



Determination whether faculty required – Grade II listed urban parish church built in the decorated style in 1848-9 to a design by George Gilbert Scott – Archdeacon’s written notice given under List B1 (6) on 2 October 2017 for installation of a new replacement gas boiler – New gas boiler not installed until after 1 July 2022 – Whether List B notice still valid following amendment to List B1 (5) removing the replacement of a boiler with a new boiler using a fossil fuel supply from List B and requiring full faculty approval – Faculty Jurisdiction Rules 2015 rules 3.3, 3.8, Interpretation Act 1978 sections 16, 21-3

Application Ref: 2017-011805

IN THE CONSISTORY COURT
OF THE DIOCESE OF OXFORD

Date: Thursday 13 April 2023

Before:

THE WORSHIPFUL CHANCELLOR HODGE KC

In the matter of:

HOLY TRINITY, HEADINGTON QUARRY

Between:

The Reverend Canon Dr Peter Groves
(Assistant Archdeacon of Oxford)

Applicant

- and -

(1) The Reverend Laura Biron-Scott (Vicar)
(2) David Smith and

(3) Margaret Taylor
(Churchwardens)

Respondents

This application was determined on the papers and without a hearing.

No cases are referred to in the Judgment

JUDGMENT

Introduction

1. This application raises the question whether an archdeacon's written notice, given under what was then List B1 (6), on 2 October 2017 for the installation of a new replacement gas boiler remained valid and capable of implementation following the amendment to List B1 (5), with effect from 1 July 2022, removing the replacement of an existing boiler with a new boiler using a fossil fuel supply from the scope of List B and requiring it to secure full faculty approval.

Factual background

2. On 23 February 2023 one of the diocesan church buildings officers sent me an email inquiring whether, given the specific changes to the legislation affecting the proposal, an archdeacon's List B notice given on 2 October 2017 for the like-for-like replacement of the church's gas-fired boiler would still be considered valid and, if so, whether the parish could proceed with the installation of a replacement gas boiler founded upon that consent. The officer explained that as works undertaken under List B were generally relatively minor in nature, it was assumed that they would be undertaken quickly, and so no specific period for completing the work was stated within the notice. The query raised the wider question of what should be considered a reasonable time frame for completing works authorised under List B.

3. The immediate context for this inquiry was that the parish of Holy Trinity, Headington Quarry were in the course of preparing a faculty application to replace their existing gas-fired boiler, which had failed in September 2022, with a new, more energy-efficient gas-fired boiler, but at a full meeting of the Diocesan Advisory Committee, held in January 2023, a majority of committee members had concluded that the parish had not demonstrated sufficient due regard for the net zero guidance issued by the Church Buildings Council on reducing carbon emissions. According to an accompanying email from the parish, dated 20 February 2023, in the course of preparing the information for their application for a faculty to introduce the new replacement gas boiler, the parish had come across an existing archdeacon's written notice, given on 2 October 2017 (under reference 2017-011805), in accordance with rule 3.3 of the Faculty Jurisdiction Rules 2015 (the **FJR**), as originally enacted, and referencing what was then List B1 (6), authorising the implementation, without faculty, of the removal of the church's existing gas boiler, and the installation of a new gas condensing system boiler, subject to a number of conditions, but without any limitation in point of time. The email from the parish explained that this work had not been carried out in 2017 as initially the Parochial Church Council (the **PCC**) had wanted to align the boiler replacement with a major building project, and the consequent delay had then been compounded by a vacancy in the church's ministry, and finally the Covid pandemic. The work needed to the boiler was exactly as described in the original List B application; and, since the archdeacon's notice pre-dated subsequent changes to the FJR on 1

April 2020 and 1 July 2022, the parish felt that the notice should not be affected by those rule changes. If this were the case, the parish inquired whether they could move forward to satisfy their immediate needs by implementing the extant archdeacon's notice. In support of the spirit of the new rules, the parish stated that they had confirmed with their Eco group that the proposed replacement boiler would be a key transition component of their future sustainable energy solution. I infer from this email, that the parish had not, by then, already installed the replacement boiler.

