

Neutral Citation No [2019] ECC Yor 4

In the Diocese of York

In the Consistory Court

The Parish of Burton Pidsea

The Church of St Peter and St Paul

1. In June 2016 the Vicar and PCC of the church of St Peter & St Paul, Burton Pidsea (“the parish”) presented a proposal to the DAC to enter into a licence under faculty with NET Coverage Solutions Ltd (“NCS”) for a term of 20 years in respect of telecommunications apparatus. Submitted with the proposal were copies of the plans for the installation of the apparatus. In fact all the preparation for the proposal and its submission was being dealt with on behalf of the parish by NCS.
2. The matter was first considered by the DAC on 7 September 2016. At that meeting the Committee expressed concerns about whether the electricity supply would be adequate and also as to whether the proposed replacement of the wooden louvres with GRP louvres would be sufficiently well matched to the wooden ones that it was intended they would replace. In the course of the pre submission consultations, Historic England had recommended that the existing louvres be retained unless a convincing case was made out for their replacement. Apparently wooden louvres can be more resistant to the passage of electronic signals than is appropriate. NCS had anticipated that this would not be the case here, but it is their practice always to include the possibility in their applications. NCS subsequently explained to the DAC that this would be resolved at a later stage as would the electricity load testing.
3. The matter was then reconsidered by the DAC on 20 October 2016. The proposal was recommended by the DAC subject to two provisos: “1. the installation of the scheme must be to the satisfaction of the Inspecting Architect and 2. all electrical work must be carried out by a suitably accredited electrician.”
4. The matter was then referred to me on the online faculty system. I directed that I needed to see a copy of the draft licence agreement. The Registrar was then contacted by Winkworth Sherwood, Solicitors, (“WS”) who had been instructed by NCS to act on behalf of the PCC in drawing up such an agreement. WS informed the Registrar that they were also instructed to ensure that all other necessary consents had been obtained and all other necessary consultations carried out. WS said that they would be in touch as soon as all that work had been completed.
5. On 6 March 2017 WS wrote to the Registrar enclosing a hard copy of the petition along with all the usual supporting paperwork. These documents were referred to the DAC for further consideration. They were considered by the Secretary to the DAC and the Church Buildings Officer who noted that most of the plans were the same as

those previously submitted apart from drawings 601/700 which were sent to the Inspecting Architect for him to consider, in line with the first proviso from the previous meeting. He expressed himself content. The matter was again referred to me. On 6 July 2017 I declared that I was satisfied that the petitioners had made out a case for the works and I directed that a faculty should pass the seal. I made the faculty subject to conditions that reflected the two provisos. I expressed “my gratitude to the petitioners and the proposed grantee for obtaining skilled professional help in the drafting of the licence.”

6. As long ago as 1991 there were two cases which set out what needed to be included in any licence for the protection of the parish. The first was *Re: Rusthall, St Mark's Biggin Hill and St Mary's Shortland* (reported 13.05.1991), a decision of Goodman Ch, and the second was *Re: Harborough Magna* (unreported 13.09.1991), a decision of Gage Ch. Both chancellors set out some of the minimum matters that ought to be included in any licence of this sort. Since then matters have become more sophisticated and even more issues must be dealt with. This will inevitably involve taking legal advice. Fortunately companies like NCS who deal with these matters regularly use solicitors who understand both the technicalities of the industry and also the peculiar requirements of the Church of England. Sadly, from time to time I have been presented with documents that amount to little more than a few heads of agreement which might also be described as “back of the envelope workings”. On the whole these have occurred when a local small business decides to offer broadband facilities to a local community and wishes to use the local church tower as the place from which to transmit its signal. In those circumstances the business's understanding of legalities can be way behind its understanding of telecommunications. Also the profit margin might be such as does not encourage investment in what might be regarded as costly legal advice. On this occasion however the licence was a comprehensive document that covered everything that should be included in a telecommunications licence.
7. Over the years as the telecommunications industry has not only been expanding but has also been changing. It has moved from an industry dealing with voice calls between hard wired phones through voice calls on mobile devices to a medium dealing in the transfer of and access to data. We have moved from 2G through 3G and 4G and are promised that we will soon have 5G. Further, there has been increasing regulation in connection with the industry including increasing the powers and rights of network operators. This has meant that the approach of the Consistory Courts when the opportunities arise for churches to benefit from licencing operators to place their equipment on a church roof or in a tower has had to adapt to changing circumstances.
8. One obvious change has been the length of the licence. Whereas it was once said that 5 years would be appropriate, it is now accepted that it is not commercially viable for an operator to instal equipment unless they have a licence for 20 years. That is clear if I compare *Re: Rusthall, St Mark's Biggin Hill and St Mary's Shortland* (1991 supra) when Goodman Ch endorsed the DAC standard conditions that stressed “the importance of ensuring that the Licences of fairly short periods with provision

for renewal ..." with "*Re: St Mary, Warwick* (unreported, 15 May 2004) when Gage Ch said "the DAC recommended a period of no longer than 10 years. My view is that both the petitioners and the telecommunication companies are entitled to the security of an agreement for longer than that.". He settled on 20 years for that licence.

