

JUDGMENT

1. This is a petition by the Vicar and Churchwardens of St Anne, Wandsworth (Revd Dr Gordon Jeanes, Ms Jennifer Ripley and Ms Elizabeth Turner) and NET Coverage Solutions Limited ("NET"). It was received in the Registry on 1 July 2015. It seeks permission for (i) the installation of seven antennae and a 300mm transmission dish within the bell chamber in the tower and (ii) authority for the incumbent to enter a licence agreement for a term of 20 years with NET to permit the installation and operation of the equipment permitted¹.
2. The church of St Anne, Wandsworth is listed, Grade II*. The Statement of Significance explains that it is a "Waterloo Church", that is one of the churches built by the Church Commissioners under the Church Building Act 1818 by way of thanksgiving for victory at the Battle of Waterloo. It was designed by the distinguished architect Robert Smirke (who also designed the British Museum). Although the "pepper pot" style of the tower is well known, I am told that Pevsner is critical of it, saying that it is of *unhappy proportions* and *exactly twice as high as it should be*. It is nonetheless an historic and important local landmark.
3. The PCC resolved to enter into negotiations with NET on 15 January 2014. Following the successful conclusion of those negotiations, on 17 March 2015, the PCC unanimously resolved to seek a faculty for the installation of the equipment and to enter into an agreement in respect of it. Before it so resolved, it had valuation advice from Adam Harvey BA MA MRICS, a partner in the firm of Biscoe Craig Hall, Chartered Surveyors. His advice was that the annual fee payable of £14,300 was the best that could be achieved in the circumstances. The PCC have had legal advice as to the effect of the licence, which is a standard form that has been used elsewhere within the Diocese. It has a term of 20 years and provides for "upwards only" fee reviews every five years.
4. The Statement of Need points out that the annual fee will generate much needed income which will assist the Church in meeting the spiritual and community needs of its parishioners. It will improve mobile phone and internet reception in the parish. The visual impact within the tower is likely to be less than if the equipment has to be sited elsewhere. The PCC have considered the health and safety aspects of the proposals and their environmental and reputational impact. By the reference to "reputational impact", I take it to mean that it has taken into account the fact that some members of the community may consider it inappropriate for telecommunications equipment to be installed in the tower. It is, of course, not unusual for churches to permit telecommunications equipment to be installed in their buildings, although not all choose to do so.

¹ The equipment will actually be operated by Vodafone and O2 (Telefonica) by virtue of arrangements made under the licence.

5. In the context of the need identified by the PCC, it is worth recalling the expression of Government policy expressed in paragraph 42 of the National Planning Policy Framework:

Advanced, high quality communications infrastructure is essential for sustainable economic growth. The development of high speed broadband technology and other communications networks also plays a vital role in enhancing the provision of local community facilities and services.

6. By its Notification of Advice dated 21 July 2014, the DAC recommended the proposals subject to the following proviso:

Antennas to be painted black and ordinary pigeon netting used rather than gale-break mesh.

7. The Committee certified that, in its opinion, the work was likely to affect the character of the church as a building of special architectural or historic interest.

8. Accordingly it was necessary that English Heritage, the Georgian Group and the local planning authority (Wandsworth LBC) should be consulted.

9. In respect of the latter, Wandsworth LBC granted planning permission for the proposals on 5 February 2015. Pertinently, permission was granted subject to a condition that details of the black gale break mesh to be installed in the tower should be approved by the authority before development began. On 1 May 2015, Wandsworth LBC approved such details: the black mesh they approved was black pigeon netting.

10. The tower of St Anne's has two levels. The initial proposal was for equipment to be installed at both levels. Now the proposal is for the equipment only to be installed at the lower level. These facts explain the context of English Heritage's concluded view of the proposals which was as follows:

The amended scheme, which omits the installation of antennas from the upper level windows is certainly less harmful. We note that there would be some impact in longer views of the lower level windows of the tower, but with the black mesh the harm appears minimal and would seem outweighed by the clear financial benefits provided, which would support the long term sustainable use of the building.

