

IN THE COMMISSARY COURT OF THE
DIOCESE OF CANTERBURY

BADLESMERE, ST LEONARD

JUDGMENT

1. The Petitioners are the Revd Peter Newell, Priest in Charge, and Mrs Linda Collins and Mr Hugh Reid, Churchwardens. The Schedule of Works or Proposals sought a faculty in the following terms:

“Retrospective confirmatory faculty for replacement of nave and chancel ceilings and partial redecoration of interior.”

2. Because of the confirmatory nature of the Petition and having regard to the consultation response of the Church Buildings Council (“CBC”) I directed, on 19th February 2020, that there should be a preliminary hearing to enable me to decide whether or not I could dispose of this matter on the papers or would need to hold a full hearing. Accordingly, a preliminary hearing was held at the church on 3rd March 2020. The following people attended: the Petitioners, the Archdeacon of Maidstone (the Venerable Stephen Taylor MBE), the Chairman and Secretary of the Diocesan Advisory Committee (“DAC”), Ms Keri Dearmer (Church Buildings Officer of the CBC) and the Registrar and Registry Clerk.
3. At this hearing, I directed that the Petition be amended by the deleting of the word “*retrospective*”, explaining that a confirmatory faculty cannot operate to legalise unauthorised works retrospectively, although it may confirm their lawfulness for the future: In Re St Mary’s Balham, [1978] 1 AER 993, 995-996. It also became clear at the hearing, as others had already observed, that the walls of the church and reredos panels had been the subject of redecoration and I direct that the Petition be further amended by the addition of the words after “*interior*”: “*namely the painting of the nave and chancel ceilings and walls and the reredos panels*”.

Background to the Petition

4. The hearing helped me to gain a clear understanding of what has happened in this case and to view for myself the effects of the work undertaken. In this, I was greatly assisted by the representatives of the DAC, Mr Newell and the CBC’s officer, Ms Dearmer. As a result, I am satisfied that I fully understand the position and am therefore able to determine the amended petition without the need for a full hearing. I am very grateful to all those who attended for their assistance and desire to co-operate with the Court and with one another.

5. To summarise, the history of this matter began in the late autumn of 2018, when the Churchwardens properly reported to the DAC Secretary a fall of plaster from the western end of the church ceiling. They put forward a quotation from a local builder, Mr Murphy, who had done works at a nearby church and at Leeds Castle and was therefore regarded as an appropriate contractor. Following advice from the DAC, I granted an interim faculty to authorise the necessary repair work, on condition, amongst other things, that a confirmatory faculty be sought within three months.
6. In January 2019, Mr Underwood, a conservation architect of great experience, contacted the DAC Secretary on behalf of the Parish to say that, in his view, work beyond the specific repair authorised by the interim faculty was required because further failures were likely. The two gentlemen corresponded briefly by email with a view to framing a schedule of works to form the basis of a further emergency application, but it then transpired that not only the authorised work, but also re-plastering and decoration of the whole ceiling and walls, had been undertaken.
7. Two DAC architects inspected the works and there was detailed discussion about the roof construction in order to understand the implications of what had been done. Concern was expressed because modern artificial fibre had been utilised in the plaster and there was lack of clarity about the type of paint employed. The DAC Secretary found it *“difficult to get detailed answers”* from Mr Murphy.
8. The parish was reminded by the DAC Secretary that the petition for a confirmatory faculty was overdue and the Archdeacon became involved. At a PCC meeting in June 2019 it was agreed that the parish should apply for a confirmatory faculty but nothing further appears to have happened that year.
9. In January 2020, the PCC appointed a new inspecting architect, Mr John Sell. He set about helping the Petitioners prepare to submit the confirmatory faculty petition. As part of these preparations, he undertook a full, forensic investigation of what had been done. Mr Sell advised in an email dated 16th January:

