

## Neutral Citation Number: [2019] ECC Wor 4

### In the Worcester Consistory Court

### Archdeaconry of Dudley

### Parish of St. George Kidderminster

### Faculty petition (2018-027571) relating to the retention of an illuminated cross at the top of the west face of the tower.

## Judgment

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### Introduction

1. St George's Church in Kidderminster was consecrated in 1824; the interior was rebuilt in 1922 after a fire. The description of the building in Pevsner's *Buildings of England: Worcestershire* starts as follows:

“A stately Commissioners' Church, faced in Bath ashlar; perp style, cost over £19,000. Very tall west tower, four stages, with angle buttresses, battlements and polygonal pinnacles. Paired bell-openings filled with an unglazed diagonal tracery grid, cast iron like all the tracery in the church.”
2. The church is set in a prominent position within a well-maintained churchyard on a sloping site a quarter of a mile from the town centre, but somewhat isolated from it by the ring road. The church, and the tower in particular, are visible from miles around.

### The proposal

3. A petition has been submitted seeking a faculty for the retention of an illuminated cross to hang from the tower of St George's church during Holy Week and Eastertide, at Christmas, and on other occasions as appropriate.
4. The schedule to the petition explains the works as follows:

“The cross will not be fixed in any way to the tower; the whole structure will hang from the castellations.

The horizontal bar will have 4- 3/8 eye bolts. These will correspond to the castellation, so that the galvanised chain will wrap around them and lockable carabiners will secure them to the eye bolts, pulling the cross to the tower. The chain will rest on the top of the stone course, taking the weight of the cross. This will stop any horizontal or vertical movement.

A ½ inch rope passing through an eye bolt at the top of the cross, secured to two existing eye plates located in the corners of the tower will hold the cross tight to the stonework, again preventing any movement.

The waterproof LED light cable will come from the top of the cross and connect to a waterproof junction box, then pass through the trap door down inside the tower to the socket location.”

5. In spite of the statement that it is to hang from the tower only on certain occasions, it appears that the cross has been permanently in situ for two years, but only lit occasionally. It was put up on the basis of an archdeacon’s licence granted on 27 May 2018.

### **The archdeacon’s licence**

6. I note in passing that an archdeacon’s licence may only be granted for “a scheme of temporary minor re-ordering” (see Faculty Jurisdiction Rules 2015, rule 8.2(4)). That is designed to authorise on a temporary basis a scheme of internal reordering, prior to a more permanent scheme being proposed and authorised.
7. The present proposal does not seem to me to fall happily within the scope of “re-ordering”; nor, in view of its visibility, can the cross necessarily be said to be “minor”; and whilst the cross will presumably not be in place for ever, it is only questionably “temporary”.

### **Visual impact of the cross**

8. It is difficult to assess the impact of the cross from photographs taken during daylight hours, as its central position at the top of the west face of the tower means that it aligns with the flagpole above, which gives a misleading impression. I have visited the church on various occasions, and so am familiar with its appearance in daylight; I therefore inspected it, after dark, when the cross was illuminated.
9. The parish observes that over the two years the cross has been in place, no negative comments have been received; any comments have been supportive.
10. This is an unusual proposal; but I am satisfied that there is no reason why it should not be allowed. And since the petition is for a confirmatory faculty, there is no need for any conditions to be imposed, subject to my observations below as to the maintenance of the cross and its eventual removal.

### **The need for consent under the planning Acts**

11. The question has arisen as to whether authorisation under the planning Acts is required for the cross. Such authorisation could take the form of either planning permission under the Town and Country Planning Act 1990 or consent under the Town and Country Planning (Control of Advertisements) (England) Regulations 2007. The planning authority has variously suggested that the works could be authorised by deemed consent under the 2007 Regulations or by a grant of retrospective planning permission.

