Neutral Citation Number: [2017] EACC 1

THE ARCHES COURT OF CANTERBURY
APPLICATION FOR PERMISSION TO APPEAL
FROM THE CONSISTORY COURT OF THE DIOCESE OF SOUTHWARK
(CHANCELLOR PHILIP PETCHEY)

CAUSE OF FACULTY RELATING TO ST JAMES, KIDBROOKE

PETITIONERS/ PROPOSED RESPONDENTS:

(1) THE REVD. CANON KIM HITCH
(2) RICHARD PHILPOT
(3) JENNIFER ANDERSON
(4) NET COVERAGE SOLUTIONS LIMITED

PARTY OPPONENT/APPLICANT/PROPOSED APPELLANT:
VELMA LYRAE

DECISION

1. This decision is in respect of a renewed application dated 1st February 2017 by the Applicant (Party Opponent below), Miss Velma Lyrae, for permission to appeal against the judgment of Chancellor Philip Petchey, sitting as Chancellor of the Diocese of Southwark, handed down on 20 December 2016, [2016] ECC Swk 16. The chancellor refused leave to appeal on 17 January 2017.

(i) Background

2. The Petitioners, the Rector and Churchwardens of St James, Kidbrooke, and NET Coverage Solutions Limited ("NET") sought permission for (i) the installation of twelve antennae and two dishes behind GRP replacement louvres in the tower of the church and (ii) authority for the Rector to enter a licence agreement for a term of 20 years with NET to permit the installation and operation of the equipment. The petition was accompanied by an "ICNIRP Declaration", that the installation had been designed to comply with the guidelines of the International Commission on Non-Ionizing Radiation on the limitation of exposure of the general public to high frequency electromagnetic fields (0 Hz to 300 GHz).

3. There were 14 objections to the proposal, but only the Applicant (who lives in the vicinity of the church) opted to become a Party Opponent. The Applicant did not file any expert report under rule 10.5 of the Faculty Jurisdiction Rules 2013 ("the FJR 2013") within the time set for this by the chancellor. The chancellor held a hearing at the church on 21 November 2016, when the Petitioners were represented by Mr Matthew Chinery, solicitor, and the Applicant represented herself.

4. The principal objection of the Applicant to the petition was summarised thus by the chancellor in his judgment:

> "30. Miss Lyrae considers that the proliferation of telecommunications equipment in order to facilitate the transmission of messages by mobile phones presents a general threat to health. She appreciates that the consensus of scientific opinion is, at the moment, that there is no evidence that it does so but points out that until comparatively recently the risks of asbestos were not appreciated. She also draws attention to the situation that arose as regards emissions from Volkswagen cars which were under-estimated over an extended period of time.
> 31. More specifically she tells me that she is electro-hypersensitive, that is, she suffers from a multitude of symptoms which she considers are caused by her exposure to existing electro-magnetic fields. She tells me that these symptoms include peripheral nerve sensitivity and black outs which happen at least twice a day. She is concerned that if the petition is granted it will make her existing condition worse."

5. The chancellor also recorded (para 50 of the judgment) the Applicant's concern that although the Petitioners would be required to comply with the ICNIRP guidelines as regards High Frequency Emissions, they would not be required to comply with the ICNIRP guidelines as regards Low Frequency Emissions (1 Hz – 100 kHz).

(ii) The judgment under appeal

6. The chancellor carefully considered, before rejecting, the principal objection of the Applicant. In doing so he relied on four matters:

(i) Operators of radio transmitters are under a legal obligation to operate them in accordance with the terms of their licence from Ofcom. If scientific research were in the future to identify a greater risk to health from the operation of that equipment than was secured by compliance with the ICNIRP high frequency guidelines, it was to expected that Ofcom would require action to be taken under the terms of that licence (para 39 of the judgment).

(ii) The effect of clause 10.2.2 of the proposed licence agreement "which provides that notice to terminate the agreement could be given if the Government guidance as to the safety of the equipment changed" (para 53 of the judgment).

