

Neutral Citation Number: [2024] ECC Sal 1

In the Consistory Court of the Diocese of Salisbury

Petition 2023-081723

Re St Mary, Stalbridge

Introduction

1. The petitioners seek a faculty for the installation of an oil-fired boiler as a like-for-like replacement of their current heating provision.
2. The proposal was not recommended by the DAC, which did not regard the petitioners' explanation of how it had had regard to net zero guidance as adequate. Notwithstanding that, and as they were entitled to do, the petitioners pressed on with their petition. Following directions from the Chancellor, the petitioners indicated that they were content for the petition to be disposed of on the basis of written representations; and it would have been dealt with in this way.
3. However, following the completion of the public notice period but before the petition could be considered, and knowing that it was being done without lawful authority, the petitioners procured the installation of the new boiler. It is not yet clear whether the contractor is or was aware of the potential consequences for them of unlawfully undertaking works on a listed church.
4. Consideration of the petition on the papers was, therefore, halted. The petition became one for a confirmatory faculty; and because of the petitioners' actions in this regard and for that reason alone, it became necessary to hold a hearing. At a hearing in the church on Thursday 25 January 2024, I announced that I would grant a confirmatory faculty, subject to conditions on the details of which I wished to consult the DAC. This judgment sets out my reasons and the conditions attached to the faculty.
5. I have given directions to allow for further consideration of the consequences of the petitioners' unlawful actions, and a further judgment will follow on that issue in due course.

History

6. St Mary's is a fine grade II-listed mediaeval church with 19th century additions, standing on a rise dominating the small rural town of Stalbridge. By 2022, when the church had been in interregnum for three years, the parish was confronted with the need to replace the old oil-fired boiler, and the PCC proposed a like-for-like replacement. The present incumbent, the Rev Canon Richard Hancock, took up the incumbency at the end of June 2022. The timing is significant: the PCC and churchwardens were proceeding on the basis that a new oil-fired boiler could be approved under List B without the need for a faculty. This would previously have been the case; however, that position changed on 1 July 2022, a change of which the parish was apparently unaware until informed by the Archdeacon in October 2022.
7. The old boiler was condemned in November 2022. The present faculty petition was commenced in January 2023. By March, the parish had further developed its 10-year mission action plan, with an oil-fired boiler being seen as a temporary measure until a long-term environmentally-friendly solution could be afforded (this featuring in the 3-5 year phase of the 10-year plan). At its meeting in May, the DAC recommended that the PCC undertake a full appraisal of heating options in line with the CBC's net zero guidance. There followed what could perhaps be described as a piecemeal and incomplete provision of further information to the DAC through the summer of 2023. As a result, at its meeting on 8 September, the DAC again felt unable to recommend the proposal, recommending further investigations into renewal and upgrade of the electricity supply to allow consideration of other heating types in the future.
8. At this point, the paths of the two matters which I must consider start to diverge. The first matter is the faculty petition itself; the second is the decision to proceed with unauthorised work. The second matter will be the subject of a separate judgment.

Faculty petition

9. The PCC took the DAC's decision as a dismissal of their proposal, against which (as they saw it) their only recourse was to appeal to the court. This is, of course, not correct. The DAC's role is, as its name suggests, merely advisory: assisting, first, the

petitioners and, secondly, the court with its advice. The decision whether or not to grant a faculty is always that of the court alone.

10. There has been no further formal exchange of materials between the petitioners and the DAC since September. The formal position is, therefore, that the DAC advice to me is that the petitioners have not satisfied the DAC that its explanation of how it has had due regard to the net zero guidance is adequate; or that the proposed works should be recommended.

