

In the Consistory Court of the Diocese of Newcastle
In the matter of the Church of Newcastle, St George

JUDGMENT

1. The Court is asked by the petitioners to vary the terms imposed by my predecessor, Chancellor Euan Duff, on 5 April 2020 when he gave judgment reported at [2020] ECC New 2 granting a faculty in response to a petition in respect of St George's Church, Jesmond, the petition being pleaded in these terms:

“The erection of a single storey extension at the north-west corner of the Church adjoining the Memorial Garden”.

2. That accurate and concise description belied the scale of what was proposed (then estimated to cost in excess of £387,000) which the judgment went on to set out as follows:

“The extension..... consists of a small complex accessed through the doors at the north west corner of the church (which are not currently used) leading into a 30 square metre multipurpose lobby area for kitchen and recreation purposes with a servery and store room off, male and female toilets and an accessible toilet. Those are immediately behind and to the east of the doors and to the west is a 36 square metre Garden Room. The extension has proposed new paved access to the car park at the east end of the church, along the north side and an exit from the Garden Room into the Memorial Garden. A new stone boundary wall on the north side, west of the Garden Room is proposed.”

3. I need not rehearse the issues he then considered other than to note that the level of objection to the proposals was significant resulting in the Chancellor

describe the petition as giving rise to “by far and away the most difficult case in which I have had to give a judgment”.

4. Without setting out his reasons or what follows in detail, conditions were imposed as part of the grant of the faculty as follows:

46. “In the light of the extent of the scheme I will grant a period of 3 years for the work to be completed¹, although I note that the current grant of Planning Permission² requires commencement of the work prior to 28 February 2022. That may need addressing in due course and an extension sought.

47. I will make it a condition of the grant of the faculty that no work is to be begun nor any contract for work entered into until all proper funding is in place and a further condition that prior to any work commencing the DAC are to be provided with plans to ensure the proper safeguarding and integrity of that area of the Memorial Garden which contains interred remains and to give approval to those plans before the commencement of any work.”

This court surmises that the thinking behind the condition in paragraph 47 was to ensure that the petitioners did not embark on such a major piece of construction work without the certainty of knowing that funds were available to pay for its completion thus removing the risk of the development being a building site for an extended period of time or worse.

5. The issue that now arises, with the imminent expiry of the secular planning permission, is that “all proper funding” is not in place leading the petitioners to ask the court to relax that condition. Simultaneously, consideration is being given to submit an application to the local authority for an extension to the planning permission that will expire on 28 February 2022, albeit if they *commence* the works before that date, as I understand it, an extension may not strictly be required.

¹ Thus expiring on 4 April 2023

² The secular planning permission granted by Newcastle City Council is dated 1 March 2019 and noted that ‘The development to which this permission relates shall begin not later than the expiry of three years beginning with the date of this decision.’

6. It is perhaps not surprising that this situation has arisen if note is made of the date of the original petition which was about two weeks into the first national lockdown. The petitioners, quite simply, have not been able to embark upon the fund raising anticipated due to the 2020 public health crisis. Although he could not have foreseen its scale and duration, Duff Ch. anticipated issues when he said:

“45.I have also considered whether the current closure of churches and lockdown caused by the Covid 19 crisis ought to play any part in my granting a faculty for a scheme of this extent, but I consider that it is important that positive plans for the future of the Church remain in place and should not be deflected by the current crisis, even though it is of the utmost gravity. Indeed, it may be that some would argue that at this time the Church should be even more vigorous in proclaiming its message.”

That reasoning is noted and, in this court’s judgment, remains as valid in November 2021 and it did in April 2020.

7. There are three other conditions of planning permission namely:
- (i) The submission and approval of further details;
 - (ii) The provision of samples of materials to be used for the external surfaces of the extension before work can start ‘above ground’; and
 - (iii) The preparation of a tree management plan.
- In contacting the Secretary to the DAC, the point was made by the petitioners that none of these conditions are onerous and, on compliance, the only impediment to commencing work is the term of the faculty requiring all funding to be in place.
8. The petitioners point out that, contrary to reasonable expectations at the time the petition was presented, it has been impossible to carry out the necessary fund raising since the time that the faculty was granted. Accordingly, they ask that the condition previously imposed be relaxed.
9. In that event, a proposal has been made that there is work that could be commenced in the near future in anticipation of the major works that would be

of overall benefit in the short term. Thus the boundary wall between the Garden of Remembrance and the adjoining Northumberland Tennis Club, necessitated by pressing need to replace the current fence which has partially collapsed³, could be constructed now with immediate benefit to the ambiance of the Garden and the tennis club (thereby fostering goodwill with users of both). Likewise, the foundations for the lavatory area only, themselves adjacent to the wall, could be dug, to be backfilled and covered with a temporary subbase likely satisfying the requirement of having commenced work and obviating the need to apply to extend the planning permission.

