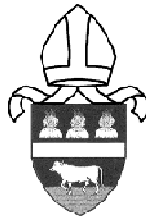


Neutral Citation No: [2020] ECC Oxf 1



Faculty – Grade II listed church – Yew tree – Removal or cutting-back*

Application Ref: 2019 - 043231

IN THE CONSISTORY COURT
OF THE DIOCESE OF OXFORD

Date: 26 January 2020

Before:

THE WORSHIPFUL DAVID HODGE QC, CHANCELLOR

In the matter of:

ALL SAINTS, MARCHAM

**THE PETITION OF THE REVEREND CANON RICHARD ZAHIR (Vicar) and
TAMSIN GILBERT and NEIL ROWE (Churchwardens)**

Determined on paper.

The following cases are referred to in the Judgment:

Re St Alkmund, Duffield [2013] Fam 158

Re St John the Baptist, Penshurst (2015) 17 Ecc LJ 393

Re St. Mary, Mapledurwell [2019] ECC Win 1

Re St Peter, Shipton Bellinger [2016] Fam 193

Re St Peter & St Paul, Aston Rowant [2019] ECC Oxf 3

Re St. Philip and St. James, Whittington [2017] Ecc Wor 1

JUDGMENT

1. By an online faculty petition dated 22 November 2019 the vicar and churchwardens of the church of All Saints, Marcham have applied for a faculty authorising the removal of a large yew tree which stands next to the south wall of the nave of the church. The church is located in a village about two miles west of Abingdon and stands in the centre of a large walled churchyard (closed since about 1900) within the Marcham Village Conservation Area. It is of pre-Conquest origin and was substantially rebuilt in 1837-8. In a notice dated 1 August 2019 the Head of Planning Services at the Vale of White Horse District Council indicated that the local planning authority had no objection to the felling of the yew tree to ground level. The proposed felling was endorsed at a meeting of the PCC (attended by 15 members) on 25 September 2019. The felling has been recommended for approval by the DAC who were satisfied that the work would not affect the character of the church as a building of special architectural or historic interest.

2. Since the church is a Grade II* listed building, this faculty application falls to be addressed by reference to the series of questions identified by the Court of Arches in the leading case of *Re St Alkmund, Duffield* [2013] Fam 158 at paragraph 87 (as affirmed and clarified by that Court's later decisions in the cases of *Re St John the Baptist, Penshurst* (2015) 17 Ecc LJ 393 at paragraph 22 and *Re St Peter, Shipton Bellinger* [2016] Fam 193 at paragraph 39). These are:

(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 not, have the petitioners shown a sufficiently good reason for change to overcome the ordinary presumption that in the absence of a good reason change should not be permitted?

(3) If there would be harm to the significance of the church as a building of special architectural or historic interest, how serious would that harm be?

(4) How clear and convincing is the justification for carrying out the proposals?

(5) In the light of the strong presumption against proposals which will adversely affect the special character of a listed building, 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?

3. The first of the *Duffield* questions cannot be answered without first considering the special architectural and historic interest of the listed church as a whole and whether this would be adversely affected overall by the proposed works. The court needs to consider whether the proposed works will adversely affect the appearance, the character, and the setting of this Grade II* listed church, not in the abstract, but rather as “a building of special architectural or historic interest”. When considering the last of the *Duffield* questions, the court has to bear in mind that the more serious the harm, the greater the level of benefit that will be required before the proposed works can be permitted; and that serious harm to a church listed as Grade I or Grade II* should only be permitted in exceptional cases. As this court recently observed in the case of

Re St Peter & St Paul, Aston Rowant [2019] Oxf 3 (at paragraph 7), when applying the *Duffield* guidelines, the court has to consider whether the same, or substantially the same, benefit could be obtained by other works which would cause less harm to the character and special significance of the church. If the degree of harm to the special significance which would flow from the proposed works is not necessary to achieve the intended benefit because the desired benefit could be obtained from other, less harmful, works, then that is highly relevant. In such circumstances, it may be unlikely that the petitioners could be said to have shown a clear and convincing justification for proposals which would, on this hypothesis, cause more harm than is necessary to achieve the desired benefit. When applying the *Duffield* guidelines, the court should bear in mind at all stages that the desirability of preserving the listed church, and all the features of special architectural or historic interest which it possesses, in their setting is a consideration of considerable importance and weight. The court has directed itself by reference to these expanded guidelines, which it bears very much in mind. The court is also required (by s.35 of the *Ecclesiastical Jurisdiction & Care of Churches Measure 2018*) to pay due regard to the role of the church as a local centre of worship and mission. In the present case, of course, these guidelines fall to be applied to an application to fell a yew tree in the churchyard, rather than to carry out works to the fabric of the church itself, so that the court must focus upon the effect of the proposal upon the appearance and the setting of the exterior of the church building.

