

In the matter of All Saints, Featherstone

And in the matter of a petition from Wakefield Metropolitan District Council

## Judgment

1. By a petition dated 30 July 2024, Wakefield Metropolitan District Council (the Council) seek a confirmatory faculty in respect of an ash tree which was felled and removed without lawful authority in or about May 2024.
2. The progress of this petition has been extremely slow, and the court has had to make several directions in order to extract sufficient information to allow it to be determined. In many ways the issue is minor and straightforward, but discrepancies in the evidence have required a lengthier and deeper enquiry. Having consulted the parties, and with some hesitation, I ordered that it was expedient to determine the petition on written representations under r 14 of the Faculty Jurisdiction Rules 2015 (as amended). I apologise that it has taken me longer to write this judgment than I would have wished.

### **Local authority maintenance of closed churchyards**

3. Upon the closure of a burial ground by Order in Council under the Burial Act 1853, the obligation for maintenance may be passed by a Parochial Church Council (PCC) to the relevant local authority pursuant to section 215 of the Local Government Act 1972. Where notice is properly served, the local authority cannot decline the liability nor agree with the PCC to limit its scope or extent. The decision in *Lydbrook Parochial Church Council v Forest of Dean District Council* (2003) 7 Ecc LJ 494, Gloucester County Court, reinforces the legal position that the duty is one of substantive maintenance and not merely management of decline.
4. The transfer of the duty of maintenance requires local authorities to conduct routine inspections of the churchyards for which they carry the obligation and to undertake such works as are necessary to eliminate or reduce the risk of harm. Notwithstanding the transfer, the closed churchyard remains subject to the faculty jurisdiction and local authorities must ensure that all necessary permissions are in place before carrying out works. The position with regard to trees can be problematic as there are instances when both the faculty jurisdiction and the secular law are engaged, such as when a tree preservation order is in place. See generally the discussion of the matter in P Petchey, 'That yew-tree shade: the law relating to trees in churchyards' (2025) 27 Ecc LJ 26-38.
5. Consistory Courts do not function in a vacuum, immune to the practicalities and complexities of the real world. Judicial notice is taken of the fact that local authorities are under considerable financial pressure to deliver the range of services required of them. Liability for the maintenance of churchyards is not taken on voluntarily through an arm's length transaction but by operation of law. It cannot be refused. And it can be substantial both in

terms of routine inspection and substantive maintenance. It can be a significant burden on cash-strapped local authorities, but it is undertaken routinely up and down the country conscientiously and competently. Lapses of the type in this case are thankfully rare, and nothing in this judgment should detract from the considerable benefits which result to many parishes in the Church of England who transfer liability for the maintenance of a closed churchyard. The gratitude of those parishes and of the wider Church cannot go unacknowledged and unappreciated.

#### **Lawful authority for works to trees**

6. It may be helpful to set out the various mechanisms by which an ecclesiastical permission can be secured for works to trees. Secular permissions are subject to an entirely separate regime, not the subject of this judgment.

##### *(i) List A*

7. Certain works to trees appear in List A at Table 1 of Schedule 1 to the Faculty Jurisdiction Rules 2015 (as amended). The current iteration dates from a revision which became effective on 1 April 2019. The relevant item is A8 which reads as follows:

#### **A8. Trees**

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|--|--|
| (1) The felling, lopping or topping of a tree the diameter of any stem of which does not exceed 75 millimetres (measured over the bark at a height of 1.5 metres above ground level) | The works do not relate to any tree in respect of which a tree preservation order is in force or which is in a conservation area.<br><br>Regard is had to guidance issued by the Church Buildings Council as to the planting, felling, lopping and topping of trees in churchyards |
| (2) The lopping or topping of any tree— that is dying or dead; or has become dangerous   | Regard is had to guidance issued by the Church Buildings Council as to the planting, felling, lopping and topping of trees in churchyards  |
| (3) The removal of dead branches from a living tree  | Regard is had to guidance issued by the Church Buildings Council as to the planting, felling, lopping and topping of trees in churchyards  |

8. These works may be undertaken without a faculty and without the need for any consultation.

##### *(ii) List B*

9. Certain other works to trees, more extensive than those in List A, appear in List B at Table 2 of Schedule 1. The relevant item for trees is B7.