(iii) So far as the Applicant's concern about Low Frequency Emissions, the chancellor said (para 50):

> "If it be the case that the installation is not required to meet the Guidelines as regards Low Frequency Emissions, I think that there must be some doubt as to the relevance of these Guidelines. However this may be, the Petitioners have undertaken to meet these Guidelines. The point accordingly falls away."

The chancellor imposed a condition "that the equipment be operated in accordance with the ICNIRP guidelines in force for the time being as regard both [high] and low frequency omissions" (para 56 of the judgment).

(iv) In *In re Bentley Emmanuel Church, Bentley* [2006] Fam 39 para 50, the Court of Arches had expressly agreed with the view of Grenfell Ch in *In re St Margaret's. Howes* [2003] 1 WLR 2568 (Diocese of Ripon and Leeds) that:

> "in the absence of compelling evidence of a real risk to human health as a result of transmitting radioways up to the levels set by the United Kingdom Government in their adoption of the ICNIR guidelines, it would be wrong to adopt lower guidelines for a base station just because it happens to come under the jurisdiction of the consistory court in addition to planning requirements" (para 38 of Grenfell Ch's judgment).

Bentley was binding on chancellors in the Province of Canterbury. Therefore, because the Applicant "did not call expert evidence, her basic case… was doomed to failure. This is because once it has been established that the installation will be operated in accordance with the ICNIRP guidelines, the basis for refusing a faculty without the benefit of expert evidence to support that refusal does not arise" (para 40 of his judgment). It was clear that in the case before him the installation would be so operated. The chancellor explained that *Bentley* "was a case in which the Chancellor had refused permission for the installation of telecommunications equipment despite the fact that it met the ICNIRP Guidelines; his decision was overruled and a faculty issued" (para 41 of his judgment).

7. The Applicant also raised a separate concern in relation to the insurance position, which the chancellor dealt with as follows (para 52):

> "Her point was that the obligation under the licence agreement upon NET to keep an insurance policy in place in the sum of £10M in respect of public liability was likely not to include liability in respect of injury arising from electro-magnetic fields because this was not covered in a standard policy in the insurance market…Mr Chinery took instructions and produced a letter from CTIL's brokers, making it clear that the cover is in respect of liability to pay compensation and damages in respect of personal injury (including damage as a result of electro-magnetic fields)…The Court relies upon the good faith of all those [who] appear before it. If in any case it were to transpire that that faith had been misplaced it would be a very serious matter, potentially leading to the revocation or modification of a faculty".

(iii) The prior interlocutory decision in Re St James, Kidbrooke [2016] ECC Swk 8.

8. Properly to understand the chancellor's reference to the Applicant not calling "expert evidence" and the consequent effect of *Bentley* (see para 6(iv) above), it is necessary to refer to the chancellor's interlocutory decision of 14 April 2016. At that stage the Applicant was intending to rely on expert reports at the hearing, and the chancellor accepted that, if she called expert evidence, she would be seeking to substantiate her case by reference to evidence in the manner left open to her in *Bentley* (para 14). But in his decision the chancellor also addressed what would be the position if (as eventually occurred) the Applicant did not call expert evidence, but sought to rely on technical papers contained in two appendices to her own evidence. The chancellor said (para 15):

> "The technical papers that these [appendices] contain are not, as they stand, evidence. If they are to be relevant to my consideration they would be background material going to form and support the view of an expert about the matter. If an expert is not to be called, I cannot take them into account. The position would then be as envisaged in the *Bentley* case: in the absence of evidence to the contrary, it would be appropriate to proceed on the basis

that no health risk arises if the ICNIRP Guidelines are met. Of course, Miss Lyrae will still be able to address me even if she calls no expert evidence, but unless she is able to persuade me that the interpretation of the *Bentley* case that I have set out above is wrong, there is no basis on which I would properly be able to hold that the proposals before me should be rejected on the basis that they present a risk to health."

