

Neutral citation number: [2016] ECC Swk 8

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

IN THE MATTER OF ST JAMES'S CHURCH, KIDBROOKE

AND IN THE MATTER OF A PETITION BY REVD CANON KIM HITCH, RICHARD PHILPOT,
JENNIFER ANDERSON AND NET COVERAGE SOLUTIONS LIMITED

DIRECTIONS

1. This is a petition by the Rector and Churchwardens of St James, Kidbrooke (Revd Canon Kim Hitch, Richard Philpot and Jennifer Anderson) and NET Coverage Solutions Limited ("NET"). It was received in the Registry on 18 September 2015. It seeks permission for (i) the installation of twelve antennae and two dishes¹ behind GRP replacement louvres in the tower of the church and (ii) authority for the incumbent to enter a licence agreement for a term of 20 years with NET to permit the installation and operation of the equipment permitted.
2. The church of St James, Kidbrooke is listed, Grade II, the listing stating that is a large, good representative example of a mid-Victorian Gothic church building. It was designed by the partnership of Arthur Newman and Arthur Billing. The church has had a rather chequered history as is explained in the Statement of Significance prepared by Canon Hitch. Consecrated in 1867, it had to be rebuilt almost immediately because of the poor quality of its original construction. In the Second World War it was badly damaged successively by a land mine and then a V2. The original spire was thus lost, which was replaced in the restoration of the 1950s by a smaller "spike". The tower however survived. It has a bell chamber with a single bell. The proposal is to install the equipment in the bell chamber and in the chamber in the tower immediately below the bell chamber.
3. The proposal was advertised in the usual way, namely by a notices on display for 28 days inside the building and on a notice board outside the building.
4. The Registrar received seven objections to the proposal. Of those objecting, two (Miss Velma Lyrae and Obiora Onuora) opted to become parties opponent. Obiora Onuora has now changed his mind and simply wants me to take his written objection into account in reaching my decision; I am happy to proceed on this basis. Accordingly there are six objections in writing which I shall take into account in reaching my decision. As regards Miss Lyrae's position, she has submitted a detailed objection (dated 17 November 2015) together with two appendices containing numerous technical papers about the effect of radio waves and their associated electrical fields on human

¹ The petition refers to 14 antennae but this is a summary made by the DAC. The plans clearly show 12 antennae and 2 dishes. The party opponent has identified the discrepancy and the petitioners are happy for the petition to be amended accordingly. I am confident that there was no intention to mislead (and the party opponent certainly was not misled) but this may be something I hear argument about hereafter.

health. She considers that there will be risk to health arising from the proposals. By an e mail dated 30 November 2015, Miss Lyrae informed the Registrar:

I confirm that I would like to have an oral hearing. I appreciate that the church would like to keep the costs as low as possible but, as I understand it these costs will be met by CTIL² as I would not want to burden the church with unnecessary costs. I believe that because of the complexity of understanding the severity of damage these transmitters pose, this will be best served by explaining in person. I also hope to have the opportunity to bring experts to the hearing.

5. The Petitioners have prepared a reply/response to the objections which is dated 17 February 2016. The conclusion of that document is as follows:

Having carefully considered the objections raised, the Petitioners respectfully submit that the objectors have not raised any valid grounds of objection or evidence in support thereof. The Petitioners further submit that, in the context of the existing case law and regulatory framework, there is nothing which should prevent the grant of a faculty as prayed.

Whilst of course recognising the parties opponent's right to a full hearing in the consistory court, the Petitioners respectfully submit that the Chancellor, in exercising his case management powers, makes it clear to the parties opponent the clear and settled case law on the matters raised in their objections (which is also entirely in accordance with the guidance and practice of the relevant secular authorities) and the potential cost consequences of pursuing such lines of objection at a contested hearing (emphasis supplied).

6. Earlier in the Response³, the Petitioners invite me to rule that objections on health grounds should be summarily rejected on the basis that *the Court's position regarding public perception of health risks is now so firmly established by precedent that an objection on health grounds is not sustainable.*
7. Miss Lyrae lives in the parish or, at any rate, in the vicinity of the church; accordingly, there is no challenge to her standing. Against this background, she is entitled (as the Petitioners accept) for her objection to be considered at a hearing. However before I give directions for such a hearing it is appropriate that I do put a number of matters to Miss Lyrae.
8. Government Guidance to planning authorities about telecommunications equipment is short and to the point. It is now contained in paragraph 46 of the National Planning Policy Framework and is as follows:

Local planning authorities must determine applications on planning grounds. They should not ... question the need for the telecommunications system, or determine health safeguards if the proposal meets International Commission Guidelines for public exposure.

9. In my papers is a certificate dated 11 September 2015 which states that the equipment and installation proposed in the present case is designed to meet the International Commission Guidelines.

² She means the Petitioners.

³ See paragraph 24.

10. The relevance of the Guidelines was considered by Grenfell Ch in *In re St Margaret Hawes and Holy Trinity, Knaresborough*⁴. He said:

*... in the absence of compelling evidence of a real risk to human health as a result of transmitting radio waves up to the levels set by the United Kingdom Government in their adoption of the ICNIRP guidelines, it would be wrong to adopt lower guidelines for a base station just because it happens to come under the jurisdiction of the consistory court in addition to planning requirements*⁵.