11. Note that the relevant department of English Heritage has now become Historic England.
12. The Georgian Group is satisfied that the pigeon netting proposed would provide adequate mitigation in respect of any visual detriment. It does not oppose the grant of a faculty.
13. The proposal was advertised in the usual way under rule, namely by a notices on display for 28 days inside the building and on a notice board outside the building.
14. Further, a *Code of Best Practice on Mobile Development in England* (2013) has been developed by a Working Group including representatives of the telecommunications industry, the Department for Communities and Local Government, the Department for Culture, Media and Sport, the Department for Environment, Food and Rural Affairs, English Heritage, National Parks England and the Planning Officers Society. This advises consultation with the local community depending on how sensitive the site is (as assessed under the *Code* according to a "traffic light" system). St Anne's was assessed at amber. This meant that ward councillors were consulted.

Appendix D of the Code records that, since 2001, planning guidance has advised that, where it is proposed to install a mobile phone base station on or near a school or college, operators should discuss the proposed development with the school or college concerned. NET have interpreted *on or near a school or college* to mean on a school or college or within 250m of it. In the light of this guidance, NET wrote to the Wee Ones Nursery at 4 St Ann's Crescent, Wandsworth and Allfarthing Primary School, which is also in St Ann's Crescent. They did not receive any response.

15. The Registrar received one objection to the proposal. This was from Philippa and Noel Glendon-Doyle, who live within the parish. Mr and Ms Glendon-Doyle send their son to the Wee Ones Nursery. They are consider that the close proximity of mobile phone masts is dangerous to children and refer me to the views of Dr Keith Baxendale, a neurophysiologist who has expressed this opinion. In their letter Mr and Ms Glendon-Doyle point out that the Wee Ones Nursery is within 60m of the church, St Anne's Church of England Primary School and Allfarthing Primary School are within 350 m of the church and that numerous children's groups operate from the church hall.
16. In accordance with the Faculty Jurisdiction Rules, the Registrar wrote to Mr and Ms Glendon-Doyle asking them whether they wanted to become parties opponent to the petition or whether they were content for me simply to take their objection into account in reaching a decision on the petition. The Registrar has not heard back from Mr and Ms Glendon-Doyle. Accordingly I shall take their objection into account in reaching a decision on the petition but it is not necessary for there to be a hearing in respect of it.
17. Mr and Ms Glendon-Doyle's letter drew my attention to the existence of St Anne's Church of England Primary School, just outside the 250m limit. I directed that the Head Teacher and the Chair of Governors should be specially cited under rule 8.1 of the Faculty Jurisdiction Rules. In the event, it was the Vice Chair of Governors who was cited, Dr Jeanes (one of the Petitioners) being the Chair of Governors. Neither the Head Teacher nor the Vice Chair has responded to the citation.
18. Although it evidently is good practice that schools and colleges are notified of proposals such as this to install telecommunications equipment, they will not usually have the basis for objecting on grounds relating to health: consultation rather provides the basis for those making the proposal to explain what is involved and, insofar as they are able, to allay concerns. This is because of the approach that has been adopted by the planning system to such proposals; an approach which, in turn, has been adopted by the ecclesiastical courts considering such proposals.
19. Government Guidance to planning authorities is short and to the point. It is now contained in paragraph 46 of the National Planning Policy Framework and is as follows:

Local planning authorities must determine applications on planning grounds. They should not ...question the need for the telecommunications system, or determine health safeguards if the proposal meets International Commission Guidelines for public exposure.
20. In my papers is a certificate dated 11 November 2014 which states that the equipment and installation proposed in the present case do meet the International Commission Guidelines.

21. The relevance of the Guidelines was considered by Grenfell Ch in *In re St Margaret Hawes and Holy Trinity, Knaresborough*². He said:

*...in the absence of compelling evidence of a real risk to human health as a result of transmitting radio waves up to the levels set by the United Kingdom Government in their adoption of the ICNIRP guidelines, it would be wrong to adopt lower guidelines for a base station just because it happens to come under the jurisdiction of the consistory court in addition to planning requirements*³.

22. This statement was expressly approved by the Court of Arches in *In re Emmanuel Church, Bentley*⁴. The Court of Arches added:

*This applies with equal force to the suggestion that a faculty should be refused because of concern (however genuine) about the possibility of a health risk, which cannot be substantiated in any way by evidence*⁵.

23. It may be some addition reassurance to Mr and Ms Glendon-Doyle that papers submitted with the petition and subsequently indicate that the monitoring of radio waves at existing telecommunications installations produces measurements that fall far short of International Commission Guidelines. Since 2001, Ofcom has funded and conducted a total of 724 surveys. The highest measurement recorded was 1/279th of the International Commission on Non-Ionizing Radiation Protection (ICNIRP) safety threshold. No installation tested by them exceeded 0.005% of the specified radiation safety limit. This programme was continued by Ofcom until 2012. Subsequent testing has produced similar results.