“1. *The existing lath and plaster ceiling has been replaced with a new lath and plaster ceiling. The laths are 1200 x 25 x 6mm sawn larch, spaced 6mm apart and fixed with 38mm stainless steel ring-shanked nails. The plaster is a pre-mixed lime plaster using polypropylene fibre as reinforcement rather than the traditional hair. The ceiling has been decorated with a trade emulsion paint. I would prefer limewash to have been used but, as there is a void above the ceiling, the permeability of the ceiling is not a significant concern. Photographs taken of the upper side of the ceiling show that the plaster has sufficient key. It is my view that this ceiling, although not as I would have specified, is likely to give satisfactory service for a long period.*

2. *The walls of the church have been painted with the same trade emulsion as the ceiling. From my discussion with John Underwood I understand that the walls are coated with a lime:sand render and have in the past been decorated with limewash. In my view it would have been better if the walls had been also limewashed on this occasion. However, this trade emulsion does not contain vinyl and will therefore be more porous than most ‘modern’ emulsion paints. The PCC have been advised that the use of emulsion paint is likely to mean the walls are less able to ‘breathe’ than they would be if limewash had been used, but that I expect the decorative surface will give a reasonable length of service. Trying to remove the coating from the surface would be a lengthy, labour intensive process and in my opinion the cost of doing this would be disproportionate to any potential benefit. I have recommended that the PCC removes salt deposits from time to time from the surface of the wall with a dry brush to avoid salt being re-absorbed into the wall as humidity increases and re-crystallising as humidity decreases to minimise unsightly damage to the painted finish and the render.*

3. *The panelled reredos, which gives the appearance of timber, is in fact a cement:sand render and the applied mouldings are also cement:sand with an armature of ferrous nails. It is unfortunate that the external walls of the church are also coated in a cementitious render as this means any damp rising through the masonry will be trapped. At some point in the future this dampness will cause damage to the rendered surfaces of the walls. The rendered reredos has been redecorated with a paint with a gloss finish. The contractor who carried out the work tells me that the paint used was the same trade emulsion as that used on the walls. If that is the case then I can only conclude that the paint finish has subsequently been sealed with something far less permeable.*
 4. *The PCC have been advised that this finish is likely to show signs of flaking or blistering in the relatively near future and, in fact, some small blisters have already appeared. In an ideal world the external render would be removed and replaced with a lime render which would mitigate the effects of rising damp and give the church a much improved appearance. The render on the reredos could be removed and replaced with a lime render, or with timber panelling on preservative treated battens. In my view the use of a relatively impermeable paint finish will hold back the unsightly effects of rising damp for a while but in due course damage to the finish will occur. The render on the reredos is of no historic significance and the use of a sealer or impermeable paint has probably not made matters significantly worse than they were before this work was carried out. Stripping the paint finish without removing the lime:sand render is unlikely to result in a significant improvement in the permeability of the wall.”*
10. The Petition was eventually submitted on 6th February 2020. The Petitioners included with the Petition a letter from the Churchwardens in which they apologised for the situation, putting this down to “*poor communication*” with their then inspecting architect, Mr James Kenton. Despite the subsequent involvement of the experienced Mr Underwood, it seems that Mr Kenton of the same practice was handling matters as inspecting architect at that stage. The Churchwardens told me that they relied on Mr Kenton and believed that he was dealing properly with faculty matters. Both Mr Murphy and another builder who had quoted for the work recommended replastering the entire ceiling. The Churchwardens said in their letter that they therefore commissioned the full ceiling works when they received a sizeable donation to enable them to do so. The quotation for emergency works was £8,000 and for the extended project £32,000. Both the original and extended works were the subject of unanimous PCC resolutions in November 2018 and May 2019 respectively. Mr Kenton left his employment with Mr Underwood at the end of 2019 and was succeeded as inspecting architect by Mr Sell shortly afterwards, as I have said.
 11. Mr Newell was licensed to Badlesmere and two other parishes in February 2019, by which time the work was well advanced. It was his understanding, at that stage, that the necessary faculty was in place. Badlesmere has a population of around 200 people, there are about 50 people on the electoral roll, 6 on the PCC and average congregations are around 10, with more at festivals.