#### **B7. Trees**

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|--|--|
| (1) The planting of trees  | Regard is had to the guidance issued by the Church Buildings Council as to the planting, felling, lopping and topping of trees in churchyards. |
| (2) The felling of a tree—<br>(a) that is dying or dead; or<br>(b) that has become dangerous | In the case of any tree in respect of which a tree preservation order is in force or which is in a conservation area, section 206 of the       |

Town and Country Planning Act 1990 (which provides for the planting of replacement trees) is complied with.

Regard is had to the guidance issued by the Church Buildings Council as to the planting, felling, lopping and topping of trees in churchyards.

(3) All other works to trees (whether or not prescribed in List A) except felling

If applicable, the law relating to the preservation of trees in respect of which a tree preservation order is in force or which are in a conservation area is complied with

Regard is had to the guidance issued by the Church Buildings Council as to the planting, felling, lopping and topping of trees in churchyards.

10. These works may be undertaken without a faculty but require the prior written authority of the archdeacon, following appropriate consultation. The archdeacon may impose conditions. In this, as in many dioceses, List B permissions are dealt with administratively via the Online Faculty System.

*(iii) Minor Works Direction*

11. The 2019 iteration of the Schedule to the Faculty Jurisdiction Rules 2015 contained an innovative procedure in the form of the Minor Works Direction (MWD). It should be distinguished from the Additional Matters Order regime which is entirely separate and is generic in purpose. A MWD is case sensitive and fact specific. The power to make a MWD is to be found in the preliminary rubric of Schedule 1 which includes the following:

*Application may be made to the chancellor for directions as to matters not included in List A or List B that are of such a minor nature that they may be undertaken without a faculty.*

The power to make a MWD is a welcome tool for the efficient operation of the faculty jurisdiction and effectively restores an element of discretion for minor works (formerly called *de minimis*) which had been lost when Lists A and B were originally introduced. The MWD regime provides 'judicial wriggle room' in respect of situations very nearly, but not quite, within Lists A or B.

12. It is not the practice in this diocese to make MWDs retroactively since this would be contrary to the spirit of Lists A and B which are prospective in their operation. However, all MWDs are made formally in writing, annexed to the parish's file in the registry and notified to the Diocesan Advisory Committee. This avoids misunderstandings as to the extent of any authority granted and ensures a consistency of approach across the diocese.

*(iv) Faculty*

13. A proposal which cannot be brought within any of the three categories set out above requires a faculty. Even though the works might have come within the compass of List B or been the subject of a discretionary MWD, those processes cannot be activated retrospectively. The situation can only be regularised, as here, by petitioning for a confirmatory faculty.

**Cases of urgency**

14. One feature in this, as in many cases, is the claim that the works were urgent on grounds of public safety, although this does not sit happily with the contention, ultimately abandoned,

that there was a pre-existing agreement authorising what was done without the need for any formal permission.

15. I had hoped that during my first decade as Chancellor of the newly created Diocese of Leeds to dispel once and for all the myth that consistory courts are slow, bureaucratic and laborious. Admittedly these proceedings have taken time, but this has been in large measure due to a lack of engagement by the parties and the need to make repeated directions. In any event as the petition is for a confirmatory faculty in respect of work already carried out, time has not been of the essence.
16. The consistory court is amongst the most nimble and efficient of the courts of this realm. The registry is well equipped, accessible and responsive: it can move with speed and expedition in cases of urgency. As chancellor I can be reached 24/7 via the registry or through the archdeacons who have my email and mobile phone details. With modern communications this can be fully effective even when I am working overseas. And provision is made for a permanent deputy, currently Chancellor Glyn Samuel, to exercise full jurisdiction should I be unavailable.
17. Interim and emergency facilities can be granted via email or on the telephone. I have a recollection of a 'personal best' for this diocese being something in the order of six minutes from enquiry to grant. This is only beaten by an incident in the Diocese of Chichester when vandals threw stones through the window of a church. I happened to be conducting some clergy training in the adjoining church hall and was able to grant an interim faculty for temporary boarding up almost contemporaneously with the damage occurring.
18. The occasions when it is proper and appropriate for works to be carried out without a faculty (or other authority) being in place are vanishingly small in today's world. The unattractive mantra of the inert and the indolent that it is easier to seek forgiveness than permission has no place in the faculty jurisdiction.

