Neutral Citation No. [2016] ECC Oxf 3

IN THE CONSISTORY COURT OF THE DIOCESE OF OXFORD

Date: 9th May 2016

Before :

THE REVEREND AND WORSHIPFUL ALEXANDER McGREGOR
CHANCELLOR

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In the matter of :

St Leonard, Watlington

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Determined on consideration of written representations

- -

JUDGMENT

The Chancellor:

1. The Rector and churchwardens of Watlington have submitted a petition seeking a faculty to authorise the the replacement, at St Leonard's church, of 5 cast iron downpipes and associated hoppers with high density polyethylene (HDPE) replacements. The HDPE replacements would be in 'cast iron style'; that is to say that they would seek to give the appearance of of traditional cast iron rainwater goods.

2. The petition was accompanied by a report entitled 'Proposal for the use of cast iron style polyethylene downpipes at St Leonard's Church, Watlington' which was submitted to the diocesan advisory committee when the petitioners sought its formal advice on the proposals. That document was prepared by Mr Raymond Jackson, a member of the fabric committee of the Parochial Church Council and a Chartered Engineer. I am particularly grateful to Mr Jackson for the trouble he has taken in the preparation of that document and the subsequent revisions in which he has set out in very clear terms the petitioners' case.

3. In summary, the case for the petitioners is that black HDPE rainwater goods of 'cast iron style' will be visually very close in appearance to the existing cast iron rainwater goods; that they have an estimated lifespan of 40 years; that they would be approximately half the cost of new cast iron goods (£1,973 instead of £4,000); and that they are significantly easier to maintain than cast iron so that over the lifetime of the HDPE goods the total expenditure needed to install and maintain them would be considerably less than the costs associated with installing and maintaining cast iron replacements. The petitioners state that the total cost over 80 years would be £3,946 for HDPE and £23,360 for cast iron; or over 120 years – and based on less favourable estimates of the durability of HDPE as compared with cast iron - £7,892 for HDPE and £20,940 for cast iron.

4. Following an initial exchange of correspondence in which its officers gave some informal advice, the diocesan advisory committee issued a certificate in respect of the proposals. The DAC does not recommend the proposals for approval for the following reasons–

   "(1) The DAC considers that polyethylene is an inferior material to cast iron or aluminium, both in terms of longevity and its inability to be repaired, and as such considers that it is unsuitable for use on a listed building.

   (2) The committee wished it to be known that it is concerned that the PCC's funding priorities seem to be focussed on the significant extension proposed at the expense of the maintenance of the fabric of the building."

5. The certificate went on to state that in the opinion of the DAC, the work (or part of the work) proposed was likely to affect the character of the church as a building of special architectural or historic interest. There has been subsequent correspondence between Mr Jackson, on behalf of the petitioners, and the DAC in which Mr Jackson has taken issue with the DAC's position on the issue of durability, including by way of reference to research conducted in the United States of America. The DAC has not changed its position on that issue in the light of the further information provided by Mr Jackson.

6. In addition to seeking the advice of the DAC, the petitioners also contacted English Heritage (as it was then known) and the four amenity societies. No response was received from the amenity societies. A response from English Heritage advised the use of cast iron as being "the most appropriate material for the replacement of downpipes in this instance".

7. When the papers came to me earlier this year, I directed that Historic England (by which time it was then known) be specially cited given the earlier indication of their position. Mr Richard Peats, Historic England's Inspector of Historic Buildings and Areas at their South East office, has provided a letter setting out Historic England's position which is, in summary, as follows. St Leonard's church is of medieval origin but was almost completely rebuilt by H.J. Tollit and E. Dolby in 1877. The existing (cast iron) downpipes and guttering are probably associated with Tollit and Dolby's restoration "and make a valuable contribution to the architectural qualities of the building". Mr Peats states that the use of iron allows rainwater goods, and their associated fixings and hoppers, to be cast with a degree of crispness not matched by plastic; that this is particularly apparent in the downpipes; that HDPE pipes are extruded and have rounded corners rather than the squared corners of the iron ones. "More importantly plastic does not have the feeling of quality and solidity that metal does. The difference is subtle but nevertheless noticeable; it is immediately apparent that plastic rainwater goods are lighter and more flimsy and to use them would detract from the feeling of quality and solidity that is manifest on the exterior of the building."

8. Mr Peats also argues that as cast iron rainwater goods were probably introduced at the 1877 rebuilding, that to use HDPE now would be inauthentic and would not be the best way to retain the significance of the building.

