as set out at paragraph 1.1 of this Judgment and was subject to the following provisos:

- "(1) A person approved in advance by the archaeological adviser to the DAC shall maintain an archaeological watching brief during the works of excavation.*
- (2) No items of archaeological or historical interest may be removed from the church site without prior consultation with the DAC.*
- (3) Any human remains disturbed during the works shall be immediately covered from public view and must be treated decently and with reverence at all times. Their discovery shall be notified immediately to the incumbent. They shall be labelled and preserved as an entity in locked premises until they are reburied in the churchyard at the direction of the incumbent, in a place as close as practicable to the location in which they were uncovered.*
- (4) The electrical installation must comply with BS7671 – 2008 Requirements for Electrical Installations (IEE Wiring Regulations 17th Edition) and the best practice set out in the Council for the Care of Churches booklet 'Wiring of Churches' ISBN 0-7151-7571-8 (1997).*
- (5) The lighting installation must comply with BS7671 – 2008 Requirements for Electrical Installations (IEE Wiring Regulations 17th Edition) and the best practice set out in the Council for the Care of Churches booklets 'Church Lighting' ISBN 0-7151-7584-X (2001) and 'Wiring of Churches' ISBN 0-7151-7571-8 (1997).*
- (6) Sample panels of the proposed stone and brick work showing selective materials, mortar mixes*

and width of joints should be provided for endorsement by the DAC before work commences.

- (7) The location and fixing of lighting equipment and cable runs must be agreed on site by a representative of the DAC.*
- (8) A specification should be provided for the DAC's endorsement covering the dismantling and re-erection of the historic timber vestry screen.*
- (9) The DAC reserves its position on the detailed engraving of the new windows until further information is available.*
- (10) A number of items require further clarification as set out in the Notes of a Meeting at Diocesan House dated 25 January 2013 which accompanies this certificate."*

The Certificate contains the following note:

"(1) A certificate under paragraph 2 does NOT give you permission to proceed with your proposals, unless and until a faculty is granted by the Chancellor (or by the Archdeacon in respect of matters within Appendix A of the Faculty Jurisdiction Rules 2000)"

The DAC also certified that, in their opinion:

"the work proposed is not likely to affect:

- (a) the character of the church as a building of special architectural or historic interest*
- (b) the archaeological importance of the church*
- (c) archaeological remains existing within the church or its curtilage"*

1.5. In accordance with normal practice, the Registrar, having received the copy DAC Certificate, wrote to Mr Whateley enclosing a Faculty petition

form and explaining what to do about public notices. The Faculty Petition form makes it quite clear that the purpose of a Faculty Petition is to seek the permission of the Court to undertake works.

- 1.6. On 4 April 2013, I directed that confirmation be sought from English Heritage ("EA") Ashford Borough Council ("ABC"), the Society for Preservation of Ancient Buildings ("SPAB") and the Victorian Society ("VS") ("the Citation Bodies") that they were content with the proposals. In fact, VS does not have any responsibilities in relation to the church since this has no Victorian elements, as its Churches Conservation Officer pointed out on 5 April 2013.
- 1.7. Following my direction, the Project Architect, Mr David Paine, communicated with the DAC to enquire whether the Petition should proceed in advance of receiving responses from the Citation Bodies. By email dated 9 April, the DAC Secretary replied as follows:

"I have now been able to discuss the Kenardington project with the Chairman. Richard was quite concerned to note that the PCC was about to sign a contract since it is our understanding that the faculty has not yet been issued. I am therefore copying this email to the Registry who will be able to advise you on the progress of the faculty application and the likely date when approval may be forthcoming.

As far as the pentice is concerned, the sub-committee had real concerns relating to the design which they felt could be resolved without too much difficulty. I am copying this email to Tom Foxall and Nick Lee Evans who I am sure would be very pleased to help to resolve this matter by an exchange of emails.

Finally, I am copying this email to Richard, Rod Whateley and Archdeacon Philip for their information."

The Registry immediately replied by email that the Registry had not yet received a Faculty petition.