9. Another change, of which this case is an example, has been that whereas the initial licences were granted directly to the network operators, the current trend is for businesses, which will act as the providers of the necessary infrastructure, to take the licence and then to sub license the use of the equipment to one or more network operators. The usual arrangement in these cases is that there is a licence fee agreed with the infrastructure provider and then when that provider grants sub licences, the church will obtain a percentage of those licence fees, in this case not less than 95% of such fees.
10. One thing that has not changed throughout the time that these cases have been dealt with by consistory courts is the nature of objections that have been raised. In the cases of *Re: St Margaret Hawes and Holy Trinity Knaresborough* (unreported 21 May 2003) heard together by Grenfell Ch, he dealt with what he described as five issues: (i) health, (ii) appearance, (iii) appropriateness, (iv) the secular use of a church building and (v) the content of the transmission. Secular use was settled in the early cases and has not troubled chancellors since to any significant extent. Appearance and appropriateness are usually sorted out in the consultation phase with the DAC and other bodies. Issues that continue to be raised with chancellors are those of health and content. Grenfell Ch found, as have a number of other chancellors in other cases, that there was no evidence that there was a real risk to health from the radio waves provided that standard protection guidelines were followed. He also considered the content issue and imposed a condition on the faculty that "Vodafone use reasonable endeavours, so far as technology allows, to prevent the use of the Equipment for sending a message or other matter that is grossly offensive or of an indecent, obscene or menacing character, or for any purpose referred to in section 43 of the Telecommunications Act 1984 (as amended) or which might otherwise be contrary to English law."
11. The Court of Arches dealt with the first of those matters, health, in the case of *Re: Emmanuel Bentley* [2005]. The Court in paragraph 50 of the judgment not only affirmed Grenfell's decision, but said that in the case before them, Shand Ch had been wrong to attach the weight he did to the "depth of feeling locally" which was against the proposal which he had disallowed. That Court subsequently dealt with the content issue in the case of *Re: Chingford St Peter and St Paul* [2007] 1 Fam 67 when it decided that the risk that material transmitted as a result of installation might contain unlawful or immoral subject matter is not a sufficient basis on which to refuse the faculty. It is also clearly unrealistic now to attempt impose terms of the sort that Grenfell Ch did in relation to control of the content. Those of us who have seen "cell site data" sheets in the course of criminal trials are aware of the vast numbers of calls and quantities of data that such sites now transmit. It is clear that there is very little that the telecommunications industry is able to do to monitor the

content of what is transmitted. Any such undertakings as were required by Grenfell Ch would be valueless today.

12. Once it has been decided that the use of a church to enable digital communication is not inconsistent with its sacred status, then it must be accepted that the content is effectively regarded as neutral. That is not to say that an individual church could not decline to enter into such an arrangement if it felt uncomfortable about the use that some end users might be making of the technology. The extent to which the church could now be compelled to accept such technology under the provisions of the Digital Economy Act 2017 remains to be seen.
13. I refer to those two particular issues of health and content as they were matters that were considered by the PCC when deciding whether to seek permission for this proposal. The PCC minute in support of the proposal shows that they had considered these issues, namely the public perception that there may be health risks associated with mobile telecommunications and also that some of the communication that “passes through” the equipment may be of an “adult” nature. Having considered these “pastoral and practical implications” they decided to proceed with the proposal.
14. All of that is the background to the original uncontroversial petition and the faculty that was granted.
15. The matter has now been referred back to me because NCS wish to assign their licence to a company called Shared Access (SA). My understanding is that the licence was agreed and signed on 29 September 2017 with an initial licence fee of £6,700. I have been told that the equipment is currently being installed, I having granted an extension of time for that to be completed.
16. NCS have explained in correspondence the history of their involvement with churches in relation to matters of this sort since 2004. They have been working as an infrastructure provider finding and constructing sites which they then sublicense to telecommunications operators, whilst themselves retaining the head licence. What they propose to do in the future is to continue to find sites, conduct negotiations with the site owners, obtain all the necessary approvals including faculty approval, and then handover the site to SA who will deal with the telecommunications operators and manage their licences thereafter, SA being the holder of the head licence. It is a little unclear whether they or SA will actually build the site, but it matters not for my purposes so far as I can see.
17. It is said that there are a number of advantages in this arrangement as a result of the passing of the Digital Economy Act 2017 and the coming into operation of the new Electronic Communications Code on 28 December 2017. However it seems to me that until the Lands Chamber has made decisions about interpretation of the Act, it is uncertain what the extent of those advantages will be.

