

Neutral Citation Number: [2020] ECC B&W 1

IN THE CONSISTORY COURT

OF THE DIOCESE OF BATH AND WELLS

Re: The Church of St Thomas à Becket, Lovington

JUDGMENT

The Proceedings

1. By their petition dated March 29th 2019 the Reverend Marion Clutterbuck, priest in charge of the church of St Thomas à Becket, Lovington and the two churchwardens Mrs Lynda Payne and Mr Martin Roberts, seek the permission of the Consistory Court to release a small strip of land at the North West corner of the churchyard into an adjacent trackway and to grant a long lease of the strip to the owners of the nearby Becket's Barn. This is a residential property owned by Mr and Mrs Barraclough, who use the trackway and also have title to some undeveloped land to which the trackway gives access.

2. The petition is opposed. The Parties Opponent are all members of the Trott family, who also own land in the immediate vicinity of the church. Two of their number, Mrs Maureen Trott and Mr Richard Trott, jointly instructed Mr Jonathan Dobson of Battens Solicitors to act for them; Mr Justin Trott has acted in person. Two further family members, Ms Heather Trott and Mrs Jacqueline Osborne, submitted letters of objection without becoming parties to the proceedings. I have taken their correspondence into account in reaching my decision.

3. On July 2nd 2019 I gave directions in the matter and indicated that the case was suitable for determination upon written representations. The parties sensibly agreed to this course. Mr Dobson accordingly served and filed written representations on behalf of his clients on October 17th 2019. Mr Justin Trott's representations were received at the Registry on the same day. The Petitioners found themselves in some difficulty through an unavoidable need to instruct fresh solicitors and to deal with administrative matters associated with the exercise. In the event, it was necessary for extensions of time (one of them retrospective) to be granted so as to achieve valid filing and service of the Petitioners' written representations, dated December 11th 2019. Although Mr Dobson challenged the admissibility of the Petitioners' representations on the grounds of delay, I was satisfied that it was in the interests of justice that they should be admitted. Mr Dobson was, however given leave to introduce supplemental representations in response, which he did on January 29th 2020.

4. The written representations are lengthy; those of Mr Dobson, for example, run to 122 paragraphs. While much of the material included in the parties' representations provides a useful background, in many respects

their contentions (as this judgment will explain) are wide of the mark. I shall therefore concentrate upon the relevant issues without necessarily addressing every point which has been taken for or against the proposal.

History and Layout of the Site

5. It is necessary at the outset to give some account of the scene of the dispute. St Thomas à Becket's church, of thirteenth century origins, is surrounded by an area of ancient churchyard approximately square in shape. On the West side of the churchyard lay a rectangular plot described in the 1838 Tithe map as "potato land". Beyond that is Burrell Lane, which is wide at its junction with the public highway to the North of the churchyard but narrows considerably as it passes the rectangular plot. On the far side of Burrell Lane is farmland owned by members of the Trott family.

6. The history of what I have described as the rectangular plot is curious. A small building which stood on it until 1930 has since disappeared, and by 1954 the land seems to have been abandoned. Its future became of obvious interest to the Parochial Church Council which, having by 1958 taken all reasonable steps to trace any surviving owners, brought the land into the churchyard and acquired a possessory title to it. The land remains unconsecrated, and has yet to be used for burial. The actions of the PCC have, however had the effect of incorporating the land physically into the churchyard, so that it has become unconsecrated curtilage of the church in accordance with the principles explained in re St John's Church, Bishop Hatfield [1967] P.113. By Section 57 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, the Consistory Court has undoubted jurisdiction over unconsecrated curtilage.

7. The circumstances prompting the current petition are as follows. Mr and Mrs Barraclough, wishing to make use of Burrell Lane for vehicular access to their property, obtained from South Somerset District Council a Certificate of Lawful Use or Development dated April 30th 2015 for (inter alia) "...removal of foliage to facilitate the opening of an access to the existing trackway known as Burrell Lane..."