4. My response was that this was an issue on which I should not express an informal opinion. Rather I should be invited to make a formal determination under FJR 3.8, either on an application by an authorised person (as defined in FJR 3.1 (5)) or by the archdeacon.

5. On 29 March 2023, I received an email from the Reverend Canon Dr Peter Groves, the Assistant Archdeacon of Oxford, requesting a formal determination under FJR 3.8, in the case of the replacement of a gas boiler at the parish church of Holy Trinity, Headington Quarry. He made this request in his capacity as Assistant Archdeacon and Commissary, asking me to determine whether the works concerned might be carried out under List B rather than requiring a full faculty. The Assistant Archdeacon explained that List B permission had been granted in 2017 to replace the church boiler but, at the time, the parish had proceeded with repair rather than replacement. Before last Christmas, the question of a replacement boiler had become pressing again. Dr Groves explained that he had visited the parish on 2 March 2023 to meet with the vicar and the churchwarden and they had discussed various matters. At that visit, it was confirmed that the boiler replacement had, in fact, already taken place. Dr Groves's understanding is that the parish had '*rediscovered*' their 2017 List B permission, and they had believed that they had licence to proceed.

6. On the same day, I responded by email referring Dr Groves to FJR 3.8 (3) (cited below). I stated that I was content to dispose of this request on consideration of written representations. I asked him to invite the parish to submit to him any written representations they might wish to make on the question whether they had been lawfully entitled to carry out the boiler replacement works under the existing List B permission within (say) 14 days. These were then to be forwarded on to me by email together with any representations that Dr Groves might wish to make. I would then issue a written determination in the form of a short, written, public judgment.

7. On 11 April 2023, Dr Groves submitted a letter dated 3 April 2023 from the vicar and churchwardens of Holy Trinity, Headington Quarry. This reads:

Thank you for considering the matter of the replacement gas boiler at Holy Trinity, Headington Quarry. I outline below the position of the parish on this matter, referring to some background information on the decision to replace the boiler, the pastoral and missional need to ensure adequate heating in the church building, and the legal framework within which we believe we were lawfully entitled to replace the boiler.

Background to the Decision

In 2007, the parish installed a Worcester Greenstar Boiler CD40 (40KW output) to power the church's gas-fired central heating system. After ten years of use, the PCC decided in 2017 to replace this boiler with a new and more

efficient gas boiler and secured a List B permission to do so. It is clear from past PCC minutes and conversations with former churchwardens that the old boiler was failing regularly, and that it would be only a matter of time before it failed completely. In securing a List B permission to replace the boiler, PCC sought to act pre-emptively in this regard.

The parish fell into vacancy in April 2018, following the vicar's resignation at the end of 2017. The PCC did not act to replace the boiler during this time, largely on financial grounds, and partly owing to the significant work involved in running the parish during the vacancy. In addition, the PCC began a large capital fundraising campaign in 2019, and it was deemed sensible to absorb the cost of a new boiler within this bigger campaign for funds. The new vicar arrived in June 2019, and in February 2020 the PCC reconsidered the matter of the replacement boiler. However, it was not possible to take the decision any further, because one month later the church building was required to close for public worship, and the parish found itself responding to the unprecedented challenge of the Covid-19 pandemic. The significant disruption and strain this placed on parish life cannot be underestimated.

In August 2022, the churchwardens arranged the annual boiler service, and the boiler was deemed to be failing and beyond the cost of reasonable repair. A quotation of £7,000 (including VAT) was obtained to replace the boiler and filter, alongside improvements to the pipework and insulation of the boiler house. Joint funding for this work was secured from the PCC and Friends of Holy Trinity, and the decision to accept the quotation and replace the boiler was approved at a PCC meeting on September 28th 2022.

Pastoral and Missional Needs of the Parish

In the years since the pandemic, the parish has made regathering in the church building a significant pastoral and missional priority, and we now find ourselves with a thriving congregation once again. In addition to Sunday worship, the church building is open seven days a week for private prayer and visitors. We hold a midweek communion service (which includes elderly and vulnerable members) and a midweek 'tots service' (which includes babies and infants). We also regularly welcome school groups and visitor groups who come to learn about the church's significant connection with the author C.S. Lewis. Baptisms, weddings, and funerals take place regularly. There is a rarely a day on which the church building is not used.