The chancellor's final judgment shows that he was evidently not so persuaded

(iv) The Grounds of appeal

9. In the Applicant's document "Concise Reasons for permission to Appeal to the Dean", she listed:

"1. Failure to implement the Precautionary Principle as required by the Stewart Report.
2. Failure to oversee relevant planning requirements to ensure correct procedure according to Faculty Jurisdiction [Rules] 2015.
3. Failure to ensure reliable Insurance cover is provided for potential emf damage.
4. Potential breach of the ICNIRP Guidelines where there is doubt of willingness to comply.
5. Failure to apply due consideration. Omitting to respond to major errors and omissions reported to the Chancellor with regard to serious health concerns.
6. Compelling reasons why this appeal should be heard."

10. Each of these items was then expanded in her document "Reasons for Appeal", responded to by the Proposed Respondents in written submissions following my directions under rule 23.4(2)(a) of the Faculty Jurisdiction Rules 2015 ("the FJR 2015"), and further explained in the Applicant's submission in response thereto. I am satisfied that the application can properly be determined without a hearing (see rule 23.4(1) of the FJR 2015).

(v) Test for permission to appeal

11. This is now contained in rule 22.2 of the FJR 2015 which provides:

"Permission to appeal to a provincial court may be granted only where the judge to whom the application for permission to appeal is made considers that -

(a) the appeal would have a real prospect of success; or
(b) there is some compelling reason why the appeal should be heard."

12. Rule 23.5 (1) provides that:

"Where the chancellor or the Dean grant permission to appeal, the order granting permission may –

(a) limit the issues to be considered on appeal, and
(b) make the grant of permission subject to conditions (which may include conditions relating to costs)."

(vi) Consideration of the proposed Grounds of appeal

1. Failure to implement the Precautionary Principle as required by the Stewart Report

13. The Applicant's complaint is that the chancellor has focused solely on the uppermost threshold levels content, and has not "given credence to all the criteria under the ICNIRP", for example by "omitting to include the magnetic flux limitation (avoidance of "strobe light" effect) of electromagnetic signals". He has thus "not deliberated upon what the document is instructing i.e. not to put masts near residential areas or schools". She also asserts that her own oral and written evidence constituted "compelling evidence" within the ambit of *Bentley*, because she referred to various technical documents, including "the newly produced American Toxicology Report", which she claims includes "results showing significant damage to human DNA".

14. As the proposed Respondents point out, the Stewart report was an independent report; it is not mandatory guidance for local planning authorities or chancellors. The health safeguard contained in government planning policy has been to require all installations to comply with exposure standards set out in the ICNIRP guidelines; thus as set out most recently in para 46 of the National Planning Policy Framework, planning authorities "should not determine health safeguards if the proposal meets International Commission guidelines for public exposure". Subject to an exception for "compelling evidence" to the contrary, that is the approach endorsed also for consistory courts in *Bentley*.

15. It may be that the Applicant is unaware of the elementary evidential principle applied by our courts (secular as well as ecclesiastical) that opinion evidence (as opposed to evidence of fact) is generally inadmissible unless given by a suitably qualified expert, that is a person possessing special knowledge or experience in the relevant area (here the health implications of this sort of installation). For this reason there are specific procedures for the introduction of expert reports in consistory court proceedings (see rule 11.5 of the FJR 2015, replacing rule 10.5 of the FJR 2013), with safeguards to ensure that the chancellor is assisted in assessing the credibility of the opinions therein expressed. The chancellor in this case (unlike the position in the *Knaresborough* case) had no such expert report or reports from the Applicant.

16. Nor does there appear to have been any expert medical evidence to support the Applicant's claim to suffer from "electrohypersensitivity" (which she describes in her Grounds as "chronic arousal of peripheral and sensory nerves").

17. Accordingly, I am entirely satisfied that the chancellor (in both his judgments) correctly interpreted this court's decision in *Bentley* and was right to follow its approach, as so interpreted; and, in the absence of expert evidence to the contrary, not to seek to apply different or additional health safeguards. The alternative approach argued for by the Applicant is contrary to basic legal principles and would undermine the consistency and certainty which *Bentley* has brought to the exercise of the faculty jurisdiction in relation to proposals such as this.