The effect of the certificate was limited to confirm compliance of the work with planning requirements. It did not touch upon the legality of the proposals in any other respect. Doubtless, however, comforted by the certificate Mr Barraclough proceeded in May 2015 to clear the undergrowth which over a long period had invaded Burrell Lane. The success of the operation was short-lived. In July 2015 members of the Trott family dug a ditch and constructed a fence on their side of Burrell Lane which had the effect of constricting the trackway at its narrowest point to a width of about three metres or 10 feet. It must be inferred that the action taken by the Trott family was in response to the clearance of Burrell Lane, not least because several of them had previously made representations against the granting of the certificate by South Somerset District Council. It was in order to restore Burrell Lane to its full width that the PCC resolved unanimously on January 30th 2019 to release land from the unconsecrated plot and to petition for a faculty.

The Applicable Legal Principles

8. Section 68(2) of the Mission and Pastoral Measure 2011, which prohibits the disposal of churches, their sites or "any consecrated land belonging or annexed to a church" otherwise than in accordance with that Measure, does not apply to unconsecrated curtilage. Accordingly what

Chancellor Newsom Q.C. described as the common law power of the Consistory Court to authorise dealings in unconsecrated curtilage by faculty has been preserved. How is the power to be exercised? In re St Peter's Bushey Heath [1971] 1 WLR 357 Chancellor Newsom Q.C. explained (at 360c) that,

“although the court should act by analogy with the cases about consecrated land, it has a somewhat greater, if undefined, latitude in respect of unconsecrated church curtilage. It follows that faculties for secular user; and particular user for private purposes, of unconsecrated church curtilage can be granted, but ought to be granted very sparingly....”

Chancellor Newsom's further suggestion that a hearing in open court was normally required, while underlining the need for a proper enquiry into the circumstances, has been overtaken by changes in the procedure of the court and is no longer applicable.

9. The reasoning in re St Peter's Bushey Heath was followed in re Christ Church, Chiselhurst [1973] 1WLR 1317 where Chancellor Goodman (at 1322D) said,

“There is no doubt in my mind that unconsecrated curtilage may, in appropriate circumstances and subject to adequate safeguards, be used for secular purposes and that an incumbent is capable of creating or transferring a legal estate in such land if he acts under the authority of a faculty.”

The contrary view expressed by Chancellor Ellison in re St George's Oakdale [1976] Fam 210 on the question of jurisdiction was effectively

discredited re St Mary Magdalene's Paddington [1980] Fam 99 and can no longer be treated as good law.

10. In their written representations the parties have assumed that the guidelines given in re St Alkmund, Duffield [2013] Fam 158 at paragraph 87 of the judgment are applicable to the present case. I do not share that assumption. In formulating the Duffield guidelines the Court of Arches was specifically concerned with the balance to be struck between making alterations to listed church buildings (or possibly associated structures such as listed tombs or lych gates) and any resultant harm to their significance in architectural or historic terms. The Court of Arches did not attempt to give comprehensive guidance upon the exercise of the whole spectrum of the faculty jurisdiction, nor did it purport to overrule the line of authority, culminating in re St Mary Magdalene's, Paddington, which concerns dealings with unconsecrated curtilage.

11. From that line of authority the following principles emerge:-

- (i) The Consistory Court has jurisdiction to authorise by faculty the alienation of the legal estate in unconsecrated curtilage for secular or private purposes, or the creation of lesser interests for those purposes.
- (ii) The jurisdiction must be exercised very sparingly and after careful enquiry.
- (iii) A faculty may be granted only in appropriate circumstances (which will vary from case to case) and to the extent required to achieve the objective in view.
- (iv) The integrity of the church, its churchyard and any retained unconsecrated land must be safeguarded.

To these principles I would add that any expected benefit to the church arising from the transaction is of relevance.

The Issues to be Determined

12. The line of the boundary between Burrell Lane and the farmland owned by the Trott family falls outside the jurisdiction of this court, which is concerned with ecclesiastical matters and cannot try title to secular land. Accordingly it is for the present purposes immaterial whether or not the erection of the new fence and the excavation of the ditch in July 2015 were lawful. Similarly it is necessary to disregard the hostility to these works which periodically finds an outlet in the Petitioners' case since there may have been no illegal encroachment into Burrell Lane and hence no basis for legitimate criticism of what was within the landowners' rights.

