

Neutral Citation Number: [2016] ECC Swk 14

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

IN THE MATTER OF ST CHRISTOPHER'S CHURCH, WALWORTH (PEMBROKE COLLEGE MISSION)

AND IN THE MATTER OF A PETITION BY REVD DAVID EVANS, JEAN-BAPTISTE BAZIE AND BABATUNDE OYEMADE

JUDGMENT

Introduction

1. This is a petition dated 31 August 2016 by the Revd David Evans, Jean-Baptiste Bazie and Babatunde Oyemade, the Vicar and Churchwardens respectively of St Christopher's Church, Walworth. By it they seek permission for the installation of a pre-fabricated timber framed building into the community garden at the church.
2. At a meeting held on 12 July 2015, the PCC of St Christopher's resolved unanimously to apply for a faculty for the works.
3. Planning permission for the proposal was granted on 3 February 2016.
4. On 18 July 2016, the DAC issued its Notification of Advice. It recommended the works, subject to provisos. I shall come to provisos in due course.

Background

5. Walworth is an ancient settlement and is referred to in the Domesday Book. By the end of the nineteenth century it was entirely built up and it was here that Pembroke College, Cambridge founded a Mission in 1885. The building for the Mission was designed in an Arts and Crafts style by ES Prior and was initially constructed in 1891-2. Building ceased at that time at first floor level and it was completed in 1908 to slightly different designs under the supervision of H Passmore. It is listed Grade II.
6. The building is of two stories, with a hall at ground floor level and what we would now call the "worship area" on the first floor above. When in 1995 a new benefice and parish of St Christopher, Walworth was created, the Mission became the principal church of a new parish¹. The church shares the use of the building with the Mission, and the Vicar of the parish is also the Warden of the Mission. East Walworth is among the 6 % most deprived areas of England and, as the Statement of Needs puts it, the Church and Mission do important work with people *marginalised by poverty, shallow horizons, homelessness, addiction or disability*.

The proposal

7. The site on which the building stands lies between Tatum Street and Halpin Place and the building occupies most of that site. There is no churchyard. However there is an open area – originally

¹ It was brought under the faculty jurisdiction by an order of the Bishop made in 1999.

perhaps just a service yard - adjoining the building on the Halpin Place side. This has been turned into a community garden. In 2015 the garden was used by nine community groups both as an attractive place to meet and for gardening sessions as part of health and wellbeing projects. Obviously use of the garden is constrained in the winter. The proposal is to introduce into the area an enclosed “garden room”² which will be heated. The room, which will contain sitting out chairs, will facilitate the use of the garden; at times of inclement weather it will still be possible to enjoy the ambience of the garden visible through its large glass windows. The building will be prefabricated and sit on concrete pads. This has the effect that it is raised 6 inches (150mm) above the ground. In turn this means that, unless further provision were made, it would not be accessible to those in wheelchairs. It is proposed to make it accessible by means of the provision of a portable ramp, which will be kept folded within the building. In practical terms, the building is used for group sessions, so there will always be help on hand to put the temporary ramp in place when it is needed.

8. It would have been possible for an architect to design a building which would not have required the access to be raised above the ground. To do this would however have led to considerable delay and significant extra expense; more specifically, I am told that it is likely to entail alterations to the ventilation system of the existing boiler room and to the drainage arrangements to the garden.
9. It would be possible to provide a permanent ramp, but this would require digging footings in the garden and the permanent loss of grassed space.
10. The proposal will cost of the order of £25,000 and is to be funded by a grant from the London Borough of Southwark. It cannot be certain that that funding would be available for a more expensive project.
11. Although the DAC recommended the proposals, it commented on what it described as the unsatisfactory temporary nature of the accessibility of the garden room. It said:

Advisers considered that the temporary solution may not be Equality Act compliant, and the DAC's recommendation is contingent on the PCC putting in place a plan to keep accessibility under review and aim towards full Equality Act compliance in the future.