1.8. In his covering letter of 10 April 2013, Mr Whateley explained that the results of the archaeological explorations were awaited. He also confirmed that the Citation Bodies had been consulted by the DAC "several years" previously but that their latest responses would be forwarded. He confirmed that an earlier proposal to open up a blocked window did not form part of the Petition and he gave details and/or confirmation in respect of some of the provisos listed on the DAC Certificate. He added that the PCC had experienced "*great difficulty in communicating with the DAC*", apparently because the "*decisions/questions raised by the DAC on 25 January were not received until 7 March*". He added: "*we have a project schedule that is now seriously behind, we need to be signing contracts at the soonest possible moment*".

1.9. When I arrived at the church on 18 May I was surprised and disturbed to find that a substantial start had been made to the proposed free-standing toilet block. The footprint of the proposed pentice had been fully opened and what appeared to be the brick plinth had been commenced. When I discussed these matters with Mr Whateley, he told me that he believed

that, since planning permission has been granted and a DAC Certificate issued, he did not need further permission. I explained the relationship of the Faculty jurisdiction to secular planning law and instructed him to stop the builders doing any more work until he heard from the Registry that he could lawfully do so.

1.10. In view of what I found on site, I am giving Judgment as a matter of urgency. Due to the urgency of the matter, I shall rehearse the details of the project in condensed form.

2. THE PROJECT

2.1. St Mary's Kenardington was built in 1559. It is a Grade II* listed building. The listing description was not included with the Petition but is available on EH's website. It describes the church as follows:

"Parish Church. Chancel, nave, south porch and west tower with a circular vice turret to the north of it. This is all that remains of a larger church with north and south aisles and chapels which was struck by lightning in 1559. The chancel is about two thirds the width of the naïve and not central. The tower is C13 and stands at the north west corner of the nave with no communication between the two but a blocked arch on the east side of the tower which led into the demolished north aisle. The chancel and nave are C15 and have blocked arches on the south side which led into the demolished south aisle and south chapel. The churchyard contains some C18 headstones with cherub and skull motives and some early C19 sunray motive headstones."

2.2. The church has become remote from the village and occupies a rather isolated position on the very edge of the Kent Weald and Romney

Marshes. It is a beautiful, peaceful and evocative spot. Nevertheless, the church, by reason of its location, its curious layout and the lack of electricity in particular, is not well suited to serving the congregation in its parochial mission. Following much discussion within the community and with the Archdeacon of Ashford, the PCC articulated a vision for the church to exercise a ministry of hospitality by means of hosting quiet days and by enabling recreational walkers on the many public footpaths in the area to experience spiritual refreshment and enrichment in this remarkable place. A very generous donor, Mr Uren, was involved in these discussions, shares the vision and wishes to fund the works.

2.3. In short, the physical proposals are:

- (1) To provide electricity.
- (2) To construct a free standing toilet block near the entrance to the churchyard; this would comply fully with modern standards for access by all, including those with mobility difficulties.
- (3) To construct an extension along the north elevation of the church, extending eastwards from the tower; this proposed structure is referred to as a "*pentice*".
- (4) To link the pentice to the nave of the church by means of opening a blocked up arch and installing a glass door, to be engraved with designs which are not yet finalised; the floor level of the pentice

would be such that there would be easy access to the nave for those with impaired mobility.

- (5) To install lighting and underfloor heating to the nave, replacing an unremarkable twentieth century parquet floor with stone.

3. LEGAL CONSIDERATIONS

3.1. The proposal to demolish that part of the north wall of the church which currently blocks the projected door opening engages section 17 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991. This provides as follows:

“(1) A court shall not grant a faculty for the demolition or partial demolition of a church except on the grounds specified in this section.

(2) Subject to the following provisions of this section, a court may grant a faculty for the demolition of the whole or part of a church if it is satisfied that another church or part of a church will be erected on the site or curtilage of the church or part of a church in question or part thereof to take the place of that church or part of a church.

(3) Subject to the following provisions of this section, a court may grant a faculty for the demolition of part of a church if it is satisfied that—

(a) the part of the church left standing will be used for the public worship of the Church of England for a substantial period after such demolition; or

(b) such demolition is necessary for the purpose of the repair or alteration of the church or the reconstruction of the part to be demolished.