## Is the cross at St George's an advertisement?

12. The 1990 Act defines "an advertisement" as follows:

"[a] 'advertisement' *means* any word, letter, model, sign, placard, board, notice, awning, blind, device or representation, whether illuminated or not, that is:

- in the nature of advertisement, announcement or direction; and
- employed wholly or partly for the purposes of, advertisement, announcement or direction; and

[b] without prejudice to [a], "advertisement" *includes*:

- any hoarding or similar structure used, or designed or adapted for use, for the display of advertisements; and
- anything else used, or designed, or adapted principally for use, for such display."<sup>1</sup>

13. The items listed in part [a] are not all of the same kind. They can be split into three categories:

- words, letters, devices, and representations;
- signs, placards, boards, notices, awnings and blinds; and
- models.

14. Each item in the first category constitutes or is an element of the actual message of an advertisement. Each item in the second is a physical mechanism to enable that message to be transmitted from the advertiser to the onlooker; and the list thus includes, for example, shop fascia signs and poster panels, but does not include advertisements on television or in magazines. The third category – models – is a combination. It is likely that a "model" used for the purposes of advertising will be both the message itself and the medium of its transmission. Scale is presumably irrelevant – a miniaturised jumbo jet and a giant glass of beer are each "models."

15. The word "device" may appear to belong in either category. It could be a near-synonym for "mechanism" or "contrivance," or it could be an alternative to "emblem" or (in commercial parlance) "logo". However, the word is used in the Regulations only in the latter sense – deemed consent is thus granted for a flag if it bears no more than "the name or *device* of any person occupying the building." Similarly, in all the Regulations up until 1984, there was a limitation on advertisements displayed with deemed consent, that they should contain no "letters, figures, symbols, emblems or devices" of more than a certain height.

16. Thus in considering the meaning of such a limitation in the corresponding Scottish Regulations of 1948, the Sheriff of Lanarkshire noted that:

"The word ["device"] must be used in the regulation in its rather archaic form and not with its modern and more usual meaning."<sup>2</sup>

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<sup>1</sup> TCPA 1990, s 336 (emphasis added, along with letters in square brackets and bullet points, for clarity).

This interpretation was supported in *McDonald v Howard Cook Advertising Ltd*.<sup>3</sup> It has also been adopted by the Secretary of State – who in one appeal took the view that a “device” in the context of the Regulations “means an artistic design, or heraldic device or emblem, which is displayed on land or premises to indicate the identity of the occupant, or to draw attention to the nature of the activities taking place at the premises.”

17. In the light of this, it seems clear to me that the cross at St George’s is either a “model” (albeit a stylised one), or a “device” – or, of course, possibly both. It therefore constitutes an “advertisement” for the purposes of the Act and the Regulations.

### **The need for consent**

18. The display of any advertisement requires either deemed or express consent under the Regulations – unless it is exempt under regulation 4(2), which the cross is not. Under regulation 6 of the 2007 Regulations, deemed consent is granted for advertisements in various categories. Otherwise an application must be submitted for express consent. To display without consent an advertisement that is not an exempt is a criminal offence.
19. Class 2C (which is commonly relied on to authorise church notice boards) relates to “an advertisement relating to any institution of a religious ... character, at the premises where it is displayed.” But that is subject to a condition that no part of the advertisement may be more than 4.6 metres above the ground – which therefore excludes the cross.
20. Class 3D relates to “an advertisement announcing any local event of a religious, educational, cultural, political, social or recreational character” – which might conceivably be argued to include Christmas and Easter. But that class is subject to the same condition as to height above the ground, and a further condition excluding illumination.
21. It follows that deemed consent is not granted under the Regulations, so that express consent under the Advertisements Regulations will be required. There is no ecclesiastical exemption from the need for such consent – even though in practice many planning authorities seem to operate as if there is.
22. It may be noted that the same conclusion would apply to a very large range of crosses and other such signs, illuminated or otherwise, on churches and church halls across the country – few if any of which are the subject of consent under the Regulations – and indeed a wide range of other signs and advertisements. It is no doubt for that reason that deemed consent (under Class 13) is granted for any advertisement that has been in place for at least ten years.

