

**IN THE CONSISTORY COURT
OF THE DIOCESE OF LONDON**

IN RE ST AUGUSTINE, KILBURN

**IN THE MATTER OF THE PROPOSED INSTALLATION
AND USE OF TELECOMMUNICATIONS EQUIPMENT**

JUDGMENT

1. This parish submitted a petition dated 3 September 2012 to install nine mobile telephone antennas in the bell chamber of the church tower, to replace the existing lead covered oak louvres with glass reinforced plastic louvres and to enter into related licence agreements. This petition was in exactly the same form as those in the reported case, decided by me, of re St George in the East, Stepney [2012] P.T.S.R. 1214 and conformed with the Practice Direction I had issued on 28 March 2011 which is also reported under the reference above. In fact there was nothing to distinguish this application from eleven others I have granted over the last two years, two of them in the City of Westminster, where the City Council had raised no objections or queries; one (St Saviour, Pimlico), is immediately next to a nursery school and across the road from a secondary school (Pimlico Academy) and on the other side of the road from one of the largest blocks of residential apartments in London (Dolphin Square, which consists of 1,250 apartments) and the other (St Stephen, Rochester Row) is close to two schools as well as various blocks of flats and almshouses. I point this out to put some of the ludicrous and ill-informed correspondence with which the Registry was bombarded in this case into context as complaint is made about the proximity of this installation to schools and residential units.
2. The precise chronology of relevant activity in this case is as follows. The Parochial Church Council (PCC) resolved unanimously on 15 March 2012 to enter into negotiations with the proposed licensee, New Edge Telecommunications (NET) Limited, adopting the procedure set out in the Practice Direction to which I have

referred. The church in recent times has suffered various financial setbacks and has very limited income to maintain this important Grade I listed building as well as carrying out its important mission in this part of London. The proposals were duly submitted to the Diocesan Advisory Committee (DAC) which recommended the works without proviso; save that it recommended consultation with English Heritage and the Victorian Society. The DAC certificate is dated 3 May 2012.

3. English Heritage, when first consulted about the proposals, indicated certain concerns about the louvre replacements. So that these concerns could be discussed, English Heritage, NET and the Incumbent together arranged a site meeting, which took place on 2 May 2012. Having inspected the plans, spoken to the Incumbent and inspected the proposed site, English Heritage indicated its contentment with the proposals and made helpful suggestions to NET on their implementation of the proposals, which were incorporated into later drafts of the architectural drawings. Those are the versions submitted to me, i.e. as recommended by English Heritage. The lead covered oak louvres which are to be replaced are to be retained within the church and can be re-instated in the future. This is identical to the Faculty granted to St Saviour, Pimlico referred to above. The Victorian Society initially objected to the works but that was apparently on an erroneous basis as it misunderstood the nature of the existing louvres of the bell tower and did not appreciate that, although made of oak, they are covered in lead and it is therefore not oak that is visible but lead, on which the effect of weathering would be minimal as with the proposed replacements which are also designed to look identical, unlike oak. In any event, the Victorian Society did not seek to become a Party Opponent and, having considered its submissions and, in so far as they are not based on an erroneous premise, in my judgement the proposed replica louvres will not alter the external appearance of the building from the current louvres and they certainly do not involve an alteration to such an extent as is likely to affect the building's character as a building of special architectural or historic interest.
4. NET's planning consultant GVA Grimley notified the Local Planning Authority, the City of Westminster, of these proposals, under the provisions of the Town and Country (General Permitted Development) Order 1995, on 9 May 2012. Part 24 of Schedule 2 to this Order provides general planning permission to Telecommunications code system operators to carry out development permitted by

Class A of Part 24, subject to certain exclusions which did not apply in this case, without making a planning application to the Local Planning Authority. These works, as with all of those in the cases I have mentioned earlier, come within those statutory provisions and the notice was sent by recorded delivery and was delivered on 10 May 2012. The local authority does not have to reply to such a notice but a month has to elapse after the notice before the development may commence. NET therefore became entitled to carry out the work on 11 June. Thus the City of Westminster was aware of the details of these proposals in May 2012 and did not indicate then that planning permission was considered to be necessary and the matter proceeded under the provisions of the aforementioned Order. In fact, as I interpret the law, if the Local Planning Authority does not respond within the statutory time limit, it is deemed to have accepted that the works are permitted development and no further planning application is necessary.

