



Petition No. 9712

**IN THE CONSISTORY COURT  
OF THE DIOCESE OF OXFORD**

Date: 19<sup>th</sup> August 2014

**Before :**

**THE REVEREND AND WORSHIPFUL ALEXANDER MCGREGOR,  
CHANCELLOR**

-----  
**In the matter of :**  
**St John the Baptist, Burford**

-----  
-----  
Mr Andrew Johnson, solicitor, of Batt Broadbent Solicitors LLP, for the Petitioners  
Mr Robert Fookes, counsel, for the Parties Opponent

Hearing date: 19<sup>th</sup> July 2014  
-----

**JUDGMENT**

## **The Chancellor:**

### *The church and churchyard; Warwick Hall*

1. The church of St John the Baptist, Burford dates from the second half of the twelfth century and is a grade I listed building. It is situated within a four-sided churchyard. To the north and the east the churchyard is provided with a natural boundary by the river Windrush. To the south and west it is enclosed by man-made boundaries. The petition shows that the churchyard was closed by Order in Council in 1946.
2. The main churchyard gate is to the south of the church and opens into an area of highway known as Church Green. Immediately to the south of the churchyard, and to the east of the main churchyard gate, is a property known as Warwick Hall consisting of a grade II listed building and associated land at its rear. Warwick Hall has belonged beneficially to the parochial church council since 1962 and is vested, pursuant to section 6 of the Parochial Church Councils (Powers) Measure 1956, in Diocesan Trustees (Oxford) Limited who are the diocesan authority for the purposes of that section.
3. Formerly a parish school, Warwick Hall has been used for about a century as a church hall. The parochial church council wishes to carry out works extending Warwick Hall in order to improve the facilities that it affords for uses that are ancillary to the church and for wider community use. Planning permission and listed building consent have been granted for the proposed works of extension to Warwick Hall.

### *The proceedings*

4. The Vicar, one of the churchwardens and the chairman of the parochial church council's fabric committee now petition this court for a faculty to authorise:

Works associated with the extension of Warwick Hall: removal of two trees; relocation of memorials; removal and rebuilding gate post; alterations to churchyard wall; resurfacing of path.

The petition was submitted by them pursuant to a resolution of the parochial church council which was passed unanimously by those present at a meeting of the council on 25 November 2013.

5. For reasons that will be explained below the Petitioners now apply to amend the petition to omit "alterations to churchyard wall" from the Schedule of works or proposals.
6. The Diocesan Advisory Committee issued a certificate advising that they had no objection to the works subject to provisos as to archaeological observation and recording and the making of a photographic record and measured drawings of the features that are to be affected before the work begins.
7. The proposals involve the re-location of monuments in the churchyard, 5 on a temporary basis while the works are carried out and the relocation of one footstone to a position next to its corresponding headstone on a permanent basis. In order to comply with section 3(2) of the Faculty Jurisdiction Measure 1964, notices as to the proposed works were published in the Witney Gazette inviting descendants of those commemorated to contact the church office. No such contact has been made.