12. It also commended the Diocesan Accessibility Adviser's guidance on the diocesan website.
13. Its recommendation was that a faculty be granted subject to two provisos. One was that the work be completed to the satisfaction of the Church's Inspecting Architect. This does not, of course, present any difficulty. The second was:

The PCC should keep the issue of accessibility to the garden premises under review, and make plans for the future for full compliance with the Equality Act 2010 (in particular as/when any future landscaping of the garden is being planned), having regard to the written guidance from the diocesan accessibility adviser (as available on the diocesan website).

² It will be 4.9m wide by 3.1m deep and 2.5m high (16 ft x 10 ft x 8 feet).

Is the proposal compliant with the Equality Act 2010?

14. The DAC are not lawyers; I am. It seemed to me that the issue of Equality Act compliance having been raised, I was bound to consider the matter. If I form the view that the proposals are not Equality Act compliant, I do not think that I should grant a faculty for them.
15. I hope I do not unfairly categorise the Petitioners' position as impatience with the concerns that have been raised about the application of equality law. From their point of view they have achieved a common sense solution to providing a new building at an affordable cost to enable the Church to expand its important work in the parish; the issue of access for those whose mobility is impaired being addressed by an equally common sense solution, whereby access by a ramp will readily be available when required.
16. However, common sense is a notoriously uncertain guide, potentially meaning no more than what the person relying on it considers ought to be the case. Moreover, as we shall see, the duty contained in the Equality Act 2010 is not simply to make reasonable provision for the disabled but not to discriminate against the disabled, which is rather different (even though the duty not to discriminate may include the duty to make reasonable provision). In any event, anyone who has had to construe the terms of the Equality Act 2010 and the Statutory Guidance made under it will appreciate that those provisions are very complicated. Compliance with those provisions should not be taken for granted.
17. I think that it is helpful to begin with the *Disability Inclusion Policy* of the Diocese of Southwark, adopted in 2013. It begins with the following mission statement:

We are made in the image of God, and as such all people are of equal importance and significance. In God there is no distinction: male and female, Greek or Jew, bond or free, disabled or able. We all, irrespective of our status have privileges and responsibilities in the practice and outworking of our faith. Just as there is a "bias to the poor" so there is a biblical imperative to have corporate responsibility to those on the margins of society and within the structures of our church.

The policy enshrines the principle that all people employed or accessing services offered by the Diocese of Southwark are treated equally.

18. If "equally" is taken to mean "in the same way", it will be immediately apparent that what is proposed in the present case involves a departure from that policy.
19. I am here considering policy and not law. However law itself will generally incorporate a policy and, where it does, it is useful to understand that policy as an aid to interpretation. The policy of the law relating to the treatment of the disabled was first enunciated in a church case, namely in *In re Holy Cross, Pershore*³. Mynors Ch said that that policy was

*... to provide access as close as it is reasonably possible to get to the standard normally offered to the public at large*⁴.

20. The words of Mynors Ch were endorsed by the Court of Appeal in *Ross v Ryanair Limited*⁵ by the Court of Arches in *In re Holy Trinity, Eccleshall*⁶. Unsurprisingly, this reflects the principle

³ [2002] Fam 1 (Consistory Court of the Diocese of Worcester).

⁴ See paragraph 105.

enunciated in Diocesan Policy but it will be noted that, as translated into law, the principle is qualified by the phrase *as close as reasonably possible* and the requirement is to provide access of the same **standard** (i.e, not necessarily the **same** access).