4. The court must begin by identifying the significance of the church as a building of special architectural or historic interest. This is to be gathered from its listing description, which in the case of this church dates from February 1966. The exterior of the church is described as follows:

“Early C13 and C15: rebuilt, except tower, by William Fisher of Oxford in 1837. Coursed dressed limestone with ashlar dressings, except tower which is of uncoursed limestone rubble. Gabled stone slate chancel roof, and Welsh slate nave roof. Chancel with north chapel, wide nave and west tower. 1:5:1 bays. Early English and Perpendicular styles: remodelled in Perpendicular Revival style. Double-gabled east wall of chancel has 3-light Curvilinear-style window to left of early C13 stepped three-light lancet window. Each side wall of chancel has chamfered lancet and pointed doorway. Crenellated nave has label moulds over 2-light and central 3-light Perpendicular-style transomed windows to north: similar 3-light windows flank gabled south porch: very fine late C14/early C15 south doorway is cinquefoil-headed with independent leaf decoration in casement-moulded architrave. Early C13 three-stage west tower has original corner buttresses, one-light bell openings, slit lights and west lancet: unusual early C13 ashlar stair turret in north-east corner has slit lights and quatrefoil panel in gable top.”

The churchyard is not separately mentioned in the listing description. The listing entry includes a photographic image of the exterior of the south of the church, apparently taken in January 2003, which shows the yew tree in question, looking rather overgrown and apparently obscuring one of the windows in the south wall of the nave of the church. A late 18th century limestone chest tomb commemorating Mary Grove (died 1796) approximately 15 metres south-south-east of the south porch of the church has a separate Grade II listing. The yew tree is not shown on the photographic image of this chest tomb, which was also apparently taken in January 2003. The churchyard is not mentioned in the entry for the church at pages 380-381 of the 2010 edition of the volume for *Berkshire* in *Pevsner's Buildings of England*.

5. Helpful guidance on the approach to be taken to the felling of yew trees in a churchyard is to be found in two recent decisions of the Consistory Courts. The first is the decision of Mynors Ch in *Re St. Philip and St. James, Whittington* [2017] Ecc Wor 1. The petition in that case related to the proposed construction of a new extension to the north of the west end of the church to provide a meeting room, an accessible toilet, a store, and a kitchen, replacing existing facilities provided by a temporary portacabin in the churchyard. The decision turned on the impact the proposed extension might have upon a yew tree which was thought to be 700-750 years old. The Chancellor refused to grant the faculty because he considered that, whilst it was by no means certain that the new building would result in the loss of the yew, the benefit that would undoubtedly arise from the new building was not sufficiently great to justify the risk of its loss and the harm that would result if the yew were to be lost.

6. At para 47 the Chancellor noted:

“47 The best information as to old yew trees generally appears to be the website maintained by the Ancient Yew Group. This has no official status, and contains a variety of different lists and registers, some of which are not entirely consistent. In particular, it identifies three categories of yews, by age – “notable” (300 to 700 years old), “veteran” (500 to 1200 years old); and “ancient” (at least 800 years old). The overlap between the categories reflects the fact that the age of particular trees is often being reassessed, usually upwards. However, it would seem that the yew at Whittington falls squarely within the “veteran” category.

At paras 50-51 the Chancellor recorded that his researches suggested that “veteran” and “ancient” yews were significantly less numerous than Grade I or II* buildings. He was therefore satisfied that the yew at Whittington, however it was classified, was not only of very substantial age, but was also of considerable rarity value. He therefore considered that it merited protection as far as was reasonably possible. In the present case, the court has consulted the Gazetteer of ancient, veteran and significant yews maintained by the Ancient Yew Group and it notes that this yew tree at Marcham is not recorded therein.

7. The Chancellor set out his conclusions in *Whittington* at paras 83 and 84:

“83 It seems to me that the total loss of an ancient or veteran yew (as those terms are defined above) is equivalent to serious harm to a grade I or II* building and should only be exceptionally allowed. In the present case, I accept that it is by no means certain that the new building will cause the loss of the yew, but I consider that the risk of its loss, and the harm that would result if it were to be lost, are sufficiently great that they are not justified by the benefit that would undoubtedly arise from the new building.