24. They should also be reassured by the following provisions of the licence agreement:

- Clause 5.1.3: a requirement that NET use all reasonable endeavours to procure the maintenance and operation of the equipment in good and safe condition
- Clause 5.1.6: a requirement that the equipment be operated in accordance with the requirements of the Health Protection Agency, Ofcom, ICNIRP and any other competent authority
- Clause 6 – covenants in respect of the regular monitoring of emissions. If requested by the Vicar and Churchwardens, the NET will carry out direct radio frequency emission measurements in the vicinity of the equipment and building
- Clause 10.2.2 – termination provisions in the event that a relevant regulatory body advises that the apparatus presents an adverse health risk.

25. It may be noted that this protection may be better than that which obtains in respect of telecommunications equipment erected under the secular system where there may be no on-going requirement for monitoring and no legal requirement to cease using the equipment in the event of

² [2003] 1 WLR 2568.

³ See paragraph 84.

⁴ [2006] Fam 39 at para 50.

⁵ *Ibid.*

it failing to meet the ICNIRP Guidelines in the future. There is for example no condition in respect of monitoring imposed upon the planning permission that has been granted in this case.

26. It will be seen that the basis does not exist for refusing to grant a faculty because of any health risk arising. I appreciate that Mr and Ms Glendon-Doyle will continue to be concerned. They have indicated that they will withdraw their son from the Wee Ones Nursery if the proposal goes ahead. This will be unfortunate but if they do this it will of course mean that, in the event, their son will not be at any risk at all from this equipment. I hope this judgment will have explained that the Church authorities (and indeed Government and the mobile phone network operators) do take the health issue seriously. If evidence does come forward of the risk being greater than hitherto it has been considered to be, it is to be expected that the ICNIRP Guidelines will change.
27. There is a further issue that sometimes arises in connection with telecommunications equipment. For completeness I should mention it, although it is not raised by Mr and Ms Glendon-Doyle. Sometimes objection is made because the equipment can be used for the transmission of pornographic and other objectionable material. Provided adequate safeguards are in place, this was rejected as a basis for objection by the Court of Arches in *In re St Peter and St Paul's Church, Chingford*⁶. In the present case I am satisfied that such appropriate safeguards are in place (see clause 5.4.1 (e) of the draft licence agreement reflecting paragraphs 56 to 61 of the *Chingford* judgment).
28. I turn to consider the effect that the proposal will have on the architectural and historic character of this Grade II* building. The short point is that the DAC, English Heritage, the local planning authority and the Georgian Group have all examined the proposals and find them unobjectionable. In these circumstances there would, on the face of it, have to be something special in the case which could lead me to conclude that a faculty should be withheld based on the effect on the listed building. Nonetheless it is clear from the DAC's advice that the works will have some effect on the listed building and from the representation of English Heritage that (in its view at least) that effect is, to a degree, harmful. Accordingly I think that I need to engage with the balancing exercise between harm and benefit that in these circumstances necessarily arises.
29. The "pepper pot" style of the church tower means that it is possible to see daylight through both levels of the tower (i.e. through the openings at each level of the tower). The bell that is hung in the tower does not affect these through views because it is hung immediately below the first level openings. Of these views, those through the upper level of the tower are more significant. There are several places in the immediate area from which one can see through these openings but only one place (Pentland Street) where one can see clearly through the lower level. At one time there were clear views from Rosehill Road but, with the growth of a protected tree in the churchyard, this view was obscured. Moreover it seems that this view is in any event spoiled by a large building development in the town centre.
30. The installation of the antennae and transmission dish will obstruct such views as there are through the lower level of the tower.

⁶ [2007] Fam 67.

31. Against this background I shall address the “Duffield questions”, that is the questions and guidance that the Court of Arches has identified as relevant in considering proposals potentially affecting a listed church⁷.

(1) What is the special architectural interest of the church, and especially the character of that special interest?

32. It is a fine Georgian church by a significant architect of that period which contributes importantly to the townscape of this part of Wandsworth. Its significance is to a degree compromised by Victorian alterations, damage in the Second World War and from a fire in 1950.

(2) What is the special historic interest of the church, and especially the character of that special interest?

