

Neutral Citation Number: [2022] ECC Swk 5

IN THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK

IN THE MATTER OF THE CHURCH OF ST SAVIOUR, CROYDON

AND IN THE MATTER OF AN INTENDED PETITION BY SHERI YUSUF AND REDVA WILLIAMS

AND IN THE MATTER OF AN APPLICATION FOR AN INTERIM FACULTY

JUDGMENT

Introduction

1. This the application of Sheri Yusuf and Redva Williams, the churchwardens of Holy Saviour, Croydon for an interim faculty¹. The application relates to a petition for a faculty to replace the existing gas boiler at the church with a new one; although a petition has not yet been submitted to the Court, the applicants propose doing so as soon as possible.

Background

2. The parish encompasses an area of high deprivation. Congregations at the church have not returned to their pre-Covid levels. 30 – 35 adults attend the main service on a Sunday, the majority of whom are elderly or retired. Finances are a constant challenge. The church is listed Grade II. It is a fine building of polychrome brick (by A R Mullins) dating from 1867. It was re-ordered in 1990 (the scheme being designed by Roger Molyneux). The western third of the church now provides church hall facilities, which are well used both by the congregation and the wider community. The church (including the hall facilities) is heated by a system relying on a gas boiler. This failed earlier in year and in the meantime the churchwardens and PCC have been investigating options for its replacement.
3. Mindful of the aspiration of the Church of England generally to achieve carbon neutrality by 2030 and of the Diocese of Southwark to achieve this target by 2035, their initial preference was to replace the boiler with an electric one.
4. The DAC counselled caution. It said:

The Committee does presently have some hesitancy about this solution. This kind of system, for the first few years of its life, will produce more carbon emissions overall, rather than fewer, until such time as the proportion of renewable energy in the national electricity supply increases sufficiently. This is because a significant portion of electricity to the National Grid is still being generated by power stations using fossil fuels.

In the long-term it will help move towards, and could theoretically help achieve, the target of net zero carbon by 2035 if electricity is bought on a green tariff. But, for so long as there is only a limited/partial supply of non-fossil-fuels energy to the National Grid, this merely means that there is less 'green energy' available for everyone else to use.

5. It seems to me that the effect of these caveats is to indicate that the solution being pursued on the basis of its “greenness” was not as green as it might seem. However it is apparent that the caution of the DAC was primarily a concern about cost:

¹ There is currently no incumbent.

*The running-costs of electric boilers will be significantly higher, and the committee would urge you to consider very carefully the affordability of this. The current costs of electricity are roughly **four** times that of gas (emphasis in the original).*

6. The PCC carefully looked at the matter again and regretfully concluded that, as the PCC had surmised, it would not be able to afford the cost of running an electric boiler. It looked at all the other options and concluded that they were impracticable or too costly or could not sensibly be pursued because of a combination of these factors. Accordingly, it proposes replacing the existing gas boiler with a new one.
7. The PCC's investigations have taken up the summer and autumn. If an interim faculty is now granted it will be comparatively simple for the new boiler to be installed and this could happen quickly so that the church and hall could once again be heated. If an interim faculty is not granted (i.e. the petitioners wait until a "full" faculty is granted²) it will be after Christmas before the church and hall are once again heated (at the earliest).
8. The views of the DAC on the proposals have not yet formally be obtained. However I have set out the advice it has already given at paragraph 5 above. The DAC heating adviser has been asked to comment specifically on the application for an interim faculty and supports it; he does not suggest that the PCC's investigations have been inadequate or that its conclusion is wrong.
9. The Archdeaconry of Croydon is currently in vacancy following the appointment of Rt Rev Rosemarie Mallett as Bishop of Croydon. Ven Moira Astin, the Archdeacon of Reigate, is currently dealing with faculty matters in the Croydon Archdeaconry. She supports the proposal.

Interim faculties

10. In an appropriate case, the Consistory Court can grant an interim faculty³. This is the authorisation of the Court to carry out the works or part of the works before a "full" faculty is granted. It is appropriate in cases of urgency since otherwise any works that are carried out will lack authorisation and thus be unlawful. It will usually only be appropriate to grant an interim faculty if the petitioners give an undertaking to modify or even to remove the works if subsequently required to do so by the Chancellor. If the Court did not require such an undertaking, it would mean that, if there were a subsequent objection, it could be rendered nugatory.

