

## In the matter of St Peter, Bramley

Between:

Leeds City Council

Petitioner

and

(1) Reverend Paul Crabb

(2) Michaela Stevenson

Respondents

The Reverend Eric Owen, counsel, instructed by Nicola Murphy, section head civil litigation, Leeds City Council, for the petitioner.

The first and second respondents in person.

### Judgment

1. By a petition dated 19 September 2016, and amended pursuant to the court's directions of 31 October 2016, the petitioner seeks (i) a confirmatory faculty for the retention of a fence which it erected unlawfully in the churchyard of St Peter's, Bramley, and (ii) a faculty for the fence's removal.
2. The reason why a local authority finds itself simultaneously seeking two incompatible outcomes will become apparent during the course of this judgment. They are pursued in the alternative. First I need to say a word about the parties. The original petition had three individuals as the petitioners: Ms Joanne Clough, a manager with Leeds City Council, the priest-in-charge of St Peter's, Bramley and one of its churchwardens. It was wholly inappropriate for an employee to pursue a petition on behalf of a local authority and I therefore ordered that Leeds City Council be substituted as petitioner. A preliminary scrutiny of the papers suggested a degree of unease on the part of the parish with the proposal and I therefore ordered that the second and third petitioners become respondents.

#### **Background**

3. St Peter's church is a grade II listed building which lies in the suburbs of Leeds. It sits in a churchyard which was closed by order in council made in 1987. It is accepted

that the duty of repair and maintenance for the churchyard passed to the petitioner pursuant to the provisions of section 215 of the Local Government Act 1972.

4. Shortly before the hearing, a point arose as to whether the entirety of the churchyard was in fact closed. A plan located with a copy of the order in council appeared not to include the grassed section on the perimeter of which the fence in question had been erected, but this may have been a simple mistake and the closure in fact extended to the entire churchyard.
5. Mr Owen, for the petitioner, submitted that the fence may have been erected in a section of the churchyard which had not been closed, as assumed, but which had nonetheless been maintained by the petitioner in recent years. He stated in his supplementary submissions, and affirmed in oral argument, that the petitioner will continue to maintain this section on a voluntary basis, if it is not in fact closed. I am pleased to record that assurance in this judgment.
6. Mr Owen conceded that whether the fence had been erected on a closed portion of the churchyard or on some part which had not been closed, it still came within the faculty jurisdiction and permission was still required for the erection of the fence. In the circumstances, it was unnecessary to enter into an investigation of this matter which – though important – did not need to be determined for the fair disposal of the petition. Mr Owen did not invite me to resolve the matter; and if it remains contentious, it can be litigated on another occasion.

#### **The petitioner's case**

7. The petitioner relied upon the evidence of Ms Joanne Clough contained in a witness statement dated 7 November 2016. She was unable to be present for the hearing but her evidence was unchallenged. Ms Clough is the Trading and Operational Support Manager (Parks and Countryside) for the petitioner, a post she has held since 2010, although she has been in its employ in other positions for many years.
8. Ms Clough describes how Parks and Countryside Officers were first alerted to youths standing on the boundary wall of St Peter's throwing stones onto passing vehicles. An email from the first respondent dated 22 August 2016 had been forwarded to her by elected ward members on 30 August 2016. A site meeting was duly arranged for 7 September 2016.

9. Ms Clough continues at paragraph 6:

The operational managers instructed the front line staff from the Parks and Countryside service to visit the site on 31 August 2016 and tidy up the area around the Bell Tower including measuring the boundary area adjacent to Town Street with a view to installing a bow topped fence to prevent youths from gathering on the wall and to prevent anyone from falling off the boundary wall.

10. Ms Clough states that it was reported back to her that from the litter which was removed, it would appear that the area had been used for drug misuse. A metal palisade was reported as being attached to the outer edge of the boundary wall which, she says, had not been erected by the petitioner.

11. Ms Clough then records that the petitioner erected a bow topped metal fence on 1 September 2016. She states:

Officer's [*sic*] were acting in a manner that they would normally do when responding to issues of safety on Council owned and managed land and thought that they were doing the right thing in relation to the closed church yard at St Peter's Church Bramley, by acting upon the email that the Parks and Countryside service had received.

12. Surprisingly, Ms Clough offers no explanation for the fact that the work was undertaken without any apparent consultation with her and in the knowledge that a meeting had been scheduled for less than a week hence to be attended by interested parties.

13. Ms Clough describes the subsequent meeting on 7 September 2016, attended by one Sarah Blenkin of the petitioner's legal services, the second respondent, three elected ward members and PCSO Broadhead. She notes that one Jessica Thomas was present whom she wrongly describes as being from the Leeds Diocesan Registry. Ms Thomas has nothing to do with the Registry but is Assistant Secretary to the Leeds Diocesan Advisory Committee. I interpose to comment that this seems to evidence Ms Clough's unfamiliarity with the operation of the faculty jurisdiction, and that of the petitioner's legal team which was represented at the meeting.