18. As churches only grant licences and not tenancies the complications of the Landlord and Tenant Act 1954 will not arise. The extent to which operators will seek to use Code powers in relation to churches also remains very uncertain. What is said to be a real benefit is that under the Code the assessment of the “rent” will not take account of the business going to the licensee but will instead consider the disruption costs to the licensor. It seems to me that although there may be a real reduction in rents chargeable for a telecommunication tower in the corner of a field where there is very little disruption to the field owner, different arguments might well apply in relation to access to church towers. But that remains to be seen.
19. The case put forward by NCS is that SA under the Act is “a wholesale infrastructure provider”. Section 106 (4) of the Communications Act 2003, as amended, draws a distinction between network operators and infrastructure providers. It gives to the newly included infrastructure providers the enhanced code rights previously enjoyed only by network operators. It is said that these are mutually exclusive and that SA has no intention to apply to be registered with OFCOM as a provider which would enable it to exercise code powers. Indeed, it is said that the company has given an undertaking to the Diocese of Southwark to that effect. In that case individual operators contracting with SA will not be able themselves to apply for code rights as that alternative is excluded by the Act. It is also said that the result of that will be that any assessment of rent will not be restricted by the application of the new “disruption” test.
20. Some idea of the scale of this industry is found in figures in the Impact Assessment carried out for the DCMS in 2016. It refers to there being across the UK 33,000 rent attracting sites of which 10,700 were operated by Wholesale Infrastructure Providers (WIP). The remaining 22,300 sites were owned by Mobile Network Operators themselves, with an estimated 18,200 being greenfield sites and 4,000 being rooftop sites. Those figures don’t quite add up, but they are a clear indication of the size and spread of the market. The amount of money being paid by Mobile Network Operators (MNO) in rent, licence fees and business rates was then in the region of £359 million per annum.
21. It seems clear to me that such an outcome as NCS argue for and which I have set out in paragraph 19 above was not the intention of the Act. Whether it survives may depend on whether a court agrees, if ever it should be asked, that were a WIP has chosen not to apply for code powers, an MNO could or could not themselves apply for code powers. Particularly as I understand the position to be that most WIPs have registered and so are in a position to assert Code rights.
22. However the question for me is whether there is any objection either in principle or in the particular circumstances of this case to the assignment of this head licence from NCS to SA. Third party assignment is dealt with in the licence at para 5(4). Assignment may be made if it has the consent of the incumbent and PCC “such consent not to be unreasonably withheld or delayed, it being (without limitation) reasonable for the Council to withhold consent if it considers that such party will not comply with any of the obligations of the Grantee in a manner acceptable to the

Council and/or if the Council considers that such assignment would adversely affect the objects or concerns of the Council PROVIDED THAT (A) the Grantee has obtained the prior approval of the Consistory Court ...". The PCC has considered the matter and has agreed to this assignment. It is my prior approval that is now being sought.

23. NCS has provided documentation and assurances in relation to the continuing guarantees of a financial nature that are part of this head lease.
24. I have dealt with all these matters in some detail because, as I understand it, the Court is being asked to deal with this case so as to establish as a matter of principle how things should proceed in the future.
25. Although I have expressed some reservations about how potentially conflicting code rights of WIPs and MNOs might yet be interpreted by the Lands Chamber, which is the court which will deal with such matters, I am going to ask that a condition of this assignment will be an undertaking in writing by SA to this Court, that it will not register so as to be in a position to apply for Code Rights under the Electronic Communications Code. Upon that undertaking being given, the proposed assignment of this license to SA may take place.
26. As for any future proposals in relation to other churches, they will each be treated in accordance with their own particular circumstances. However, I am anticipating that SA would be a party to any petition, even though the preliminary work and drafting of the petition may have been completed by NCS and/or lawyers instructed by them.

Canon Peter Collier QC
Chancellor of the Diocese of York.

8th February 2019