#### **The facts**

19. After those prefatory remarks, which I trust will be widely read in this diocese both by parishes and local authorities, I come to the facts of this case which can be shortly stated, even though they took some time fully to emerge.
20. Staff of the Council carried out a routine safety inspection of the churchyard in October 2023 which identified, *inter alia*, an ash tree as a cause of concern. It is said that the particular tree (identified as No. 7) had the fungus *Inonotus Hispidus* on the main stem and was also suffering from ash die back. Following guidance on how these two conditions together cause the inner structure of a tree to deteriorate, and having conducted a risk assessment, removal of the tree was programmed to take place during the following nine months. The tree was duly felled and removed in May 2024. It is conceded that the Council did not seek any of the following: List B approval, a MWD, an emergency faculty, an interim faculty or a full faculty.
21. The schedule of works in the petition as originally lodged included the following:  
*We have always had an agreement that if the works are for safety reasons, then no applications are required.*  
An application was subsequently made to amend the petition by the deletion of these words. But their original inclusion had exercised the court.

22. I do not think it is contentious that had a prospective application been made for approval by the archdeacon under List B, it would have been granted under B7(2)(a), either unconditionally or with a requirement for compensatory planting. Equally I do not think it is disputed that even within the Council's own chronology there was sufficient time available for List B approval to be sought and obtained prior to the date when the tree was removed. It is unfortunate and regrettable that neither the incumbent nor the PCC were alerted to the Council's intention to fell and remove the tree.

### **Discussion**

23. Occasionally well-meaning individuals carry out works in churches and churchyards entirely in good faith but without the requisite permissions being in place. The usual course is that wrongdoers explain their oversight, apologise and demonstrate contrition sufficient for the court to be confident that there will be no repetition. Ordinarily, that is how this petition would have been disposed of. However, two separate and distinct matters gave cause for concern and required further investigation.

#### *i. Prior agreement*

24. The inclusion in the original petition of the positive averment of a pre-existing agreement dispensing with the requirement for 'applications' where works were required for safety reasons was troubling. No court could give effect to an agreement to subvert or circumvent the operation of the faculty jurisdiction. This falls within the general maxim that agreements to perform an illegal act cannot be relied upon in court proceedings: *ex turpi causa non oritur actio*. Accordingly on 6 August 2024, I made the following directions:

*The petitioner will need to file a full witness statement setting out the background to these unlawful works. In particular, the petition asserts there was a pre-existing agreement in place for this churchyard. If this agreement was in writing a copy will need to be supplied. If otherwise than in writing full details will need to be given of those representing the relevant parties and of the specific terms agreed. Whichever, the petitioner must state on what legal basis the operation of the faculty jurisdiction is alleged to have been suspended or dispensed with.*

25. Repeated reminders had to be sent in respect of this witness statement, and when eventually the Council did supply some limited information, it was silent as to the existence and content of the alleged agreement. No copy has ever been supplied.

26. Somewhat belatedly the Council applied to amend the petition by the deletion of this averment. No explanation was given by the Council for the abandonment of this element of its case, nor the legal and factual basis for its inclusion in the first place. What it revealed was the porous understanding on the part of the Council of the legal framework concerning its operations within this closed churchyard. I am drawn to the inevitable conclusion that no such agreement ever existed, and there was no sustainable basis for raising it as a reason or excuse for proceeding without the necessary legal authority.

27. On a more positive note, by email dated 18 December 2024 under cover of which the Amended Petition was lodged, the Arbor Operations Manager for the Council wrote as follows:

*Our department acted in good faith with no intended malice as it was a matter of Health and Safety. We were under the impression that a faculty would not be required, which in most cases it is not, but did not realise that under List B at least, permission needs to be sought from the Archdeacon. Going forward we endeavour to ensure that we follow the*

*correct procedure. I would like to sincerely apologise for any misunderstanding with regards to this matter.*

28. Whilst the apology is welcomed, it is apparent that that there was no evidential basis on which the averment of a pre-existing agreement could properly have been made. The petition (Form 3A) contains a statement of truth in the following terms: 'We believe that the facts stated in this petition are true'. It was signed and dated by the Arbor Operations Manager. Whilst I am uneasy that inaccurate information should be submitted to the court over a statement of truth signed by an officer of the Council on its behalf, I have concluded that it would be disproportionate to pursue the matter further in light of the belated, albeit unexplained, amendment of the Petition.