5. The petitioners duly complied with all the other requirements of the Practice Direction and the final proposals were considered at a meeting of the PCC on 1 August 2012, when they were unanimously approved. Public Notices were then displayed from 1 – 29 August on the principal door of the church – there is currently no notice board as it was destroyed by storm damage (plans for a replacement are currently before the DAC) – and upon an internal notice board. The certificate of publication was signed on 2 September and submitted with the petition on 3 September.
6. Only one notice of objection was received in time, initially by email and then by letter, from a Mr T Fry of Helmsdale House, Carlton Vale, whom I have assumed to be, and treated as, resident in the parish. Mr Fry did not elect to become a Party Opponent, although he continued to write to the Registry on various matters, none of which I found helpful. He raised procedural objections to the siting, timing and display of the public notices. These, in fact, amount to criticisms of the Faculty Jurisdiction Rules which are delegated legislation which I am bound to implement in the approved form, rather than substantive objection to the proposals. As I am satisfied that the correct procedure has been followed to the letter, there is no merit in these points and no legal reason for refusing a Faculty is disclosed by them.

7. Mr Fry also goes on to raise health concerns, specifically related to radiation and the proximity to the site of schools and children and other vulnerable people. These matters have been fully litigated in the secular Courts and the position adopted by the secular courts in relation to objections on public health grounds is clear. In *T-Mobile UK Ltd (1), Hutchison 3G UK Ltd (2), Orange Personal Communication Services Ltd (3) v The First Secretary of State (1), Harrogate Borough Council (2)* [2004] EWCA Civ 1763, the legitimacy of perceived health risks as a ground for preventing mobile telephone mast developments was emphatically rejected by the Court of Appeal [see in particular the judgment of Laws, L.J. at paragraphs 18-19]. The Court held that departure from Government policy in relation to such installations would require specific justification and would only be justified in exceptional circumstances.
8. Subsequent to that decision the matter has come before the ecclesiastical Courts at first instance and on appeal. In *Re Bentley Emmanuel Church* [2006] 2 WLR 1068, the Court of Arches heard an appeal against the decision of Chancellor Shand in the Lichfield Consistory Court refusing a petition for the installation of telecommunications equipment in a church. One of the issues on which the Chancellor based his decision was the perception of local residents as to the possible health risks. The Court of Arches noted that the form of licence provided for compliance with the Public Exposure guidelines of the International Commission on Non-Ionising Radiation Protection (“ICNIRP”) and regular monitoring, as does that before me. The Court of Arches held that the ecclesiastical Courts should not apply stricter requirements than those of the Government and local planning authorities. The licences in this case make the same provision and, given that the decisions of the Court of Arches are binding on me, I could not as a matter of law refuse this petition on those grounds.
9. Mr Fry’s objection was the only one received in time but there have been many others submitted by post or email and the Registry continued to be bombarded by emails to like effect. Although not required so to do I have considered all of them and they do not raise anything new or significantly different. The same health concerns are raised, and, as I have indicated, I am bound by precedent on that issue and even if I were not, all the reliable evidence supports the previous decisions of the Courts on

this matter and I would still follow them. All these other late objections also complain about consultation and procedure and the notice period. As I have already indicated, the correct procedures of statutory consultation and notice required by the Faculty Jurisdiction Rules and my Practice Direction have been followed and there is no reason for refusing the petition on that ground. Specifically, complaint is made that the 28 day period for which the notice was on display was during August when the schools were on holiday. I am singularly unimpressed by that argument as the parish was following a specific timetable and gave notice as soon as the PCC had approved the proposals and some three months after the DAC certificate had been issued. The parish had been considering this most carefully and submitted its petition in accordance with the entirely reasonable and appropriate timetable which I have set out earlier in this Judgment.

10. Furthermore, I have been informed that visitor records for the period show that the church was actually busier in this period than at any time for many years. The church is usually open every day for Mass (and approximately half an hour either side of the service), as well as Saturday mornings. However, during August 2012 the church was open from at least 9am-5pm seven days a week, as part of the Diocese of London's "Faith Walks" scheme to keep churches open for visitors during the Olympic period. The church's visitors' book notes that the majority of visitors during this period, rather than being overseas tourists, were in fact local residents expressing delight at seeing the church open. All visitors to the church had to go directly past both the external and internal Public Notice of these proposals. The Petitioners therefore submitted, and I accept, that not only did they display the Public Notices in accordance with the Rules, they displayed them at a time when the church was experiencing maximum 'footfall'.

11. Notwithstanding the due process that had been followed in accordance with the statutory procedures *vis a vis* the local authority that I have outlined above and long out of time for the lodging of objections, the City of Westminster asked for a further 28 days to consider its response to the citation, it having been duly notified of the petition for the Faculty in August 2012. The works in the petition are, of course, exactly the same as those notified to the City of Westminster under the provisions of the Town and Country (General Permitted Development) Order 1995 as set out above

to which the City of Westminster made no response within the statutory time limit or at all; until what appears to have been some whipped up, ill informed local campaign began after the matter had been referred to me.