10. On receipt of this request to vary I raised a number of questions for the petitioners to answer prior to making a decision:

- (i) What is the current estimated cost of the project overall?
- (ii) What funds are presently available?
- (iii) How long, realistically, is it considered it will take raise the balance, leaving to one side what may be described as windfalls such as legacies and presently unanticipated gifts?
- (iv) What is the basis for thinking that the timescale suggested is solid as opposed to aspirational?
- (v) Is it confirmed that no borrowing is anticipated?
- (vi) Arrangements for covering up partially completed work?
- (vii) Details of the areas subject to visual or other impact?
- (viii) The likely duration of such works, if permitted, and how long before work can resume?

11. I am grateful to Mr Derek Nicholson, whole site plan committee member, for his detailed response on behalf of the original petitioners and a new church warden.

- (i) With inflation alone the cost has risen to £431,000 plus fees, £465,000 net of VAT;

³ A significant section of it did completely collapse due to Storm Arwen on 26/27 November.

- (ii) There is no funding stream in place but the general building fund holds £58,000 from which the boundary wall could be funded. There is an associated charity that has funds to which a request for assistance would be made and it is noted that approximately £25,000 has already been expended on fees;
- (iii) Excluding windfalls but relying on a professional fundraiser who has already been approached, it is thought that the funds could be raised (via grants, fund raising, legacies and one off donations) within 24 to 30 months and, in answer to (iv) he cites past experience, including the raising of funds for the tower repairs recently carried out. The size and nature of the congregation is one of the strengths in this regard;
- (iv) There are no plans to borrow at all, albeit that is not ruled out as an option to fund a modest shortfall;
- (v) The main visual impact will be the new wall: if foundation work for the lavatories was undertaken, it would be hidden and photographs show the nature of the area, between the northern elevation of the church and the boundary fence with the tennis club which is not presently particularly sightly in any event (compost heaps, old tarmac and concrete slabs);
- (vi) The new wall would provide an immediate benefit to parishioners, the neighbours and the general public who use the Garden of Remembrance as well as addressing an existing health and safety concern;
- (vii) The expectation would be to commence the main works within 18 to 24 months of the completion of this initial work. Consideration is also being given to dividing the main construction work into two phases (the link and lavatory first, followed by the Garden room itself).

12. Procedurally, the situation that has arisen is governed by the Faculty Jurisdiction Rules 2015. Rule 20.3 provides as follows:

Amendment and setting aside in other circumstances

20.3.—(1) If it appears to the court just and expedient to do so, it may order that any faculty, judgment, order or decree—

(a) be set aside (either in whole or in part); or

(b) be amended.

(2) If the court is considering exercising the power conferred by paragraph (1)(b) in a manner that would constitute a substantial change in the works or proposals already authorised by faculty the court must give such directions as to the giving of notice to the public and to such other persons and bodies as it considers just.

13. Having questioned the impact of what is proposed, on consideration of r.20.3(2), it does not appear that the court is being asked to sanction 'a substantial change in the works or proposals already authorised by faculty' such as to trigger the requirement for notice to the public and others. No change is proposed to either the works or proposals: rather, what has changed relates to timescales and the manner in which the works already authorised are to be carried out. Of course, Duff Ch. had good reason for imposing the condition in question but, whilst he was expressly aware of the public health crisis caused by Covid-19, it is reasonable to assume that, like most people, he did not anticipate just how far reaching its consequences were likely to be. Regardless, he stressed the likely added importance of what he was authorising for the good of this church and its mission.

14. In the court's judgment, there is obvious merit in addressing the issue of the boundary wall for the reasons identified. Although part of the faculty, this is a stand alone piece of work that is not in any sense dependent on the major project. Its appearance and overall integrity is not linked to that project. There is a pressing need to replace the fence which has now significantly collapsed. The church is in possession of funds sufficient to complete the work. The court has no hesitation in lifting the condition set out in paragraph 47 of the judgment of Duff Ch. with regard to the boundary wall.