13. The Petitioners' proposal has, therefore, to be evaluated by reference to any benefit which Mr and Mrs Barraclough may derive from the lease, and to any detriment or advantage to the church and its curtilage.

Benefit to the Intending Lessees

14. The Parties Opponent put at the forefront of their case the submission that any indulgence given to Mr and Mrs Barraclough is unnecessary because Burrell Lane adjacent to the fence and ditch is still three metres wide. At that point it can accommodate a motor car, as video and photographic evidence demonstrates. Nevertheless the fence and ditch create a constriction in width, both the part of Burrell Lane used as a car park and its continuation beyond the fence and ditch being substantially wider.

15. It is in principle reasonable that Mr and Mrs Barraclough should seek an adjustment of the boundary of the church curtilage in order to

produce a consistent width along the full extent of Burrell Lane. There is, furthermore the possibility that the land owned by Mr and Mrs Barraclough to which Burrell Lane gives access is ripe for development. Building work on this land would require broader means of access than the three metres now available at the narrowest part of the lane, both for construction traffic and for future occupiers. So much is conceded at paragraph 91 of Mr Dobson's written representations. He has contended, however, that the question of development has been raised prematurely because no relevant planning application has yet been made. That submission is rejected for two reasons. First, the adequacy of access along Burrell Lane will itself be a relevant consideration at the planning stage, and ought if possible to be established before any application for planning permission is made. Secondly, to delay a decision on the present petition until planning permission has been sought or obtained will prolong an already protracted and unpleasant dispute to the detriment of all concerned.

16. I have therefore concluded that Mr and Mrs Barraclough are justified in seeking, for their own benefit, to acquire a leasehold interest in the strip of land for the purpose of eliminating the constriction in Burrell Lane. The justification arises in part from the convenience of wider access than that currently available when approaching Becketts Barn, and in part from the access requirements associated with residential development of the adjacent land.

The Interests of the Church

17. The wishes of the intending lessees cannot be permitted to override the best interests of the church. In terms of detriment, the loss of even a small parcel of land on a long lease is likely to be irreversible and must be

treated with caution. The land in question is about 58 square metres in extent, and if kept within the curtilage would eventually be available for burials. The historic churchyard has not been closed by Order in Council and although available space in it for interments may be limited there will in time be scope for re-use. More significantly, the part of the unconsecrated plot to be retained as curtilage under the Petitioners' proposal will provide ample fresh space to meet the needs of the parish. Although, therefore, some loss of land for burial is under contemplation, such loss is not substantial; the parish remains relatively well endowed in this respect. Neither will the appearance or amenity of the church building and churchyard be harmed, the retained unconsecrated curtilage continuing to form a cordon between the historic churchyard and Burrell Lane.

18. In terms of benefit, there are aspects of the draft lease which are advantageous to the church. First, there are lessees' covenants at clauses 2.4 and 2.15 to raise no objection to car parking in the broad entrance of Burrell Lane and to share in the maintenance of that area. Secondly, the use of Burrell Lane (apart from traffic associated with the development) is limited to "light vans for household deliveries" under clause 2.5. The leased land is to be maintained by the lessees, who are also to provide a new boundary fence and hedge. Most important is a draft supplemental deed restricting the development to no more than two additional dwelling-houses. This is a valuable provision protecting the church from nearby over-development.

19. There is also a financial consideration; clause 1 provides for a single payment of £5,000 while a supplemental deed requires payment of 10% of the uplift in value of the land identified for development in the event of the

project proceeding. In accordance with its duties as trustees the PCC obtained a valuation report dated August 26th 2016 from Mr Thomas Ireland of Carter Jonas which supported those figures. The report was annexed to the petition so as to satisfy the court that the PCC had taken proper advice. It was not expert evidence within Rule 11(5) of the Faculty Jurisdiction Rules 2015. Neither was the "Informal Opinion of Market Value" written by Rebecca Kaye of Symonds & Sampson, dated October 14th 2019 and disclosed by the Parties Opponent. Rebecca Kaye's figures are higher; £7,500 for the grant of the lease and 30% for the uplift. No application has been made for expert evidence to be adduced, and neither report contains the statement of truth prescribed in Rule 11.5(4)(a). Had expert evidence been permitted, the valuers would have been required to discuss the issues and to produce a joint statement identifying areas of agreement and disagreement. In the event this valuation material must be disregarded save for the purposes of demonstrating that proper advice was taken in the matter by the PCC and that some financial benefit will accrue as a result of the transaction.