Net zero guidance

11. So far as is relevant, the Faculty Jurisdiction Rules 2022 provide as follows:
 - (1) Rule 2.2 defines 'net zero guidance' as:

'guidance issued by the Church Buildings Council under section 55 of the Dioceses, Pastoral and Mission Measure 2007 on reducing carbon emissions'.
 - (2) Rule 4.2(2)(b) provides that at the initial stage of consultation with the DAC intending applicants must submit:

'any advice or other material relating to the environmental implications of the works or proposals including, in the case of matters to which net zero guidance applies, an explanation of how the intending applicants, in formulating the proposals, have had due regard to that guidance'.
 - (3) Rule 4.9(7A) states that when the DAC provides its advice, this must include:

'a statement of—

 - (a) whether, in its opinion, the explanation under rule 4.2(2)(b) is adequate, and
 - (b) if its opinion is that the explanation is not adequate, its reasons for that opinion.'
 - (4) Rule 5.5(3)(e) provides that the same material as is mentioned in rule 4.2(2)(b) must be submitted with the petition.
 - (5) The specimen DAC Notification of Advice (Schedule 3, Form 2) requires the DAC to indicate whether or not the explanation as to how the Petitioners have had regard to net zero guidance is adequate, in its opinion. It provides as follows:

‘The works or proposals involve matters to which net zero guidance applies (that is, guidance issued by the Church Buildings Council under section 55 of the Dioceses, Pastoral and Mission Measure 2007 on reducing carbon emissions). In the opinion of the Committee, your explanation of how, in formulating the works or proposals, you have had due regard to net zero guidance is / is not adequate. [and the Committee’s reasons for the opinion that your explanation is not adequate are:]’.

12. The requirement for the DAC to give this advice is plainly to assist the court in considering whether the petitioners have had due regard to the guidance.
13. As far as the interpretation of the phrase ‘due regard’ is concerned, I agree with the consistory court in the Diocese of Carlisle in *re All Saints, Scotby* [2023] ECC Car 3. That court noted that the Safeguarding and Clergy Discipline Measure 2016 imposes a legal duty on the clergy, readers and lay workers, churchwardens and parochial church councils to ‘have due regard to guidance issued by the House of Bishops on matters relating to the safeguarding of children and vulnerable adults.’ The meaning of ‘having due regard’ in that context was explained in a Note by the Church of England Legal Office:

‘What does ‘due regard’ mean?’

Where legislation – whether an Act of Parliament or a Church Measure – imposes a duty on a person to ‘have due regard’ to guidance of this sort, the law understands that duty in a particular way. The legal duty to have due regard means that the person to whom the guidance is directed is not free to follow the guidance or not as he or she chooses. As a matter of law, the guidance should be given great weight and must be followed unless there are ‘cogent reasons’ for not doing so [...].’

14. This meaning of the phrase ‘having due regard’ is, I find, apt not just in the safeguarding context but also more broadly; and in particular, in the context of the requirement to have due regard to net zero guidance.

15. So, the separate roles of the DAC and the court are clearly delineated. The DAC is to advise on whether the petitioners' explanation of how they had due regard to the guidance is adequate. The court is to take into account all relevant matters, including whether (to the extent that it is relevant) whether the petitioners have in fact had due regard to the guidance – that is, whether they have either followed the guidance or have cogent reasons for not doing so – in deciding whether the petitioners have discharged the burden on them to persuade the court to grant the faculty sought.

Consideration

16. In the present case, it is unanswerable that the petitioners have not followed the net zero guidance. That is, at least in part, because at the point that the decision was made to undertake a like-for-like replacement of the boiler, there was no requirement that they should. The work that the petitioners have undertaken to address the matters raised with them by the DAC is inevitably open to criticism for being an *ex post facto* justification of a settled decision rather than an open exploration of all the possible options leading to a properly informed conclusion. However, even if the petitioners had gone back to the drawing board for the purposes of having due regard to the net zero guidance (which may, at least from a process point of view, have been the ideal course to take), the work would inevitably have been vulnerable to significant cognitive biases arising from the settled view already reached. This may, but not necessarily would, have been alleviated if the petitioners had obtained external independent advice from a heating adviser (for which, according to the DAC secretary's evidence to me, the petitioners' unspent budget of £500 would have been sufficient).
17. On balance, while there may have been more that the petitioners could have done, I accept that the slightly unhappy timeline of events in this case, where the decision predated the requirement to have due regard to the guidance, does present a cogent reason for not complying with that guidance before the decision was taken. This must not be thought to set a precedent; this conclusion arises out of the particular set of facts before me, which is unlikely to arise again in the future.

