

In the Consistory Court of the Diocese of Leeds
In the matter of the Venerable Bede, Wyther

2016-003539/16-121C

- (1) Reverend Andrew Pearson
 - (2) Mrs Monica Battensby
 - (3) Telefonica UK Limited
 - (4) Cornerstone Telecommunications Infrastructure Limited
- Petitioners

Judgment

1. These proceedings have a long and unhappy history. The specific matter which now falls for determination is the subject of a re-re-amended petition, as set out in the following revised Schedule of Works:

A confirmatory faculty to approve retrospectively the retention of the telecommunications equipment now installed at the church (including the additional equipment and enhancements installed in 2014 without the benefit of a faculty) under implied terms that substantially mirror those in the Agreement dated 31 July 2002 (but which has now expired) subject to (and with the parties agreeing that):

1. As a gesture of goodwill the Fourth Petitioner shall pay an uplift in the level of compensation payable for its continued use and occupation (on implied terms) to an annual figure of £[redacted], effective from 4 February 2017 until the Fourth Petitioner's vacation from the Church on or before the Exit Date (defined at paragraph 4 below);
2. The Fourth and Third Petitioners agree to make payment of any shortfall in uplift of compensation for the period 4 February 2017 to 3 February 2018 (if not already paid) within 14 days of the date of any faculty being granted;
3. The Fourth and Third Petitioners agree to pay compensation for the Fourth Petitioner's continued use and occupation in the church at the stated daily rate of £[redacted] until such time as the equipment is removed from the Church in accordance with paragraphs 4 and 5 below;
4. The Fourth and Third Petitioners shall procure removal of all of the telecommunications equipment specified in the attached schedule prepared by DAEL on behalf of the Third Petitioner and Fourth Petitioners and dated 18 December 2017 ("the DAEL Schedule") within 6 (six) calendar months (or sooner) of the date of issue of any faculty ("the Exit Date"), the Works of decommissioning and removal of the equipment and reinstatement of the Church to be undertaken as specified in the DAEL Schedule and following the Exit Date the Third and Fourth Petitioners shall have no further interest or presence at the Site they having surrendered their interests and yielded up;
5. Within 14 days of the Exit Date and the removal of the telecommunications equipment (to the satisfaction of the First Petitioner), the Third or Fourth Petitioners will pay the fee due under paragraph 3 above.

In the context of the proposed decommissioning and reinstatement Works the Petitioners will ensure that high cladding is placed around any scaffolding erected adjacent to the Church, to mitigate the risk of unlawful access whilst the Works are being undertaken. All internal and external plaster, render, brick and stonework, mortar and pointing are to be made good and reinstated to the condition in which they were before the telecommunications equipment was originally installed in 2002 or 2014 as the case may be.

The Works are to be carried out between the hours of 09:00 and 17:00 on weekdays only (with access at other times only as permitted by the First Petitioner).

The Petitioners seek the leave of the Court to leave in situ any electrical cables and other conduits which have been buried within or beneath concrete structures, including but not limited to the power supply cable beneath the access ramp to the Church, subject to the said cabling being left in a safe condition in accordance with current building regulations.

2. Although what is now proposed is largely uncontentious and is put before the Court by way of a joint application from all four petitioners acting collaboratively and with the benefit of independent legal advice, the background is such that the Court cannot fairly dispose of the matter without reference to some of the history and to the unusual course which the proceedings have taken. I will endeavour to deal with the matter as succinctly as possible.