9. Mr Peats, in similar vein to the DAC, also raises the issue of durability. While acknowledging that HDPE is a superior material to PVC, its life expectancy is unknown unlike that of cast iron rainwater goods which can have a life of over 100 years.

10. Mr Peats concludes that the proposals would "materially harm the significance of the building". He accepts that in some circumstances a balance has to be struck between the use of authentic materials and the conservation of the building as a whole, but in this instance there is no good reason to accept this harm given that the continued use of cast iron would be possible.

11. In written representations prepared on behalf of the petitioners, Mr Jackson has responded in detail to Mr Peats' letter. He takes issue with Mr Peat's view on the architectural quality of the church building and says that it is "Grade 2 listed largely for its internal features". Although the cast iron rainwater goods may have been Victorian, many sections have had to be replaced, cracks sealed and new fixings installed, not all of which match the originals. Mr Jackson accordingly rejects the suggestion that they contribute to the architectural quality of the building. HDPE would, by contrast, "look smart" and will not rust. He points out that HDPE pipes are rotationally moulded rather than extruded; and although they have rounded corners, any 'crispness' in the appearance of cast iron pipes is liable to be lost as a result of repainting.

12. Mr Jackson takes issue with what Mr Peats says about the physical qualities of HDPE pipes. He makes the point that different plastic materials have different qualities and that it is unsatisfactory to generalise. The parish are undertaking their own weathering trials of a sample pipe and hopper which has not revealed any signs of deterioration.

13. As to authenticity, Mr Jackson says that the continued use of cast iron is disadvantageous for reasons set out in detail in the petitioners' earlier report on their proposals. In summary, it is expensive to purchase and install, expensive to maintain (requiring scaffolding for access to some places) and is unsightly when it rusts.

14. With regard to "performance" (in other words durability), Mr Jackson refers to information he has previously collated about the durability of HDPE (including that referred to above) and states that HDPE should have a life expectancy of 50 years. He points out that Guildford United Reformed Church had recently used HDPE for its new rainwater goods and was pleased with the result.

15. The Church Buildings Council were written to by the diocesan registry and provided with the petitioners' supporting documentation. CBC stated that it "was unable to source any Agrément Certificate to demonstrate that this product [i.e. HDPE] has been specifically tested, just references to an accelerated weathering BSEN 607 test and the company's quality standard." The CBC was concerned that HDPE would become brittle in time and degrade. The additional intermediate clipping of sections, recommended in the product information, would mean additional interventions in mortar joints.

16. CBC recommended the refusal of a faculty. They referred to the case of Long Melford where, as the petitioners have pointed out, HDPE rainwater goods have been installed but explained that the circumstances there were "markedly different: HDPE was approved as an experiment only due to ongoing problems of metal theft".

17. Mr Jackson takes issue with what CBC have said about HDPE pipes becoming brittle which is not the position shown in the research to which he has had access. He says that CBC should provide evidence to support their concerns about the durability of HDPE pipes. With regard to what CBC said about Long Melford, Mr Jackson says that there are an increasing number of examples of historic buildings deploying cast iron style plastic rainwater goods, and not on an experimental basis. Mr Jackson quite reasonably makes the point that the fact the manufacturer of HDPE pipes offers only a 10-year guarantee is not an indicator of the life expectancy of the product. (Elsewhere he makes an analogy with the 10-year guarantee provided by the builders of new houses.) He emphasises what is involved in maintaining cast iron rainwater goods.

18. In addition to his written representations, Mr Jackson has also provided a number of photographs. These include a side-by-side shot of an HDPE cast iron style downpipe (with hopper) and an existing (rusted) cast iron downpipe.

19. Although the petition is formally unopposed it is nevertheless contentious and requires detailed consideration. I took the view that it was expedient to determine the proceedings on consideration of written representations instead of by a hearing. The petitioners – the only parties to the proceedings – agreed to determination on consideration of written representations and were afforded the opportunity of submitting any further representations they wished. Under cover of a letter of 9 April from Mr Michael Gardner, a churchwarden of Watlington and one of the petitioners, a complete set of documents was submitted. These included both earlier correspondence between the petitioners, the DAC, Historic England, CBC and the registry and additional and updated submissions, including a response to the letter of objection from Historic England. I have considered all of these as well as the content of the covering letter itself which succinctly summarises the petitioners' case.