Heritage Considerations

12. The church is listed at Grade 2*. The listing description is in the following terms:

“Parish church. C13 and early C19, Flint, entirely rendered and channelled except on part of nave north wall. Plain tiled roof. Chancel, nave, south porch and west tower. C19 west end, with chamfered Gothic lancets, and double chamfered west doorway to tower-cum-porch, with louvred belfry. Battlemented south porch. Chancel with offset corner buttresses, 2 east lancets and C14 ogee headed north window. North nave and chancel wall is inset 3 times with exposed quoins, the chancel roof also stepped – evidence of previous greater size of church. Interior: west tower intrudes into nave;

nave roof of 2 large moulded crown posts, chancel roof of 3 spindly crown posts. No chancel arch, but chancel stepped in from nave, and north chancel wall stepped in, with exposed jambs of arcade to lost chapel. Fittings: complete set of C18 box pews with raised and fielded panels, the rear set raised in tiers. Integral 2-tier pulpit with ramped hand rail and panelling. C18 altar rail with turned balusters and square knobs and moulded dado panelling to sanctuary and reredos with ball flower finial and inscriptions. C15 bench ends incorporated into C18 Choir stalls; linenfold panels, with emblem of Trinity on one end and Star and Garter on the other end. Inscribed to and made for Sir Richard Badlesmere, 1415. C15 octagonal font; plain with C17 wooden font cover. Royal coat of Arms 1717, and large hatchment on south wall. Six Tugged inscription boards in nave. The whole is remarkably unrestored and unusually so for this part of Kent. (See B.O.E. Kent II, 1983, 131)."

This description notes the remarkable lack of internal restoration work and I was struck by this aspect of the church in general. The external render is also highlighted in the description.

13. The DAC Secretary consulted Historic England, the Society for the Protection of Ancient Buildings and the CBC, seeking their views on the confirmatory faculty Petition. The Historic England Inspector observed that although it was regrettable that these works were carried out without the benefit of first obtaining a faculty, she noted Mr Sell's recommendation that undoing the work is likely to cause more harm than good and stated that Historic England did not raise any objections. SPAB did not wish to comment. The CBC replied as follows:

"The Council could not have recommended the works which have been carried out as they do not conform to conservation principles. Both in terms of having replaced both ceilings entirely rather than repairing areas of failure or likely failure, and the use of modern materials in the plaster and the paint finishes.

The Council accepts the architect's assertion that to remove and replace the ceilings would cause more unnecessary harm to the building than the benefit to be gained by replacing the ceilings in the appropriate materials.

The PCC will need to monitor the paint finish on the walls, ceilings and reredos for signs of decay and remedy these as they appear.

The Council is concerned that there is no mention of having repaired the cause of the ceiling collapse. The documents seem to suggest that the roof was in poor condition which lead to the collapse. If this has not been appropriately fixed, it would be a great shame if the ceiling were to collapse again and the priority should now be to prevent any further damage from occurring."

14. The Court of Arches reviewed the principles to be applied to the consideration of petitions affecting listed churches in the case of Re St Alkmund, Duffield [2012]. The Court reaffirmed these principles in Re St John the Baptist, Penshurst [2015].

15. The Court set out at paragraph 89 a framework or guidelines for the consideration of faculty petitions concerning listed buildings, as follows:

“1. Would the proposals, if implemented, result in harm to the significance of the church as a building of special architectural or historic interest?

2. If the answer to question (1) 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, 26-8, and the review of the case-law by Chancellor Bursell QC in Re St Mary's, White Waltham (No2) [2010] PTSR 1689 at para 11). Questions 3, 4 and 5 do not arise.