The history

3. On 22 January 2002, the then Chancellor of the then Diocese of Ripon and Leeds granted a faculty for “the introduction of telecommunications equipment on the tower” of the church of the Venerable Bede, Wyther. The faculty said nothing about authorising the incumbent and PCC to enter into a licence agreement with any telecommunications company.
4. On 31 July 2002, a document was executed, the parties being the then incumbent and the PCC and O2 (UK) Limited. The document appeared to have been drawn up by Addleshaw Booth & Co, solicitors, and styled itself a “Lease of Rights”. Counsel for the third and fourth petitioners stated at the abortive hearing of this matter on 20 November 2017, that he was unaware of the legal nature or basis for such a document.
5. The purported demise in the so-called “Lease of Rights” reads:

The Landlord with limited title guarantees DEMISES TO the Tenant the Rights in respect of the Premises TO HOLD the Rights to the Tenant for the Term YIELDING AND PAYING to the parochial Church Council on and from the Rent Commencement Date the Rent payable annually ...
6. Counsel submitted that this terminology was meaningless and I am inclined to concur. It would have been open for the then Chancellor to have included within the faculty provision authorising the incumbent and PCC to enter into a licence on specified terms, reserving to the Consistory Court jurisdiction as to its enforcement.
7. At the time, however, it was not 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”: see section 56(2) of the Pastoral Measure 1983. A change in legislation was not introduced until the Pastoral (Amendment) Measure 2006, which effected amendments to section 56 giving to the chancellor power to grant a faculty, subject to certain conditions, authorising the granting of a lease of part of a church. These provisions are now to be found in section 68 of the Mission and Pastoral Measure 2011.
8. I was led to believe that the granting of leases (whether expressed as a “Lease of Rights” or otherwise) for the introduction and retention of telecommunications equipment was commonplace in various dioceses of the Northern Province, even

prior to the passing of the Pastoral (Amendment) Measure 2006. However, at a late stage in these proceedings, the Archdeacon of Leeds drew to my attention a Licence drafted by Gordons, solicitors, dated 6 July 2004 made between the incumbent and PCC of St Pauls, Pudsey and O2 (UK) Limited. So it would seem that telecommunications licences were not entirely unknown in the north.

9. Be that as it may, the term of the so-called "Lease of Rights" in this matter was expressed to be ten years, up to and including 3 February 2012. Clause 3.4 of the so-called "Lease of Rights" required the equipment to be removed at the expiry of the term. It was not: in fact more equipment was installed. These proceedings concern the unhappy events which ensued.
10. The equipment remained and the so-called Tenant continued to pay to the so-called Landlord monies which were styled Rent. It was agreed between the telecommunications company and the parish that the equipment would be upgraded and an enhanced annual payment would become payable.
11. The telecommunications company (acting through CAIP) wrote to the PCC secretary on 2 August 2013 setting out the terms of an agreement between itself and the parish to carry out alterations to the equipment. The letter records that CAIP had been in touch with Peter Mojsa "at a diocesan level" who had no objections to the proposed alterations. The parish's consent was signified by the signature of the second petitioner. The letter also stated, "Mr Mojsa has confirmed the Parish will need to inform the Diocesan Registrar if the proposed works are agreed". Mr Mojsa, I understand, was secretary to the Diocesan Advisory Committee for Ripon and Leeds.
12. It would appear that no one thought to seek directions from the chancellor. Had I been consulted at the time, I would have proposed granting an interim faculty to authorise the works with a condition that the parties entered into a licence to regularise the position. It would have been a swift and inexpensive resolution.
13. After some of the works had been undertaken without authority, the parish was apparently advised to seek a faculty and the work ceased. The petition, however, was pursued with chronic and crass ineptitude.

The proceedings

14. The online petition is dated 7 July 2016 and on its face it sought a confirmatory faculty "to regularise the erection and upgrade of telecoms equipment". Only at a much later stage of the proceedings did it emerge that the works had in fact ceased before they had been completed. In truth, the petition was largely prospective as the majority of the work was yet to be undertaken. Regrettably, all the material submitted in support of the online faculty was to the effect that the work had already been carried out and that what was being sought from the court was a confirmatory faculty. The DAC notification of advice reinforced this false picture.