8. Eight letters of objection from resident parishioners were received by the Registry in response to the public notices of the petition. Two of the objectors, Edward Mortimer CMG and Elizabeth Mortimer, subsequently submitted particulars of objection, thereby becoming Parties Opponent to the petition.
9. One of the objectors withdrew his objection by letter dated 13 February 2014.
10. The remaining 5 objectors have elected to leave me to take their letters of objection into account in reaching a decision without their becoming parties to the proceedings. Accordingly, I have taken their objections into account in reaching the decision set out in this judgment. I have not, however, set out or summarised their objections because they do not give rise to any issues that are additional to those which have been raised by Mr and Mrs Mortimer and which have been the subject of evidence and argument in the course of the hearing of the petition.
11. A letter of objection was also received from the Society for the Protection of Ancient Buildings. Both SPAB and English Heritage were given special notice of the proceedings in accordance with a direction given by me but neither chose to become parties or otherwise sought to be heard.
12. I have taken the letter from SPAB into account in reaching my decision. As with the objections raised in the letters from parishioners, the letter from SPAB does not raise any additional points to those which have been fully articulated by Mr and Mrs Mortimer and in argument by counsel on their behalf.
13. English Heritage, whose views are set out in the report of West Oxford District Council's planning officer, had previously indicated that they were content with the proposals subject only to a concern relating to the proposed new roofline of the hall which is not material to these proceedings.
14. The Petitioners' case, as summarised in their statement of need and explained in full in the evidence of the Vicar, the Reverend Richard Coombs, is that there is a need for the expanded facilities and increased convenience that would result from the proposed works to Warwick Hall and the associated works in the churchyard. They say that the works are necessary to meet current standards in terms of the facilities available in the hall so that the mission of the church in the town can be taken forward. That mission is said to be "somewhat constrained by the lack of such facilities and the sense of making do which pervades in some of the regular activities of the parish".
15. The grounds of objection pleaded by the Parties Opponent are:
  - i. The churchyard and its wall form part of a Grade I listed church and as such are protected by law.
  - ii. The proposed new entrances to the Warwick Hall will bring an unprecedented volume of pedestrian traffic into the churchyard.
  - iii. There is a feasible alternative.
  - iv. The proposed wide paved area and frequently used doors will destroy the secluded character of this part of the churchyard and damage the setting of the church.
16. The hearing took place in the church of St John the Baptist, Burford on 19 July 2014. The Petitioners were represented by their solicitor, Mr Andrew Johnson and the

Parties Opponent by counsel, Mr Robert Fookes, who appeared pro bono. I am grateful to Mr Johnson and Mr Fookes for their assistance at the hearing in identifying the issues in dispute and for their clear and helpful submissions.

17. Shortly after the beginning of the hearing the court inspected the entire boundary of the churchyard, and in particular its boundary with Warwick Hall. We were given access to Warwick Hall and were shown inside the building and the land to its rear. Consequently, I was able to gain a clear impression of the church, the churchyard and its setting and to inspect both sides of the wall at the boundary between the churchyard and Warwick Hall.

*Proposed alterations to the boundary wall*

18. The reference in the Petition to “alterations to churchyard wall” arises from the fact that the proposed works to Warwick Hall involve, among other things, relocating its main entrance from Church Green – outside the churchyard gate – to a new opening in the boundary wall between the churchyard and Warwick Hall. This new entrance would consist of glass doors through which one would enter the extended building from the churchyard by means of a new paved apron situated at the edge of the churchyard and immediately in front of the doors. The current door in Church Green would remain in place but could no longer function as the main entrance to the building because, as a result of changes to the internal layout, it would no longer be practicable to access most of the building by that route.
19. The proposed works also involve the creation of two other new openings in the boundary wall, one being a secondary entrance into the building and the other a new gate into the remaining, unbuilt on, land to its rear. As formulated in the plans which received planning permission and listed building consent, the works would also involve the demolition of part of the boundary wall and its reconstruction as an external wall of the extended building.
20. Mr Julian Munby, the Diocesan Archaeological Adviser, helpfully agreed to my request that he give evidence as a judge’s witness. His report states that the proposed works are not “exceptional or such as to arouse concerns for the preservation of significant historic fabric, finds, or deposits.” In his conclusion he says, “the requirements of secular and ecclesiastical controls with regard to archaeological mitigation will if properly carried out be an adequate response to the impact of the proposed works”. At the hearing he stated that it had become clear from the inspection of the boundary wall that a considerable amount of work had previously been carried out to it, adding to its archaeological complexity. But he said that none of this changed his conclusion that the impact of the proposed works would remain within acceptable norms.
21. In his skeleton argument dated 27 June 2014, Mr Fookes makes a number of important submissions about this aspect of the Petition.
22. First, he says that although the Petitioners have obtained planning permission and listed building consent for the works to Warwick Hall, and that following *In Re St Mary’s Churchyard, White Waltham (No. 2)* [2010] 3 WLR 1560 the consistory court is entitled to accept the reasoned decisions of a planning authority unless they are demonstrated to be wrong by cogent evidence, the local planning authority in the present case did not apply the correct test under sections 16, 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990. Those provisions require the

planning authority to “have special regard to the desirability of preserving the building or its setting” and, in the case of a conservation area, to pay “special attention ... to the desirability of preserving or enhancing the character or appearance of that area”. As Mr Fookes points out, this imposes a strong burden of proof on applicants which has to be drawn to the attention of the planning committee. He submits that as that did not happen when the planning committee considered the applications for planning permission and listed building consent relating to the Petitioners’ proposals, this court should reconsider the merits of the proposals in accordance with the correct tests.

