

In the matter of St Peter and St Paul, Wadhurst

## Judgment

1. By a petition dated 12 December 2013, the incumbent and churchwardens of St Peter and St Paul Wadhurst seek a petition for:
  - The removal of pews and pew platforms at the back of the nave and in the north aisle and the construction of a new floor at the same level as existing aisles;
  - Installation of a kitchen at the back of the north aisle;
  - Introduction of new cupboards in the north transept;
  - Introduction of new chairs;
  - Improvements to the heating system.

### **Demolition and partial demolition**

2. The petition was treated in the registry as one involving the partial demolition of a church, thereby engaging the provisions of section 17 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, with its extensive consultation provisions and additional procedural requirements. This was not entirely surprising since section C of the petition had been completed indicating that part of the east wall of the vestry was to be demolished (even though that aspect of the work is not the subject of the petition). For my part, I do not consider that the section is engaged at all. The proposed works, properly styled an 'internal reordering' in the architects' papers, do not include any element of demolition and the petitioners have chosen – for whatever reason – to limit the current petition to the reordering: see the Schedule of Works and Purposes in the petition.
3. It is plain from the papers that the matters contained in the current petition are the first phase of a more extensive programme of intended works affecting this parish church, the later phase of which will comprise the construction of a vestry extension. Even though this includes the removal of a wall in the vestry, and notwithstanding the use of the word 'demolition' in the architect's description of this element, I cannot see how this future proposal could properly be classified as 'the partial demolition of a church' as envisaged by the statute.
4. It is not necessary for me to decide the point in the context of the current petition which is merely for a modest internal reordering, but the registrar has requested some general guidance for future petitions within the diocese. Section 17(1) of the Measure provides that 'A court shall not grant a faculty for the demolition or partial demolition of a church except on the grounds specified in this section'. The remainder of the section prescribes certain restricted circumstances when a faculty may be granted, focussing on whether worship will continue in the retained part, or a new church constructed on the site.

5. If the section is engaged, action is required on the part of the registrar in notifying various potentially interested parties, hence the request for guidance. The prevailing procedural provisions at the time (but see below) were the Faculty Jurisdiction Rules 2000, rule 13(7) of which reads as follows.

13(7) - Where the petition is for a faculty for the partial demolition or demolition of a church and falls within section 17(2) or (3)(a) of the Measure

(a) the registrar shall give notice in writing to the bodies specified in section 17(4)(b) and, if relevant, to the bodies specified in section 17(5)(a) of the Measure and the bodies concerned shall have a period of 28 days from the date of the notice within which to give advice or to send to the registry and the petitioners a written notice of objection containing the information required by Form No 4 in Appendix C in respect of the proposed partial demolition or demolition,

(b) the notice stating the substance of the petition (which is required by section 17(4)(a)(ii) of the Measure to be published by the petitioners in the London Gazette and in such other newspaper as the chancellor may direct) shall be published:

(i) in the case of the London Gazette not more than 28 days after the petition was submitted to the registry,

(ii) in the case of such other newspapers (including a newspaper circulating in the locality) within such period as the chancellor shall direct or, if no period is directed, within 14 days of the giving of the direction.

6. The question here is whether a future petition for the extension, currently envisaged as phase two of the works, be properly categorised as one for the demolition or partial demolition of a church? In the House of Lords' decision in *Shimizu (UK) Ltd v Westminster City Council* [1997] 1 WLR 168, Lord Hope of Craighead determined that in a secular planning context, demolition of a listed building must mean the removal of the whole building, and, possibly, the clearing of a site for redevelopment while leaving the façade, but that anything less substantial would be properly categorised as 'alteration' of the whole by the removal of a part.
7. However, the language of section 17 in the ecclesiastical context speaks of 'demolition or *partial* demolition' (emphasis added). The routine work of the consistory court includes scores of cases every year which include the destruction or removal of small and insignificant parts of the fabric of the church. If every one of these were regarded as a partial demolition, then the faculty jurisdiction would collapse under the weight of pointless and unnecessary consultation. A sensible and purposive interpretation is self-evidently called for.
8. The most detailed discussion of section 17 is to be found in *Re St James' Chapel, Callow End* [2001] 1 WLR 835, Worcester Consistory Court, in which Mynors Ch concluded as follows at paragraph 13:

On that basis, therefore, the correct test seems to be to consider the overall operation, and to ask whether it is best characterised as:

- (i) demolition or partial demolition alone;
- (ii) demolition or partial demolition followed by building of something else;
- (iii) alteration; or
- (iv) extension.

If it is either of the first two, section 17 applies, [...] If it is either of the third or fourth, even though the works may, indeed almost inevitably will, involve the demolition of some existing fabric, the section does not apply..