Law and guidance on the net zero objective

11. In February 2020 General Synod set an ambitious target for the Church of England to achieve carbon neutrality by 2030. The target in the Diocese of Southwark is 2035, which is still ambitious. In July 2022, General Synod endorsed guidance entitled *The Church of England Route Map to Net Zero Carbon by 2030*⁴. The Church Building Council has also issued practical guidance.
12. There have now been a number of cases in the Consistory Court (in this Diocese and elsewhere) concerning the net zero carbon objective and I shall refer to them below.
13. This is the first case of which I am aware to which the amendments to the Faculty Jurisdiction Rules 2015 made by the Faculty Jurisdiction (Amendment) Rules 2022⁵ apply. Specifically relevant to the proposal now before me, by rule 4.2 (2) (b) of the rules as amended, the proposal must explain how the intending applicants have had due regard to the CBC's guidance in formulating the proposal. By

² Apart from anything else, the process involves notices being posted for a period of 28 days.

³ See Part 15 of the Faculty Jurisdiction Rules 2015 (SI 2015 No 1528).

⁴ Prepared by the Net Zero Carbon Sub-Committee of the Environment Working Group.

⁵ SI 2022 No 155.

rule 4.9 (7A), the DAC must state whether it considers this explanation adequate (and, if not, its reasons). By rule 5.5 (3) (e) the documentation submitted with the petition must include an explanation that the petitioners⁶ have had due regard to the guidance in formulating the petition.

14. Before the amendment to the rules, List B (Works which may be undertaken without a faculty (subject to consultation with the Archdeacon)) included the replacement of a boiler in the same location and utilising an existing fuel supply and existing pipe runs. Following the amendment, this is the position only where the replacement will have a non-fossil fuel supply. The effect of the rule change is that authorisation by faculty must be sought to replace a gas boiler with a gas boiler.
15. The background to the amendment of the rules is as follows. Following Synod's resolution in February 2020, the Environment Working Group presented a paper to Synod about its practical implementation and the Net Zero Carbon Faculty Working Group progressed matters further, making recommendations to the Rule Committee. The Rule Committee's recommended changes were presented to Synod on 9 February 2022. In commending the changes to Synod, Morag Ellis QC⁷ said:

... there are four principles underpinning it, as you will see from the Order Paper. One, to encourage behaviour that will move churches towards net zero carbon. Two, to make the permissions route more straightforward for proposals that are most likely to reduce carbon. Three, to increase the strength of the case needed for a parish that has a proposal that will commit it to producing additional carbon well after 2030 - for example, installing a new oil boiler. And, four, not to put into the Rules matters better dealt with by guidance⁸.

Consideration

16. If it were easy to achieve carbon neutrality, the 2030 or 2035 targets would be met; indeed they would be bettered. However it is difficult and the reason it is difficult is that it is expensive⁹. Many parishes have to work very hard in order to pay their parish share to the Diocese¹⁰ and the ambition to achieve carbon neutrality is invariably a further financial burden¹¹. Accordingly decisions about “going green” are inevitably ultimately about money.
17. In terms of what is at the heart of the faculty jurisdiction – namely the effect of a proposal on the fabric of the church - a like-for-like replacement of an item such as a boiler is likely to be intrinsically satisfactory. It will however nonetheless be a cause for concern if it adds to or does not contribute to reduction of the church's carbon footprint. If, for example, a proposal to replace a gas boiler with a gas boiler is permitted, the opportunity to reduce the church's carbon footprint will not have been taken; and the comment may be made that if such replacements generally were to be permitted, the church will not achieve its carbon neutrality targets.
18. This background led me to take the following approach to faculty petitions which involved issues which related to carbon neutrality. I required petitioners to demonstrate that they had carefully considered the issues arising. If they had done so and had reached a considered view that a greener option was not available or appropriate, I did not seek to second guess their decision¹². I never had a case which came before me in which the proposals had not been recommended to me by the DAC; I

⁶ Intending applicants become petitioners upon the presentation of a petition.

⁷ Now KC.

⁸ Principles two and four are not directly relevant to the rule changes that I have identified as relevant to the proposal before me.

⁹ Some steps along the way such as the efficient use of energy or the elimination of damp may cost effective but they will not, of themselves, enable parishes to achieve carbon neutrality.

