

Neutral Citation Number: [2023] EACC 1

IN THE ARCHES COURT OF CANTERBURY

APPLICATION FOR PERMISSION TO APPEAL

FROM THE COMMISSARY COURT OF THE DIOCESE OF CANTERBURY

(ROBIN HOPKINS, COMMISSARY GENERAL)

[2023] ECC Can 2

In the Matter of an Application for a Restoration Order in respect of St Leonard, Hythe, Diocese of Canterbury

Christopher Jack Cooper

Applicant /Proposed Appellant

On consideration of the Commissary General's Judgment, his reasons for refusing permission to appeal and the Applicant's renewed application for permission to appeal,

ORDER OF THE RIGHT WORSHIPFUL MORAG ELLIS KC, Dean of the Arches

Introduction

1. The three grounds are related and rest upon the answer to a question of principle: whether moving and commencing the use as a nave altar of a Holy Table already in the church required authorisation under the faculty jurisdiction. Ground 2 comes closest to articulating this question and I therefore deal with it first, followed by Grounds 1 and 3, in that order.
2. The Commissary General did not consider it necessary to decide the question of principle but considered the matter as one of discretion, effectively giving Mr Cooper the benefit of the doubt on the point. Ground 2 of the application for leave to appeal seeks to put in issue the jurisdictional questions, rather than arguing in terms that the exercise of discretion was wrong as a matter of law, a high hurdle for an appellant to overcome. I deal with the questions raised under Ground 2 directly and make no findings on the exercise of the Commissary General's discretion, since this has not been directly called into question.
3. The tests for granting leave to appeal under Rule 22.2 of the Faculty Jurisdiction Rules 2015 (as amended) are:
 - (a) that an appeal must have a '*real prospect of success*'; and/or
 - (b) that there is '*some other compelling reason*' why the appeal should be heard.

Ground 2: 'Clarification as to the requirements for instating of nave altars is required under the EE. Their use often profoundly alters the view of a building and the way it is used. Should faculties rather than licences not thus be required to protect listed churches from profound alteration without faculty'?

4. Permission to appeal is **refused** on Ground 2.

Reasons

5. The Appeal on this Ground does not have 'a real prospect of success'. Nor, in spite of the desirability in principle of clarity in the law, is there a compelling argument in this case either that clarification is necessary or that it should be achieved via the route of an appeal. I shall, nevertheless, deal with the point in a little more detail than might normally be done on an application for leave, in order to assist the Applicant and the Minister and Parochial Church Council, as well as the diocesan authorities, in understanding roles and responsibilities in this instance. Clearly, as this determination merely deals with the point on an application for leave to appeal, it is confined to the facts of this case

6. Unlike the secular town and country planning and listed building systems, ecclesiastical law does not exhaustively specify the scope of the faculty jurisdiction. Canon F1 *Of the care and repair of churches* provides as follows (so far as immediately relevant):

'... 3. It shall be the duty of the minister and churchwardens, if any alterations, additions, removals, or repairs are proposed to be made in the fabric, ornaments, or furniture of the church, to obtain the faculty or licence of the Ordinary before proceeding to execute the same.'

7. There are no associated definitions. I note that the object in question in this case is movable by hand and that it has not been altered; nor has it been removed from the church as a result of its periodic positioning in the nave and use in the celebration of Holy Communion, after which it is returned to a chapel in the church.

8. Canon F2 *Of the holy table* provides as follows (so far as immediately relevant):

'1. In every church and chapel a convenient and decent table, of wood, stone, or other suitable material, shall be provided for the celebration of the Holy Communion, and shall stand in the main body of the church or in the chancel where Morning and Evening Prayer are appointed to be said. Any dispute as to the position where the table shall stand shall be determined by the Ordinary ...'

9. The directions as to position reflect the terms of the Rubric in the Book of Common Prayer, at which date 1603 Canon 52 envisaged or required regular movement of the Holy Table for

the celebration of Holy Communion¹. The language is clearly broad enough to include positioning in the nave.

10. The Canon is not prescriptive as to precise position but envisages that there may be disagreement and provides that such disagreement is to be settled by the Ordinary, that is, the Bishop, not by the Chancellor (or Commissary General).
11. Whilst I accept Mr Cooper's submission to the effect that the use of a nave altar affects the way in which a church building may be used and appreciated, this does not mean that the mere movement of non-fixed items, even items of great liturgical significance, within the church building requires authorisation within the faculty jurisdiction. The Court of Ecclesiastical Causes Reserved decision in *Re St Stephen's Wallbrook* [1987] Fam 146 concerned the introduction of a new (second) altar in a central position within the body of the church. Reported² Consistory Court cases on nave altars concern either the introduction of a new Holy Table into the church and/or some associated physical reordering, typically a dais and the removal of fixed pews to the liturgical west of the nave altar. Such matters clearly fall within Canon F1 and often engage the *Duffield* questions because so many of the Church of England's churches are listed buildings (as is the case here, to which the Ground refers to, in shorthand, as 'the EE' (which I take to mean the Ecclesiastical Exemption)). But in this case, the item is movable and is simply transported by hand to the position in the nave for the services at which the Parochial Church Council has decided that this is liturgically desirable. There is no alteration to the fabric or furnishings of the church. The law (Canon F2) provides a method of dispute resolution which is not the Commissary Court. I do not consider that further 'clarification' is required by means of appellate litigation.
12. The subsidiary question of whether or not authorisation could be granted by Archdeacon's licence for temporary re-ordering or whether this could only be achieved by faculty does not arise. It also follows that there was no jurisdiction to grant a restoration order because the periodic movement and use of the article as a nave altar did not constitute the commission of an act which was unlawful under ecclesiastical law : see section 72 Ecclesiastical Jurisdiction and Care of Churches Measure 2018.
13. Accordingly, I find that Ground 2 does not have a real prospect of success nor is there any other compelling reason for granting leave.