2. Failure to oversee relevant planning requirements to ensure correct procedure according to Faculty Jurisdiction [Rules] 2015

18. Although the Applicant's heading refers to the FJR 2015, the proceedings below fell within the FJR 2013, since they were "started before 1st January 2016" (see rule 28.3(1) of the FJR 2015). On the other hand, this application for permission to appeal is governed by the FJR 2015 (see rule 28.3(2) of the FJR 2015). However, in the Grounds the Applicant correctly refers to the provisions of the FJR 2013.

19. The Applicant complains principally of four matters:

(i) A failure to consult English Heritage (now Historic England) or any of the national amenity societies. She complains that "the Statement for Significance of Need" (by which I presume she means the Statement of Significance and the Statement of Needs – see rule 3.3 of the FJR 2013) did not reveal that the church was a listed building, nor was there "an accompanying impact assessment", which in her view "would suggest that this has not been looked at in detail, which is negligent", as well as explaining the failure by the Petitioners to consult English Heritage and any of the national amenity societies (see rule 3.4 of the FJR 2013) and the failure of the Diocesan Advisory Committee ("DAC") to recommend such consultation (see rules 3.6 and 3.7 of the FJR 2013, though the Applicant mistakenly includes a quotation from the irrelevant rule 3.8).

(ii) A failure by the chancellor in accepting a need based "solely about financial benefit to the incumbent", when "Need must relate to worship and how this can be enhanced by a faculty", for which proposition she relies on the booklet of my predecessor Sir John Owen, *Making changes to a Listed Church*.

(iii) Alleged breach her human rights and of rule 1.1(2)(a) of the FJR 2013 by reason of the telecommunications operative becoming a petitioner in the case, and Mr Chinery acting at the hearing for both the church and NET, both of which she says evidenced a conflict of interest.

(iv) The grant of the faculty even though the final planning permission had not yet been given by the local planning authority, "which breaches Faculty procedure".

20. These purported challenges are all without merit. I shall briefly explain why.

21. In regard to (i), the chancellor referred to the Grade II listing of the church, and that the equipment was to be installed in the bell chamber and in the chamber in the tower immediately below the bell chamber (para 3 of the judgment). One can only presume that the reason he did not expressly deal with the proposal's effect on the listed building was because that was not a matter argued before him by the Applicant or raised in the written objections he took into account. That alone would be enough to dispose of this item. But, in any event, so far as English Heritage/Historic England were concerned, it appears most unlikely that the proposal

fell within para 3(3) of Schedule I to the FJR 2013. So far as the national amenity societies, the proposal does not appear to have fallen within para 4(1)(a) of the same Schedule. Since the consultation requirement in rule 3.4(1) relate specifically to the contents of Schedule I, I do not see how there can be said to have been any breach of rule 3.4, even if (of which there is no evidence, and which appears very doubtful) the proposals would "involve alteration to…a listed building to such an extent as would be likely to affect its character as a listed building of special architectural or historic interest" (see rule 3.4(2)(a) of FJR 2013). Similarly the DAC's duty to consult under rule 3.6(7) is by reference to "works in respect of which Schedule I provides for that body to be consulted". There is nothing to suggest that the DAC's discretionary power to recommend consultation under rule 3.6(6) should here have been triggered.

22. With regard to (ii), the relevant test for a Statement of Needs is that it set out "the justification for the proposals", including in a case where there was likely to be harm to the significance of the church as a building of special architectural or historic interest (which, as I have said, is unlikely to have been the case here), "the basis on which it is said that the proposals would result in public benefit that outweighs that harm" (rule 3.3(1)(b) and (2) of the FJR 2013). There is no basis in law for the Applicant's contention that the need must relate only to how worship can be enhanced by the faculty.