9. I respectfully agree with this analysis, which seems to me to reflect the sensible and common sense way in which the question has been approached in this diocese hitherto. In this instance, I consider that the section 17 was not engaged, first because the proposals in the petition were limited to a reordering and secondly because (even had phase two been included within the proposals) the works were properly classified as an extension within category (iv) above. The registrar may have been a little over-zealous in requiring consultation with the Secretary of State, the Diocesan Bishop, the Church Buildings Council *et al*, although he did so on the basis of information contained in the petition. I am reinforced in this view by the various responses which came back from the consultees, ranging from indifference to petulance.
10. Subsequently to the lodging of this petition, there have been various procedural changes effected by the Faculty Jurisdiction Rules 2013, which came into effect on 1 January 2014. Though differently numbered, and slightly differently expressed, the notice provisions on demolition are not changed in substance, largely because they reflect the mandatory provisions of the section 17 of the 1991 Measure. However, a wind of change is blowing through faculty legislation, and (assuming it finds favour with the Ecclesiastical Committee of Parliament this week) the current Church of England (Miscellaneous Provisions) Measure, once enacted, will substitute a new section 17 into the 1991 Measure. Section 17(3)(a), in its revised version, will permit the granting of a faculty for the demolition of part of a church if the consistory court is satisfied that 'the demolition is necessary for the purpose of the repair or alteration of the church or the reconstruction of the part to be demolished'.
11. Of more direct relevance to the current concern as to when the notification provisions may be triggered, section 17(5) of the revised section will provide a helpful definition as follows:

For the purposes of this section, 'partial demolition' and cognate expressions-

- (a) mean removal of such part of a church as would, in the opinion of the court, significantly affect its external appearance, and
- (b) do not include the destruction or removal of minor or ancillary structures forming part of the building.

Under this forthcoming definition, it seems to be clear beyond any doubt that what will be proposed in phase two, (namely the removal of a wall of twentieth century construction in a vestry addition) would not constitute demolition or partial demolition. Nor does it, in my judgment, as a matter of pragmatism and common sense, amount to partial demolition under the currently prevailing statutory regime as I have indicated earlier in this judgment.

### **The proposed reordering**

12. That being so, this petition falls to be determined under the principles in *Re St Alkmund, Duffield* [2013] Fam 158, in which the Court of Arches opined in paragraph 87 that 'chancellors should be freed from the constraints of the *Bishopsgate* questions' which carried 'a danger of imposing an unduly prescriptive framework on what is essentially a balancing process'. The appellate court prescribed a new framework 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, 26–28, and the review of the case law by Bursell QC, Ch in *In re St Mary's Churchyard, White Waltham (No 2)* [2010] Fam 146, para 11. Questions 3, 4 and 5 do not arise.

- (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 *In re St Luke the Evangelist, Maidstone* [1995] Fam 1, 8), will any resulting public benefit (including matters such as liturgical freedom, pastoral well being, opportunities for mission, and putting the church to viable uses that are consistent with its role as a place of worship and mission) outweigh the harm? In answering question (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 I or II\*, where serious harm should only exceptionally be allowed.

It is in the context of this framework that I approach the current petition.

### **The petitioners' case**

13. Wadhurst church is a Grade I listed building dating from the twelfth century, although most of the current building is of later fourteenth century origin. The church benefits from an unusually large collection of seventeenth century iron tomb slabs in the floor, and a striking two-storey porch. I need say nothing at this stage with regard to the proposed construction of a small extension to a twentieth century part of the building for a lavatory (which will be undertaken as a later phase of the works should a future faculty be granted) save to note that it does not appear to have elicited any objections either from the consultees or from those living in the locality.
14. The works to the interior comprise the removal of pews and pew platforms to the west end of the church, to the north aisle, and to the north transept. The new level floor will be of oak boarding at the west end, and of matching stone in the north aisle and transept. The existing stone aisles with their iron memorial slabs will be retained in situ. In the north transept, the existing cupboards on the north wall will be extended around the west wall to provide discreet storage for stackable chairs when not needed. A modest kitchen will be erected in the north transept.
15. The Statement of Need indicates that this is a growing community which values the sacred beauty of its church, but which seeks a minor reordering the better to fulfil its mission and witness to its various congregations.

### **Other information**

16. The proposals are the subject of a certificate of recommendation from the DAC dated 15 October 2013, and no adverse comment has been forthcoming from the CBC, the diocesan bishop, the Department for Communities and Local Government, the Ancient Monuments Society and English Heritage. Planning permission has been granted for the proposed extension (albeit this does not form part of the current petition) and no comments have been received in the registry following public notice.

### **Assessment**

17. Applying the framework commended by the Court of Arches, my assessment is as follows:

*(1) Harm to the significance of the church as a building of special architectural or historic interest*

18. This is a relatively minor proposal. The lack of any adverse comment from any of the consultees is strongly suggestive that no harm will be caused to the significance of the church as a building of special architectural or historic interest. The DAC certificate expresses the view that the work proposed is likely to affect the character of the church as a building of special architectural or historic interest, but in my judgment it would not reach the threshold of significant harm for the purposes of this balancing exercise.

*(2) Rebuttal of presumption against change*

19. In this instance, I consider that the petitioners have sufficiently discharged the burden of proof which lies upon them. They have satisfied me of the liturgical and other benefits of the proposed reordering and the opportunities for expansion and mission which would arise from a more flexible use of space.

*(3), (4), & (5) Serious harm and justification*

20. Having regard to my findings at (1) and (2) above, it is unnecessary for me to consider these three further questions.

**Conclusions**

21. It therefore follows that a faculty will be granted for the matters specified in the Schedule of Works and Proposals at page two of the petition. They are to be carried out under the supervision of Mr Richard Andrews, the inspecting architect, and completed within six months. As to the proposed construction of the extension, which the petitioners – for whatever reason – have chosen not to pursue in this petition, a good case would appear to have been made out already on the papers, but as the court is not yet seized of the matter, I propose to say nothing further on the subject. It will need to be the subject of a future petition.