(4) The court shall not grant a faculty under subsection (2) or (3)(a) above unless—

- (a) the person bringing proceedings for the faculty has—
 - (i) obtained the written consent of the bishop of the diocese concerned to the proceedings being brought; and
 - (ii) within the prescribed time, caused to be published in "The London Gazette" and in such other newspapers as the court may direct a notice stating the substance of the petition for the faculty;
- (b) the registrar has given notice in writing to the Council for the Care of Churches and the advisory committee of the diocese concerned of the petition;
- (c) the judge of the court has thereafter considered such advice as the advisory committee has tendered to the court; and
- (d) the judge has heard evidence in open court, after application for the purpose has been made to the court in the prescribed manner, from—
 - (i) a member of the said Council or some person duly authorised by the Council; and
 - (ii) any other person, unless in the opinion of the judge his application or the evidence which he gives is frivolous or vexatious.

(5) Without prejudice to the requirements of subsection (4) above, the court shall not grant a faculty under subsection (2) or (3)(a) above in the case of a church which is a listed building or in a conservation area unless—

- (a) the registrar has given notice in writing to—
 - (i) the Secretary of State;
 - (ii) the local planning authority concerned;

- (iii) *the Historic Buildings and Monuments Commission for England; and*
 - (iv) *the national amenity societies;*
 - (b) *the judge of the court has thereafter considered such advice as any of those bodies may have tendered to the court;*
 - (c) *the registrar has given notice in writing to the Royal Commission on the Historical Monuments of England and thereafter either—*
 - (i) *for a period of at least one month following the giving of the notice reasonable access to the church has been made available to members or officers of the said Royal Commission for the purpose of recording it; or*
 - (ii) *the said Royal Commission have, by their Secretary or other officer of theirs with authority to act on their behalf for the purposes of this section, stated in writing that they have completed their recording of the church or that they do not wish to record it.*
- (6) *A court shall not grant a faculty under subsection (3)(b) above unless—*
- (a) *the court is satisfied, after consultation with the advisory committee, that when the proposed repair, alteration or reconstruction is completed the demolition will not materially affect the external or internal appearance of the church or the architectural, archaeological, artistic or historic character of the church; or*
 - (b) *the requirements of subsection (4) above and also, in the case of a church which is a listed building or in a conservation area, the requirements of subsection (5) above have been complied with."*

3.2. The Court of Arches recently gave guidance for the consideration of Faculty Petitions relating to listed buildings in St Alkmund, Duffield. After discussion about the principles behind the Ecclesiastical Exemption in relation to listed building consent, the Court endorsed the principle of “*equivalence*”, noting that this principle does not necessarily require that the same result be achieved as that which might be arrived at in the secular system but that what is essential is that the decision be reached in as informed and fair a way as possible (paragraph 39). At paragraph 87 of the Judgment, the Court set out guidelines for the consideration of such questions as follows:

1. *Would the proposals, if implemented, result in harm to the significance of the church as a building of special architectural or historic interest?*
2. *If the answer to question (1) is 'no', the ordinary presumption in faculty proceedings 'in favour of things as they stand' is applicable, and can be rebutted more or less readily, depending on the particular nature of the proposals (see Peek v Trower (1881) 7 PD 21, 26-8, and the review of the case-law by Chancellor Bursell QC in In re St Mary's White Waltham (No2) [2010] PTSR 1689 at para 11). Questions 3, 4 and 5 do not arise.*
3. *If the answer to question (1) is 'yes', how serious would the harm be?*
4. *How clear and convincing is the justification for carrying out the proposals?*
5. *Bearing in mind that there is a strong presumption against proposals which will adversely affect the special character of a listed building (see St Luke, Maidstone at p.8), will any resulting public benefit (including matters such as liturgical freedom, pastoral well-being, opportunities for mission, and putting the church to viable uses that are*

consistent with its role as a place of worship and mission) outweigh the harm? In answering question (5), the more serious the harm, the greater will be the level of benefit needed before the proposals should be permitted. This will particularly be the case if the harm is to a building which is listed Grade 1 or 2, where serious harm should only exceptionally be allowed."*

3.3. I shall consider the three elements of the works in turn by reference to the St Alkmund guidelines.

3.4. Toilet Block

3.4.1. Works in respect of this element of the proposals have reached slab level.

The block is proposed to be small, functional and, as I have said, sited relatively inconspicuously in the least sensitive part of the churchyard, near the entrance drive and just in front of the back boundary fence of a pleasant but historically insignificant house. ABC as Local Planning Authority are clearly satisfied about the relationship to the listed building, siting, design and relationship to neighbours since it granted planning permission on 12 February 2012 for the pentice extension and the WC building with ancillary service and plant.² So am I. My answer to the first St Alkmund question in respect of this part of the proposal is a clear: No. Whilst the rationale for the block relates to the rest of the project (which I shall consider below), nevertheless it would be useful in its own right and I consider that the case for it is established.