14. Ms Clough's statement proceeds to apologise for 'any inconvenience' resulting from the erection of the fence without having a faculty in place. It also mentions a letter of apology subsequently sent to the chancellor. This is a reference to a letter of 26 October 2016 in which she apologises on the petitioner's behalf for 'any upset this may have caused'.

15. The petitioner further relied on a statement from PC Sarah Carroll exhibited to Ms Clough's statement. She describes herself as a ward manager dealing with youth and anti-social behaviour in Bramley. PC Carroll attests to the danger and disruption occasioned by the stone throwing recorded above, and the danger to youths in consequence of the substantial drop of 4 metres or more on the boundary. She indicated that CCTV existed of stone throwing on 14 August 2016. I did not consider it necessary to view the footage as this was not disputed.

16. PC Carroll indicates that a meeting was held on about 18 August 2016 addressing these matters and that following the meeting she met the first

respondent and discussed a range of possible actions, including the erection of a fence. This led to the first respondent's letter of 22 August and arrangements being made for the site visit on 7 September 2016 attended by PCSO Broadhead. She states that since the fence was erected there have been no further incidents of anti-social behaviour and concludes that the West Yorkshire Police would advise that it should remain in situ.

### **The respondents' case**

17. The respondents rely upon a written statement from the first respondent. He describes being alerted to the situation by PC Carroll and meeting her in the churchyard, along with the second respondent, on 22 August 2016. He recollects the points of concern were the use of stones as missiles and injuries which may occur to youngsters were they to fall from the wall. A structure in the churchyard (named as a former bell tower and possibly once the spire of St Margaret's church) was noted as being a gathering point for youngsters and it was feared it may be potentially unsafe. Photographs were taken and it was agreed to consult local councillors and council officers, as well as the church's insurers, hence the email of 22 August 2016 which led to the meeting being scheduled for 7 September 2016.
18. At about the same time, the respondents were already dealing with Richard Thornton, a crime prevention design architect, with whom a meeting had been arranged for 26 August 2016. He made detailed suggestions as to what might be done, and this included the possibility of a fence, albeit of a type and in a position different from that which – unknown to them – the petitioner was to erect peremptorily. It was intended that Mr Thornton's report would be used in support of a forthcoming grant application.
19. He then describes how on 31 August 2016, he was alerted by the second respondent to the fact that workmen were in the course of erecting a fence in the churchyard. This came as complete surprise to both of them. He says he asked them to stop, which they did pending contact with a manager, who duly arrived and – so it would appear – spoke on the telephone with Ms Thomas of the Diocesan Advisory Committee. Notwithstanding the protestations of the respondents, and apparently Ms Thomas as well, the manager ordered the workmen to proceed and short of physically restraining them, there was nothing the respondents could do save take some photographs.

The first respondent continues,

I was not happy about this, as the erection of the fence had forestalled the discussions we were intending to have with the necessary parties to agree the best way to address the issue of the youngsters and their anti-social behaviour. Whilst appreciating the health and safety concerns, I was

frustrated that all concerned had not had the chance to think through what was needed and where it should be sited.

~~20.~~ The PCC held an extraordinary meeting on Sunday 26 September 2016 which resolved unanimously that it 'offers no objection' to the fence and the confirmatory faculty sought for its retention. The minute records the missed opportunity of making better and more suitable provision.

~~21.~~ The first respondent also provided a short note, dated 16 November 2016, of unattributed comments from various PCC members made on 14 November 2016. In oral submissions, the first respondent explained that the fence was merely one aspect of a multi-faceted problem concerning anti-social behaviour, which needed to be addressed and a longer-term solution found. He generously paid tribute to the local police, to ward councillors and to the petitioner, but nonetheless expressed frustration that by acting unilaterally and with undue haste, the petitioner had effectively shut down discussion of finding a better and more lasting solution to a deep seated issue. Representatives of the petitioner and the police were present at the hearing when he said this, and I am happy to record the expression of universal goodwill to work collaboratively towards seeking a solution, notwithstanding the petitioner's peremptory action regarding the fence.

#### **The Diocesan Advisory Committee**

~~22.~~ I gave directions seeking the view of the DAC and am grateful to the chairman, Canon Simon Cowling, for providing a written note dated 4 November 2016. The issue of the fence had been considered at the DAC's meeting on 1 November 2016. Having commented on the locality, the note continues:

Within this overall setting the Committee considers the fence to be an unobtrusive addition which does not cause visual harm. In addition, the Committee accepts the need to resolve the concerns highlighted by the police in respect of anti-social behaviour and health and safety.

Overall, and although it regrets that due process was not observed before the section of the fence under consideration was introduced to the churchyard, it is the considered opinion of the Diocesan Advisory Committee that the fencing is aesthetically uncontentious, does not conflict with the sacred status of the churchyard, or give any other cause for concern.