33. It is an historic building that has stood in this part of Wandsworth for 200 years. It is an important example of a Waterloo church. It contains interesting monuments.

(3) Would the proposals, if implemented, result in harm to the significance of the church as a building of special architectural or historic interest?

34. Yes (see paragraph 28 above).

(4) If the answer to question (3) 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, 26–28, and the review of the case law by Bursell QC, Ch in In re St Mary's Churchyard, White Waltham (No 2) [2010] Fam 146, para 11. Questions 3, 4 and 5 do not arise.

35. The answer to (3) is Yes.

(5) If the answer to question (1) is “yes”, how serious would the harm be?

36. It seems to me that the harm is modest. It must have been intended by Smirke that it should be possible to see through both the lower and upper levels of the tower but no-one has suggested to me that this is an important feature of his design. Further, the views through the lower part of the tower have been compromised as explained at paragraph 29 above. Only a small part of the church will be affected. None of the heritage “stakeholders” has suggested to me that the harm will be serious, let alone sufficiently serious to warrant refusing permission against the benefit (see question 6) which flows from the proposals. Although, at the lower level, there will be very limited views through the tower after the completion of the works, the use of pigeon netting rather than a more rigid gale break mesh will mean that the effect of the installation will be softened.

(6) How clear and convincing is the justification for carrying out the proposals?

37. The benefit that flows from the proposals is principally a financial one. Immediately there does not appear to be any need to spend the money on the building itself. However it is always possible that that situation may change. More broadly a lively church, better able through this funding to maintain its activities in the community is more likely to be in a position to support the upkeep of

⁷ In *In re St Alkmund, Duffield* [2013] Fam 158.

the listed building into the future. I also note the local benefits from improved mobile and internet reception and the benefit to the national economy.

(7) *Bearing in mind that there is a strong presumption against proposals which will adversely affect the special character of a listed building (see In re St Luke the Evangelist, Maidstone [1995] Fam 1, 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 (7), 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 I or II*, where serious harm should only exceptionally be allowed.*

38. This is evidently not a case where serious harm will be caused to the listed building. The harm will be modest. This means, as the commentary to question 7 makes clear, less benefit will be required to outweigh the harm than would be case than if the harm were more serious. But there is still a strong presumption against even modest harm. How this works is illustrated by three recent cases in the secular courts.

39. In *East Northamptonshire DC v Barnwell Manor Wind Energy Ltd v Secretary of State for Communities and Local Government*⁸, Sullivan LJ observed:

28 It does not follow that if the harm to such heritage assets is found to be less than substantial, the balancing exercise referred to in policies HE9.4 and HE10.1 should ignore the overarching statutory duty imposed by section 66(1) [of the Planning (Listed Buildings and Conservation Areas) Act 1990], which properly understood (see the Bath Society case [1991] 1 WLR 1303, the South Lakeland case [1992] 2 AC 141 and the Heatherington case 69 P & CR 374) requires considerable weight to be given by decision-makers to the desirability of preserving the setting of all listed buildings, including Grade II listed buildings. That general duty applies with particular force if harm would be caused to the setting of a Grade I listed building, a designated heritage asset of the highest significance. If the harm to the setting of a Grade I listed building would be less than substantial that will plainly lessen the strength of the presumption against the grant of planning permission (so that a grant of permission would no longer have to be "wholly exceptional"), but it does not follow that the "strong presumption" against the grant of planning permission has been entirely removed.

40. In *R (Forge Field Society) v Sevenoaks DC*⁹, Lindblom J said

48 As the Court of Appeal has made absolutely clear in its recent decision in Barnwell, the duties in sections 66 and 72 of the Listed Buildings Act do not allow a local planning authority to treat the desirability of preserving the settings of listed buildings and the character and appearance of conservation areas as mere material considerations to which it can simply attach such weight as it sees fit. If there was any doubt about this before the decision in Barnwell it has now been firmly dispelled. When an authority finds that a proposed development would harm the setting of a listed building or the character or appearance of a conservation area, it must give that harm considerable importance and weight.

49 This does not mean that an authority's assessment of likely harm to the setting of a listed building or to a conservation area is other than a matter for its own planning judgment. It does not mean that the weight the authority should give to harm which it considers would be limited or

⁸ [2015] 1 WLR 45 (CA).

⁹ [2014] EWHC 1895 (Admin) (High Ct).

less than substantial must be the same as the weight it might give to harm which would be substantial. But it is to recognize, as the Court of Appeal emphasised in Barnwell, that a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering.

