

IN THE CONSISTORY COURT OF THE
DIOCESE OF ST EDMUNDSBURY & IPSWICH

IN THE MATTER OF ST MARY'S, MILDENHALL

-and-

IN THE MATTER OF UNAUTHORISED WORKS

JUDGMENT

1. There are two matters to consider. In the first, the Petitioners are the Reverend Sue Leathley and the churchwardens of St. Mary's Church in Mildenhall. They petition me for a confirmatory faculty in respect of works undertaken without faculty in or around 1997. In the second, the Archdeacon of Sudbury, the Venerable David Jenkins complains to me in a written communication dated January 12, 2016 that unauthorised works, in the form of a lighting system, within the west porch, have been carried out (apparently in or around late 2015) and invites me to consider making a restoration order in respect of these works.
2. I have given three sets of directions. After considering a witness statement from the Petitioners on behalf of themselves and the PCC on the one hand, and from the Archdeacon as complainant on the other, I concluded that an oral hearing of both matters was necessary. I further required an undertaking from the Reverend Sue Leathley and the churchwardens that nothing would be done to remove, interfere with, add to or in any way alter either the speakers or lights in their current location. This was because there was *prima facie* evidence before me that a potentially damaging "do it yourself" spirit was present here on at least two occasions nearly twenty years apart.
3. The Reverend Sue Leathley is the priest who has had effective day-to-day charge of this church since 2008 and, to simplify this judgment I shall call her "SL" from here onwards. I shall refer to the present churchwardens as "CWS" for the same reason.
4. The hearing was set down for April 28, 2016 and took place on that date in the church. I took the opportunity to view the audio system before the hearing and, as the hearing was in the west porch, sat amidst the lighting that had been installed. I directed that the witness statement of the Archdeacon stand as his evidence. There was one area of potential dispute, or at least an issue of interpretation, about what one CW had said to the Archdeacon when he had discovered the unauthorised lighting in January 2016. As I made clear at the time, in as much as it had any relevance, I was prepared to accept SL and the CWS' interpretation. I also directed that a chronology

prepared by the secretary to the Diocesan Advisory Council (“DAC”) stand as evidence of its facts once SL’s observations had been added in by her in purple type. Here again, there was one area of dispute, this time as to the secretary’s reaction when he saw the lighting for the first time, but, for obvious reasons, that was irrelevant as the unauthorised lighting had already been installed by then. The witness statement of SL on behalf of herself, the CWS and the Parochial Church Council (“PCC”) was directed to stand as her evidence in chief and I thereafter asked her a number of questions with a view to my understanding the detail more clearly. She was not represented.

5. **The Application for a Confirmatory Faculty:** in or around December 2015, SL had her attention drawn to a “blog” commenting on two speakers high above the north aisle. Those speakers had been fixed by screws and brackets into a timber frame forming part of the mediaeval roof, described by some as the finest mediaeval roof in East Anglia. She reported the matter to the DAC. Further speakers have been similarly bracketed into the stonework high up above the southern aisle, but not into the roof itself. It appears that two further speakers were also utilised because those put in place in 1997 were inadequate. These were subsequently affixed to columns in the nave. The DAC visited the church on January 12, 2016 to inspect the problem.
6. SL told me that by talking to parishioners she had concluded that the speakers (other than the additional speakers in the nave) were put in the church at or before Christmas 1997. There was no faculty. She believed that they replaced a previous system for which it was believed there was a faculty. She has no proof of any earlier faculty. She told me that although she was aware that there was a sound system once she came to the church, her eye never fell on the particular speakers attached to the mediaeval timber framing. When she came to the parish in 2008 she assumed the sound system had a faculty. She appreciated it would require one.
7. I accept what SL says about not having noticed the speakers affixed to the roofing. Having seen them myself, and bearing in mind the height of the roof, the relatively small dimensions of the speakers and the size of the church, I can understand how this might be. Of course, once spotted, it is then impossible not to see them – and I have no doubt that she has had the same experience. I found SL to be a truthful and convincing witness on this matter.
8. I can be sure that there was no faculty applied for in respect of this audio system, including the speakers, because that is agreed evidence and the Diocesan Registry has no trace of any such faculty. I am satisfied on the balance of probabilities that there was no faculty applied for in respect of the earlier system either. In the light of those findings, the “to-ings” and “fro-ings” of the nave speakers were never covered by faculty in any event. I do not hold SL or the current CWS at fault in this matter, because I accept that they genuinely, and not unreasonably, assumed that there was a faculty in place.
9. It is right I emphasise that, since this unfortunate discovery, the PCC has endeavoured to cooperate with the DAC to agree a scheme that can put matters right, identify and repair any damage and provide a sound system that can satisfy the needs of this church without causing harm, or any more harm, to its significance as a building of special architectural and historical interest.
10. SL and the CWS on behalf of the PCC ask me to grant a confirmatory faculty and they accept it must be with conditions.
11. I sought the advice of the DAC on both matters before the court prior to the hearing and SL, the CWS and the PCC had an opportunity to consider it. The DAC has recommended certain conditions to me if a confirmatory faculty were appropriate. SL,