84 I have therefore concluded that I am not willing to grant a faculty for this proposal.”

8. The second of the authorities is the decision of Ormondroyd Ch in *Re St. Mary Mapledurwell* [2019] ECC Win 1. There five yew trees, a conifer and a holly tree had been felled without the authority of a faculty. There had been an application for a faculty using the Online Faculty System. The petitioner (a churchwarden) had taken the approval of the Diocesan Advisory Committee to mean that a faculty would be granted. By the time the Chancellor visited the churchyard to inspect the trees, they had been removed. The Chancellor granted a confirmatory faculty, subject to a condition that new native trees should be planted in the churchyard.

9. The Chancellor began his judgment (at para 1) by noting that:

“It takes many years for a tree to grow to maturity such that the trees in our streets and churchyards are a testament to the previous generations who planted them.”

The relevant part of the Chancellor’s judgment is to be found at paras 8 to 12, which I reproduce in full:

“8 As regards churchyard trees, it should not be assumed that just because any relevant consents have been obtained from the local authority (as they were in this case) that a faculty will automatically be granted. Where trees in a conservation area are concerned, the local authority will simply consider whether the trees provide sufficient amenity value to warrant the making of a tree preservation order.

9 This court, on the other hand, will look at matters in a broader perspective which acknowledges that trees are living parts of God’s good creation, which have value for that reason regardless of their utility to human beings. This is particularly so if, as appears to have been the case here, the trees provide a habitat for other species. More specifically, trees may form an important part of the character and appearance of the churchyard. Yew trees in particular have long been associated with churchyards (although the reasons for this association are somewhat obscure) and the presence of mature yew trees in a churchyard is accordingly of some historical and cultural value in itself. I have already mentioned, above, the link that mature trees provide to past generations who have cared for the site.

10 For all these reasons the court will require clear and convincing justification if the felling of churchyard trees is proposed, together with an explanation of why pruning is not an acceptable alternative. It will be sensible, if local authority consent is also required, for the two applications to be progressed simultaneously. Had that been done in the present case, it would have avoided the perceived need for urgency towards the end of the process.

11 I must now determine the substantive petition. As I have already indicated, it is something of a moot point whether or not permission is granted because the trees have gone and nothing I say will bring them back. Not having seen the trees in situ, I am also not able to second guess what my decision would have been had I been considering this matter prospectively. From photographs, it seems that the conifer (apparently a non-native species) was somewhat unsightly and little may have been lost from its removal. The yew trees (also described in documents presented by the petitioners as a multi-stemmed bush) and holly do appear to have been valuable in various ways. The concern

with them was that they were in the wrong location, too near either to the church or to a gravestone and the boundary wall respectively. I was not presented with any evidence to demonstrate that safe retention of the trees would have been impossible or unduly difficult, however.

12 In all the circumstances, I am minded to grant a faculty to regularise the situation. However, I will also impose a condition that three new native trees must be planted in the churchyard. This will compensate for the loss of trees of value, and the new planting can be carried out in locations which are more appropriate in the long term. In that way this unfortunate case will hopefully leave a positive legacy for the future.”

10. The present case is clearly distinguishable from the two decisions cited above. Unlike *Whittington*, the court is not here concerned with an ancient, a veteran, or even a notable yew (as to which very different considerations are engaged). Unlike *Mapledurwell*, the court is looking at the matter prospectively and, happily, has not been presented with a *fait accompli*. Nevertheless, the guidance in the latter case holds good: the court requires a sufficiently clear and convincing justification for the felling of this established yew tree, together with a satisfactory explanation of why pruning is not an acceptable alternative.

11. In support of their petition, the petitioners say that the yew tree could potentially cause problems with the church building over the course of time if it is not dealt with now. They rely upon the statement at para 9.2 of the church architect’s most recent (February 2019) Quinquennial Inspection Report that the yew tree (which was wrongly identified in the report as a large *leylandii* bush) was “too close to the walls” of the south side of the nave and the recommendation that it should either be “pruned back or removed” within the following twelve months. The petitioners have applied to the local planning authority for the appropriate conservation area consent to remove the yew which has confirmed that it has no objection to this course. The petitioners have also obtained a quotation from a tree surgeon for the cost of removing the yew tree to ground level and grinding out its stump. Whilst the petitioners acknowledge that the yew tree could be cut back, they say that this would not look particularly attractive so they would prefer to remove it instead. Due to the size and position of the yew tree, they claim that it could provide good coverage for anyone looking to access the roof (and its lead), which the petitioners say they would obviously wish to avoid. The petitioners do not believe that the removal of the yew tree will harm the significance of the church building or the churchyard. If anything, they say that it might improve the view of the church and increase the light inside the church building. There are also a number of grave stones that are completely covered by the yew tree. The petitioners say that care will be taken to avoid any damage to the affected memorials and graves (as explained in an email dated 8 January 2020 to the registry from one of the petitioners).