41. In *Ecotricity (Next Generation) Ltd v Secretary of State for Communities and Local Government*¹⁰, Charles George QC (sitting as a judge of the High Court) said:

*... the rather surprising consequence [of Barnwell and Forge Field Society] is that section 66(1) of the Listed Buildings Act has been held to require that decision makers give “considerable importance and weight” to the desirability of preserving the setting of listed buildings regardless of whether the harm to such a heritage setting is less than substantial or presumably even if it is less than significant. That this should be so is not immediately apparent from the wording of the statute, but the statute now has glosses of such high judicial authority that at the level of this court the interpretation is binding, however anomalous the consequences*¹¹.

42. It goes without saying that the words of such distinguished judges (including the Dean of the Arches, albeit wearing a secular hat) are entitled to the highest respect. I note the surprise that Mr George QC expresses about where the law has ended up, but the “considerable importance and weight” to which he refers to and is another was of putting the “strong presumption” identified by Sullivan LJ is reflected in the strong presumption identified by Sir John Owen in *In re St Luke Maidstone* and incorporated into Question 7 of the Duffield guidance.

43. Obviously, although these cases have arisen in the secular jurisdiction, they have relevance to the ecclesiastical jurisdiction. With respect, I agree with what they say. The difficulty I have is how, sensibly, I am to apply the strong presumption against harm in respect of harm that is modest.

44. Let me explain what I mean. In the present case, the justification is in part financial benefit to the parish (with consequential benefit for the listed building) and in part improvement to the telecommunications network. These are significant benefits and I have no difficulty in saying that, absent any special presumption, they clearly outweigh the modest harm. I think it is apt to describe them as strong benefits. But it would strain language for me to suggest that they are **very** strong. If of course they were very strong, it would be easy to say that the strong presumption against harm was outweighed. But how is the decision maker to decide if the benefits are sufficient to outweigh the presumption if they are less than that? The assessment will have become circular (and thus meaningless) if the decision maker decides that the benefits are sufficient to outweigh the strong presumption because, in his view, it is appropriate that permission should be given.

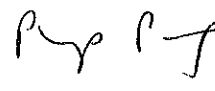
45. I think that the correct way to approach the matter is to reflect that although the strong presumption remains **proportionately** of equal weight whether the harm be modest or severe, its **quantum** is much less when applied to modest harm. The benefits, on the other hand, are of a fixed quantum. Accordingly the strong presumption is more easily outweighed by the same

¹⁰ [2015] EWHC 801 (Admin) (High Ct).

¹¹ See paragraph 95 of his judgment.

amount of benefit where the harm is modest. On this basis, I can properly say in the present case (as I do) that the modest harm is properly outweighed by the strong benefits, even though I approach the matter on the basis that there is a strong presumption against permission. It seems to me to accord both with common sense and with how the Court of Arches would wish the guidance in *Duffield* to be applied to say that, where the harm is modest, strong benefits can outweigh the strong presumption. My conclusion also reflects the fact that planning permission has been granted for the development. In weighing the balance I bear in mind that the proposal is reversible, which certainly makes the proposal more acceptable than it would otherwise be; it is not necessary for me to engage again with the relevance of reversibility¹².

46. Finally on this I should note that Fookes Dep Ch in the recent case of *In re All Saints', Evesham*¹³ has suggested (obiter) that it may be necessary to revisit the *Duffield* guidance in the light of the secular authorities that I have considered in this judgment. As I understand the Court of Arches will have the opportunity to comment on this suggestion in its judgment in an appeal from the Consistory Court of the Diocese of Winchester. It seems to me that whatever emerges in the light of the suggestion of Fookes Dep Ch, it is unlikely to affect what I consider to be the correct outcome of this case, however that be addressed.
47. Since in the present case I am of the view that the guidance in the *Duffield* case suggests that a faculty should issue and that there is no other basis on which permission for a faculty should be refused, I direct that a faculty should issue. In accordance with the advice of the Diocesan Advisory Committee, it shall be a condition of the faculty that the antennae be painted black and (in accordance with the planning permission) be protected by black pigeon netting.



PHILIP PETCHEY
Chancellor
2 November 2015

¹² On this see paragraph 33 of my judgment in *In re All Saints', West Dulwich* [2015].

¹³ In the Consistory Court of the Diocese of Worcester.