15. The more significant issue is proposal to commence the major works, albeit to a very limited extent, thereby preserving the existing planning permission. The Consistory court is invited to sanction the use of what is really a device, namely permitting part of the foundations to be laid, so as to enable the petitioners to meet the civil requirement that work has started in accordance with the time

limit the planning authority imposed. It noted that there is secular authority to the effect that this can be achieved by taking what might be thought to be surprisingly modest steps, such as digging a trench for foundations. Having visited the area where it is proposed that this might happen, it is accepted that there will likely be little or no visual detriment. However, there are other factors:

- (i) The court questions whether, post Covid, the mere updating of estimates for inflation affords it a realistic view of the likely cost. It is common knowledge, and the court's own experience, that the near universal shortage of many commonly used building materials, timber is a stand out example but by no means the only one, has resulted in rampant materials inflation such that tradesmen are revising previously accepted estimates radically and to sums significantly in excess of inflation as measured by either RPI or CPI. The court is therefore very sceptical as to whether the proposed new costings are in fact realistic and may represent a marked undervalue;
- (ii) The court was surprised to learn that, against even the original estimate, the available funds are so limited. They are, of course, the church's general building fund and, it is assumed, this fund was not intended to be depleted in its entirety as one imagines a minimum reserve is expected to be retained to deal with more routine building work as and when it arises. Even if the whole was to be expended and the inflationary updated estimate accepted, it represents just over 13% of the sum needed, once the £25,000 already expended on fees is taken into account. This is an exceptionally low base from which to start;
- (iii) The court further notes the optimism that the petitioners have for a 24 to 30 month funding campaign based on past experience and suggest that, if permitted to put in the limited footings at this stage, the main works could commence within 18 to 24 months. That campaign would include applications for grants as well as requests of parishioners who, in the main, live in an affluent area. The court also acknowledges that windfalls and legacies should not be ignored but are, by their nature, difficult to anticipate;

- (iv) One hopes, of course, that such optimism is well placed. As has already been noted, that within the parish this has been a very controversial scheme and the petition was itself subject to very significant objections, a factor that cannot be ignored in considering whether past experience of fund raising is a good guide to future performance.

16. Separately, the petitioners appear to be revising their thoughts to this extent: they are currently evaluating an option whereby the construction takes place over two phases, the first being the link and lavatory construction and the second the Garden room. The response to the court's questions do not appear to contemplate phase two never being reached, only that it may take longer than hoped. There is no application to vary in that regard and so it is a hypothetical position at the moment. Were it to bring with it the chance that phase two might not be reached, the court would need to re-evaluate whether its decision in respect of r. 20.3 would still apply: it could be said that dividing the phases up could bring about the risk that a substantial change in the proposal covered by the faculty was contemplated. However, that is not before the court and no worked out plan is available.

17. Drawing all of these matters together, having regard to the likely purpose of the condition in the first place the court is simply not satisfied that in respect of the main project, from such a low financial base, it would be proper to grant the petitioners the relief they seek. The court is sympathetic to the issues facing the petitioners created by Covid and will extend the time for the work to be completed to three years from today's date but, to lift the condition as to funds being in place before work commences, whilst it cannot be said that this may never be permitted, there must be a balance to be struck in terms of there being a reasonable proportion of the funds available before embarking on the intended work. It is not persuaded that the device of beginning the work in a very modest way is a proper basis for this court, in effect, to extend the civil permission granted by the planning authority and, particularly in uncertain times, it exposes the petitioners and, more importantly the parish, to exactly the situation against which Duff Ch. was seeking legislate. It is not helpful to identify any given sum that might have brought about a different outcome and

the court is not minded to make hypothetical suggestions by reference to phases as none are currently worked up and, footings aside, would not presently be affordable in any event. It is not difficult to anticipate that thought would need to be given to the integrity of the first phase if the second was to be very seriously delayed, or more significantly, never to materialise, hence the reference to r. 20.3.

18. Whilst the court would have to consider any subsequent application on its merits, in the event that the petitioners seek to propose a different project whereby the work is completed in phases, the court would need to see each phase properly worked up to include consideration of the overall impact of each in the widest sense on the church and the project as a whole. It would also expect funds for the immediate phase to be in place and proposals as to how and over what period it could be expected that a second or any subsequent phase could be. Furthermore, the court would, as a precondition to an application to vary, expect the petitioners to have satisfied the DAC as to the suitability of any revised proposals which, it seems to the court, will fall to be considered under the terms of r.20.3 to which attention has already been drawn.

19. The court accepts that circumstances have been wholly unprecedented since the judgment was given in April 2020. For the reasons given:

- (i) permission is granted to the petitioners to proceed with the construction of the boundary wall subject to the details being provided to and signed off by the DAC, the condition set out in paragraph 47 of the judgment of Duff Ch. attaching to the faculty being relaxed to that extent;
- (ii) permission to relax the same condition in respect of the main project is refused but the time by which the work is to be completed will be extended by a period of three years from today's date to 29 November 2024.

Simon Wood

Chancellor

29 November 2021