3. If the answer to question (1) is ‘yes’, how serious would the harm be?

4. *How clear and convincing is the justification for carrying out the proposals?*
 5. *Bearing in mind that there is a strong presumption against proposals which will adversely affect the special character of a listed building (see *St Luke, Maidstone*¹ at p.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 (5), 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 1 or 2*, where serious harm should only exceptionally be allowed.”*
16. As the Court of Arches explained, the Duffield guidelines reflect the need for procedural equivalence between the ecclesiastical and secular control of works to listed buildings. For this reason, I have given considerable weight in my deliberations to the advice of Historic England, whilst also being concerned to understand and take fully into account the concerns of the CBC and the advice of the DAC.

Discussion

17. Using the Duffield guidelines as the framework, I turn now to express my conclusions.
18. The significance of this Grade 2* listed church is accounted for by a combination of the survival of its interior largely unchanged for well over 200 years as well as the presence of some furnishings and glass of considerable historic interest. As a Grade 2* building the church forms a very important part of the national heritage.
19. All the experts who have considered the works in question agree that they are sub-optimal. This is because the materials which have been used are inauthentic and therefore not in line with conservation best practice. This matters, not merely for aesthetic or historicist reasons, but because current conservation practice reflects the fruit of experience which is that the most reliable materials to use in repair work are, generally, those closest to materials contemporaneous with historic structures. This is particularly important in the case of plaster and paint because modern, synthetic products tend to be less breathable than traditional ones, which exacerbate problems associated with damp. The church structure already struggles in this regard because of its nineteenth or early twentieth century external casing of concrete render. It is therefore particularly important to exercise great care internally. It is for these reasons that the CBC was concerned to understand whether the works would cause risks for the historic roof timbers and, indeed, to seek to discover the cause of the initial plaster collapse.
20. The DAC’s Notification of Advice recommends the works for the approval of the Court but advises that the works are likely to affect the character of the church as a building of special or historic interest and its archaeological importance. It was clarified at the hearing that the second matter - archaeological importance - is no longer of concern.
21. I shall use the Duffield questions as a framework for my consideration as to whether or not to grant a confirmatory faculty in this instance, adjusting the tenses to reflect the fact that the works have already occurred.
22. Duffield Questions 1 and 3 - harm to significance. In my view, there has been some harm to significance. This is because modern, rather than traditional, materials have been used to repair and replace historic elements of the building’s fabric. Therefore its integrity has, to some degree, been diminished. This incongruity is obvious to the viewer, partly because the newness of the work makes it appear surprisingly bright and, on the reredos panels, somewhat shiny in its whiteness; the brightness will soften in time, but probably not the

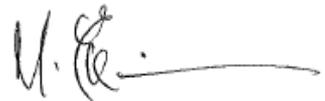
¹ Re St Luke the Evangelist, Maidstone [1995] Fam 1 at 7AC

incongruous treatment of the reredos panels. The new plasterwork is also smoother in appearance than the old, possibly because of the use of modern materials, and this contrast will remain apparent.