the CWS and the PCC agree with these proposals. It has the effect of removing the present speakers altogether from the church and replacing them with ones that fit inside the main circular light frames. This means they will be discreet and, I am told, actually more effective than the present system. Measures have also been put in place to allow for the careful removal of the existing speakers and the repair of any damage caused to the timbering, the stonework and the nave columns.

12. I have to perform a careful balancing exercise and it is important first of all to say something about this very striking church.
13. It is a Grade I listed building in the centre of Mildenhall - a dramatic mediaeval construct. Although there are some additions from later ages, including a "stair turret" above the battlements dating from the Victorian period, the building is resolutely mediaeval, housing an exceptionally fine roof together with its tower, completed during the Wars of the Roses or shortly thereafter, the base of which comprises the west porch.
14. The Court of Arches in *In re St John the Baptist, Peshurst* [2015] WLR (D) 115, reaffirmed the approach it set out in *In Re St. Alkmund, Duffield* [2013] Fam 158 in performing the necessary balancing exercise when determining petitions affecting listed buildings attracting the ecclesiastical exemption. It is this:
 - ONE - Would the proposals, if implemented, result in harm to the significance of the church as a building of special architectural or historical interest?
 - TWO – If the answer to ONE is "no", then the presumption is to be in favour of the *status quo*, but it can be rebutted more or less easily depending upon the nature of the proposals.
 - THREE – if the answer to ONE is "yes" – the next thing to ask is how serious the harm would be,
 - FOUR – next, it is necessary to assess how clear and convincing is the justification for the proposals.
 - FIVE – requires a recognition that the greater the harm, the greater the benefit will need to be to justify the proposals and, in the case of a building that is listed grade I or II*, where serious harm would result, then the justification would need to be exceptional.
15. I have no difficulty in finding that these proposals, if implemented, would not result in any harm to the significance of this church as a building of special architectural or historical interest. I also have no difficulty in concluding that the provision of sound amplification in this large church is justified and necessary. The presence of unobtrusive and effective sound amplification is exactly what this church requires.
16. I have also to consider whether a confirmatory faculty is fair more generally. After all, it may be argued, this was a deliberate and flagrant breach of the faculty jurisdiction by someone in authority at that church. Amongst many other considerations, the public was denied its right to object to the proposals and consultation with other bodies was impossible.
17. Here, the problem was the siting of the speakers. Absent that problem, it would not, in all probability, have been necessary to seek additional advice to that proffered by the DAC. The only known objection there has in fact been in nineteen years to this sound system has been the recent "blog" relating to the siting of the speakers, which will be corrected by the conditions I would be now able to impose in granting a confirmatory faculty. Because the work can be carried out under supervision and in stages to change from one poorly sited speaker system to a properly sited one, I also

judge that, in consequence, any reasonable objection is highly unlikely.

18. Accordingly a confirmatory faculty is granted for the audio system in the church with the following conditions:

- (i) The PCC to accept the proposals from Audio Electronic Design (“AED”) for the introduction of new speakers to be installed within the existing light fittings and adopt the cabling recommended by AED;
- (ii) The current speakers to be removed from their brackets;
- (iii) Initial investigations to be carried out by AED on the present brackets in consultation with the PCC’s inspecting architect;
- (iv) The repairs to walls and stonework to be referred to a stone conservator and the DAC to be fully consulted on any repair work before it commences and to be satisfied with the proposals and express that satisfaction in writing, written approval transmitted electronically being sufficient;
- (v) The repair of the timberwork to be referred to the DAC’s timber expert and the DAC to be fully consulted on any repair work before it commences and to be satisfied with the proposals and to express that satisfaction in writing, written approval transmitted electronically being sufficient.