² On 19 February 2013, consent was granted for a non material amendment to that permission.

3.5. Archaeological Exploratory Works

3.5.1. These works were undertaken under my informal authorisation on the recommendation of the DAC that they were required. My authorisation was given on the understanding and in the expectation that these works would, in due course, be included in the Faculty Petition so that they could become the subject of a confirmatory Faculty. The exploration has now been undertaken and, given the responsible fashion in which they came to be undertaken and their purpose, I intend to include them within the Faculty. All the citation bodies have been well aware of the works. I also have regard to the fact that ABC effectively gave permission for the excavations by virtue of Condition 5 on the planning permission which requires such work to be undertaken as a precondition of lawful implementation. I find that, in themselves, they have not harmed the significance of the listed building. Within the Faculty process, however, the recommendation and procedure adopted were for there to be pre-determination, as opposed to pre-commencement, explorations. I deal with the implications of this matter in the next paragraph.

3.6. Pentice

3.6.1. As I have said, works to construct the pentice have also commenced. I deduce, from the fact that I could see the bricks of the plinth and because Mr Whateley told me that the works were done "because the builder said that he was pouring concrete", that foundations have been laid. I am very

concerned about this fact, not only because of the flouting of the jurisdiction of this Court (which is also true of the works to the toilet block) but also because, so far as I am aware, no report on the archaeological investigations has been produced. The pentice lies within an area which is likely to have formed the nave of the original church and the potential for archaeological remains is obvious. That is why such excavations were required by the DAC and authorised by the Court in advance of considering the Petition. *“Jumping the gun”* in this way apparently defeats the purpose of the investigations. Without the necessary archaeological report, I am not sufficiently well informed to consider the statutory questions pertaining to partial demolition or the question of harm to the significance of the listed building as set out in St Alkmund. Therefore I am not prepared at present to confirm the works which have been undertaken to the proposed pentice nor will I authorise further works to the pentice unless and until I have seen the archaeologist’s report. I also need evidence to address the question of public worship which arises under subsection (3)(a) of s.17 of the 1991 Measure as set out above.

4. CONCLUSION

4.1. I understand from Mr Whateley that he has not yet signed a contract with the builder. It is not for me to intervene in the contractual relationship between the PCC and the builder but the matter should be reviewed in

the light of my proposed Order. I strongly advise the Petitioners to discuss the matter with the Diocesan Registrar.

4.2. I direct:

1. That a confirmatory Faculty be issued in respect of:
 - (a) works of archaeological excavation undertaken in the churchyard
 - (b) works of construction undertaken to the proposed toilet block up to and including 18 May 2013.
2. That a Faculty be issued in the terms sought in the Petition but only in relation to the further construction of the toilet block.
3. That no further work shall be undertaken in respect of the proposed pentice until further Order.
4. That a report of the archaeological excavations be prepared forthwith and lodged at the Registry.
5. That the name and contact details of the builder and any of his subcontractors undertaking the project be lodged at the Registry forthwith.
6. That information as to whether or not the church will be used for public worship be lodged at the Registry forthwith³.
7. Liberty to apply.

³ Lodging at the Registry may be done by email

4.3. It is a great pity that this exciting and valuable project, which has inspired such generosity and enthusiasm in the donor, should have been marred by a failure to follow the important procedures and safeguards laid down by the law and by the DAC in this instance. I very much hope that the next steps will be swiftly and properly taken. The effect of my Order is that work may continue on part of the project (the toilet block) so that any difficulty with the builder should be minimised. He should be shown a copy of this Judgment and Order and he and all others involved need to understand that any breach of the terms of the Order would constitute a contempt of the Commissary Court. This Judgment and Order are to be sent to the Archdeacon of Ashford and the DAC Secretary.

MORAG ELLIS QC

21 May 2013