23. With regard to (iii), it was perfectly proper for NET to be one of the petitioners, and this did not give rise to any objectionable conflict of interest. As the proposed Respondents have pointed out, as a joint petitioner NET could give undertakings to the court and be directly liable for any breaches of conditions to the faculty. I can see no good reason why the Petitioners should not have jointly instructed one advocate to appear for them at the hearing, and much to commend the course taken.

24. With regard to (iv), the chancellor dealt at length in his judgment with the position as regards planning permission (paras 10 to 20 of the judgment). He concluded that planning permission was not required for the installation of the equipment in the tower, and that the planning authority were well aware of the situation and appeared to take the same view (see para 13 of the judgment). There was a minor element of doubt concerning an electricity meter cabinet, but the chancellor's view was that it was unlikely that this needed planning permission; if it did, then planning permission was unlikely to be refused. Accordingly he held that the planning position was not a reason for declining to grant the faculty (para 27 of the judgment). There is no arguable error of law here.

3. Failure to ensure reliable Insurance cover is provided for potential emf damage

25. At para 7 above, I have set out how the chancellor dealt with the Applicant's objection in relation to insurance cover. Her proposed ground of appeal is that the chancellor ought to have examined the insurance position more closely. She alleges that he ignored Lloyds of London Exclusion 32 which will not cover damage from emfs and preferred to rely on the "good faith" of the underwriters to honour their insurance provision. Therefore the chancellor has failed to safeguard the church against claims which could arise in the future from residents or staff working at the

church. She says that an insurance counter-indemnity has never been mentioned previously.

26. In response the proposed Respondents re-iterate that under the proposed licence the incumbent and the PCC have an extensive and high-value indemnity from the proposed licensee, backed by a counter-indemnity from the proposed sub-licensee, Cornerstone Telecommunications Infrastructure Limited. The licence also contains detailed requirements for the licensee to arrange public liability insurance. They rely on the unambiguous statement placed before the consistory court from Aon UK Insurance brokers, on behalf of the insurers, Tokio Marine Kiln Insurance Limited, which confirmed that the relevant public liability cover, in the limit of £10 million per event, extended to "Personal injury (including as a result of magnetic fields)". They point out that Lloyds of London are not an insurer but a marketplace, and that naturally not all insurance policies are the same. By requiring sight of an explicit statement from the insurers, the chancellor did more than enough to satisfy himself as to the insurance arrangements for these proposals.

27. I agree. I do not think it arguable that the chancellor should have done more, or that he erred in law in the approach he took to the insurance matter.

4. Potential breach of the ICNIRP Guidelines where there is doubt of willingness to comply

28. The Applicant re-raises the matter of the ICNIRP low frequency guidelines (see para 6(iii) above). She is concerned that the proposed licence did not warrant that NET would comply with the low frequency guidelines. She asserts that "NET has never agreed to comply to ICNIRP's low frequency Guidelines". She adds that "the Chancellor is unsure whether he wants to include this element of the ICNIRP Guideline which….demonstrates his abandonment of his duty of care to parishioners and the community as a whole".

29. The proposed Respondents contend that there is no such uncertainty such as the Applicant alleges. They refer to the way in which the chancellor dealt with this matter in his judgment, including the condition he imposed. This approach:

> "goes further than required by the secular planning regime (and therefore, arguably further than required by the Court of Arches in *Re Emmanuel Church Bentley*). The [Applicant] appears to have failed to grasp the significance of this."

The chancellor's approach was, they say, an entirely reasonable way to deal with the matter, There is no uncertainty such as the Applicant alleges.

30. Again I agree, and do not regard the contrary to be arguable.

5. Failure to apply due consideration. Omitting to respond to major errors and omissions reported to the Chancellor with regard to serious health concerns

31. This proposed Ground overlaps with proposed Ground 1, and repeats the allegation that the chancellor erred in law by failing to address the technical information that the Applicant supplied which "reveals that the current threshold

levels are significantly flawed and the mistake is likely to have serious consequences for every human being, putting the nation's health and lives in jeopardy". She claims that the matter is not only extremely important, but "could also have devastating effects on the role of Christianity and the church if the Church of England fails to act or is seen to fail to act on this critically important issue".