In light of the above, it is very important that the church can be heated adequately for services and events, and this need is especially strong as we continue to recover from the impact of the pandemic. Our churchwardens made this point in an email to the DAC, dated October 24th 2022: *'Thank you for your email regarding the replacement boiler ... We pray that we will be able to replace our boiler sooner rather than later as the colder days are coming and we have worked so hard to get the momentum back into our church since the pandemic. It would be so sad to lose all that because of a cold church'*. This was reiterated to the assistant archdeacon

during his visit to the church on March 2nd 2023, at which point he was aware that the boiler replacement had taken place.

Legal Framework for Boiler Replacement

At our meeting in September 2022, PCC members were aware that changes to the faculty rules had come into place and that like-for-like fossil fuel boiler replacements require full faculty approval. Accordingly, the incumbent contacted the archdeacon for further advice, and the matter was passed on to the DAC. On October 18th 2022, the archdeacon and assistant archdeacon confirmed their support for an early and pragmatic replacement of the boiler, and on October 24th the DAC advised that the matter was under consideration. Meanwhile, the overwhelming pastoral and missional need to ensure the church would be warm in time for the busy Advent and Christmas season remained.

In our view, the pastoral and missional needs of the church are relevant to the legal position on the boiler replacement. As Eyre Ch. observed in *re St Peter, Walsall* [2021] ECC Lic 4: '[14] *There is clearly a real need for any church to be adequately heated. If a church building is cold there can be a significant negative impact on the life and mission of the Church in that place*'. The incumbent and churchwardens judged that this pastoral necessity should take precedence over the need to wait for final confirmation that the boiler replacement could go ahead. Upon looking into the matter further, we are content that, given that the 2017 List B permission for a replacement boiler has not expired, we do have a legal basis for the decision we made. As Church of England guidance indicates: '*any application made under the 2015 and 2019 rules will remain under that specified version and will not automatically be moved to the newer legislative version*'. Section 8.3 (Faculty permission) at page 6 of *Church Heating: Permissions and Regulations*. As the List B permission was made under the 2015 rules, we believe that we were lawfully entitled to replace the boiler.

Thank you for considering our position on this matter.

8. At the same time, Dr Groves submitted his own letter. This reads:

This letter accompanies another from the Vicar and Churchwardens of Holy Trinity Headington Quarry, concerning the replacement of their boiler under List B permission.

The written representations offered by the parish include their understanding that support for an early replacement of the boiler was offered by both the Archdeacon and me. This is entirely correct. At the same time, the Archdeacon and I understood the constraints within which the DAC was working, and the context helpfully set out in the background information supplied by Jennie Schillig. There were communication delays at both ends, through nobody's fault, but the urgency of the situation was keenly felt by the PCC.

I am of the opinion that the parish found itself in an almost impossible position in relation to the new regulations, and that they made what seemed

thoroughly reasonable efforts to respond to those recently introduced rules. They clearly felt that they had had “*due regard*” in this case but were unaware that that wording carried with it a particular definition which goes beyond the common usage of the phrase. Again, this is nobody’s fault.

As the representations make clear, there was a strong missional and pastoral need to heat the church to prevent the falling away of a congregation and community which has been steadily built up and grown following the restrictions of the pandemic. The use of the building for activities other than worship is an important factor in this need. The move to make use of existing List B permission to replace the boiler seems to me to have provided a reasonable solution to an almost intractable problem.

9. I note that the letter from the parish does not identify the precise date when the boiler replacement actually took place. From the terms of the parish’s email, dated 20 February 2023, referred to in paragraph 3 above, using the phrase “*we could move forward with our immediate needs*”, I infer that the parish had not by then installed the replacement boiler. By that time, the parish had already received feedback from the DAC case officers (by way of email dated 19 January 2023) which concluded:

The application will be progressed so that a notification of advice (NOA) can be issued for the gas boiler replacement. This will go to the Chancellor along with a separate report explaining why the DAC did not consider that due regard for the Net Zero guidance had been demonstrated by the parish in preparing the proposals. Once the NOA has been issued, the parish should complete the petition and generate and display the public notice as directed on the online faculty system. The application should then be submitted for a final time to allow the Chancellor to make his determination. Canon Peter Groves has offered to assist you in making the faculty petition and has suggested that you contact him directly should you require assistance.