15. But this was not the only problem with the petition. The petitioners were persisting in their earlier error in seeking a lease rather than a licence. Whilst the law had changed and it was no longer unlawful for a lease to be granted, the arrangement was clearly better suited to a licence. The draft lease submitted with papers was drawn up by Lupton Fawcett Denison Till.
16. Secondly, and more significantly, the parties to the petition were (1) the first petitioner; (2) the second petitioner; and (3) Mr Andrew Tierney. Why Mr Tierney was joined is incomprehensible: he was an employee of the telecommunications company (now calling itself CTIL). He has since suggested that the addition of his name was done by someone else.
17. I issued directions on 6 September 2016 so these problems could be remedied. However, these directions were not complied with and in the ensuing fifteen months or more I have had occasion to make more directions on this one matter than in all the other casework of the Consistory Court of the Diocese of Leeds combined.
18. DAC Beachcroft came on record as acting for third and fourth petitioners, added in substitution for Mr Tierney in the amended petition. The first and second petitioners represented themselves, notwithstanding advice that they instruct ecclesiastical solicitors.
19. A telephone directions hearing took place on 25 July 2017. It was only at this stage that it became apparent the Schedule of Works in the petition was misleading and that, far from the petition being solely confirmatory in nature, much of the proposed installation was yet to be completed. I gave detailed directions to bring the matter on for hearing on 21 September 2017, with a time estimate of two days. This was subsequently vacated on the application of the first petitioner. Importantly, following the directions hearing, the petitioners (or some of them at least) produced a re-amended petition including a revised Schedule of Works setting out precisely the matters for which a faculty was then sought both prospectively and on a confirmatory basis.
20. In the meantime, Lupton Fawcett LLP (on whose instructions it is unclear) produced what was stated on its face to be a Licence. However, a cursory reading of the document revealed that it was nothing more than the earlier Lease with its title changed, and the terms Licensor and Licensee deployed instead of Landlord and Tenant.
21. It was becoming obvious that the parties had little understanding of the legal process in which they were engaged. They did not seem to realise that all four petitioners were principal parties in court proceedings. They gave the impression that they were inert participants in some diocesan administrative process. Neither the first nor the second petitioners complied with the court's directions. They sent the odd email to the court, but did not file and serve any witness statements either from themselves or from the agent, Mr Andrew Cranston, who had apparently been intimately engaged in the negotiations between the parish and the

telecommunications company. They did not seem to understand that it was their responsibility to put evidence before the Court sufficient to discharge the burden of proof necessary to secure the grant of a faculty. They seemed to assume at times that the diocesan registrar was their lawyer, and did not realise that his function was that of clerk to the court.

22. The third and fourth petitioners, in fairness to them, did serve witness statements in proper form but ignored the overriding objective set out in the Faculty Jurisdiction Rules 2015 which requires them to co-operate with the other parties and with the court.
23. To try and find a way forward, I circulated a preliminary indication in written form stating that I was willing to grant a faculty in the terms sought in the re-amended petition, subject to a licence in proper form being agreed. I anticipated that this would bring the matter to a swift conclusion. On the contrary, matters took a most unexpected turn.
24. Hitherto, the petition had proceeded on the basis that a specific five figure sum had been expressly agreed as the annual licence fee. I decline to name the figure at the request of the third and fourth petitioners who claim that it is commercially sensitive. The figure appeared in the draft Lease/Licence which all four petitioners were asking me to approve. However, it now appeared that third and fourth petitioners were seeking to resile from the agreed licence fee, notwithstanding that it was expressly stated in the agreed Heads of Terms, and specifically set out in the draft Lease/Licence. There was a separate issue as to the date from which the enhanced licence fee should run, but this was based upon what had originally been presented to the court, namely a petition for a confirmatory faculty. The normal order would be for the enhanced licence fee to be back-dated so as to run from the completion of the upgrade.
25. In the light of this unexpected and highly unusual development, I directed the matter to be brought on for a hearing so it could be resolved once and for all. I also required that a deputy registrar be appointed as there appeared to be a fissure developing between the stance of the first and second petitioners and that of the third and fourth. It was unclear who was instructing Lupton Fawcett in relation to the draft Licence (which was still not finalised), and this was compounded by the fact that the four petitioners were now no longer agreed as to the licence fee. To avoid any possibility of conflict of interest or apparent bias (such as that identified in the much-publicised case of *Re Christ Church Spitalfields* [2017] ECC Lon 1), Mr Jos Moule, the Registrar of the Diocese of Gloucester stepped in as deputy registrar. I wish to record the court's gratitude for his assistance.