23. Secondly, he argues that the planning committee of the local planning authority was not provided by the planning officer with adequate or accurate advice as to the precise nature of the proposals or as to the objections that had been made when it considered the applications for listed building consent and planning permission. He also says that there are discrepancies between what is sought in the Petition and what has been granted permission by the planning authority.
24. Thirdly, he argues that the demolition and reconstruction of part of the boundary wall between Warwick Hall and the churchyard in order to form one of the external walls of the extended building would amount to the erection of a building on a disused burial ground, contrary to section 3 of the Disused Burial Grounds Act 1884 and cannot, therefore, be authorised.
25. Fourthly, he argues that the Petitioners have not made out a case to justify the demolition of so much of the boundary wall. In particular, it is said that an alternative layout for the extension put forward by the Parties Opponent would meet the needs and objectives of the parish with less impact on the wall and on the churchyard more generally.
26. In response to those arguments, the Petitioners made an application on 11<sup>th</sup> July to amend the Petition to omit “alterations to churchyard wall” from the works for which the Petition seeks authority. The basis for the application was not that the Petitioners no longer wished to carry out the works to the wall but because they now contend that they are not subject to the jurisdiction of the court on the basis that the boundary wall between the churchyard and Warwick Hall is not situated on land that forms part of the churchyard or other curtilage of the church, but on land that belongs exclusively to the parochial church council as the owners of Warwick Hall. The Petitioners’ application stated that they relied on the evidence of Ian Brown and Keith Davis whose witness statements had already been filed.
27. In a second skeleton argument Mr Fookes raised the following arguments in response to the Petitioners’ application to amend the Petition to omit the proposed alterations to the wall.
28. Canon 85 of the Code of Canons of 1603 imposed a duty on the churchwardens to  

“take care, and provide that the churches shall be well and sufficiently repaired ... The like care they shall take that the churchyards be well and sufficiently repaired, fenced, and maintained with wall, rails or pales, as have been in each place accustomed ...”.
29. The same duty has been continued by Canon F 13 but is now imposed on the parochial church council by virtue of section 4(1) of the Parochial Church Councils (Powers) Measure 1956.

30. Mr Fookes draws attention to material contained in a report of Mr Richard Morriss prepared at the behest of the Petitioners' architects. The report is headed with the name and address of Warwick Hall and is entitled "An Architectural and Archaeological Assessment". It is dated July 2010. He also draws attention to a document included by the Petitioners in the court bundle headed "Report on Warwick Hall" which is anonymous and largely unsourced but which the court was informed at the hearing had been written by a local historian, Raymond Moody.
31. On the basis of this material and in the light of Canon 85 of 1603 Mr Fookes seeks to demonstrate that along the entirety of the length of the existing boundary between the churchyard and Warwick Hall there was for a considerable period prior to the building of the existing Warwick Hall an established wall which was either a free-standing churchyard wall or was a party wall, in other words a wall wholly or partly standing on land forming part of the churchyard. He further argues that to the extent that a wall standing on land forming part of a churchyard has been encroached upon by the owners of land adjoining the churchyard, that has no bearing on the application of the faculty jurisdiction which depends primarily on the consecrated status of land and not on its ownership.