19. These works will be commenced within the next 4 months at the latest, unless the time period is extended on application to the Chancellor or the Deputy Chancellor, showing good cause.

20. The cost of all works, including repair work, to be borne by the PCC.

21. Finally, I make clear that the essence of these terms was raised and considered at the oral hearing and SL made it clear to me that they were agreed by the CWS and the PCC.

22. **The Application for a Restoration Order** formed the second matter upon which SL gave evidence. She explained that the area in which the court was sitting had been a “dumping ground” before 2014 and was then cleared out. Temporary lighting was put in. I saw two of these temporary lights still there. They were tall, free standing lamps giving off a rather poor light.

23. The PCC had applied for permission to make certain minor changes introducing temporary heaters, and wooden covers for the stone benches and, more substantially, for LED lighting. SL sought and was granted permission to remove the lighting element from that petition to speed consideration of the other minor works under consideration. Various proposals for the lighting went back and forth between SL and the DAC to try and agree proposals that could be put into a separate faculty application for the lights. One particular area of dispute between the PCC’s consulting architect and the DAC was a proposal to affix six vertical tracks into mortar joints. It was said there would be no visible wires or transformers. This was continuing into the spring of 2015. The DAC was of the view that the PCC needed to engage better with its consulting architect.

24. The DAC’s concern is exemplified by what SL herself told me. She said that once the consulting architect had submitted his proposals (involving the tracking) she thought the lighting was agreed in principle. One of the CWS identified lighting thought to be suitable and SL told me that she emailed both the consulting architect and the DAC about it. She received no reply. At around this time, the electrician was in the church carrying out works in connection with the heating and she took the

opportunity to have the lighting installed. She said she had no reason to think this would not be well received and that, in effect, the faculty itself was going to be simply a formality.

25. She said she had never pre-empted the issue of a faculty in this or any other way before and understood the importance of the faculty system. She, nevertheless, thought “it was the ideal time to do it”. She thought the new lights would be screwed into the mortar joints and “could be removed” if they did not work. Apparently, the electrician was hard to book for visits and it was “a wonderful opportunity”. She thought that the DAC was hardly likely to reject the architect’s advice. Having seen the admitted chronology, she now accepts that her assumption was misplaced. When asked to summarise her state of mind, she said she had decided “to take the risk”. She said she understood that parishes could not simply behave towards church buildings as they liked. She understood the significance of this building, listed class I, that she loved this church and she now realises what she did was not right. It was done “in the heat of the moment”. She accepts holes have been drilled into the stonework as opposed to being screwed into the mortar joints. This work was done probably in November 2015.
26. It appears from the agreed chronology that there was some discussion between the DAC secretary and the consulting architect about what could be done. The Archdeacon, on seeing the new lighting during the DAC visitation over the siting of the speakers on January 12, 2016, ascertained that no faculty for these lights had been granted. He also discovered, and it is not disputed, that this was deliberate. He immediately reported it to me.
27. I asked SL if she had tried to phone or email the architect or the DAC to say she was going to use the opportunity of the electrician’s presence to install the lighting without faculty. She said she had not. I then asked her whether the electrician had known there was no faculty when he installed the lighting system. She said he had. He said “if it (the permission) never came they (the lights) would be easy to remove.” As I have not yet given him the opportunity to tell me his version of the events, I shall not in this judgment name him or the company for which he works. However, since there appears to be *prima facie* evidence that he was complicit in this wrongful act, I shall direct the Registrar to write to him for an explanation. Thereafter, I shall consider what, if any, action I should take in respect of him or his company.
28. As well as the general exceptional qualities of this church this discrete area has specifically important features. The base of the tower is dated by Pevsner to the second quarter of the sixteenth century. It has “tunnel like” fan vaulting in three bays with stone benches along each side. The effect created by this feature is in my judgment visually stunning.
29. I understand the desire of the PCC to use this space properly. I also understand the need to have the area properly lit. It makes an obvious and dramatic difference to the appreciation of its extraordinary qualities.
30. However, aside from the issue of the the works having been carried out without faculty, the present installation looks amateurish and unsightly, the drilling directly into the stonework is unnecessary and damaging and the siting of the lights is unattractive particularly when viewed from the eastern side, from where this area is most likely to be viewed.
31. I have considered carefully SL’s explanation. It is really two explanations: first, she

thought the issuing of a faculty to be a formality and second, she decided to take a risk. Since these reasons are to an extent contradictory I find it represents an evolution of her assessment now as the hearing progressed. Wishful thinking and shutting her eyes to the obvious led her to form the first conclusion and a realisation of what had in reality happened led her to the second.

