

RECENT ECCLESIASTICAL CASES

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Instead of the usual summary of Consistory Court cases,
the following judgment is fully reported.

Re: All Saints, Harborough Magna
(Coventry Consistory Court; Gage Ch. 13 September 1991)

The Worshipful W. M. Gage, QC.: There is before me today, a Petition for a faculty presented by the two Churchwardens of All Saints Harborough Magna. They seek a faculty to sanction the grant of a licence for the installation of two Omni Aerials, a communication dish to be placed on the church tower, an isolator power and radio unit mounted in an oak veneer cabinet in the church porch, and any attendant wiring necessary for such installation. This is the first such petition that has come before me in this diocese, although I am aware that petitions for such faculties have been presented in other dioceses. Because of its unusual nature and because of its novelty so far as this diocese is concerned, I ordered that there should be a hearing in court.

I must start first by dealing with the law. I gladly adopt and accept the position as set out by Chancellor Goodman in *Re: Rusthall, St Mark's Biggin Hill and St Mary's Shortlands* as yet unreported. He said at page 3 of the Judgment:

“First I must consider the law. The use of church buildings in these cases would of course be for wholly secular purposes. Generally speaking of course, any use of a consecrated church or a consecrated churchyard must be for ecclesiastical purposes. These days “ecclesiastical” is often interpreted generously. Thus it will cover use of part of the church as a meeting room, for providing kitchens, washing and lavatory facilities and so on. Permission is sometimes given to use part of a church for a nursery school, or an old people’s day centre. But all of these activities can be comprehended within the expression “pastoral outreach”. Here however the use is wholly secular and commercial even if the general public will benefit.

“There have been cases where faculties have been granted to approve rights of way over churchyards for the benefit of neighbouring land owners. Part of a churchyard can be permitted to be used for road widening purposes and small electricity sub-stations have been permitted to be erected on a churchyard if it is judged that they will not adversely affect the essential character of the churchyard. Use of part of the church itself for wholly secular purposes is of course, another matter.”

Chancellor Goodman went on to refer to the case of *St James Bishampton* [1961] 2 All E.R. 1 where a faculty was granted to permit a mast to be erected on the tower of the church as a warning light for the benefit of aircraft flying in the vicinity. As Chancellor Goodman pointed out that case was reported principally upon the question of whether or not the Minister of Aviation had a sufficient interest to present a petition. However, it is also authority for the proposition that such a mast could be placed upon a church for purely secular purposes, namely to guide aircraft. Chancellor Goodman held that he had jurisdiction to grant the faculty sought. At page 5 he stated:

“I am fortified in the conclusion I have reached by certain comments made by Chancellor Newsom in his recent book on Faculty Jurisdiction of the Church of England page 99 when he said “It happens quite often, especially in towns, where land is scarce and expensive that there is part of a church, often a crypt, which is not needed for worship or for any purpose ancillary to worship. In such cases and under careful arrangements it is admissible for the Court to allow such an area to be used by third parties for suitable secular purposes so as to provide revenue which will assist in maintaining the church and its services.”

I also agree with the those observations and hold that I have jurisdiction to grant this faculty. I should just add that in general it is my view that a faculty for use of a church for secular purposes only, should be granted only in rare and exceptional circumstances. In cases such as this, each one must be considered on its merits. Although I shall give some general guidance, I recommend that each parish looks at any individual case very carefully before deciding whether or not to present such a petition.

Looking at the matter generally, Mr Hawkes, the Chairman of the Diocesan Advisory Committee, told me that the grant of faculties in such cases was the subject of a debate at a conference arranged by the Council for the Care of Churches. The Council for the Care of Churches has also produced a paper called Aerials for Personal Communications Networks. Arising out of that paper I have thought it right to ask questions of the various witnesses who came before me. It seems to me that the following five matters must be considered when the court is faced with a petition such as this and a decision whether or not a faculty should be granted.

1. *Siting*

Aesthetic considerations clearly play a large part in any decision. It is obviously vital that, if any such installation is to be placed in or upon a church it should be placed as unobtrusively as possible; and in a place that does not interfere with the aesthetic look of the church. This is something which I have no doubt the Diocesan Advisory Committee will pay great attention to.

2. *Lightning*

By placing such an installation in a church there can be increased risks in relation to lightning. Expert advice should be sought by Parochial Church Councils on this matter before they present any petition for a faculty in respect of such an installation.