¹⁰ Some do not achieve this.

¹¹ Some greening measures may have a financial benefit but fortunate is the parish that can consider that “going green” on the basis that it positively saves money and can justify investment on this basis.

¹² I took the same approach in cases involving floodlighting where it will be seen that it requires a broader justification.

worked on the assumption that the DAC took a broadly similar approach to me¹³. It seemed to me that, if I refused permission for a proposal on the basis that it was not green or sufficiently green, I could be imposing a financial burden upon a parish which it could not reasonably bear. I considered that decisions about funding were appropriately made by the parish. More particularly, if by a refusal of a faculty, I sought to prioritise expenditure on a greener proposal, I would be making it more difficult for the parish to pay its assessed parish share to the diocese. I was also aware that my refusal would not of course of itself bring about a green or greener solution; it would simply mean that the parish's preferred solution would not be permitted. On any view, the resulting "stand off" potentially created would present difficulties.

19. I think that the amendment to the Faculty Jurisdiction Rules does affect the correctness of this approach¹⁴. It seems to me that although the principal reason for the change to List B may be one of encouragement, if the change is to be meaningful, it must envisage circumstances in which the Consistory Court might refuse permission for replacement of gas boiler with, e.g., another gas boiler. One such circumstance might be where the Court considered that the consideration of the issues by the Petitioners – or the consideration of them by the Petitioners and the DAC was inadequate; it is unlikely that the Court would, without evidence, be able to substitute its own judgment of what was appropriate. However this may be, it seems to me that, as both as regards boiler replacement and more generally, the rules do require a closer engagement by the Consistory Court with the issues arising than that which I had articulated. I think that, in the light of specific advice on the matter from the DAC, I do now need directly to consider whether what is proposed is appropriate in terms of its implications for the carbon footprint of a church.
20. Considering the issues in the present case and having read all the material submitted to me by the Petitioners, I am satisfied that the Petitioners have carefully considered all the available options¹⁵. Further, on the material before me, I am not satisfied that there is an alternative at reasonable cost in this case to replacing the gas boiler with another gas boiler. I consider therefore that, on the face of it, it is appropriate for permission to be given to replace the existing gas boiler with a new gas boiler¹⁶.
21. In these circumstances, it seems to me that the urgency of the situation is a strong justification for granting an interim faculty. Against this should be set the consideration that, if the new boiler were once installed, there would have to be very strong reasons for taking it out again. In practical terms, it might be that an objector would be faced with a *fait accompli*.
22. I think that it is necessary to be realistic about this. On the material before me, it is very difficult to imagine circumstances in which I might, on consideration of the petition for a "full" faculty require the Petitioners to fulfil their undertaking and remove the boiler. It would be remarkable if there were any objections to the grant of the faculty¹⁷. As long as the Petitioners are aware of the risk – and it will be for them to assess it – from the point of view of the Court, it is sufficiently small so as not to make it inappropriate to grant an interim faculty. Although the jurisdiction to grant an interim faculty should be granted sparingly, it seems to me that this is an appropriate case to exercise it.

¹³ I said in *In re St Mary the Virgin, Welling* [2022] ECC Swk 3 that I would consider the situation where the views of the parish and the DAC differed if and when it arose. As one might expect, the involvement of DACs with green issues has over time become much greater both in the light of both general concerns about climate change and also in the light of Church of England guidance about them as it has emerged.

¹⁴ In *In re St Thomas and St Luke, Dudley* Humphreys Ch disagreed with my approach; the disagreement was noted in *In re St Peter Walsall* [2021] Ecc Lic 4 and in *In re St Mary the Virgin, Dedham* [2022] ECC Chd 2. In both cases, the Court did not have to decide which approach was correct; it only fair to note that in the *Dedham* case, Hopkins QC Ch inclined to the view of Humphreys Ch.

¹⁵ The appraisal is in the form of the simple options appraisal as set out in the CBC Guidance *Church Heating: Options Appraisals and Getting Advice* (August 2021).

¹⁶ I note that the CBC Guidance *Church Heating Principles* (February 2021) recognises that *For some churches, having fully assessed their options, there may be no feasible solution other than replacing gas-with-gas ...*

¹⁷ Conceivably someone might object on the basis that the proposal is insufficiently green. However, as has been seen, that issue has been thoroughly examined.