32. A moment's thought disposes of the notion that the grant of a faculty was any kind of formality, even if that would be mitigating feature, which it would not. There was no extant petition to seek permission for this lighting. The DAC, even if it had been favourable to the scheme as envisaged by the architect, does not decide whether a faculty is granted. That is solely within the jurisdiction of the Chancellor or Deputy Chancellor of this diocese. The clue is provided by the word "advisory" in Diocesan Advisory Committee. In fact, the DAC was not favourable to the scheme as proposed. SL told me that she understood the Chancellor, or Deputy Chancellor where appropriate, alone granted a faculty. Her discussion with the electrician is, I regret, only capable of one reasonable interpretation: namely that she was proposing to take a chance and go ahead with unauthorised works.
33. In my judgment she shut her eyes to the risk that the architect had not obtained a favourable response to the proposals from the DAC. She ignored the fact that by proceeding with the works in this way she was depriving the public of a right to express opposition to, or observation upon, the scheme. She pre-empted any consideration by the DAC or Chancellor that bodies such as the Church Buildings Council, Historic England or the relevant Amenity Societies might need to be consulted. She deprived the DAC of its right to advise the Chancellor about the proposals prior to their implementation and prevented any proper consideration as to other important matters such as the way the work was carried out and appropriate insurance arrangements.
34. She accepts full responsibility for what happened and, in the light of that, I shall not pursue an analysis on this occasion as to the role of the CWS and the PCC.
35. The DAC, in its recent advice that I requested, supports proper lighting of this area. It is concerned about the current lighting tracks, and suggests repositioning on the western side of the ribs with fixing into mortar joints. It suggests re-wiring and re-routing of cable both for the heaters and the lights. The wiring is competent but unattractive. It suggests that the track and lamp units be painted to match the stonework. It further recommends that repair of the stonework be referred to a stone conservator and the stone conservation and electrical installation to be viewed by the DAC prior to the remaining work commencing.
36. SL, CWS and the PCC agree with these proposals. They are concerned that the area should be properly lit with as little interruption as possible.
37. I have given the most anxious consideration to the Archdeacon's application for a restoration order. This obviously pre-dated the receipt of the advice from the DAC. I am just, but only just, persuaded that I can refrain from imposing a restoration order in this case at this stage. Nevertheless, I should make clear that had the Archdeacon not himself applied for a restoration order as he properly did, I would have held a hearing of my own motion to consider such an order.
38. I have reached this conclusion because, applying the test in *St. Alkmund* (above) the objectionable feature of the lighting is primarily once again how it has been sited. If placed in this part of the church as advised by the DAC I do not find that it would have resulted in harm to the special architectural and historical significance of this

building. Indeed, it is capable of enhancing it. A good case is made out for the lighting but it must be sited sympathetically and appropriately.