20. I am satisfied that in all the circumstances the proposed transaction, notwithstanding the loss of the 58 square metres of land, will be of real benefit to the church in terms of controlling the use of Burrell Lane, (including its use for parking) and of restricting nearby development to an acceptable level.

Other Matters

21. Three further issues raised by the Parties Opponent require consideration. First, it is alleged that there was insufficient consultation before the petition was presented. I reject that argument. This matter has

been under discussion within a small community for almost five years. The planning application leading to the grant of permission on December 16th 2016 for the works now proposed in the petition, gave ample notice to the interested parties. I do not consider that more should have been done by way of consultation.

22. Secondly, it is alleged by Mr Justin Trott that Mr Martin Roberts, a Petitioner and one the churchwardens, has a conflict of interest through his friendship with Mr and Mrs Barraclough. That is a matter for the internal governance of the PCC, which unanimously voted in favour of applying for a faculty. It does not affect the conclusions which I have reached on the merits of the case.

23. Finally, Mr Justin Trott alleges that the opportunity of mediation with the assistance of the Rural Dean was lost through the Petitioners' lack of co-operation. A letter dated November 14th 2019 from the Rural Dean, the Reverend Liz Mortimer, reveals that although mediation was discussed with Mr Justin Trott in general terms she never offered to be a mediator, such a role being beyond her professional remit. The Petitioners were wary of mediation, having regard to what they perceived (rightly or wrongly) as pre-emptive action on the part of the Trott family. It is doubtful whether mediation would have produced a satisfactory outcome, other than that now proposed in the petition. Once again, this issue cannot affect my decision on merits.

Conclusion

24. Being satisfied that there are appropriate circumstances for the grant of a lease, the sparing exercise of the jurisdiction requires that the area to be leased and the length of the term are not to be excessive. On the first of

these questions, a narrow strip of 58 square metres in extent appears sufficient but not excessive for the improved access. As regards the duration of the lease, the proposed 999 year term appeared at first sight to err on the side of generosity. The likelihood, however, is that any dwellings to be built will ultimately be sold as freehold units, so it is realistic to create means of access which will in practice (if not in strict law) be comparable to a freehold.

25. It will therefore be decreed that a faculty shall pass the seal as sought by the Petitioners, who shall have leave to apply all resultant financial proceeds to the general purposes of the PCC. The faculty will be subject to the condition that the church architect shall be satisfied with the provision of the new fence and other accommodation works, the relocation of the gate being permitted in order to make available more adequate space for burials.

Costs

26. The costs of faculty proceedings fall into two categories; the court fees and the legal costs incurred by the parties themselves. The usual order is for the Petitioners to pay the court fees and otherwise for each party to bear its own costs. In the present, highly unusual case it is wrong in principle that the court fees should be paid by the parishioners to fund what was, in origin, a private dispute between landowners. There is mention in the papers of indemnity arrangements as between Mr and Mrs Barraclough and the PCC, although it is not clear whether those arrangements extend to the contested faculty proceedings. That must be resolved separately with Mr and Mrs Barraclough, against whom no costs order can currently be made as they are not parties to the proceedings. On the assumption that some contribution will be forthcoming from that source, the proper order for costs should reflect the fact that the Parties Opponent have failed in their

opposition. Taking the whole history of the matter into account, the fair outcome is that the Parties Opponent should be responsible for 50% of the court fees.

27. The formal costs order will therefore be that the Petitioners shall be liable for the court fees in an amount to be agreed with the Registrar or, in default of agreement, fixed by the Chancellor; and that the Petitioners shall be entitled to recover 50% of such fees from the Parties Opponent who shall be jointly and severally liable in that respect. Otherwise, the parties shall bear their own costs. All parties may apply within 28 days of the handing down of this judgment to vary the costs order.

A handwritten signature in black ink, reading "Timothy Briden". The signature is written in a cursive style with a long, sweeping underline.

Timothy Briden

Chancellor

12th March 2020