

Re Holy Innocents, Southwater (No 2)

Judgment on Application for Variation of Faculty

1. This unfortunate matter comes before me for determination following a considerable delay at the registry for which a full apology has been offered. It concerns an application for a variation of a faculty which was granted following an earlier judgment of this court dated 24 June 2009. The faculty permitted, amongst other things, the removal of the raised floor in the chancel and choir stalls. For reasons to which I shall come later in this judgment, a concrete slab was laid in the chancel. This was unlawful as it was outside the clear terms of the faculty. Furthermore, the introduction of a sheet of polythene (a further illegality) might give rise to serious damp problems at this church in the future.
2. It ought to be well known within the diocese and beyond that applications to vary a faculty ought to be made to the consistory court at the earliest possible opportunity. The court will decide what, if any, expert advice it requires and will prescribe a timetable for the commissioning of that advice. Unfortunately, in this instance, the inspecting architect elected to make an approach to the Diocesan Advisory Committee (whose involvement ceases upon the grant of a faculty) and while a nugatory process of consultation was in train, the contractor proceeded to carry out the unlawful work. In this instance, it appears that one concern amongst the petitioners was that tight timetabling of the works between events scheduled in the church placed them in a difficult position. I emphasise yet again (as it does not seem to have permeated every corner of the diocese) that the systems exist for the chancellor (or his deputy) to deal with urgent matters within 24 hours (often less) 365 days a year. The registry should always be the first port of call whenever a variation is required (particularly if there is any suggestion of urgency) or whenever it appears that a retrospective faculty is required. The consequence of not following this simple rule is borne out by the sad circumstances of this case.
3. That said, I have been extremely impressed by fulsome, contrite and thoughtful representations made to this court by Mr Simon Dyson (the inspecting architect), dated 21 October 2010, Mr Nicholas Fox of Clover Construction & Decorating Limited (the contractor) dated 8 November 2010 and Mr Stephen Chapman (on behalf of the petitioners) dated 26 November 2010. I accept without reservation that the unlawful work was undertaken in good faith and was not done in defiance of this court or in deliberate flouting of the faculty jurisdiction.
4. My only abiding concern arises from Mr Fox's letter. It states in paragraph 3 that 'Ms Khwemah Sykes (HMDW Architects Ltd) was the architect in charge overseeing the work'. This is not correct. The terms of the faculty dated 15 July 2009 contained a

single condition, namely that the work 'is to be carried out under the direction of Mr Simon Dyson RIBA of HMDW Architects Limited'. There may well have been a misapprehension on Mr Fox's part and I make no adverse findings without having invited comment from Ms Sykes and Mr Dyson. But I do wish to make it plain throughout the diocese that when the customary condition is imposed stating that work is to be undertaken under the direction of a named individual (whether the inspecting architect or otherwise) that responsibility is non-delegable. If the individual considers there are valid reasons why someone else should do so, the proper course is to apply to the court for a variation to a faculty. A brief email to the registry will suffice giving reasons and it will be determined expeditiously by the chancellor or his deputy.

5. I raise the above concern because in Mr Fox's letter, he states that once it became apparent that the sub-base was unstable, a meeting was convened involving Ms Sykes, Mr Chapman and himself at which it was agreed that the floor could not stay as it was. Mr Fox continues: 'After another meeting between Ms Sykes, Mr Chapman and I, it was agreed that I should continue with the work due to wedding commitments promised'. Mr Dyson has not been afforded the opportunity of commenting upon the suggestion that the unlawful works were authorized by his delegate, for whose acts and defaults he (or his firm) is vicariously liable; and in his letter of 8 December 2009 to Mr Steven Sleight, DAC secretary, he expressly states 'no verbal or written instruction had been given by us as architects to proceed'. I note that, in his letter, Mr Chapman makes no mention at all of Ms Sykes. Even if what Mr Fox says is strictly accurate, he ought to have known that neither Ms Sykes, nor her employer, has power to vary the terms of a faculty issued by order of this court. I do not consider that any useful purpose will be served by a forensic investigation of what took place, and I make no findings. In the light of the gracious, apologetic and dignified letters from all concerned, I propose to say no more on the matter. I am in no doubt that lessons have been learned and I am confident that what I am happy to categorise as an honest mistake will not be repeated.
6. What order should this court make on the application to vary the faculty? Ordinarily works which have been undertaken unlawfully should be reversed at the expense of the wrongdoer. See generally the Faculty Jurisdiction (Injunction and Restoration Orders) Rules 1992. This court tries to adopt a pragmatic and common sense in cases such as these, which are fortunately rare. The first question is the extent to which the integrity of this Grade II listed building may have been compromised by the unlawful works. In the view of the DAC (whose opinion the court would have sought even had the correct procedure been followed), had a DAC certificate been sought prospectively for the introduction of a slab, it would not have been recommended. See its letter of 16 November 2009. There was a concern that such an intervention could lead to water being driven to the outer walls of the church causing problems in the long term. The DAC also regretted the loss of the tiled floor, although I interpose that its condition was questionable.
7. Mr Dyson, as I understand the position, accepts that there is force in the DAC's concern that the polythene membrane could act as a wick conveying moisture into the walls. To mitigate the effect of the membrane, Mr Dyson recommends that the