### *Jurisdiction*

32. The question of the precise location of the boundary between the churchyard and Warwick Hall and the court's jurisdiction in respect of the wall has become a central issue in the case.
33. The jurisdiction of consistory courts (which has existed since shortly after the Conquest) was put on a statutory footing by the Ecclesiastical Jurisdiction Measure 1963. By virtue of section 6(1)(b) of that Measure, "the consistory court of a diocese has original jurisdiction to hear and determine a cause of faculty for authorising any act relating to land within the diocese, or to anything on or in such land, being an act for the doing of which the decree of a faculty is requisite".
34. The extent of the jurisdiction of consistory courts has been put beyond doubt by statute. Section 11(1) of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 declares "that the jurisdiction of the consistory court of a diocese applies to all parish churches in the diocese and the churchyards and articles appertaining thereto". Section 7 of the Faculty Jurisdiction Measure 1964 declares "that where unconsecrated land forms, or is part of, the curtilage of a church within the jurisdiction of a court that court has the same jurisdiction over such land as over the church".
35. Unconsecrated land situated wholly outside the boundary of a churchyard (and not otherwise within the curtilage of a church – see section 7(1) of the Faculty Jurisdiction Measure 1964) is not within the jurisdiction of the consistory court even if it is a church body such as a parochial church council who owns the land in question and who intends to carry out works on that land. Accordingly, if the boundary wall is situated wholly or partly within the churchyard, the wall (or at least part of it) is subject to the faculty jurisdiction. If it is situated wholly outside the churchyard it is not subject to the faculty jurisdiction.
36. The ecclesiastical courts are superior courts in the sense that it need not appear in the proceedings or judgments of an ecclesiastical court that it was acting within its jurisdiction: *R v Chancellor of St Edmundsbury and Ipswich Diocese, ex p White*

[1948] 1 KB 195 at 205–206). But, as section 6 of the 1963 Measure makes clear, they are courts of limited jurisdiction. If the jurisdiction of a court depends on the existence of a particular state of facts, the court must inquire into the existence of those facts in order to decide whether it has jurisdiction (see Halsbury’s Laws of England, volume 24 (5<sup>th</sup> edition) at paragraph 623).

37. While disputes as to the location of boundaries are matters within the jurisdiction of the common law courts, it has been held that a consistory court has jurisdiction to determine the line of a boundary if it is necessary to do so in order for the court to decide whether or not to grant a faculty which relates to that boundary – for example a faculty authorising the erection of a fence to delineate the boundary of a churchyard. See *Re St Clement's, Leigh-on-Sea* [1988] 1 WLR 720 and *Re St Peter and St Paul, Scrayingham* [1991] 4 All ER 411.
38. Consistently with all of the foregoing, a consistory court must also be able to determine the line of a boundary if it is necessary to do so to enable the court to decide a question raised in faculty proceedings as to whether a structure to which it is proposed to carry out works is subject to the court’s jurisdiction and, accordingly, whether a faculty is required to authorise those works.

#### *Location of the boundary*

39. I turn, then, to consider the arguments that have been advanced as to the location of the boundary between the churchyard and Warwick Hall.
40. Although Canon 85 of the Code of Canons of 1603 imposed a duty on the churchwardens to keep churchyards fenced etc., it does not seem to me that it imposed an absolute duty. The duty is to take care “that the churchyards be well and sufficiently repaired, fenced, and maintained with wall, rails or pales, as have been in each place accustomed”. The word “sufficiently” implies that the duty is to fence churchyards and maintain them with walls etc. to the extent that it is necessary to do so. If some other feature existed to demarcate the consecrated land, for example a watercourse, then there would have been no need to create a further demarcation by means of a fence or wall. And that appears to have been the approach taken at Burford where the river Windrush establishes the boundary of the churchyard on its north and east sides.
41. Similarly, it seems to me that if some other man-made structure was in place that demarcated the extent of the churchyard, for example the wall of a house or of a garden standing next to the churchyard, then there will have been no need for the churchwardens to construct an additional wall at the edge of the churchyard next to, and following the same course as, that structure. Indeed, to suppose that there was such a requirement would have been an absurd interpretation of the Canon.
42. The words “as have been in each place accustomed” may also have allowed for a degree of latitude. There are many churchyards which are not, and have never been, surrounded by a fence or wall. The reference to local custom seems to accommodate this divergence of practice.
43. It is not possible, as Mr Fookes asks me to do, to extrapolate from the provisions of Canon 85 a presumption that there must have been a wall standing on land forming part of Burford churchyard to demarcate the boundary between it and what is now Warwick Hall. And I do not consider that I should presume that if a boundary wall

between the churchyard and Warwick Hall does not stand wholly on land forming part of the churchyard it must then be a party wall, standing partly on the churchyard and partly on the adjoining land.