The hearing

26. The hearing of this matter on 20 November 2017 was nothing short of a fiasco. The third and fourth petitioners were ably represented by Mr Christopher Buckingham of counsel, who graciously and candidly accepted that the troubled procedural history stemmed largely from his clients' unfamiliarity with faculty law and procedure.

However, none of his witnesses attended the hearing, notwithstanding an express direction that they be present for the purposes of cross-examination. Mr Buckingham indicated that he wished further to amend the petition to permit the staged removal of the telecommunications equipment on the basis that the third and fourth petitioners had found an alternative site and no longer required use of the church. However, there was no draft re-re-amended petition for the court to consider, nor had the proposed amendments been discussed (still less agreed) with the first and second petitioners.

27. The first and second petitioners appeared in person and it was immediately obvious that they were completely out of their depth, with no conception of the nature of legal process which they had begun. They produced some written representations, into which they said they had received input from a solicitor. The document contained a great deal of evidence (which ought to have been addressed in witness statements as directed by the court many months ago) but also curious and irrelevant assertions of trusts law which made very little sense. Rather than raising legal arguments, as I had expected, that the third and fourth petitioners were estopped from resiling from their agreement to proceed with the matter on the terms agreed, the first and second petitioners indicated they wished to withdraw the petition. The one thing, self-evidently, which they could not do was withdraw the petition: it was (in part at least) confirmatory in nature addressing works undertaken without authority. Even if the equipment were simply to be removed, this could only be done under the authority of a faculty.
28. As neither side was in a position to proceed, the hearing had to be aborted. I gave directions for a re-re-amended petition to be lodged, and it is the Schedule from this document that is cited *in extenso* at paragraph 1 above.
29. Subsequently, Mr Andrew Cranston, (who had been directed to give evidence as judge's witness but was not called due to the hearing being aborted), supplied the court with documentation suggesting that the third and fourth petitioners had been less than candid when seeking planning permission from Leeds City Council for the erection of a telecommunications mast on land neighbouring the church. It is unfortunate that those acting for the third and fourth petitioners chose not to inform the Council that it was only the inability of the petitioners collectively to get their tackle together (in which they themselves were complicit) that meant they were yet to receive a faculty. It would appear that as at the date of the telephone directions hearing steps had already been taken to try and secure an alternative site for telecommunications equipment. If the representative of the third and fourth petitioner knew of this at the time, it is regrettable that it was not mentioned.

Disposal of re-re-amended petition

30. Since the aborted hearing, the first and second petitioners have at last instructed solicitors. They engaged Mr Stuart Jones of Birketts LLP, a very experienced ecclesiastical practitioner. I wish to record the court's indebtedness to Mr Jones for his involvement, and particularly for his selflessness in acting on a *pro bono* basis. One can only speculate upon how the outcome to this unhappy saga might have

been very different had Mr Jones been engaged at the outset and not merely for the endgame.