20. St Leonard's church is a listed building. In considering the proposals, I have therefore adopted the framework of guidance provided by the Court of Arches in *Re St Alkmund, Duffield* [2013] Fam 158 at paragraph 87:

    (1) Would the proposals, if implemented, result in harm to the significance of the church as a building of special architectural or historic interest?

(2) If the answer to question (1) is "no", the ordinary presumption in faculty proceedings "in favour of things as they stand" is applicable, and can be rebutted more or less easily, depending on the particular nature of the proposals … .

(3) If the answer to question (1) is "yes", how serious would the harm be.

(4) How clear and convincing is the justification for carrying out the proposals?

(5) Bearing in mind that there is a strong presumption against proposals which will adversely affect the special character of a listed building, … will any resulting public benefit (including matters such as liturgical freedom, pastoral well being, opportunities for mission, and putting the church to viable uses that are consistent with its role as a place of worship and mission) outweigh the harm? In answering question (5), the more serious the harm, the greater will be the level of benefit needed before the proposals should be permitted. This will particularly be the case if the harm is to a building which is listed grade I or II*, where serious harm should only exceptionally be allowed.

I have also had regard to the observations about these questions which were subsequently made by the Court of Arches in *Re St John the Baptist, Penshurst* [2015] PTSR D40 (judgment 9 March 2015).

21. Both in the DAC's certificate and in some of the petitioners' documents it is stated that St Leonard's church is listed at grade II. That is not in fact the case; the list on Historic England's website shows that it is listed grade II*. That is a not insignificant matter. According to Historic England, as of 2012 there were approximately 375,588 listed buildings in England. Grade I buildings are of exceptional interest. Just 2.5% of listed buildings are Grade I. Grade II* buildings are particularly important buildings of more than special interest. 5.5% of listed buildings are Grade II*. Grade II buildings are of special interest warranting every effort to preserve them. 92% of all listed buildings are in this class. While all listed buildings are, by definition, of national importance, there is a significant difference between buildings listed as grade II and those listed as grade I or II*. This difference – and the significantly greater importance of grade I and II* buildings – is expressly recognised in question 5 of the *Duffield* guidelines. This, in turn, reflects the position set out in part 12 of the National Planning Policy Framework (Conserving and enhancing the historic environment).

22. The starting point for consideration of the proposals is that St Leonard's church is a grade II* listed building and that, as such, it is a particularly important building of more than special interest. It was first listed in 1963 and the list entry has not subsequently been amended. The list entry details are as follows–

> Church. C12 and C14, much rebuilt by H.J. Tollit and E. Dolby in 1877: C15 west tower. Flint rubble with limestone ashlar quoins, dressings and bands: north aisle of coursed and dressed limestone rubble; limestone ashlar tower. Late C19 tile roof with decorative ridge tiles. Chancel, north transept, aisled nave, south porch and west tower. Corner buttresses with gablets flank early C14 Reticulated east window with C19 mullions. South-east aisle has 2 Decorated-style windows and one C15 window of 4 lights with central colonette. North-east aisle has early C14 Decorated window. North transept has tall 2-light window. Nave has north aisle with 2-light trefoil-headed windows, and south aisle with C15 style ogee-headed windows, offset buttresses and gargoyles, and C14 two-light west window: pointed chamfered doorway to south porch, moulded pointed doorway to C19 double doors. C15 west tower has offset corner buttresses, pointed moulded doorway to late C19 double doors

with 3-light Perpendicular window over; 2- and one-light windows; moulded string course and cornice, embattled parapet; stair turret to north-east corner. Interior: reredos with elaborate gilt tracery by C.E. Kempe. Capitals with volutes and part of a cable-moulded shaft west end of south aisle, and south wall of chancel which also has C13 carved head. C12 arch and diapered tympanum in vestry (removed from north wall of nave). Two C15 arches to south chapel have shafted responds and central pier with capitals. South chapel has brass chandelier (purchased 1778), C18 chest and wall tablet, wall tablet to William Buckland, d.1597, and Harding family slab in floor dated l691. Nave has brass to Jerem Ewes, d.1587, in south-east corner, late C19 brass lectern, octagonal marble font with cover of 1897 and wood pulpit of 1874; late C19 roof. C14 four-bay arcade, with double-chamfered arches on octagonal piers, to south aisle which has C14 tomb recess. Stained glass: east window, south chapel windows (1887), west window (1896), and 3 south aisle windows (1902) are by Kempe; north window of 'St. Paul in Athens' by Atkinson of Newcastle.(Buildings of England: Oxfordshire, pp.829-30; V.C.H.: Oxfordshire, Vol.VIII, p.241)

23. The list description does not give much support for Mr Jackson's statement that the church was listed "largely for its internal features". Exterior features are mentioned as much as interior.