18. Ultimately, it is for me to reach a conclusion, on the basis of all the material available to me, on whether the petitioners have satisfied me that a like-for-like replacement is appropriate in the particular factual circumstances of this church.
19. In case there be any doubt, I take no account of the fact that the new boiler has already been installed. In a case such as this, a confirmatory faculty will be granted if, and only if, a faculty would have been granted to authorise the works before they were carried out. These petitioners, and any who follow after in other parishes, should not labour under any misapprehension that the fact that the work has already been done counts in their favour in any way.
20. However, I do have an advantage over the DAC in one particular respect: there is some factual material that has become available too late to be considered by DAC at its September meeting, but which is before me now. In particular, I have:
 - a. a revised quotation from the heating engineer for the supply and installation of a differently-specified oil-fired boiler, which can be converted to run on non-fossil fuel ('HVO', or hydrotreated vegetable oil) at modest cost (some £7,000 plus VAT, with future costs of conversion said to be in the region of £500);
 - b. a quotation for the cost of bringing three-phase electricity (which would be necessary for any electricity-driven solution) to the churchyard wall, of some £16,000 plus VAT; and
 - c. a quotation for the supply and installation of air-source heat pumps (the petitioners' favoured long-term solution), of some £87,000 plus VAT. This does not include any works to the heating pipework, the stripping out and replacement of which is provisionally (and, it appears to me, perhaps generously) estimated to cost £¼m plus VAT.

I also have the petitioners' responses to two sets of questions put to them by the court, which I consider further below.

21. The court in *re All Saints, Scotby* derived from the net zero guidance the following set of principles, which I find set out a useful framework for addressing the question before me:

- a. Churches need to be properly heated.
 - b. The proposed and likely uses of the building must be considered in assessing its needs.
 - c. Any proposed heating system must be affordable.
 - d. A proper appraisal of heating options will generally involve placing all possible systems in order of merit in terms of meeting the net-zero target; and identifying the highest-placed system which meets the needs (and, I would add, resources) of the church.
 - e. The court should consider whether conditions should be imposed when granting a faculty, particularly in relation to offsetting.
22. The petitioners tell me that their inability to heat the church the previous winter, coming on top of previous difficulties including COVID and the interregnum, had been a significant deterrent to church attendance and giving. Plainly, the church must be heated. The emergency measures taken in 2022, of gas-fired forced-air heaters, while well-meaning, were inappropriate given the effect on the fabric of the church.
23. As far as other options were concerned, as well as the work directed by the DAC to comply with the net zero guidance, the petitioners were directed by this court on 12 October 2023 (once the petition was under consideration) to consider other temporary alternatives, with expert advice wherever possible. These included heated pew pads or cushions; such electric heating as could be accommodated on the present supply; and the options for temporary heating set out in an Additional Matters Order of 10 April 2023 (that is, a trailer-mounted oil-fired boiler, to be connected to the existing heating pipework; oil-fuelled hot air heating systems, so long as combustion products do not enter the building; or electric heating systems).
24. The petitioners' response was received on 20 October. What that response did not say was significant. It omitted to mention that:

- a. the PCC had, on 27 September following receipt of the DAC's decision reached earlier that month, resolved to install the proposed oil-fired boiler in the full knowledge that there was no lawful authority to do so;
- b. the PCC had, on 3 October, written to the bishop informing him of their decision in terms that could charitably be described as frustrated (quite properly, the copy of that letter addressed to the Chancellor was not sent to her by the Registry; such attempts to influence the judicial process are to be strongly deprecated); and
- c. in all probability, the PCC had already commissioned the installation of the new boiler; that work commenced on 30 October.

Nor were any of these matters mentioned when further responses were provided to questions raised by the court.