12. I was not minded to grant that request as it was out of time from the original 28 days in any event and it seemed to be more than 28 days that was being asked for as the suggestion was that the matter should be considered at a planning committee meeting on 11 December which would have delayed matters considerably but most importantly because:
- a) The local planning authority had already received statutory notification of these proposals, as set out above and had not made any representations within the statutory time limit that this was not a permitted development or should not otherwise be approved,
 - b) The matter was not before the planning committee as an application for planning permission in any event
 - c) The proposals were recommended by the local planning authority's planning officers and by English Heritage, one of whose statutory functions is to advise local authorities on such matters, but whose advice the planning committee did not have before it, whereas I did, because the Petitioners had obtained and formulated proposals in consultation with English Heritage and whose recommendations were before me.

Having considered all the material before me and having the particular benefit of the recommendations of English Heritage as well as the planning officers and the Diocesan Advisory Committee, I considered that I was in a position to give Judgment in this matter and I proceeded to write a Judgment. The correct legal procedures had been followed in this case and the financial need and the case for these works generally was made out and there is no basis in law on which this petition should have been refused.

13. However, before there was time to hand down that Judgment, I heard that Westminster City Council proposed to lodge an objection in these proceedings. This was at the planning committee meeting to which I have referred above, which was attended by Councillor Moss, a ward councillor opposed to the proposal. The City Council's precise objection was to the effect that the replacement of the louvres

would be harmful to the special architectural and historic interest of the building and the works would detract from the visual appearance of the building. The City Council also said that the works would need planning permission as they would materially affect the appearance of the building.

14. Those matters have, of course, been considered by the Diocesan Advisory Committee, English Heritage and the planning officers, whose views I have already outlined. The concept of replacing original louvres with GRP replicas is not a novel one and a number of parishes both in this Diocese and elsewhere have undertaken such works and I am unaware of a site where any alteration to the external appearance of the building has been noted. There is the case of St Saviour Pimlico (a listed building Grade II) to which I have already referred, where planning permission was in fact applied for and obtained but it is not clear whether the procedure under the Town and Country (General Permitted Development) Order 1995 was followed in that case and whether planning permission was, in fact, necessary. In a more recent identical proposal, which in the event has not yet formally been pursued, at St Gabriel Pimlico (a Grade II* listed building), Westminster City Council specifically stated in an undated letter written in response to a letter dated 1 July 2010 from the parish: “The installation of the louvers is considered to be de minimis and does not require planning permission.”

15. In the instant case the bottom of the replica louvres will be almost 30 metres above ground level. Section 55(2) The Town and Country Planning Act 1990 provides that “development” for which planning permission is required, does not include, amongst other things,

“the carrying out of the maintenance, improvement or other alteration of any building of works which:

(i) affect only the interior of a building, or

(ii) do not materially affect the external appearance of a building.”

The meaning of section 55(2)(a)(ii) was considered by the High Court in *Burroughs Day v Bristol City Council*, which concerned roof alterations to a listed Georgian

building in a conservation area. Richard Southwell QC, sitting as deputy judge, summarised as follows the factors to be taken into account:

- (1) What must be affected is ‘the external appearance’, not ‘the exterior’. ... The alteration must be one which affects the way in which the building is or can be seen by an observer outside the building.
- (2) ... all roof alterations which can be seen from any vantage point on the ground, or on or in a neighbouring building or buildings would be capable of affecting the ‘external appearance’ of the building in question.
- (3) The external appearance must be “materially” affected. ... Whether the effect of an alteration is ‘material’ or not must ... depend in part on the degree of visibility.
- (4) One point much argued before me was whether a different test of ‘materiality’ should be applied to listed buildings or buildings in a conservation area. ... ‘materiality’ must in every case take into account the nature of the building which it is proposed to alter.
- (5) ... the effect on the external appearance must be judged for its materiality in relation to the building as a whole, and not by reference to a part of the building taken in isolation.”