### **The need for planning permission**

23. The display of the cross at St George’s would probably constitute a building or engineering operation, and thus “development” within the meaning of section

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<sup>2</sup> *Arthur Maiden Ltd v Lanark County Council* (No. 1) [1958] JPL 417.

<sup>3</sup> [1972] 1 WLR 90.

55 of the Town and Country Planning Act 1990, for which planning permission would normally be required. Alternatively, it could be classified as “the use for the display of advertisements of any external part of a building which is not normally used for that purpose”, which is classified by section 55(5) as a change of use, and thus “development”. However, planning permission is deemed to be granted for any display of advertisements that is in accordance with the Regulations – see section 222.

24. Once express consent under the Advertisements Regulations has been obtained, therefore, planning permission will not be required.

### **Relationship between advertisements consent and the faculty system**

25. The display of the cross in this case requires both an application for express consent under the Advertisements Regulations and a petition for a faculty under the Faculty Procedure Rules. And if either consent were to be refused, the display would be unauthorised.
26. But there is no requirement in either the Regulations or the Rules as to one or other having to be obtained first. The faculty petition form merely enquires whether secular consent (usually planning permission) is required and, if so, whether it has been sought or obtained.

### **Conditions**

27. I note that the parish suggests that it is lit “occasionally during the year, for instance at Easter, Christmas etc”. It would be unduly restrictive to specify in detail the occasions on which it may be illuminated, so as to include festivals, and other special occasions. I therefore impose a limitation drafted by reference to the number of nights in any year on which it may be illuminated.
28. The one potential problem with a structure such as the cross at St George’s is that it may cease to be maintained properly, and over the years become unsightly or, worse, unsafe. There are in existence a number of floodlighting installations and other similar structures that have not been maintained and have as a consequence fall into disuse, but have remained to become an eyesore. And, given its location high above the main entrance into the church, the continuing safety of the cross must be paramount.
29. If express consent were to be granted under the Advertisements Regulations for the retention of the cross, that would automatically be subject to conditions requiring:
  - the advertisement to be maintained in a condition that does not impair the visual amenity of the site;
  - the structure used for the display of the advertisement to be maintained in a condition that does not endanger the public; and
  - when the advertisement has to be removed under the Regulations, the site to be left in a condition that does not endanger the public or impair visual amenity.

See 2007 Regulations, regulation 2(1) and Schedule 2.

30. Further, any such express consent is likely to be limited to five years (see regulation 14(7)(a)); but on the expiry of that consent, the retention of the cross will then be able to remain indefinitely with deemed consent, under Class 14.
31. The conditions set out in paragraph 29 above are not entirely apt to cover the situation in this case, but their purpose is sensible. I therefore direct that a faculty should issue to authorise the retention of the cross on the west face of the tower at St George's, subject to the following conditions:
  - (1) that the cross is not illuminated for more than 28 days in any one calendar year;
  - (2) that the cross is at all times maintained so as not to become unsightly or unsafe;
  - (3) that when the cross is eventually removed, all fixings are also removed, and the tower is restored to its previous appearance.
32. As to the duration of the faculty, the proposal is by its nature somewhat experimental, and so the faculty will be limited to authorise the retention of the cross only for five years – in line with the position under the secular advertisements consent.
33. However, if all goes well, and the parish wishes to renew the faculty for a further period of five years subject to the same conditions, that need not form the subject of a further faculty petition. I direct (under section 78 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 and rule 3.4 of the Faculty Jurisdiction Rules 2015) that the cross on the west face of the tower at St George's may be retained for a further period of five years (on as many occasions as may be desired) without a faculty, subject to
  - (a) conditions (1) to (3) above, and
  - (b) the archdeacon having been consulted and being satisfied that those conditions have been complied with throughout the preceding five years.

**Charles Mynors**

Chancellor, Diocese of Worcester

18 November 2019