23. Accordingly I direct that an interim faculty should issue. This is subject to the Petitioners undertaking that, if required, they will modify or remove the works following consideration by the Court of a petition for “full” faculty¹⁸.
24. This is not quite the end of the matter.
25. In the *Dudley* case, the Chancellor imposed the following conditions (inter alia):
- *Gas supplied under a green tariff shall be used where possible;*
 - *The carbon emissions created by all non-renewable gas used shall be off-set (either via the tariff or separately or a combination of both depending on the tariffs available.*
26. In the *Dedham* case, the Chancellor imposed the following conditions:
- *So far as is practicable, gas supplied under a green tariff is to be used for the new system;*
 - *So far as is practicable, the carbon emissions created by any non-renewable gas used is to be off-set.*
27. In the *Walsall* case, the Chancellor imposed the same conditions, but prefaced by the words, *The Petitioners use their best endeavours to ensure ...*
28. It seems to me that I now need to consider the possibility of imposing such conditions upon the faculty that is likely to be granted in due course. I cannot, of course, decide in advance of consideration of a petition for a “full” faculty what conditions are appropriately imposed upon such a faculty. However, I can indicate my approach and I think that I should do so. This is because my attitude might affect the Parish’s decision to go ahead with the work at this stage, i.e., whether they would wish to implement an interim faculty.
29. I begin my consideration with the following observation. The churches of the Church of England that are heated by gas could be rendered essentially carbon neutral overnight if all of them switched to green gas or off set the carbon emissions produced by their consumption of gas. It is only the adventitious situation that in the present case the existing boiler has failed that gives rise to the opportunity in effect to **require** the church to become carbon neutral. I do not discount the importance or relevance of this to my consideration, but it does provide a context for the discussion below¹⁹.
30. I consider first of all, the possibility of requiring the use of green gas²⁰. At the moment, the Church of England is only able to recommend to parishes two suppliers of green gas. One of these suppliers is unable to give a quote for a new supply or take on new customers because of the current unprecedented market volatility and I surmise that the position is the same as regards the other. When it is available it is more expensive than fossil-based gas. I am sure that if the Petitioners were able to afford it, they would be pleased to use green gas. Although I do not have any figures as to the likely cost or have details of the parish’s resources, I strongly suspect that the cost will be beyond the parish.
31. As regards, offsetting I am advised that Holy Saviour used 62,749 kwh in 2020. This of course was a year severely affected by the outbreak of Covid-19 pandemic. Even so, off-setting this amount of gas would cost £795. In the *Dudley* case, the Chancellor was apparently satisfied that the saving resulting from the installation of a more efficient system (reducing gas usage by 35%) would provide

¹⁸ I also require the Petitioners to undertake that they will, as soon as possible, submit a petition for a “full” faculty; and, in any event, within 28 days of the date of this judgment.

¹⁹ In particular, the installation of a modern boiler will normally enable efficiency savings to be made which could be required to fund green measures.

²⁰ Gas supplied under a green tariff is not the same thing as green gas. The former will often or perhaps usually involve offsetting; the latter is a non-fossil fuel gas generated by a method which essentially does not involve enlarging the carbon footprint of the manufacturer. Consideration of the purchase of gas which involves offsetting may appropriately be considered alongside a consideration of whether a condition requiring offsetting is appropriate.

the funding to pay for the green tariff and any necessary offsetting. I do not think that this will be the case here.