12. Upon receipt of the application through the Online Faculty System, the court was satisfied that the petitioners had demonstrated a real need to carry out works to cut back the yew tree so as to reduce its height, size and shape and that such works would not harm, but rather would enhance, the setting, the appearance and the significance of the church building, its

churchyard and the graves and memorials contained within it. However, having viewed the helpful and informative photographs of the yew tree and its surroundings, both at ground level and from the air, which the petitioners had uploaded onto the Online Faculty System, the court had formed the provisional view that the complete removal of the yew tree would cause some harm to the appearance, the setting and the significance of the church and its churchyard. The court had concluded that such harm would be slight, but it was concerned that it could be avoided if the works were confined to cutting-back the yew tree to a similar height, size and shape as the tree (apparently a lilac tree) which stands next to the south-west corner of the church tower. The court therefore caused the registry to email the petitioners, stating that the court had given their petition for the proposed removal of the large yew tree next to the south wall of the church its preliminary consideration and that its provisional view was that the court should grant a faculty authorising the cutting-back, but not the complete removal, of the yew tree, and explaining the court's reasons (as set out above). In the light of this, the registry inquired whether the petitioners would be content to cut back the yew tree and, if not, whether they would wish to produce any further evidence or to make any further representations. The email from the registry concluded by recording that the court appreciated the petitioners' wish to carry out works to the yew tree before the end of January, so an early response would be appreciated in order that the matter could move forward.

13. The petitioners responded about a week later stating that they understand the court's view and were not seeking to be "awkward" but, following a discussion with their tree surgeon, they still asked the court to consider permitting the complete removal of the yew tree. Their reasons were that given the size of the yew tree, to cut it back to the size of the lilac in the south-west corner of the churchyard would leave a brown "twiggy" bush with no green leaves. This would, in the opinion of the tree surgeon, take a good three years to recover, and it would then require pruning at two-yearly intervals. The petitioners consider that this would adversely affect the overall look of the church and its surroundings more than the complete removal of the yew tree. To cut it back to a point where there were still green leaves would not be worth the cost as it would still remain very large. To leave it in situ would risk further damage to the graves and the memorials within the area covered by the yew tree. There were said to be a number of other yew trees within the churchyard, so the removal of this one would not leave the churchyard short of them. Two photographs were provided showing a number of such yews.

14. In the light of the further information provided by the petitioners, the court is satisfied (albeit with some personal reluctance) that they have made out a sufficiently clear and convincing justification for the felling of this established yew tree, together with a satisfactory explanation of why pruning it back is not an acceptable alternative. The court does not consider that on a question essentially of aesthetics and appearance, it should override the clear preference of the petitioners for the complete removal of the yew, as opposed to its pruning back, when this less drastic option has been expressly raised by the court with, and rejected by, the petitioners, and their preferred course has received the endorsement of the PCC, the LPA, the DAC, and the petitioner's appointed tree surgeon. Although the church's architect had recommended either the pruning back or the removal of the tree, he had wrongly identified it as a leylandii rather than a yew; and the petitioners have the support of their tree surgeon for the latter rather than the former option.

15. The court has considered the imposition of a condition requiring the planting of a replacement yew tree at some more appropriate location in the churchyard, but having seen the most recent photographs showing other yew trees in the churchyard, the court is satisfied that the planting of a replacement yew would not enhance the appearance of the churchyard unless it were to be the subject of a regular programme of pruning which the court considers would place an unreasonable and a disproportionate burden upon the PCC.

16. For these reasons, the court will grant a faculty on the following conditions:

1. The work to the tree is to be carried out by a qualified tree surgeon.
2. The work must take place outside the nesting season which starts in February and ends in September. It is an offence under the Wildlife and Countryside Act 1981 to disturb birds while they are nesting, building a nest, in or near a nest that contains their young.

The Worshipful Chancellor Hodge QC

The Third Sunday of Epiphany 2020