#### **Submissions**

~~23.~~ Mr Owen's submissions were directed in part to issues which did not need to be determined in order to dispose of the petition. It is immaterial whether the fence was erected upon a closed churchyard maintained by the petitioner under section 215, or upon some other parcel of land also subject to the faculty jurisdiction. It still required a faculty and none was sought or granted. I expressly leave undecided the nature and status of the land upon which the fence was erected. Secondly, even if the land in question did form part of a closed churchyard the maintenance of which had passed to the petitioner, Mr Owen

submitted that the duty of repair and maintenance under section 215 did not extend to erecting a fence. There was little – if any – evidence before the court regarding the state of the churchyard and particularly its perimeter at the time the maintenance obligation transferred. It is inappropriate to speculate further when the matter does not need to be resolved in order to deal with the petition.

~~24.~~ Where a confirmatory faculty is sought, the test which the court must apply is whether a faculty would have been granted had one been sought prospectively.

~~25.~~ Mr Owen submits that a faculty would have been granted on the basis that there was a pressing need to address significant safety concerns. He fairly concedes that the lack of a faculty is not the petitioner's only omission: it ought also to have obtained planning permission. He relies upon the opinion of Mr Phil Ward, the petitioner's own Design and Conservation Team Leader, expressed in an email dated 1 December 2016. Mr Ward suggested that conservation area consent was also required, but Mr Owen indicated that may no longer be the case in the light of provisions introduced by the Enterprise and Regulatory Reform Act 2013.

~~26.~~ Mr Owen states that in the event that the court comes to the conclusion that a confirmatory faculty should issue, legitimising the retention of the fence, then the petitioner will seek the necessary planning permission from itself as Local Planning Authority.

### **Determination**

~~27.~~ I take a dim view of the petitioner's conduct in this matter, notwithstanding that it may have originally been animated by an understandable sense of civic responsibility. The endemic ignorance of faculty law, process and procedure is eye-watering, and compounded by a co-extensive lack of comprehension of the requirements of secular planning law for which it is itself responsible. I regard the manager's unilateral decision on 31 August 2016 to erect the fence as staggeringly inept and singularly inappropriate when a multi-agency meeting had been scheduled for 7 September 2016. The manager's stubborn refusal to abandon the work when requested to do so by the respondents does neither him nor the petitioner any credit.

~~28.~~ I would like to think that there will be some valuable learning outcomes from all this. The petitioner must understand that closed churchyards remain subject to the faculty jurisdiction. Putting up a fence on land subject to the jurisdiction requires a faculty, as does taking it down. Secular consents, such as planning permission, may also be required in addition to a faculty. But most importantly, it is hard to conceive of a case which is so urgent that the requisite permission cannot be sought and obtained in advance. The consistory court is geared up to act with expedition and, in an appropriate case, an interim faculty can be granted by telephone, email or fax within a matter of minutes. In the Diocese of Leeds the consistory court is available 24 hours a day, 365 days a year.

~~29.~~ I indicated at the conclusion of the parties' submissions that a faculty would issue permitting the retention of the fence and that my reasons would follow in this judgment. It is obvious from the evidence that the petitioner acted with the best of intention and out of legitimate concern for public safety. In doing so the petitioner was motivated by a desire to avoid injury and loss of life, and believed that it was acting in accordance with the wishes of the parish priest, expressed in his email of 22 August 2016.

~~30.~~ However, the execution of that good intention was characterised by ineptitude, discourtesy and illegality. The manager (still unnamed) who sanctioned the immediate erection of the fence, notwithstanding the multi-agency meeting a week away, exercised poor judgment; he ignored both the faculty jurisdiction and secular planning control; and he treated the first and second respondents in a high handed manner.

~~31.~~ However through its counsel, the petitioner has offered a full and unconditional apology, not merely for 'inconvenience' or 'upset' (as Ms Clough had done), but for breaching not merely ecclesiastical law, but also secular planning control, which it administers and enforces itself. The court can be tolerably confident that the petitioner will respect the faculty jurisdiction of the Church of England in the future.

~~32.~~ Notwithstanding the failures of process, the fence has substantially addressed the danger to public safety, as the evidence of PC Carroll makes plain. There have been no further complaints since it was erected, not has the throwing of stones been repeated. It may not be to everyone's taste; it may not be in the ideal position; it may make tending the grass beyond the fence more difficult. But in the expert opinion of the DAC, summarised in Canon Cowling's note, it is 'aesthetically uncontentious' and 'does not conflict with the sacred status of the churchyard, or give any other cause for concern'. Mr Owen informs me that some £2,300 of public money was expended in the erection of the fence, and it would be churlish and wasteful to compel the fence's removal when some other equally costly solution would still be required and resources are scarce.

~~33.~~ A confirmatory faculty will therefore issue on condition that the petitioner acts expeditiously in regularising the planning position and lodges a copy of the necessary consent at the registry once it is granted.

~~34.~~ As Mr Owen properly conceded, the court costs will be borne by the petitioner, such costs to be paid within 14 days of assessment.

Chancellor

8 December 2016