23. My greater concern, having regard to the CBC's representation, was with the potential long-term damage to the roof timbers due to use of sub-optimal contemporary materials and methods. Having read all the expert reports and comments and having heard the DAC Secretary's explanation of what had happened, however, I am satisfied that the collective expert view is that such effects are unlikely. Ms Dearmer indicated at the hearing that she felt similarly reassured. I canvassed, at the hearing, the possibility of imposing a monitoring condition on any faculty, if I were persuaded to grant one. Ms Dearmer submitted draft wording for such a condition after the hearing. I am satisfied that, with the imposition and observance of a suitable monitoring condition, any unexpected effects of the work could be picked up quickly so that any necessary remedial steps could be put in place. The concerted expert view was that the greatest threat to the building comes from its external cement casing, but that, of course, is not the subject of the current Petition.
24. Drawing all these matters together, although I have found that the works have caused harm to the significance of the listed building, I concur with the judgement of the DAC officers that, in the terminology of the secular National Planning Policy Framework, this harm is less than substantial. The DAC Chairman, Dr Richard Morrice, who is also a senior officer of Historic England, assessed the less than substantial harm as being "*quite close to the lower end.*" I give great weight to these expressions of expert opinion and I conclude that, suitably conditioned, the harm occasioned is and can continue to remain slight.
25. Question 2 therefore does not arise and I have already answered Question 3.
26. Question 4 – justification. There is no justification for the harm which has occurred. It could have been prevented if proper procedures had been followed. That is not to say that I do not recognise the difficulties faced by the small congregation of this isolated rural church during a vacancy. I accept that the Churchwardens and the Priest in Charge, when he arrived, relied on their then architect and that he let them down in falling below the level of professional assistance and supervision which he should have offered. For the benefit of all who might read this judgment, I reiterate that, in faculty matters, there is always help available from the Diocese in the form of the expert and approachable DAC officers and the experienced and helpful Archdeacons. All of these people realise, as do I, that the burdens cast on churchwardens can be heavy and that the faculty system can seem daunting, so they are ready to help.
27. Question 5 requires me to arrive at a conclusion which balances harm to significance against public benefit, including pastoral, missional and liturgical matters. I am also reminded to regard serious harm to a Grade 1 or 2* listed building as something which should only exceptionally be allowed. Although there have been unfortunate and unnecessary procedural errors in this case, happily, the harm which I have found to have been caused by the works is slight and it can be tempered by condition. The money to pay for the works was raised by way of generous donations by those who clearly care very deeply about the mission of this church. The expert evidence is that it would do more harm than good, in physical terms, to strip out the work and start again. The new ceiling and redecorated walls are doing the job which they need to do and the various experts have accepted Mr Sell's reassurances as to the structural integrity of the roof timbers and new plasterwork such that I am satisfied that it will be safe to worship in the church without the risk of plaster falls, as and when public worship generally can resume. I consider that declining to grant a confirmatory faculty for the works, with the inevitable prospect of consequential removal and replacement, would send a wholly negative message to all who have contributed to the life of this worshipping community and it would be entirely disproportionate and contrary to the public interest. The CBC, which properly raised concerns which have now been investigated, does not seek such a result, as Ms Dearmer confirmed at the hearing.
28. I therefore propose to grant a confirmatory faculty. The Schedule of Works is to be amended as I have directed at paragraph 3 of this judgment; I am satisfied that no prejudice will be

occasioned by these amendments, which simply reflect the legal and factual position, of which all those who have expressed an interest in this matter are aware. The faculty will be subject to the following conditions, which reflect those suggested by the CBC:

- “1. *The condition of the ceiling, walls and reredos panelling is to be monitored annually by the inspecting architect for a period of 10 years, his or her findings to be set out in a report to be sent annually to the Churchwardens and the DAC Secretary.*
 2. *In the event of deterioration or damage being found which, in the opinion of the inspecting architect set out in the report, is wholly or partly caused by the works authorised by this faculty, the Petitioners or their successors shall send to the DAC within one month their written proposals for dealing with such deterioration or damage.”*
29. Although conditions have to be expressed in formal language, I would commend to the Petitioners the practice of discussing matters regularly on an informal basis with their architect and, if necessary, informally seeking the advice and assistance of the DAC in the event of problems.
30. Finally, at my request, Ms Dearmer also dealt, in her post-hearing email, with the possibilities of grant funding being available should the parish decide to seek to remove the external concrete casing of the church which, as noted above, is very harmful to its condition. Ms Dearmer’s email makes helpful suggestions and offers the parish assistance, should they wish to pursue that option. I have asked the Registry Clerk to forward that email to the Petitioners. If these proceedings might, perhaps, serve as a trigger for such an enhancement, that would be a very positive outcome indeed.
31. Unless there are any representations to the contrary made to the Registry in writing within 14 days, I propose to order the Petitioners (by which I mean the PCC) to pay the statutory Court costs.



MORAG ELLIS QC
4th June 2020