21. However if the **policy** of the law is as articulated by Mynors Ch, its **actual expression** is not in terms of a positive duty to provide access of any particular standard but rather a negative duty not to discriminate.
22. That negative duty is contained in four particular provisions of the Equality Act 2010, namely sections 13, 15, 19 and 29. These sections involve duties not to discriminate against those who have certain “protected characteristics”, one of which is disability. Relevant to the context in which I am considering the law, discrimination involves treating a disabled person less favourably than a person who is not disabled.
23. The most particular of the duties is that contained in section 29 of the Act. Sub-section (2) of that section provides that:

A service-provider (A) must not, in providing the service, discriminate against a person (B)—

(a) as to the terms on which A provides the service to B ...
24. Note that the duty is not to discriminate - that is, as explained, not to treat a person who is disabled less favourably than a person who is not disabled as to the terms on which a service is provided to him. It might not be obvious that a person who is responsible for a church building is a “service provider”; he or she is a service provider because he or she is providing access to a place that members of the public are permitted to enter⁷.
25. A service-provider is under a duty to make reasonable adjustments to address any situation that involves discrimination by virtue of sub-section (2). It is implicit that if a service-provider makes those reasonable adjustments then he will have discharged the primary duty not to discriminate⁸.
26. It is well known how this provision operated both generally and in relation to churches. Many churches contained access via steps. Sometimes it proved possible to replace those steps or so to alter them as to incorporate a ramp. Very often however, particularly in the case of buildings which were listed, it did not prove possible to do this. In these circumstances, churches have provided alternative access or made provision for a temporary ramp to be provided. This reflects Diocesan Policy as well as law. Under the heading “Implementation”, that policy gives the following guidelines for good practice:
 -) where possible all should be able to access the building independently
 -) where possible there should be free movement around the building for someone independently to use a wheelchair or other aids to assist their movement
 -) where possible steps and obstructions should be removed. Full participation in all aspects of worship is central to the expectation of the worshipper.

⁵ [2005] 1 WLR 2447; see per Brooke LJ at paragraph 32.

⁶ [2011] Fam 1 at paragraph 68. Note that *In re Holy Cross, Pershore, Ross v Ryanair Limited* and *In re Holy Trinity, Eccleshall* were cases on the Disability Discrimination Act 1995. The relevant provisions of that Act have been incorporated into the Equality Act 2010.

⁷ In *In re All Saints’, Sanderstead* [2012] Fam 51, I held that a duty under section 29 did not arise in respect of the administration of the sacrament of Holy Communion. That, however, was a rather special case.

⁸ The Statutory Code of Practice seems to be drafted on this basis; see, in particular, paragraph 7.39 (no breach of law in the rare circumstance where no reasonable adjustments possible).

27. The effect of this is that if I postulate that the building that I am considering in the present case had been erected before either the Disability Discrimination Act 1995 or the Equality Act 2010 had come into force, the church would have been bound to make reasonable adjustments to address the fact that it was not accessible by those who were disabled (if it had not done so before). It would, on the face of it, have made provision for a temporary ramp (and, in the circumstances, for nothing more). Thus it seems to me that a temporary ramp represents the minimum provision that must now be made. It needs however to be considered whether better provision should be made. This is for two reasons. First, the building I am concerned with is not a pre-existing building. A new building could be provided (albeit at a cost) that did not sit 6 inches above the ground. Second, the view might be taken that a permanent ramp should be provided, albeit with the loss of part of the garden area⁹.
28. Pausing at this point, it will be appreciated that access to some churches at the moment remains unsatisfactory – putting it bluntly, it does discriminate against the disabled. But it is the best that can be done in the circumstances – reasonable adjustments have been made. However the fact that there are historic situations which involve unsatisfactory access is not a reason for creating new situations that are unsatisfactory. The key question it seems to me in the present case is whether the proposal **is** unsatisfactory. By this I mean whether it discriminates against the disabled: treats a disabled person using the premises less favourably than one who is not disabled. To remind myself, the legal requirement is not to provide equal or the same access but access that is not less favourable. I can see that the provision of different access might offend the dignity of disabled people or might be inconvenient (and therefore be considered discriminatory) but this is not **necessarily** the case.
29. If I considered that the different provision here proposed did discriminate against disabled people and thus did not comply with the Equality Act 2010 then, as I indicated at paragraph 14 above, I would not grant a faculty for it. However, on the material before me and on balance, I am not persuaded that it does discriminate. I consider that the **different** provision that it makes for those who are disabled is not **disadvantageous** in the circumstances of the case. No doubt the Vicar or whoever is organising a particular meeting will know in advance whether the ramp will be needed; and for meetings where that information is not available, the ramp could be put down in advance.
30. In the light of my conclusion set out at paragraph 29 above, I direct that a faculty should issue. In terms of a possible condition, I think that a general requirement on the PCC to keep the access arrangements under review will be best. It should be noted that the duty to make reasonable adjustments is a continuing duty. The Statutory Code provides:

