12 MAR 2014

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

IN THE MATTER OF ST MATTHEW'S CHURCH, CAMBERWELL

AND IN THE MATTER OF A PETITION BY THE REVD NICHOLAS GEORGE

Introduction

1. This is a petition by the Revd Nicholas George, Vicar of St Giles with St Matthew, Camberwell for a faculty for the Southwark Diocesan Board of Finance to sign a deed of release, whereby the Board of Finance would release the rights of light enjoyed by St Matthew's Church, Camberwell to the extent necessary to permit a housing development by Notting Hill Ownership Limited.

2. The history of St Matthew's Church can be said to begin at the end of the seventeenth century, when a chapel dedicated to St Matthew was established on Denmark Hill. The Victorian church which was subsequently built on that site was destroyed by bombing in 1940, and a new church was established on a new site in 1960. That Church is at the southern end of Lilford Road, near its junction with Coldharbour Lane.

3. In 2009, Notting Hill Ownership Limited obtained planning permission for a substantial housing development on Coldharbour Lane. The proposed development "wrapped around" two sides of the church, to the south and east and had a (comparatively modest) effect on the natural light available to the church. This is not an unusual situation and the parish instructed Ian Powell, a partner at BTMK Commercial & Personal Law, Solicitors, to act for them, together with P A Fawell of a specialist firm of rights of light consultants called Right of Light Consulting. They have reached an agreement with Notting Hill Ownership Limited whereby the development can go ahead subject to "the Church" being paid £20,000. This is an arm's length transaction in which the parish has been independently advised and accordingly I can be confident as to its reasonableness. The question however arises as to how this agreement is to be put into effect.

4. Mr Powell and Lewis Silkin LLP (acting for Notting Hill Ownership Limited) have agreed the documentation which they consider appropriate. This is the documentation that they would consider appropriate for a secular transaction and I have no reason to think that it is not in a standard form for such a transaction. The documentation provides that "the Church" referred to in the documentation is the South London Church Fund and Southwark Diocesan Board of Finance.

5. The documentation consists of an agreement to enter a deed of release. The operative clause of the deed of release is as follows:

> *2.1 The Church hereby*
>
> *(a) with the intent of binding themselves and their successors in title to the Church Site and those deriving title from them from time to time:*
>
> *(i) consents to Notting Hill carrying out the Notting Hill Scheme and the Notting Hill Works notwithstanding any interference with any Rights of Light; and*
>
> *(ii) releases any and all rights of light and air insofar as required for the implementation of the Notting Hill Scheme but not otherwise; and*
>
> *(b) with the intent and so that the benefit of this covenant shall be annexed to the Notting Hill Site (and each and every part of it) and that the burden of this covenant shall run with and bind the Church Site (and each and every part of it), covenants not to sue Notting Hill (whether for damages or other relief) in relation to any interference with any rights of light insofar as they relate to carrying out the Notting Hill Works; and*
>
> *2.2 The Church further warrants that there is no other person with proprietary or other interest in the Church Site (including any licensee) who has an entitlement to rights of light or who needs to join in this deed to give effect to the provisions of this deed and indemnifies Notting Hill against any claims, damages, expenses or other losses suffered by Notting Hill as a result of any claim made by any such person in relation to any interference with the Rights of Light.*

6. I should pick up one point at the outset. There is a reference in clause 2.1 (ii) to rights of air. I can see from the (electronic) travelling draft of which I have a copy that this is a late insertion, and probably inserted out of an abundance of caution. It seems to me unlikely that any question of rights of air arise, and I would propose that such a reference be deleted in the final version of any deed that is entered into.

7. The question arises as to whether the South London Church Fund and Southwark Diocesan Board of Finance is the appropriate church body[1] to enter the deed; and, if it is not, whether any adjustments will have to be made to the deed (apart from the substitution of a different party) to reflect that fact.

[1] It might sound as if the South London Church Fund and Southwark Diocesan Board of Finance consist of two bodies but this is not the case. The South London Church Fund and Diocesan Board of Finance is the full name for the body normally referred to as the Diocesan Board of Finance, a charitable company limited by guarantee.

8. Before I turn to that matter and to inform my discussion of it, I should say something about rights of light. There is no natural right to light. What there can be in appropriate circumstances is an easement of light to a building. If an easement of light exists, it may be actionable in a neighbour to interfere with it. Thus the background to the agreement in the present case is that the church does enjoy an easement of light with which the development is going to interfere; and that "the Church" is prepared to permit that interference upon payment of a sum of money.

