

In the Consistory Court of the Diocese of Salisbury

In the Matter of Great Durnford, St Andrew

(1) Colonel Ian Stevens  
(2) The Reverend Dr Mike Perry

Petitioners

- and -

Mrs Anthea Foster

Party Opponent

## Judgment

1. The Incumbent and Churchwarden of this parish have petitioned for a faculty permitting the grant of an easement over a church-owned lane in favour of an adjacent property known as 'The Bothy'. The Parochial Church Council has voted unanimously to support the proposal.
2. The lane in question runs to the north east of the church and provides the main access to the church and churchyard from The Drive in Great Durnford. At the end of the lane, next to the church and churchyard, is a double gate which gives access onto The Bothy - a property owned by the Great Durnford Estate and used for the storage of garden machinery used in the maintenance of the estate's gardens. The lane also gives access to the property known as The Old Vicarage, which is the home of Mrs Anthea Foster.
3. In recent years issues have arisen about basis upon which the Estate vehicles might be entitled to use the lane. Negotiations have taken place over an extended period which have, with the help of legal advice, resulted in an agreement that the owners of The Bothy should be granted a right of way over the lane for limited purposes.
4. Although there is no suggestion that the land over which the lane runs is consecrated, it nevertheless clearly falls within the curtilage of the church and therefore is subject to the faculty jurisdiction of the Court<sup>1</sup>. The

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<sup>1</sup> Section 57 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018

authority of a faculty from this Court is needed before a right of way can be granted over it.

5. The Diocesan Advisory Committee have recommended the grant of a faculty in this case. When the Public Notices were displayed a letter of objection was received from Mrs Foster of The Old Vicarage. She has chosen to take party status in these proceedings, objecting to the grant proposed. Good neighbourliness has meant amicable efforts on all sides to resolve the dispute, but that has not been possible and so the matter comes before me for determination. Both parties have agreed that the matter should be dealt with by way of written representations under Part 14 of the Faculty Jurisdiction Rules 2015. I determined that it was appropriate to deal with the matter in that way.
6. Mrs Foster maintains that the grant of the easement will disrupt and disturb the tranquility of the village and upset her mental health. She says that visitors are being discouraged from using the church as a result of the Estate's use of the lane. She states that the Estate has been using the lane at unsociable hours, in a dangerous manner and with an unreasonable concentration and type of vehicles. Mrs Foster is concerned that the easement will impact upon the value of her property. She points out that the easement includes maintenance obligations for the cob wall which lines one side of the lane and suggests that there has been some financial or other inducement to the parish to enter into the grant of the easement.
7. The Petitioners have great sympathy for Mrs Foster's concerns, but maintain that those concerns relate to the current unregulated access by the Estate - particularly during a period in the spring and early summer of 2020 when the Estate was using the lane access for building works. It is their position that the grant of an easement in the terms proposed will ease these concerns, not heighten them - that is the very purpose of the agreement reached. They argue that, if granted, the easement will establish legal obligations to observe the covenants therein: the deed limits the type and size of vehicle which can use the lane for access to The Bothy; it contains a covenant against nuisance; it protects the use of the lane by the church and its visitors.
8. The summary above highlights the keys issues raised by the parties. Although not every detail is set out here, I have taken careful account of all of the material placed before me in determining this Petition.
9. The terms of the proposed right of way include the following provisions:
  - a. Use of the lane by the Estate is limited to that needed for the storage of domestic (and not agricultural) garden machinery at The Bothy and for maintenance access for The Bothy, walls and lane;
  - b. Use of the lane to develop (as opposed to repair) The Bothy is expressly prohibited;

- c. Establishment of the Estate's liability to maintain the walls and gate and contribute towards the maintenance of the lane.

10. Mrs Foster has written to the parish suggesting various amendments to the terms of the deed of easement. She has concerns that it is not sufficiently 'tight' in its terms and therefore its enforceability. The Petitioners have indicated that the currently agreed terms are the outcome of extensive and careful negotiations. Having taken legal advice throughout, they are satisfied that the current draft of the deed represents an appropriate and satisfactory form of agreement. I have reviewed the suggestions made by Mrs Foster. In doing so, I am mindful of the fact that, whereas the permission of this Court is needed before the deed can be executed by the Incumbent and PCC, it is an agreed document which cannot be amended unilaterally by them. I am faced with the option of granting or refusing a faculty for the execution of the deed in its current form. If refusing the faculty, it would be open to me to indicate the likely terms of an acceptable version of the deed, but the Petitioners could not impose that version upon the other parties to the deed and it is not clear whether the Estate would be prepared to agree to any such amendment. In those circumstances, I must consider whether the terms of the current deed reflect an appropriate agreement, protecting the interests of those concerned in it. If I am not so satisfied it will be for the Petitioners to seek to renegotiate the terms and apply again for this Court's permission.

11. Having carefully considered Mrs Foster's position and her suggested amendments, I am quite satisfied that the terms of this easement are appropriate and suitably enforceable. There will always be scope for amendment to preferred versions of the proposed terms, but I am satisfied that what has been agreed between the Petitioners and the Estate reflects a fair and appropriate arrangement in the circumstances.

12. The majority of Mrs Foster's concerns relate directly to the unregulated access which the Estate has been enjoying over the lane. The evidence that she has provided suggests that the lane was subject to heavy usage, including by agricultural vehicles, during the spring and summer of last year when building works were undertaken at The Bothy. The grant of this easement will provide a means of limiting the Estate's use of the lane and reducing or avoiding these difficulties. The alternative is to leave the situation unregulated such that the problems may well continue. I have seen no evidence that the easement will damage the value of Mrs Foster's property (and I rather suspect, but do not find, that The Old Vicarage will be a more attractive property to potential purchasers if the status of the lane and rights of access over it are clearly defined). I have seen absolutely no evidence to support the very serious allegation that there has been any financial or other inducement to enter into the deed of easement - rather the correspondence discloses careful and responsible discharge of the duties of the PCC in taking all reasonable steps to resolve and rectify these legal uncertainties, taking legal advice throughout.

13. In the circumstances I direct that a faculty shall pass the seal on condition that the deed is executed within six months of the date of this faculty.

The Worshipful Canon Ruth Arlow  
Diocesan Chancellor

27 February 2021