It would appear, therefore, that the parish had proceeded to replace the existing gas boiler despite being advised that they should be submitting a full faculty application, based upon their own perception of the continuing validity and efficacy of the October 2017 archdeacon’s notice.

The statutory background

10. Since 1 July 2022, the Faculty Jurisdiction (Amendment) Rules 2022 (SI 2022/155) require that proposals to which net zero guidance applies (such as, in this case, where it is proposed to replace an existing boiler with new boiler using a fossil fuel supply) must be accompanied by an explanation stating how the applicants have had due regard to net zero guidance in formulating their proposal. The amended FJR go on to require that the DAC must include a statement, in its notification of advice, as to whether, in its opinion, the explanation of how the applicants have had due regard to net zero guidance is adequate; and if, in its opinion, that explanation is not adequate, the DAC must state its reasons for that opinion. These changes are mirrored by changes to what is now List B.1 (5), corresponding to the original List B.1 (6), restricting its scope to boilers utilising only a non-fossil fuel supply.

11. As originally enacted (and in October 2017), List B.1 (6) applied to:

(6) *Works of adaptation (not amounting to substantial addition or replacement) to—*

- (a) heating systems*
- (b) gas, water and other services*
- (c) electrical installations and other electrical equipment*

By the Faculty Jurisdiction (Amendment) Rules 2019 (SI 2019/1184), with effect from 1 April 2020 the corresponding List B item was List B1. (5), which provided:

(5) The replacement of a boiler in the same location utilising a different fuel supply or pipe runs

With effect from 1 July 2022, List B.1 (5) now reads:

(5) The replacement of a boiler, whether in the same or substantially the same location and utilising, whether with existing or similar pipe runs —

- (a) a non-fossil fuel supply in place of a fossil fuel supply, or*
- (b) a different non-fossil fuel supply*

12. By section 77 (1) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, rules may specify matters within the jurisdiction of a consistory court which may be undertaken without a faculty. These rules are set out in Part 3 of the FJR. By subsection 77 (9) of the 2018 Measure, any question as to whether a particular matter is, or is not, a matter that is specified by virtue of subsection (1) is to be determined by the consistory court of the diocese concerned.

13. This statutory provision is given effect by FJR rule 3.8 which (as currently enacted) provides:

Determination of questions

3.8. — *(1) Any question as to whether a particular matter is or is not a matter that may be undertaken without a faculty under this Part is to be determined by the chancellor.*

(2) The determination may be made by the chancellor on the chancellor's own initiative or on the application of —

- (a) an authorised person,*
- (b) in the case of a matter specified in an additional matters order, a person who may undertake the matter under the order, or (c) the archdeacon.*

(3) The chancellor will determine the question without a hearing on consideration of such written representations (if any) as the chancellor thinks fit unless the chancellor orders that the question be determined at a hearing.

Analysis and conclusions

14. The Faculty Jurisdiction (Amendment) Rules 2022 (SI 2022/155) are directed to promoting environmental protection by reducing carbon emissions (by, for example, promoting the installation of boilers which do not use fossil fuels). They contain various transitional provisions (at rule 6). Thus, rule 6 (1) provides that the amendment made to rule 3.3 (undertaking List B matters without a faculty) by rule 2 (2) of the Amendment Rules (requiring an explanation of how the applicants, in formulating their proposal, have had due regard to net

zero guidance if the proposal involves a matter to which that guidance applies) does not apply in any case where the archdeacon has sought advice under rule 3.2 (2) before 1 July 2022. However, none of these transitional provisions apply to rule 4 which (by the Schedule to the Amendment Rules) effects the changes to Lists A and B. On that basis, I can see how it might be contended that since the amended List B.1 (5) took effect from 1 July 2022, and the church's replacement boiler was installed after that date, this boiler replacement was no longer authorised by FJR rule 3.3 since it no longer fell within the scope of List B.1 (5).