slab be cut back by approximately 25 mm to allow the insertion of a strip of Newton 520 membrane which would allow any moisture to breathe and reduce the impact on the walls. This intervention would be masked by a timber surround screwed and pelleted as per drawings accompanying Mr Dyson's letter of 8 December 2009. Cutting out with a diamond saw, he suggests, would be less likely to cause damage than breaking out the slab in its entirety. Dust containment and protection of interior furnishings, and the organ in particular, will be essential.

8. The DAC, through its secretary, wrote to the registrar on 15 December 2009. In that letter it was recognized that the introduction of the concrete slab was ill advised as well as unlawful. However it was recognized that its removal would create huge amounts of dust and dirt and acknowledged that Mr Dyson's proposal to mitigate the effects of its introduction were, in pragmatic terms, acceptable. The DAC indicated that the contractor had agreed to undertake any work in the future should dampness become a problem. Sincere and generous though this undertaking undoubtedly is, it is difficult to see how it can take the form of a legally enforceable warranty, particularly as it may take many years for the full extent of any problem to become apparent.
9. In the circumstances, I am prepared to accede to the retrospective application to vary the faculty and to permit the introduction of the concrete slab. I do so subject to the following conditions:
 - i. that the works be carried out in accordance with Mr Dyson's letter of 6 December 2009 and accompanying documentation;
 - ii. that, in particular, proper protection be given to all furnishings of the church during the currency of the works and that the organ is sealed, to the satisfaction of the DAC's organs' advisers to prevent damage from the ingress of dust;
 - iii. that the works be carried out under the direction of Mr Simon Dyson personally, such direction not to be delegated to any other member or employee of HMDW Architects Limited;
 - iv. that the works are completed within 3 months of this order varying the faculty or within such extended period as this court shall permit;
 - v. that all usable tiles be stored under cover on batons in appropriate dry conditions to the satisfaction of Mr Dyson and are not to be disposed of without the approval of this court which has in mind their sale or gift to another church for reuse;
 - vi. that Clover Constructing and Decorating Limited undertakes to carry out such remedial works as may be ordered by this court in the event that a damp problem arises at any time within ten years of the date hereof by reason of the introduction of the polythene membrane.
10. I come then to the question of costs. These comprise the additional court fees occasioned by the application to vary the faculty and the costs of the remedial works themselves. To my mind, neither of these sets of costs should fall on parish funds. My preliminary view is that Clover Construction and Decorating Limited should pay the court fees and I would welcome constructive suggestions from the parties as to how the costs of the remedial works should be paid. It may be that the insurers of

either Clover Construction or HMDW Architects Limited will need to be notified. I invite the interested parties to make written representations on costs within the next 21 days, upon receipt of which I will make my adjudication in the absence of consensus. It would be helpful for the court to have a clear indication of the likely cost.

11. This has been a most unfortunate occurrence, brought about by misunderstanding and not through malice or ill-will. The consequences need to be dealt with responsibly and I have been very impressed by the mature and constructive approach of all concerned in the aftermath of the regrettable incidents, and I trust this judgment brings the saga to an end.

The Worshipful Mark Hill QC
Chancellor of the Diocese of Chichester

5 January 2011