31. All four petitioners, through their solicitors, have signified their consent in writing to the court determining the re-re-amended petition on written representations, and have confirmed that there is no additional material that they wish to place before the court. Having regard to the procedural history and my familiarity with the matter, I am content to adopt such a course. Since the petitioners no longer seek authority for a licence, the Bishop of Leeds has ceased to be an interested party. I formally give leave for the further amendment to the petition.
32. The petition in its re-re-amended form is advanced by all four petitioners acting jointly. They no longer seek an upgrade to the telecommunication equipment and instead wish to regularise the position since the term of the so-called "Lease of Rights" came to an end on 3 February 2012. Even though the equipment was not removed as required, regular payments were made to the parish for the (unauthorised) use of the premises.
33. I reject entirely the submission made by Mr Buckingham in his skeleton argument that the third and fourth petitioners reasonably believed that they had permission to undertake works to upgrade the equipment to 4G. It matters not what Mr Peter Mojsa may or may not have said, and it is irrelevant that the second petitioner may have countersigned a letter purporting to give the parish's consent. The third and fourth petitioners are commercial undertakers who have installations at or within a number of consecrated Anglican churches. They should be familiar with the nature and extent of the faculty jurisdiction, in just the same way as they are presumed to know the requirements of planning law for the purposes of their engagement with Leeds City Council. Ignorance is no defence. They knew, or ought reasonably to have known, that neither Mr Mojsa nor the second petitioner had actual or ostensible authority to grant permission.
34. That said, we are where we are and the court is prepared to direct a confirmatory faculty to regularise the works carried out in the past without authority and the retention of the equipment beyond the end of the ten year term permitted. It will be on condition that the order for costs (see below) is paid in full by third and/or fourth petitioners within 21 days.
35. As to what I propose to style the decommissioning, the court is constrained by the agreement reached between the parties. The court is not invited to enquire whether it would be unconscionable for the third and fourth petitioners to resile from the clear and unambiguous provisions of the Head of Terms agreed by the fourth petitioner, or whether, as contended by Mr Buckingham in his skeleton argument, there was no intention to be bound until such time as the documentation was executed. These will doubtless be arguments for another case and another time. I simply observe that I do not accept the suggestion from the solicitors acting for the third and fourth petitioners that they were simply "bystanders" in the faculty process. On the contrary, they were and remain principal parties and share equally

with the first and second petitioners in the failure to prosecute the petition with due diligence. It is unattractive for them to complain at the time taken in obtaining a faculty when they were themselves complicit in the delay. If they took a decision to defer to the first and second petitioners, it was ill-judged; if they believed they were passive observers in an administrative process, such belief was mistaken.

36. I am prepared to approve the decommissioning on the basis agreed between the parties. I have annexed to this judgment a draft of the terms of the proposed faculty, with the figures redacted at the request of the third and fourth petitioners. I invite the parties to contact the deputy registrar by 4 pm Monday 5 March 2018 should they wish to suggest any revisions to its wording, which is derived from the revised Schedule submitted by the parties. In the absence of any representations, the faculty will be sealed as drawn, but with the figures inserted. The faculty will be subject to the following further conditions:

- i. That no works are to commence until the order for costs has been satisfied in full;
- ii. That any future applications concerning the implementation of the faculty (or any other works relating to telecommunications equipment at the church of the Venerable Bede, Wyther) be reserved to Chancellor Mark Hill QC, and all correspondence relating thereto be via Mr Jos Moule, deputy registrar.

37. I have included condition ii. above because an email was recently received by the secretary to the Diocesan Advisory Committee (and forwarded to the registry) from a contractor acting on behalf of MBNL (the joint Management Company for H3G and EE), who had apparently received instructions to upgrade one of the telecoms dishes at the Venerable Bede, Wyther, which was apparently installed under a separate faculty. It would not be appropriate for this matter to be dealt with under list B, and I invite the Archdeacon to decline to give notice under rule 3.3 of the Faculty Jurisdiction Rules 2015. Should it be necessary, I will consider making an excluded matters order under r 3.8.

Costs

38. Those acting for the third and fourth petitioners have indicated in correspondence their acceptance that they will be responsible for the court fees of these protracted proceedings. The usual order for costs in telecommunications cases is that the commercial operator pays the court costs together with the reasonable legal expenses incurred by the parish. It is therefore even more surprising that the first and second petitioners resisted every entreaty that they instruct solicitors until very recently. Mr Jones has stated in correspondence that he has been acting *pro bono* which precludes me from making an award of costs in his favour.

39. I therefore order that the court costs be paid by third and fourth petitioners to include a correspondence fee for the registrar, to be settled within 21 days of assessment (or agreement) and with credit to be given for the sum of £5,000 paid into court as security for costs pursuant to an earlier direction of the court.