15. However, it would be a curious result if (because of the transitional provisions) the new net zero guidance requirements had no application to a List B matter that was already under active consideration by the archdeacon as at 1 July 2022 but the new restriction on the scope of List B.1 (5) did apply where the archdeacon had given written notice under List B.1 (5) shortly before 1 July 2022 but the parish had not yet implemented the works thereby authorised. Further, such a result would seem to be at odds with the Church Heating Guidance issued by the Cathedral and Church Buildings Division, and relied on by the parish (as cited in the extract from their letter at paragraph 7 above). Concerned by this apparent inconsistency, I considered it sensible to approach the Legal Office at Church House to establish whether they wished to make any observations upon the apparent lack of any relevant transitional provisions in the Amendment Rules. They helpfully referred me to s. 16 of the Interpretation Act 1978 (read with s. 23) on the basis that the permission granted before the repeal took place was a "*right ... accrued*" under the repealed provision. I am grateful for this reference; and I am satisfied that this affords the correct solution.

16. Section 16 of the Interpretation Act 1978 (headed '*General savings*') provides that:

(1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, —

...

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;

...

(e) affect any ... legal proceeding or remedy in respect of any such right, privilege, obligation, [or] liability ... ;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced ... as if the repealing Act had not been passed.

By s. 22 (3), the Interpretation Act 1978 "*applies to Measures of the General Synod of the Church of England ... as it applies to Acts*". By s. 23 (1), these provisions apply, so far as applicable, to subordinate legislation as they apply to Acts; and by s. 21 (1) '*subordinate legislation*' extends to rules and regulations made under any Act. Section 16 therefore applies to the FJR and the Amendment Regulations.

17. I am therefore satisfied that, in principle, an archdeacon's written notice for the installation of a new replacement gas boiler, given under List B.1 (5) (or its predecessor list item) before 1 July 2022, remains valid and capable of implementation following the amendment to List B.1 which, with effect from that date, removed the replacement of an existing boiler with a

new boiler using a fossil fuel supply from the scope of List B, and required it to secure full faculty approval.

18. However, that does not necessarily lead to the conclusion that the installation of this replacement gas boiler after 1 July 2022 was validly authorised by the List B1 (6) notice given as long ago as 2 October 2017. Archdeacon's List B notices are not usually expressly limited in point of time; but I would not accept that they can necessarily remain valid and effective indefinitely, to be validly acted upon at any time in the distant future. Although I have received no representations on this point, or any evidence directed to it, I can see that it may be argued that a parish has abandoned a List B archdeacon's notice if, instead of acting upon it, it implements alternative works inconsistent with the notice. In the present case, for instance, if, instead of replacing their existing, defective gas boiler, in or around October 2017, the parish had carried out repairs to the existing installation, it might be contended that they had effectively abandoned any future reliance upon the notice that had been given by the archdeacon on 2 October 2017. I have received no evidence as to what actually happened following the giving of the archdeacon's notice on 2 October 2017, beyond the fact that it was not implemented at that time; but common sense would suggest that some repairs must have been undertaken to the boiler at that time otherwise the church would not have been adequately heated, with a consequent negative impact upon the life and mission of the church. Nor have I received any representations as to how, objectively, such events might be viewed, in terms of the continuing validity and force of the archdeacon's written notice. It follows that I do not consider that I am presently in any position to determine finally whether the replacement gas boiler was lawfully installed pursuant to the October 2017 archdeacon's written notice given under List B1 (6).

19. I leave it to the Assistant Archdeacon to determine whether he would wish to pursue this matter any further. This court would not wish to seek to diminish in any way the need to secure proper adherence to net zero guidance; and it commends the DAC for the assiduous way in which it has sought to enforce net zero guidance in the present case. But it is also clear from his letter to this court that the Assistant Archdeacon entertains no concerns that, in the present case, the parish has acted otherwise than sensibly, reasonably, and in good faith. In those circumstances, since what is done is done, for pastoral and pragmatic reasons, with which this court is not without sympathy, the Assistant Archdeacon may take the view that it is not worthwhile pursuing this matter any further, simply leaving this case to stand as providing lessons for the future. I would be content with that course.

David R. Hodge

The Worshipful Chancellor Hodge KC

13 April 2023