11. This statement was expressly approved by the Court of Arches in *In re Emmanuel Church, Bentley*⁶. The Court of Arches added:

*This applies with equal force to the suggestion that a faculty should be refused because of concern (however genuine) about the possibility of a health risk, which cannot be substantiated in any way by evidence*⁷.

12. Thus the approach in the context of the secular planning system is that there can be no sustainable objection if a proposal meets the ICNIRP Guidelines. The Court of Arches in *In re Emmanuel Church, Bentley* was saying that the same approach was appropriate in the consideration of petitions in the consistory court; and the judgments of the Court of Arches are binding on me. Thus it was that I permitted the installation of telecommunications equipment in the case of *In re St Anne's Church, Wandsworth*. (In that case, two individuals objected on health grounds but did not opt to become parties opponent).

13. Thus it is that the Petitioners in the present case assert that there is no scope for maintaining an objection to telecommunications equipment if it meets ICNIRP Guidelines; and that I should so rule. I would be saying in effect that Miss Lyrae was entitled "to her day in court" but there was in practice no relevant matter (save perhaps of detail) on which she could address me.

14. I think that such a submission goes too far. I note what Miss Lyrae says which I have set out at paragraph 4 above, namely that she hopes to bring experts to the hearing. It seems to me that if she wishes to seek to establish by reference to the evidence of an expert or experts called before me that there is a health risk in the particular circumstances of the present case, she must be entitled to do so; and that *In re Emmanuel Church, Bentley* should not be read as preventing her from doing so. I note the words *which cannot be substantiated in any way by evidence* in the quotation from the *Bentley* case set out at paragraph 11 above; if she called expert evidence, she would be seeking to substantiate her case by reference to evidence.

⁴ [2003] 1 WLR 2568.

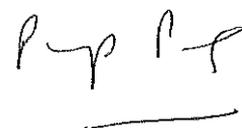
⁵ See paragraph 84.

⁶ [2006] Fam 39 at para 50.

⁷ *Ibid.* Also supplied by the Petitioners is a copy of my judgment in the case of *In re St Anne's Church, Wandsworth* (unreported; 2 November 2015). At paragraph 23 of that judgment I explain that material supplied in the context of that case indicated that the monitoring of radio waves at existing telecommunications installations produces measurements that fall far short of International Commission Guidelines. Since 2001, Ofcom has funded and conducted a total of 724 surveys. The highest measurement recorded was 1/279th of the International Commission on Non-Ionizing Radiation Protection (ICNIRP) safety threshold. No installation tested by them exceeded 0.005% of the specified radiation safety limit. This programme was continued by Ofcom until 2012. Subsequent testing has produced similar results.

15. Miss Lyrae is not herself an expert, although I accept that she has researched widely into the subject. I need to consider the matter on the basis that she did not seek to call expert evidence, but to rely on the material contained in her two appendices. The technical papers that these contain are not, as they stand, evidence. If they are to be relevant to my consideration they would be background material going to form and support the view of an expert about the matter. If an expert is not to be called, I cannot take them into account. The position would then be as envisaged in the *Bentley* case: in the absence of evidence to contrary, it would be appropriate to proceed on the basis that no health risk arises if the ICNIRP Guidelines are met. Of course, Miss Lyrae will still be able to address me even if she calls no expert evidence; but unless she is able to persuade me that the interpretation of the *Bentley* case that I have set out above is wrong, there is no basis on which I would properly be able to hold that the proposals before me should be rejected on the basis that they present a risk to health.
16. This leads me to a consideration of the emphasised passage of the Petitioners' Reply set out at paragraph 5 above. From what she says which I have set out at paragraph 4 above, it seems that Miss Lyrae is working on the basis that the Petitioners will pay the Court costs and that (implicitly) she is not at risk of paying any costs in the proceedings. What the Petitioners are raising is the possibility that this assumption might be wrong.
17. Miss Lyrae is acting in person and may not have the benefit of legal advice. Accordingly it is appropriate that I should raise for her consideration some of the issues as regards costs that might arise in this case.
18. First of all, if she does call expert evidence, it seems to me inevitable that the Petitioners will not accept it and call evidence to support their position, which accords with Government guidance. If they do this they will incur expense. Without pre-judging any issue, it seems to me that there must be a strong possibility of their argument prevailing. If it were to do so, given what the Petitioners say in their Reply, it must also be likely that they would claim their costs from Miss Lyrae on the basis that it was unreasonable to challenge the received position as articulated in Government guidance.
19. If Miss Lyrae does not call expert evidence, the evidential basis will not exist for challenging the grant of a faculty on health grounds. It must be likely that, in these circumstances, the Petitioners will seek their costs from Miss Lyrae.
20. I hope what I have set out above will be helpful to Miss Lyrae, who, I remind myself is unrepresented. I would be very concerned that she should put herself at risk as to an order for costs without being aware of the existence of that risk.
21. What I will ask Miss Lyrae to do is within 14 days to communicate with the Registrar to tell him whether, in the light of the terms of the Petitioners' Reply and these directions, she:
 - (i) intends to call an expert witness or witnesses
 - (ii) requires there to be a hearing.

22. In the light of Miss Lyrae's response I will issue appropriate further directions.

A handwritten signature in black ink, appearing to read 'P Petchey', with a horizontal line underneath.

PHILIP PETCHEY
Chancellor
14 April 2016