39. However, I am not prepared to grant a confirmatory faculty in this case. There was here a flagrant disregard of the faculty jurisdiction. It is the first case in this diocese that I have encountered, either as Chancellor or Deputy Chancellor, where petitioners have withdrawn an item from a petition for faculty and then proceeded to carry out the works previously petitioned upon whilst in preliminary discussions with the DAC about the proposal prior to re-petitioning the court for a faculty.
40. Unlike the matter of the speakers, the lights have not been installed for more than a short period and there is no good reason why public notices, and the other normal steps consequent upon petitioning the court, should not take place.
41. SL, the CWS and the PCC know already the likely advice of the DAC. Subject to there being no objection or issues relating to consultation, a final decision should be possible in a reasonable time frame. My final decision upon the application for a restoration order is adjourned for 36 days from the date of this judgment to allow a petition for a faculty to be presented.
42. There are concluding matters: In respect of the undertaking given by SL and the CWS, I now release them from compliance with it in respect of the audio system upon the confirmatory faculty in respect of those works passing the seal. I release them from the undertaking in respect of the lighting upon a faculty for that work being granted and passing the seal.
43. Unusually, I am going to permit the present lighting to remain until such time as I have considered the grant of a faculty to relocate it more appropriately. If I were to grant a faculty it would be likely to be time-limited to assess whether within a period of time consideration may be given to an alternative system as it appeared to me that these lights will have a certain “life”.
44. I direct the Registrar to write to the electrical contractors who carried out the lighting works requiring a full written explanation for the works that were carried out without faculty.
45. The cost of all works, including repair work, will be borne by the PCC in due course.
46. SL was invited to make representations about the principle of costs being awarded against the PCC and made none. Accordingly, I order that the costs consequent upon this hearing be borne by the PCC of St Mary’s Church, Mildenhall. Costs to be assessed by the Registrar and payable, subject to written appeal to the Chancellor, within 28 days of receipt.
47. At the heart of what happened here was a misapprehension about and a disregard of the Consistory Court and the faculty jurisdiction. The exemption from listed building consent provided to listed ecclesiastical buildings such as this church, known colloquially as the “ecclesiastical exemption” and granted by section 60 (1) Planning (Listed Building and Conservation Areas) Act 1960 is predicated upon there being an equally rigorous system being maintained for the regulation of alteration to such listed buildings.
48. I hope I have corrected the view, if it was held, that it is not the incumbent, churchwardens and PCC, or any combination of them, who perform the difficult balancing act between the need or justification for works and the harm those very works might cause. That is the task given to this court and one it takes very seriously indeed.

49. This diocese has a proud tradition of good relations between the DAC and individual parishes. Considerable effort and expertise is deployed in assisting petitioners in the formulation of proposals within the remit of the faculty jurisdiction and in attempting to address difficulties at an early stage. It is recognised that early consultation with the DAC and, where appropriate, with the Church Buildings Council, Historic England and the national Amenity Societies is of great assistance to those considering alterations to churches, particularly churches that are listed. In specified situations certain consultations are mandatory.
50. As already observed, it is both very disappointing and exceptional that any incumbent, churchwarden or PCC, or indeed any petitioner, should deliberately ignore the need for a faculty and even more so when the proposed petitioners are in discussion with the DAC about the very proposals that are then implemented without permission.
51. Not only is this unlawful, it is very foolish. Unlawful and un-notified works are unlikely to be covered by insurance. Contractors risk in the future the gaining of approval for other work in any other building covered by the faculty jurisdiction. Potential consultees are deprived of an opportunity to comment and advise upon, or object to, what it is sought to do. Members of the public may be rightly angry and frustrated that they were deprived of any right to object, or make observations upon, the proposals and may lose confidence in the system altogether.
52. No less importantly, there is a real risk that the works will have to be dismantled and on many occasions an oral hearing will have been involved, whatever the final decision of this court. This court does not benefit from public funding. It has to recoup its costs, or such part of them as is allowed, from those who use it or, as on this occasion, irresponsibly and unnecessarily caused the cost to be incurred. Whilst these costs are prescribed by Order, and do not represent the cost of the same work carried out commercially, they are still likely to be very considerable to those looking after tight budgets in austere times. It is a ridiculous waste of money that, from the parish's point of view, could have been used in a different way. My own broad perusal of The Ecclesiastical Judges, Legal Officers and Others (Fees) Order 2015 suggests the figure will be well in excess of £3000, although proper and itemised assessment of the fees is for the Registrar.
53. Here, I accept that SL has made a genuine apology and that the matter giving rise to the application for the restoration order arose from a moment of markedly poor judgment on her behalf. I further accept that she has chosen to accept the responsibility for this before the court, although she was not the only one involved. I also found her to be someone who obviously loves this church very much. It was both helpful, as well as necessary, to hear her evidence about these matters and I understand appreciate and acknowledge the stress she felt under during the hearing and, doubtless, leading up to it.
54. Nevertheless, this hearing concerned at least two occasions, admittedly far apart, when this church, Grade I listed, had works carried out without faculty. There is no excuse on either occasion. The first involved works that were potentially seriously damaging to the mediaeval fabric of this fine building. It was not the responsibility of SL or the present CWS. The second breach concerning the lights was flagrant and also has probably caused some limited damage. With the assistance and advice of the DAC, it will be possible to put right what happened as far as it can be and provide the church with decent amplified sound and the west porch with proper

lighting.

55. One thing needs to be clear beyond any doubt whatsoever. This is never to happen again, either in this church or anywhere else.

Etherington, Ch.