Service providers should keep the duty and the ways they are meeting the duty under regular review in light of their experience with disabled people wishing to access their services. In this respect it is an evolving duty, and not something that needs simply to be considered once only, and then forgotten. What was originally a reasonable step to take might no longer be sufficient, and the provision of further or different adjustments might then have to be considered¹⁰.

⁹ It seems to me that it must be relevant to any complaint about access for those who are disabled that, if it be the case, the opportunity was not taken to build in such a way as to avoid a less than ideal access. In these circumstances, what might otherwise have been reasonable adjustments might not be so regarded.

¹⁰ See paragraph 7.27.

31. Experience could demonstrate that the provision was not satisfactory which would lead to a requirement for a modification. On the face of it, this would involve modifications to provide access at grade or the provision of a ramp on a permanent basis, with a loss of garden area.
32. The works shall be completed to the reasonable satisfaction of the Church's Inspecting Architect.
33. I should add two footnotes.
34. First, the Petitioners will appreciate that my view of the matter is not determinative. Although I would intervene by not granting a faculty if I thought that the proposal did offend the Equality Act 2010, I am not seised directly of the legal question of whether there is or is not compliance with the Act¹¹.
35. Second, it is appropriate to mention the position under the Building Regulations. Because the building is less than 30 square metres in area, the Building Regulations do not apply¹². If they did, the requirement is that

Reasonable provision must be made for people to

(a) gain access to; and

(b) use

(c) the building and its facilities¹³.

36. The Objectives set out in the Regulations provide

2.1 The aim for all new buildings is for principal entrance or entrances and any main staff entrance, and any lobbies, to be accessible.

2.2 Where it is not possible e.g. in an existing building, for the principal or main staff entrance or entrances to be accessible, an alternative accessible entrance should be provided.

Accessible means that people, regardless of disability, age or gender, are able to gain access¹⁴.

37. I imagine that in most cases where new buildings are provided, the terms of the Regulations will be met and, being met, will in most cases ensure access that is the same for both the disabled and those who are not disabled. It will only be occasionally that issues under the Equality Act 2010 remain to be considered.
38. Accordingly it may be that the issues that I have considered in some detail in this judgment will not arise very often in practice. What I have said will I hope nonetheless be helpful to the Petitioners and perhaps to others who have to grapple with these issues. I can understand the impatience of the

¹¹ Similarly the planning authority in deciding whether to grant planning permission will have considered the position under the Equality Act 2010, but the grant of such permission does not mean that there necessarily is compliance.

¹² See Regulation 9 and Class 6 of Schedule 2 to the Building Regulations 2010 (SI 2010 No 2214).

¹³ M1 of Part M of Schedule 1 to the Building Regulations 2010.

¹⁴ See paragraph 0.26 Part M.

Petitioners to get on with the project which is generally such a good one and aimed at assisting the Church's mission to those who are disadvantaged. I am sorry if they may feel that there has been undue delay in getting to the stage where permission is at last being granted. But if nothing else I hope that this judgment has demonstrated that, although this petition is for works which are intrinsically modest, the issues arising are both very important and also far from straightforward.

PHILIP PETCHEY
Chancellor
15 November 2016