24. Having seen photographs of the exterior, I agree with Mr Peat's assessment that "externally it is a very handsome building". I also accept – and this does not appear to be seriously contested by the petitioners – that the current arrangement of rainwater goods is probably associated with the rebuilding by Tollit and Dolby in 1877. What I am less inclined to accept is Mr Peat's view that the current guttering and downpipes make a "valuable contribution" to the architectural qualities of the building. From the photographs I have seen, I consider that they make some contribution to the architectural qualities of the building but I would describe that contribution as a fairly modest one. The most important features of the special architectural interest of the church seem to be those which are specifically identified in the list description.

25. I have carefully considered the photograph of the side-by-side shot of an example HDPE cast iron style pipe with a cast iron downpipe. The difference is immediately noticeable. The HDPE pipe looks like what it is – a reproduction of a traditional shape using a form of plastic rather than traditional materials. It has the appearance of being artificial. I doubt that it would be obvious from a distance; but at close range its appearance jars and has the appearance of an anachronistic feature on the face of a historic building.

26. I accept what Mr Peat says about authenticity. HDPE pipes would be an inauthentic feature on a mediaeval exterior rebuilt in the Victorian period, which is likely to have included cast iron rainwater goods from the time of the rebuilding.

27. I note that Mr Gardner (one of the churchwardens) refers, in the letter covering the petitioners' written representations, to a range of additions or adaptations that have been made to the church building since the 19th century. These include the introduction of gas heating, replacing the wooden floor with slate, pews with chairs, the installation of an audio visual system and the building of an extension to house a kitchen and lavatory. Mr Gardner is, of course, correct in saying that none of these is "authentically Victorian" and that they "have been recognised as the best way of resolving current problems and fitting the church for the future". But these examples are not an answer to the issue of authenticity. They are examples of improvements which have been made to the church in order to make it more suitable for current use. They do not prove the petitioners' case

that renewing the rainwater goods with cast iron would be "to insist upon the use of outdated practice where modern alternatives serve the church much better". Whether HDPE would serve the church better is a question in its own right. To raise that question does not of itself dispose of the argument concerning authenticity.

28. My assessment is that replacing the existing cast iron rainwater goods with HDPE alternatives would have some adverse impact on the architectural significance of the building in that it would alter its external appearance in the way described in paragraph 25 above. It would also have some adverse impact on its historic significance by introducing an anachronistic and inauthentic feature. I would characterise the totality of that impact as constituting harm to the significance of the church as a building of special architectural and historic interest.

29. In assessing the extent of that harm, I have taken account of the fact that this is a grade II* listed building. I have also made that assessment in the light what I have said about the relative importance of the exterior of the church in terms of its overall significance, the fairly modest contribution made to that significance by the cast iron rainwater goods, and what I have said about authenticity and the appearance of HDPE at close range. I consider that such harm would not constitute *serious* harm but it would nevertheless constitute material harm.

30. The justification advanced for the proposals as a whole is very clearly set out in the documents provided by the petitioners, in particular those prepared by Mr Jackson. I have already summarised the substance of those documents. The justification advanced by the petitioners is essentially based on a cost-benefit analysis comparing renewing the rainwater goods with HDPE with renewing them in cast iron.

31. A serious difficulty for the petitioners is that the statutory bodies with expertise in the care of historic church buildings – Historic England, CBC and DAC – each reject the petitioners' case in respect of the benefits and durability of HDPE. The petitioners, fairly, point out that HDPE has been used on other buildings, including some historic buildings. They particularly draw attention to the use of HDPE rainwater goods on the United Reform Church in Guildford. That is not a listed building so it does not provide any sort of precedent for what the petitioners are seeking to do at St Leonard's. They put it forward rather as an example of the successful use of HDPE. The difficulty with that, so far as the petitioners' case is concerned, is that the HDPE rainwater goods there were installed only in 2012. The fact that those HDPE rainwater goods have not deteriorated in the period of four years is scant evidence of their long term durability.