25. However, those responses, when taken together, while not comprehensive, do set out the petitioners' position that:

- a. With the current electrical supply, the residual power available to heat the church, once existing heating is taken into account, is only about 6kW. I note that this is the equivalent of two domestic fan heaters. A single infra-red heater, loaned to the church the previous winter, was unusable as it caused the church's circuit breaker to trip;
- b. The other options set out in the AMO would have no cost or environmental benefit over a replacement of the existing boiler;
- c. While there is a mains gas supply to the Rectory, some 100m from the church, the investment required in installing new fossil-fuel infrastructure (including digging across the churchyard) for what is intended to be a short-term measure was unattractive;
- d. The needs identified by the petitioners were that the church was used regularly but relatively infrequently (aside from six parish services a month, there were six school services and in the region of 20 other events and services

a year); but that attendance was good, with a regular parish attendance of 30 to 60; school services of 180; and concerts and other events from 100 to 300. The capital cost of heating solutions relying on heating each attendee individually are therefore likely to represent poor value for money;

- e. Fixed-wiring heated pew cushions would require extensive rewiring; rechargeable ones would require a level of maintenance that the parish simply could not achieve. In any event, the provision of anything like sufficient cushions was not practically or financially viable;
- f. The current-account finances of the church were not in a strong position; it is not managing to pay its parish share, and raising even the £7,000 for the new boiler had involved a significant fund-raising effort by the local school.

26. The petitioners' responses are rather stronger on assertion than they are on evidence. In particular, I am not entirely satisfied that the suggestion of a gas-fired replacement boiler received the attention it should have; the need for laying a pipe across the churchyard would not have presented the insuperable difficulty that the petitioners suppose.

27. Having said that, I accept that it is the church's declared aim to decarbonise its heating, with the development of an eco-friendly heating system featuring in the 3-5-year timeframe in its 10-year mission action plan. I am satisfied that the most appropriate way to fill the gap between now and the implementation of such a plan is with an affordable like-for-like oil-fired boiler, which (a) can share the vast majority of the supporting infrastructure from its defunct predecessor, and (b) is capable of conversion to non-fossil fuels as soon as such fuels become sufficiently widely available at a reasonable cost.

28. It follows that I grant the confirmatory faculty.

Conditions

29. I am grateful for the assistance of the DAC in finalising these conditions.

30. The first condition I impose is that the PCC shall undertake accredited carbon offsetting to offset all carbon dioxide emissions from the use of fossil fuel in the new boiler.
31. In response to DAC comments, I provide the following clarifications, which form part of the condition:
 - a. “Accredited” means certified by a body accredited by the International Carbon Reduction and Offset Alliance. Currently, the two accredited UK certifiers are the UK Woodland Carbon Code and the UK Peatland Code.
 - b. The amount of CO₂ emissions to be offset may be calculated by reference to the volume of fossil-fuel oil consumed, using a multiplication factor of 3kg of CO₂ per litre of fuel; or on some other reasonable and evidenced basis.

The petitioners may apply to vary this condition if compliance is regarded as being unduly difficult or onerous. However, I acknowledge, and affirm the intention, that compliance with this condition will represent an ongoing cost to the petitioners until the boiler is converted to burn HVO. This will additionally mitigate any hurdle to conversion which a price differential between the two fuels might impose. Compliance with this condition will have to be demonstrated when any extension of the faculty is sought, as set out in the following paragraph.

32. The second condition is that the faculty shall authorise the use of the oil-fired boiler only until 31 December 2028. The petitioners may apply in writing during the lifetime of the faculty for an extension to that period. In considering any such application, the court will take into account all the circumstances, including: evidence of compliance with the offsetting condition set out above; whether the boiler has by then been converted to HVO; the development of the parish’s long-term heating plan; and the length of the extension sought. The court will consider then how long the extension is to be for, and to what conditions it is to be subject. It may also consider whether any further extension might be available thereafter.
33. The work of converting the boiler to use HVO would be likely to require a faculty, at least to the extent that it might require the replacement of the fuel tank. However,

I observe that the replacement of a gas tank could be carried out under List B6(4A). In the circumstances I can, and do, direct that the work of adaptation of the boiler and associated works such as replacing the oil tank are sufficiently minor as not to require a faculty; such works shall be treated as if set out in List B. The conditions set out in List A1(6) and B6(4A) shall apply, *mutatis mutandis*.

Costs

34. The petitioners are to pay the court and Registry costs of the petition.

David Willink
Deputy Chancellor

22 February 2024