32. In response the proposed Respondents point out that implicit in the Applicant's Ground is a contention that national Government guidance is wrong and the entire planning basis for telecommunications base stations in England is wrong. The Applicant was offered the opportunity to adduce expert evidence on this, and failed to do so within the entirely reasonable time limits set by the court. The Court of Arches appellate jurisdiction does not exist to give her a 'second bite at the cherry' due to her failure to comply with the consistory court's reasonable directions at first instance.

33. I agree, and merely refer back to and repeat what is contained in my para 17 above.

6. Compelling reasons why this appeal should be heard

34. The Applicant has devoted rather more than three close-typed sheets of A4 to this final Ground. So far as her arguments relating to *Knaresborough* and *Bentley*, namely that her own evidence on health implications/technical standards and her appendices ought to have been taken into account, I have already dealt with the matter under her Grounds 1 and 5. For the reasons I have explained above, she is unable, without expert evidence (which she now admits she could not call "for financial reasons") to substantiate her case that "so many transmitters at one site…will unleash a toxic cocktail that has not been witnessed before to such an extent", or "will further stimulate [her] nerves and sensory pathways to a severe & significant level which will be so serious, it will be life threatening".

35. She also contends that the proposal breaches the Equalities Act 2010; is a breach of her human rights, especially Article 2, Right to Life and Article 3, Freedom from Torture and Inhuman treatment; and her rights under the Standard Rules on the Equalization of Opportunities for persons with Disabilities, adopted by the UN General Assembly on 20 December 1993.

36. Absent expert and properly adduced scientific and medical evidence of risk or prejudice to her health before the consistory court, I do not consider that any of these various allegations constitutes an arguable error of law or a reason for granting permission to appeal.

37. I should add this. The phrase "some other compelling reason why the appeal should be heard" in rule 22.2(b) of the FJR 2015(set out in para 12 above) has a technical meaning, which the Applicant probably does not appreciate. Cases falling within rule 22.2(b) will be ones where, although there is not a real prospect of success under rule 22.2(a), the Dean (or Auditor) considers that an authoritative ruling by the provincial court is called for. I have on occasion granted permission to appeal under this head, a recent example (in the parallel Chancery Court of York) being *Re Upton (or Overchurch), St Mary* [2016] ECCY 1 (although that appeal was

later withdrawn). Of the various Grounds raised in the present case by the Applicant, there is one possible candidate for such treatment. That is whether (as I have decided) the chancellor, in both his interlocutory and final judgments, correctly interpreted the meaning of "compelling evidence" in *Knaresborough* and *Bentley*. My own decision refusing to grant permission does not carry the weight in other consistory court cases which would be carried by a determination to that effect by the full Court of Arches. Nevertheless, I have eventually decided that it would not be appropriate to grant permission here under rule 22.2(b), in circumstances where an appeal would be burdensome in terms of costs, where the Applicant would in all probability again appear only in person and thus only be able to afford limited assistance to the court, and where, even if the appeal court were to order that the automatic stay be lifted (see rule 27.1(1) of the FJR 2015), the appeal would be likely to delay the installation for which the chancellor has, in my view correctly, granted a faculty.

(vii) Disposal

38. For the above reasons I refuse permission to appeal under both limbs of rule 22 of the FJR 2015. For the avoidance of doubt there is no appeal from this decision.

(viii) Costs

39. Unless within 7 days of receipt of this decision the Applicant submits to the Provincial Registrar a short alternative costs proposal, in which case this costs order will be reviewed by me, she must pay by 1 June 2017 (a) the proposed Respondents' costs of their written representations in respect of her application, to be taxed if not agreed; and (b) the court costs of the application.

7 March 2017

CHARLES GEORGE QC
DEAN OF THE ARCHES