32. The petitioners also point to the case of Holy Trinity church, Long Melford where HDPE rainwater goods were installed in 2010. Long Melford is the only building of comparable architectural and historic significance to St Leonard's which the petitioners identify as having had HDPE rainwater goods installed. They were installed there – without, it appears, any enthusiasm on the part of the St Edmundsbury and Ipswich DAC – because the original rainwater goods at Long Melford were lead and were stolen. That consideration does not apply in the case of St Leonard's. And so far as durability is concerned, again the period for which HDPE has been in place at Long Melford is not long enough to provide reliable evidence as to its long term durability.

33. Mr Jackson has gone to some trouble to examine the outcome of testing on HDPE carried out in the United States and has prepared an impressive summary of that evidence. He argues that it shows that HDPE is not subject to significant degradation. I have already noted that Mr Jackson is a Chartered Engineer and I therefore accept that he has a

professional, scientific background. What I am unable to form any view about is the reliability of the evidence which has informed his representations, or whether the evidence that was available to Mr Jackson represents the full range of evidence that exists on this subject. He does not say that this particular subject is within his area of expertise. I am therefore unable to attach a great deal of weight to his evidence in this regard.

34. Against that, there is the advice of CBC about the absence of any Agrément Certificate for the proposed HDPE rainwater goods (i.e. a document certifying fitness for purpose issued by the British Board of Agrément which is itself accredited by UKAS). Moreover, the clear preponderance of advice from the statutory expert bodies was against the petitioners' case on this point. The petitioners say that none of these bodies has produced any scientific evidence themselves to demonstrate that HDPE does not have good longevity. Unfortunately for the petitioners, in faculty proceedings the burden is on the petitioners to make out their case; and, in the light of the findings I have already made about harm, in this case it for the petitioners to provide clear and convincing justification for their proposals. I note from the petition that the inspecting architect was neither engaged in connection with the proposals nor asked for general advice in relation to them. There is therefore no evidence from a buildings specialist which supports the petitioners' proposal to use HDPE.

35. I therefore do not consider that the petitioners have succeeded in providing clear and convincing justification for their proposals.

36. I am of that view notwithstanding the petitioners' evidence about some of the practical issues involved in maintaining cast iron rainwater goods. Although they have required repairs and patching up, the existing cast iron rainwater goods have (on the balance of probabilities) been in place for nearly 140 years. The evidence adduced by the petitioners with regard to HDPE does not demonstrate that it amounts to a modern alternative which would serve the church better than, or even as well as, cast iron, despite some of the problems that can arise with the latter.

37. The fact that HDPE is approximately half the initial cost of cast iron also makes no difference. First, because in the absence of satisfactory evidence that HDPE has the longevity claimed for it, it is impossible to form a reliable assessment of the relative ongoing costs involved.

38. Secondly, taking the petitioners' case for HDPE at its highest (which for the reasons given above I am unable to do) and using their figures, the saving over 80 years would be only £242 per year at today's prices. Under their fall-back scenario – which assumes less favourable estimates of the durability of HDPE as compared with cast iron – the saving would be only £108 per year. A cost saving alone will not normally amount to justification for harm to a listed building and such a modest level of saving as envisaged by these proposals carries very little weight.

39. Although I have characterised the harm that would result to the listed church building as being less than serious harm, the absence of any clear and convincing justification leads me to conclude that there would be no public benefit which might be capable of outweighing the material harm I have found would result from the proposals. That being so, the petitioners are unable to overcome the strong presumption against proposals that will harm the special character of a listed building.

40. I should add that even if I had not found that the proposals would result in harm to the special character of the listed building, I would still have had to find against the

petitioners. The second paragraph in the *Duffield* guidelines states that where there is no harm to the listed building, the ordinary presumption in faculty proceedings "in favour of things as they stand" is applicable, and can be rebutted more or less easily, depending on the particular nature of the proposals …". That test was set out by Lord Penzance in *Peek v Trower* [1881] P 21 at 27 as follows:

> All presumption is to be made in favour of things as they stand. If you and others propose to alter them, the burden is cast upon you to shew that you will make things better than they are – that the church will be more convenient, more fit for the accommodation of the parishioners who worship there, more suitable, more appropriate, or more adequate to its purpose than it was before …

41. In the absence of evidence to satisfy the court on the balance of probabilities that HDPE is a suitable modern alternative to cast iron, or that it would result in significant savings to the PCC, the petitioners are unable to show that by using it they would make things better than they are.

42. The petition is accordingly dismissed. The court fees are payable by the petitioners.