3. *Electrical Matters*

The question of how an installation will affect the existing electrical installations within the church is of importance. The best advice would appear to be that the installation should be completely separate from the church's electrical system. In addition, such electrical installations should be installed in such a way that they do not adversely affect the fabric of the church.

4. *The control of the use of the installation*

Nowadays, it is possible for communications to be set up for all sorts of different purposes. It seems to me wrong that the church should, in any way, be seen to lend itself to something which might reflect adversely upon it. In this particular regard, Mr Jones, on behalf of Mercury Personal Communications Limited said that it

had a system for barring the use of certain numbers which are used for pornographic purposes. Quite clearly careful consideration must be given to ensure that safeguards can be put into effect in respect of matters such as that.

5. *Licence*

The installation should be sanctioned by the Parochial Church Council by way of licence granted by the Incumbent. Great care must be taken in respect of the Licence itself. As to that it seems to me that there are a further eight matters which ought to be considered.

First, the length of any term of the Licence:

As did Chancellor Goodman, I believe that long term Licences ought not, at this stage, to be granted. It seems to me that initially the proper term should be no longer than five years. In addition there should be to start with, a period of two years where either party has the right on six months notice, to end the Licence. At the expiry of the five year period there ought to be provision for an extension year by year with each party having the right to give 12 months notice to determine the Licence, to expire on the anniversary of the granting of the Licence.

Second, the fee:

It does not seem to me that the court should hold up to ransom the Petitioners or those who own the installation, as to fees. Parochial Church Councils and Petitioners ought, in my judgment, to take independent advice and negotiate on the basis of that advice with those who own the installation so that a proper fee can be arrived at. The court will require evidence to show that that step has been taken.

Third, Access:

The Licence ought to deal with the question of access to the church by those who own the installation. Quite clearly divine worship would not be interfered with and equally clearly those who come to the church using the rights of access should act appropriately. There should also be some provision for the owners of the installation to be able to get at their installation in cases of emergency.

Fourth, Repairs:

Both during the course of the installation and in its removal there is a possibility that damage may be caused to the fabric. The Licence ought to deal with the making good of such damage. I would expect those who own the installation to indemnify the Licensors in respect of any such damage.

Fifth, Insurance:

As I have already indicated, there may very well be an increased insurance risk in respect of lightning. The cost of the increased premiums in respect of such risk ought in my judgment to be borne by owners of the installation. In addition, problems may arise from the installation, one knows not how, which could cause damage to persons and property. In my judgment the owners of the installation ought, by the terms of the Licence, to indemnify the Licensors in respect of all such damage howsoever arising whether it be damage to property or persons. They should also undertake to insure against such damage and present evidence of such insurance to the Licensors. That may seem a little harsh on well established companies but in these days it is necessary. The possibility of bankruptcy ought also to be catered for in the Licence.

Sixth:

At the end of the period of the Licence, whether by expiration of the term or by notice, provision should be made for the expeditious removal of the installation by its owners.

Seventh:

Under the heading Alienation in the Heads of Agreement which is exhibit 1, the owners of the installation wish to have the right to transfer the Licence to any associated company. In my judgment the Licence should provide that alienation should only occur with the consent of the Licensors and a faculty will be only granted on the basis of the Licence being personal to the person or entity who is granted it. It may be that by agreement the Licence can provide for consent to be granted for transferring to an associated company, such consent not to be unreasonably withheld. That is a matter for negotiation between the parties. I simply state that in respect of that term the Licensors should seek protection against the Licence being transferred to another company who may use it in a different manner.

Eighth:

The Licence should contain some reference to the Licensee undertaking to use its best endeavours to see that the installation is used for no unlawful or improper purpose and in the event of such occurring to take effective steps either to prevent such further use or to remove the installation.

Those seem to me to be the matters that ought to be considered by parishes and the DAC when petitions of this sort are presented. There may be other matters which others will think of and although I do not direct it, it is my hope that the DAC will carefully consider the whole topic and may glean assistance from the notes that have been circulated by the Diocese of Rochester.

I turn to this particular Petition and deal with these headings. (The Chancellor considered the evidence and concluded that a faculty should be granted upon a draft licence being submitted to the Diocesan Registrar for his approval.)