32. The Diocesan Heating Adviser reminds me of the section of *The Church of England Route Map to Net Zero Carbon by 2030* dealing with offsetting. It is entitled “Complex areas” and begins by saying that this is an area where further work is required to guide future decision making. The Adviser points out that *an early move towards offsetting could divert funds from emissions-reductions initiatives*. He expresses his view that rather than spending money on offsetting, the parish would do better by spending on (or saving up for) future net carbon projects, which could include replacing the gas boiler in due course. In *In re St Mary, Welling* I observed that it might be considered reasonable in the circumstances of the objective to achieve carbon neutrality by 2030 or 2035 to write off the investment in a new gas boiler over a shorter period than otherwise. But if this is to be a realistic approach, a church must plan to have the money available in 2030 or 2035 to pay for a carbon neutral replacement. An onerous requirement as regards offsetting would be likely to impair the ability of a parish to achieve this.
33. It seems to me that these are difficult issues.
34. The use of green gas is not a viable option at the present time. However, the use of the words *so far as practicable* included in a petition could address this difficulty. More fundamental is a concern as to what *so far as is practicable* would mean in this context. Practicability would evidently need to embrace affordability; but who is to be the judge of that? It seems to me that Petitioners do need to know on what basis they are to judge the matter.
35. In the *Dudley* case, the difficulty was addressed by there being an absolute offsetting requirement (i.e. one that was not qualified by the words *so far as practicable* or the words *use best endeavours to ensure*). If the requirement to offset is qualified, the same question arises as in respect of a qualified duty as to the use of green gas: who is to be the judge of affordability? And, has been seen, there is a concern, based upon *The Church of England Route Map to Net Zero Carbon by 2030* that offsetting is not the way to go.
36. As so often in these matters, I think that a pragmatic approach is appropriate. It seems to me that the conditions imposed in the *Dudley*, *Walsall* and *Dedham* cases, although no doubt capable of giving rise to difficulty, were each considered in the context of their own particular facts. In the present case, the Petitioners have written to me as follows:

... green gas is not an affordable option for us at this time.

However, we take the net zero target very seriously. That is why we have an ECO sub-group tasked with identifying ways of minimising our impact on the environment. We have so far: adopted the “reduce, reuse, recycle” principle of waste management; created a bug hotel; switched to energy saving equipment where feasible; and had trees planted as part of the National Trust tree planting campaign.

We shall continue to monitor the affordability of switching to green gas and give it serious consideration when our existing fixed term deal ends in a couple of years. We shall also undertake an energy audit to identify other ways to reduce our energy usage.

The same financial constraints apply to carbon offsetting. We are planning a carbon audit to help us reduce or carbon usage further.

37. It seems to me that the parish is in good faith doing all that it can to achieve the target of carbon neutrality by 2035; and it will be noted that it was the DAC that steered them away from an electric

fuelled boiler. A general condition requiring the Petitioners to pursue carbon neutrality would be aspirational, not necessary and probably unenforceable. It does not seem appropriate to impose it. It seems to me that a more specific requirement relating to the use of green gas or offsetting could inhibit what should, in this case, be the appropriate approach to achieving carbon neutrality by 2030 or 2035; if it were a qualified requirement, it would not in the short term (and probably over a longer period) actually result in the adoption of offsetting. Accordingly, as matters appear to me at the moment, I would not be minded to impose any condition upon the interim faculty relating to the way the parish should after the installation of the new boiler pursue carbon neutrality. The Petitioners do need to be aware that, upon consideration of the “full” faculty it is possible that it might be argued by someone that such a condition should be imposed. I do however note that the DAC or its heating adviser have not hitherto suggested such a condition²¹.

38. My decision not to impose a condition as to the way the parish should seek to achieve carbon neutrality obviously relates to the facts of this particular case. It does seem to me however that the arguments that I have considered will be relevant in other cases and it is likely also that the conclusion that I have reached upon them is likely to be of wider significance. What will be helpful in other cases is for the DAC in its advice to me specifically to consider the imposition of conditions when recommending proposals to me²².
39. The effect of this judgment may be to highlight once again the difficulties in the path of individual churches – and the Church of England generally – in achieving carbon neutrality. However, it is not all gloom and doom. In this case a small parish has demonstrated its commitment to the achievement of carbon neutrality against the background of a challenging target. My experience is that many, if not most churches – with all the financial and practical difficulties that they face – are also taking the commitment very seriously both because it is intrinsically important and because it is a way of providing valuable leadership in the community. My hope and prayer is that this commitment – coupled, of course, with the availability of continually improving technology²³ – will in due course yield progress even in difficult situations like the present.

PHILIP PETCHEY

Chancellor

21 November 2022

²¹ If someone did wish to argue the case for a condition, I would need to consider whether I should continue to act or whether it would be more appropriate for my Deputy to deal with the further consideration of the case.

²² I do direct in the present case that the replacement of the boiler is subject to the condition that the work is carried out by a person who is registered on the Gas Safe Register or is a member of another class of persons approved by the Health and Safety Executive for the purposes of regulation 3 (3) of the Gas Safety (Installation and Use) Regulations 1988.

²³ The CBC Guidance Church Heating Principles observes that, where gas has been replaced by gas, the church *can be ready for a future retro-fit when technology and the grid has progressed*.