¹ *Canon LXXXII A decent Communion-table in every Church*

'Whereas we have no doubt, but that in all Churches within the Realm of *England*, convenient and decent Tables are provided and placed for the Celebration of the holy Communion, We appoint that the same Tables shall from time to time be kept and repaired in sufficient and seemly manner, and covered in time of Divine Service with a Carpet of Silk or other decent Stuff thought meet by the Ordinary of the place, if any question be made of it, and with a fair Linen Cloth at the Time of the Ministration, as becometh that Table, and so stand, saving when the said holy Communion is to be Administered. At which Time the same shall be placed in so good sort within the Church or Chancel, as thereby the Minister may be more conveniently heard of the Communicants in his Prayer and Administration, and the Communicants also more conveniently and in more number may communicate with the said Minister: and that the Ten Commandments be set up upon the East-end of every Church and Chapel where the people may best see and read the same, and other chosen Sentences written upon the Walls of the said Churches and Chapels in places convenient: And likewise, that a convenient Seat be made for the Minister to read Service in. All these to be done at the Charge of the Parish.'

² See the Ecclesiastical Law Association *Ecclesiastical Judgments* website.

Ground 1: 'That the use of the subject nave altar (which it has come to light was itself instated without faculty) already constantly on chancel steps 2017-2022 should not now be permitted a further 24 months (on TMRO) wef 24 March 2022.'

14. Permission to appeal is **refused** on Ground 1.

Reasons

15. I have set out under Ground 2 why the use of the item as a nave altar did not require authorisation under the faculty jurisdiction. Those findings also dispose of this Ground and there are therefore neither real prospects of success nor any other compelling reason for granting leave on Ground 1.

Ground 3: 'Waiving of six year rule as regards total unauthorised loss of S Edmund Chapel fixtures.'

16. Permission to appeal is **refused** on Ground 3.

Reasons

17. Section 72 Ecclesiastical Jurisdiction and Care of Churches Measure 2018 provides as follows:

' Restoration order

(1) This section applies where at any time, whether before or after proceedings for obtaining a faculty have been brought, it appears to the consistory court of a diocese that a person—

(a) has committed a relevant act, or

(b) has caused or permitted the commission of a relevant act.

(2) A relevant act is an act in relation to a church or churchyard in the diocese or an article appertaining to a church in the diocese which is unlawful under ecclesiastical law.

(3) The court may make an order (a "restoration order") requiring the person to take such steps as the court considers necessary, within such time as the court specifies, for the purpose of restoring the position so far as possible to what it was immediately before the act was committed.

(4) A restoration order may be made—

(a) on an application by the archdeacon of the archdeaconry concerned,

(b) on an application by any other person appearing to the court to have sufficient interest in the matter, or

(c) on the court's own motion.

(5) The court may make a restoration order only if it is satisfied that the proceedings for the order were brought no later than six years after the relevant act was committed.

(6) A failure to comply without a reasonable excuse with a restoration order made by the court under this section is a contempt of that court.' (emphasis added)

18. S.72(5) (highlighted above) is unequivocal. The Commissary Court³ has no jurisdiction to make a restoration order in respect of acts committed more than six years before the making of the application for an order, even if such acts were not lawful. There was therefore no power to make a restoration order in respect of any acts occurring prior to 7th March 2016 (six years before the application). The Commissary General recorded in his substantive judgment that, according to Mr Cooper, the relevant item was introduced into a part of the church known as St Edmund's Chapel 'in the first decade of the 21st century'⁴ – well before 2016; no complaint is made about that part of the judgment. The Commissary General had no power to 'waive' the six year rule and fell into no error in his determination. The Court of Arches on appeal may '*give any judgment or direction which could have been given in the consistory court*' but does not have more extensive powers than the court below⁵.
19. Therefore there are no real prospects of success under Ground 3, nor is there any other compelling reason for granting leave to appeal.

Conclusion

20. I therefore order that the application for leave to appeal is refused and the costs occasioned by this application are payable by the applicant

MORAG ELLIS KC

DEAN OF THE ARCHES

Feast of SS Peter and Paul

³ Section 1(3) of the Measure provides that any reference to the Consistory Court within it is to be read as including the Commissary Court.

⁴ Judgment 6.4.2023, paragraph 4.

⁵ Faculty Jurisdiction (Appeals) Rules 1998, Rule 16(1)(b).