*ii. Complaint to the Council*

29. The unauthorised felling and removal of the tree was brought to the attention of the diocesan registry by a member of the public who had previously made a formal complaint to the Council. To preserve his privacy, I do not propose naming him in this judgment, as similarly I am not naming individual employees of the Council.

30. The complainant (as I shall refer to him) was informed by the Council's Street Scene Manager that his complaint had not been upheld. The notification reads:

*Further to our investigation of this enquiry we can confirm that the tree was removed for the reasons of public safety. We have a duty of care to ensure the safety of the public which means that following a comprehensive tree safety inspection any defects found have to be corrected and, in some cases, we unfortunately then have to remove the dangerous tree.*

*In respect to informing yourselves before we commenced the work this is not something we were aware of, but we will endeavour to do so in the future before any major works are carried out at All Saints. We will also aim to do this with other churches and cemeteries across the district to improve lines of communication. However, please be aware that in an emergency we may have to take immediate action and then inform you retrospectively. (emphasis added)*

31. The underlined section is unfortunate. On the Council's own case immediate action had not been necessary in this instance: its own risk assessment allowed for a nine-month timespan during which all formalities, notifications and consultations could have taken place.

32. The complainant was understandably unhappy with this determination and replied to the Council in detailed and strident terms including the following.

*It is a 'legal' requirement to apply for and obtain a 'Faculty' (written permission) before any tree can be felled et al and which can be obtained from the 'Diocesan Registrar' (lawyer) in Leeds. This applies to churchyards that have been 'Closed by Order in Council' as this churchyard is. [...]*

*For information, I suggested to the tree gang that the Diocesan Registrar could be contacted by phone there and then and who would have probably given oral permission, under the circumstances for the tree to be felled for health and safety reasons but they refused and I believe their office was contacted and spoke to someone who obviously has NO knowledge of ecclesiastical law.*

I understand that the complaint was escalated to a higher level within the Council, but it was still rejected.

33. The Council's evidence does not address the matters raised in the complaint, nor have I heard testimony on the issue. So the complainant's version stands unchallenged. It strikes me as plausible bearing in mind how the Council has interacted with the court, and how the complaint was summarily rejected. The advice given to the tree gang as they were felling the tree was broadly correct. The fact that it was ignored is unfortunate. The tree gang on the day, and the individual handling the complaint, probably considered the complainant to be nothing more than an interfering busybody. But sometimes officious bystanders are correct. Had his timely and accurate advice been heeded, the Council would not be in the embarrassing position in which it now finds itself. I consider that the Council owes the complainant both an apology and a redetermination of his complaint.

#### **Disposal**

34. I have come to the conclusion that it is appropriate to grant a confirmatory faculty in this instance. I do so despite my concerns about the Council's widespread and institutional ignorance of the relevant law and procedure concerning works affecting trees in closed churchyards. The errors and misconceptions seem to be deeply imbedded and widely shared. From the tree gang, to the various employees of the Council, through the investigator of the complaint, and the individual who sought to advance the Council's case before this court on the specious basis of a non-existent prior agreement, all showed a distinct lack of understanding of relevant principles of ecclesiastical law essential to the proper discharge of the Council's statutory duties. I am informed that the Council has learned from its mistake and put in place training and instruction so a repeat of this lapse is unlikely to occur. The opprobrium attendant upon this judgment will doubtless prove salutary.

35. Had List B approval been sought prospectively, it would very likely have been granted, and probably with a requirement for compensatory planting. I do not consider it appropriate formally to order such planting as a condition of a confirmatory faculty. However, I incline to the view that it would be a gracious gesture – both symbolic and healing – if the Council were to do so voluntarily. The precise detail can be agreed with the Archdeacon.

#### **Consequential orders**

36. The usual order for costs in a case such as this would be for them to be borne by the petitioner. However, I have not heard submissions on the matter from the Council. I will allow the Council seven days to make written representations on costs, in the absence of which my proposed order will take effect.

37. I direct that a copy of this judgment be sent to the complainant for information.