Postscript

40. This case is nothing short of a tragedy from which few emerge with any credit. Due to the inertia of the first and second petitioners, this impoverished inner city parish has lost out on a five-figure annual income. The conduct of the third and fourth petitioners in resiling from their agreement will make it hard for any parish or secular building owner to trust them in the future.

41. Petitions for a faculty for a licence to introduce telecommunications equipment are amongst the more straightforward matters dealt with by the consistory court. They can be granted swiftly and inexpensively. Rule 1.3 of the Faculty Jurisdiction Rules 2015 requires the parties to help the court further the overriding objective which includes co-operating with each other and with the court. The chancellor can be contacted via the registry 24 hours a day, 365 days a year, and can generally give a response on urgent matters within hours. Directions can be given within a day or two of any request. The court exists to help litigants and putative litigants and will offer guidance on request. This case represents a perfect storm of ignorance, misinformation, inertia, non-engagement, and stubborn refusal to follow directions. I hope and pray that it is never again repeated in this or any diocese.

The Worshipful Mark Hill QC
Chancellor of the Diocese of Leeds

1 March 2018

SCHEDULE

Terms of the Proposed Faculty

Description of Works or Proposals

A confirmatory faculty to approve retrospectively the retention of the telecommunications equipment now installed at the Church, including the additional equipment and enhancements installed in 2014 without the authority of a faculty.

Conditions

1. The Fourth Petitioner shall pay an uplift in the sum payable for its continued use and occupation of the Church to an annual figure of £[redacted], effective from 4 February 2017 until the Fourth Petitioner's vacation from the Church on or before the Exit Date (defined at condition 4 below);
2. The Third and Fourth Petitioners shall make payment of any shortfall for the period 4 February 2017 to 3 February 2018 (if not already paid) within 14 days of the date of any faculty being granted;
3. The Third and Fourth Petitioners shall make payment for the Fourth Petitioner's continued use and occupation of the Church at the stated daily rate of £[redacted] until such time as the equipment is removed from the Church in accordance with conditions 4 and 5 below;
4. The Third and Fourth Petitioners shall procure removal of all of the telecommunications equipment specified in the attached schedule prepared by DAEL on behalf of the Third and Fourth Petitioners and dated 18 December 2017 ("the DAEL Schedule") within 6 (six) calendar months of the date of issue of any faculty ("the Exit Date"). The Works of decommissioning and removal of the equipment and reinstatement of the Church to be undertaken as specified in the DAEL Schedule. Following the Exit Date the Third and Fourth Petitioners shall have no further interest or presence at the Site, they having surrendered their interests and yielded up;
5. Within 14 days of the Exit Date and the removal of the telecommunications equipment (to the satisfaction of the First Petitioner), the Third and/or Fourth Petitioners will pay the sum due under condition 3 above.
6. In the context of the proposed decommissioning and reinstatement Works the Third and Fourth Petitioners will ensure that high cladding is placed around any scaffolding erected adjacent to the Church, to mitigate the risk of unlawful access whilst the Works are being undertaken. All internal and external plaster, render, brick and stonework, mortar and pointing are to be made good and reinstated to the condition in which they were before the telecommunications equipment was originally installed in 2002 or 2014 as the case may be.
7. The Works are to be carried out between the hours of 09:00 and 17:00 on weekdays only (with access at other times only as permitted by the First Petitioner).
8. The Petitioners may leave in situ any electrical cables and other conduits which have been buried within or beneath concrete structures, including but not limited to the power supply cable beneath the access ramp to the Church, subject to the said cabling being left in a safe condition in accordance with current building regulations.
9. That no works are to be commenced until the order for costs herein has been satisfied in full.
10. That any future applications concerning the implementation of this faculty (or any other works relating to telecommunications equipment at the Church) be reserved to Chancellor Mark Hill QC, and all correspondence relating thereto be via Mr Jos Moule, deputy registrar.