Consideration

9. The freehold of a consecrated church vests in the incumbent for the time being. His ownership is, however, subject to this peculiarity: the incumbent cannot alienate or create an interest in the land without the authority of an Act of Parliament or a Measure of Synod[2]. I should also note section 68 (2) of the Mission and Pastoral Measure 2011 which provides as follows:

> *(2) Subject to subsections (3) and (4), it shall not be lawful to sell, lease or otherwise dispose of any church or part of a church or the site or part of the site of any church or any consecrated land belonging or annexed to a church except in pursuance of powers under this Part or section 44.*

10. Sub-sections (3) and (4) deal with the grant of leases in certain circumstances and section 44 with the disposal of churchyards in certain circumstances, so they do not affect the position as regards the release or modification of an easement of light to a church. I incline to the view that the prohibition contained in section 68 (2) does not apply to the modification of an easement[3].

11. Whatever the position under section 68, it will not matter if, by virtue of the common law position as set out at pargraph 9 above, the position is that the incumbent has no power to grant a deed of release of an easement of light attached to the church, the freehold of which is vested in him.

---

[2] See *Rector and Churchwardens of St Gabriel, Fenchurch Street* [1896] P 95; *In re St Swithin's, Norwich* [1960] P 77; *In re St Paul's, Covent Garden* [1974] Fam 1; 34 Halsbury's *Laws of England* (5th edition: 2011) para 840.

[3] Cf *Housden v Conservators of Wimbledon and Putney Common* [2008] 1 WLR 1172 (CA). In that case the Court of Appeal held that the grant of an easement was not the disposition of an interest in "the commons" in the context of the nineteenth century Act protecting the commons because the relevant provision was referring to the physical entity of the commons and not a legal concept.

12. I have not found any express authority on the point. However the view has always been taken that there is no power to grant an easement over a churchyard (i.e. a legal interest in rem) but only a licence[4]. Section 9 of the Church Property (Miscellaneous Provisions) Measure 1960 (power to take or grant easements) is of no assistance because that applies to property vested in the incumbent as property of the benefice; and the church and churchyard does not form part of such property[5]. It seems to me that if an incumbent does not generally have a power to alienate a church vested in him or derogate from his ownership of the legal interest in the church by granting an easement, he does not have power to grant a derogation from an easement which the church and/or churchyard enjoys whether by way of a right of way or an easement of light.

13. The inability of an incumbent to grant a legal interest in the church or churchyard does not, in practice, cause a problem: rather than grant an easement, the incumbent grants a licence under the authority of a faculty. Thus for example, in *In re St Peter's, Bushey Heath*[6], a case in the Consistory Court of the Diocese of St Alban's, Newsom QC Ch considered that it was appropriate that a licence be granted for a period of 99 years, there being no power to grant an easement[7]. It is appropriate here to record that Chancellor Newsom was a judge of great learning, who wrote the leading textbook on the faculty jurisdiction. It is not clear from the Report whether the faculty was itself the licence or whether the Chancellor authorised the incumbent to enter into the licence. Recent practice in this Diocese (and, I believe, in other dioceses) has been for a faculty to authorise the grant of a licence by the incumbent. This is something which occurs comparatively often, the authorisation of telecommunications equipment in connection with the mobile phone network proceeding in this way. It seems to me that the authorisation of a derogation of a right to light may proceed in the same way: the incumbent licensing the construction on land adjoining the church of a building which will obstruct the light to the church. I can see an argument that it is not necessary or appropriate for such a licence to be authorised by faculty but it seems to me that, being a matter which directly affects the consecrated church building (because it affects the amount of light it will receive), it is appropriate that it should be so authorised. The current agreement is, of course, not in the form of such a licence. Accordingly, by this judgment I will simply indicate that I would be minded to authorise the grant of such a licence when presented to me. Mr George

---

[4] See pp150 – 152 of Newsom and Newsom *Faculty Jurisdiction of the Church of England* (2nd edition: 1993). This passage does refer to the legal issue which arises when an easement of light is claimed in respect of consecrated land by a third party, but does not address the converse situation.
[5] See *Hamble Parish Council v Haggard* [1992] 1 WLR 122 at 131C – 133C per Millett J (as he then was).
[6] See *In re St Peter's, Bushey Heath* [1971] 1 WLR 357.
[7] This was across the unconsecrated curtilage of the church but, as curtilage, it fell within the faculty jurisdiction.

has asked whether it might be appropriate for the publication of the petition by notices to be dispensed with. I do not think that this is appropriate since (at least in theory) someone might object. Obviously, in indicating that I am minded to grant a faculty this is without prejudice to my consideration of any objection that there might be in due course.

14. I should add this. Notting Hill Ownership Limited may feel that by a licence agreement it is receiving something less than it would were the owner of the church not an incumbent with a limited title. In practice I think that it will receive equivalent protection. What a secular court would view as the appropriate church authorities (i.e. the incumbent authorised by me) will have granted an indefinite licence in return for an agreed once-for-all payment of £20,000. The building which affects the light to the church will be constructed. It seems to me unrealistic to suppose that the incumbent could subsequently bring any legal proceedings by way of complaint.

15. There will be liberty to apply. I shall be happy to look at a draft of the licence agreement before it is put in its final form and is subject to publicity.

PHILIP PETCHEY
Chancellor
10 March 2014