16. That is similar to the test that I have to apply in the context of the ecclesiastical exemption when considering works such as these to a listed church such as this (Grade I). The precise test I apply, as does the DAC when making its recommendation to me, is whether it affects the “character” of the building, but I take that to include the section 55(2) test above of “materially affecting the external appearance.” It is, of course, a consideration that caused English Heritage to recommend the changes that it did so that from street level there will be no material effect on the appearance of the building. I accept that proposition and find as a fact that the proposed replacement louvres viewed from street level, which is the proper test to apply, will not materially affect the appearance and therefore the character of the building. If, unlike other building where like works have been carried out, the glass reinforced plastic weathers differently from lead covered oak and the appearance is materially affected, the Petitioners having undertaken safely to store the original louvres for reinstallation when the telecommunications equipment is removed

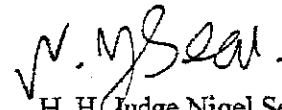
and the works reversed, the original louvres can always be reinstated earlier, subject to due notice being given. It therefore follows that I do not consider that these works would be harmful to the special architectural and historic interest of this Grade I listed building or that they would have a detrimental impact on the historic fabric and integrity of the building. Of course, as I have indicated above, the planning permission situation had already been covered by the Town and Country (General Permitted Development) Order 1995 notification in May and had this been a secular building the installation could have taken place in June of last year (subject to listed building consent). It is only because of the ecclesiastical exemption and the need for a Faculty that Westminster City Council has been able to have this late second bite of the cherry.

17. Lastly, I turn to the myriad of emails and other correspondence which arrived out of time and bore all the hallmarks of having been orchestrated as part of some ill informed local campaign and which would appear to be the real reason for the matter being considered by Westminster City Council at the December meeting, rather than proceeding on the advice of the planning officers. Another complaint in these 'out of time' objections was the alleged failures in the consultation process as part of the planning procedure in May and June, to which I have already referred. There were allegations that certain people never received the correspondence allegedly sent out at that time. I required further submissions to be made on that point.
18. The objectors have specifically identified the proximity of the site to community facilities including, in particular, local schools as a particular reason for their unease. On the evidence before me the Petitioners have been mindful of these local concerns, but I note that the Government's Planning Policy (PPG 8) does not preclude the erection of mobile phone base stations near school premises. Indeed, Ofcom has reported on occasional testing at a considerable number of schools in close proximity to telecommunications installations (*Audit of Mobile Phone Base Stations – Information Sheet*). The head teachers and Chair of Governors of St Augustine's High School, St Augustine's Primary School and Naima Jewish Preparatory School were specifically consulted regarding these proposals by letter on 16 April 2012. This letter was sent by Messrs GVA Grimley, planning consultants engaged by NET. No response to this consultation was received from any party. St George's Roman

Catholic High School is further away from the proposals and was not consulted under this procedure. However, I am informed that this particular school is significantly closer to existing masts than it is to the proposed masts. I have already dealt with safety considerations above and have applied the law as set out by both secular and ecclesiastical Courts of superior jurisdiction to mine. I am only dealing here, for the sake of completeness, with alleged defects in the consultation procedure.

19. I was originally led to believe that consultation letters had been sent out recorded delivery by GVA. However, in a letter dated 18 February 2013, it was explained to me that this was not the case as in the past GVA had received complaints from consultees annoyed at having to go to the Post Office to collect the letters if they had not been at home when delivery was attempted. So all letters were sent via Royal Mail and hard copies of all letters sent were retained on file by GVA. Letters were sent to the Chief Planning Officer, Westminster City Council; Councillors Moss, Prendergast and Rowley at Members Room Westminster City Council; the chair of governors and head teacher of Naima Jewish Preparatory School, St Augustine's C of E High School and St Augustine's C of E Primary school at their respective schools.
20. Councillor Prendergast received her consultation letter and immediately wrote to the newly installed Vicar, The Reverend Colin Amos, enquiring if he had any concerns about the proposals and offering to take them up if he did. He replied indicating he did not. Since all of the ward councillors letters were sent to the same address, i.e. the members room, I draw the inference that they were all received. The Chair of Governors and the Head Teacher of St Augustine's High School have both confirmed that they received their consultation letters as has the Chair of Governors of St Augustine's Primary School. Of course, this consultation was part of the planning process in May 2012 and therefore does not concern me but I have dealt with it to show that I have given consideration to this complaint. As I have already indicated the notification procedures so far as this Faculty petition is concerned were all carried out in accordance with the Faculty Jurisdiction Rules.
21. Having now fully reconsidered the matter in the light of the observations from Westminster City Council I am satisfied for all of the reasons set out above that the Petitioners have made out the case and there are no proper grounds of objection which

should prevent a Faculty from issuing and accordingly a Faculty may issue for the licences applied for and for works in accordance with the submitted specifications and drawings.

A handwritten signature in black ink, appearing to read 'N. Seed'.

H. H. Judge Nigel Seed Q.C.

Chancellor of the Diocese of London

2 April 2013