44. I have no doubt that Mr Fookes is correct – and it was not disputed by Mr Johnson – in saying that where a neighbouring landowner has encroached on land forming part of a churchyard and has adversely possessed that land, it nevertheless remains subject to the faculty jurisdiction. A change in ownership does not affect the consecrated status of land and, therefore, does not affect the court’s jurisdiction over it. But it follows from what I have said above that I do not accept that where Warwick Hall extends – or has in the past extended – to the northern edge of the boundary wall that that must necessarily be as the result of an encroachment on the churchyard. That is because I do not accept that there is any presumption that the churchyard must have had its own wall (or have shared a party wall). Actual evidence of encroachment is required before the court can conclude that it has taken place.
45. I turn to the evidence of how the land in question has been used.
46. At the western end of the part of the boundary in question the only physical demarcation is the northern external wall of Warwick Hall itself. This is illustrated in pl.7 in the report of Richard Morriss (previously referred to). There is an external chimney breast protruding from the north side of the wall. There are four windows, two at ground floor level and two on the first floor, looking out into the churchyard. There is also external pipework attached to the wall. These have the appearance of long standing acts of ownership on the part of the owners of Warwick Hall over the whole width of the wall.
47. Mr Fookes argues that this is a churchyard wall that has been encroached upon or is a party wall. He relies on material contained in Mr Morriss’s report which refers to this part of Warwick Hall being “on the boundary line”. This is not a precise statement. And in any event, Mr Morriss’s report does not reveal that he has any particular evidence as to the precise location of the boundary line, either historically or now.
48. I do not consider that weight can be placed on Mr Morriss’ statement that the north wall of what he refers to as the “north range” of Warwick Hall is “the churchyard wall itself”. There is nothing to suggest that Mr Morriss has investigated or is in any way concerned with the title to the wall in his report. The reference is simply descriptive of the fact that the wall demarcates a boundary with the churchyard.
49. Mr Fookes also refers to a statement contained in Mr Moody’s “Report on Warwick Hall” to a house of one John Bavorks to the north of the almshouses (which are to the south of Warwick Hall) “against the churchyard wall” in 1455-57. This is said to support the case that the churchyard had its own wall at that time and that it has since been encroached on.
50. Mr Moody’s report is unsourced and I have not been shown the source from which this information comes. It is therefore of limited value for that reason alone. It is in any event an imprecise statement because “churchyard wall” is not necessarily a designation of ownership. It could refer either to a wall standing on land comprised in the churchyard or it could refer to a wall in other ownership that formed the boundary of that land with the churchyard. The use of the term does not assist with the question of boundaries and the ownership of land. In any event, there is no evidence that this



reference is to a churchyard wall in the same location as the current boundary wall or as to precisely where John Bavorks' house stood in relation to the current buildings.

51. There is nothing to suggest that the northern external wall of Warwick Hall is anything other than the external wall of a building. The way in which the land has been used here for many years appears to me clearly to indicate the external wall of the building stands entirely on land that belongs to Warwick Hall and not to the churchyard. And the evidence does not establish that this use is the result of encroachment on the churchyard.
52. Immediately to the east of this part of the boundary runs a wall which I observed to be of the same thickness as, and to continue in line with, the northern external wall of the buildings that are immediately to the west.
53. In his witness statement, Ian Brown (who was sworn and adopted his statement) states that when Warwick Hall was used as a school there was a "major two storey rear extension of the main hall, the biggest of which ran along the boundary of the churchyard. This had many windows through its side wall overlooking the churchyard." He exhibits two undated aerial photographs which show the rear extension. He goes on to say that there are "a number of Burford residents who remember standing in the churchyard and peering through the windows into this building to watch the amateur dramatic society rehearse".
54. He then says that the building was radically altered in 1962 "when most of the long churchyard range was demolished. ... The boundary wall was clearly substantially rebuilt at this point and various entrances and openings closed up." He exhibits photographs showing the points of closure from the Warwick Hall side.
55. Mr Keith Davies also gave evidence. He was sworn and adopted his witness statement in which he states that he is 75 years old and has lived in Burford all his life. He states that he can remember the buildings on the Warwick Hall site going back to the second world war. He refers to the existence of the two storey building that formerly stood along the northern boundary of the site ("the northern range") and states that it formed the boundary with the churchyard to the north. He exhibits an aerial photograph showing this northern range of buildings. He also exhibits a photograph of the present boundary wall and points out the cornerstones of the former northern range which are now incorporated in the current wall. He states, "The northern face of the present wall, though reduced in height and with the windows filled in, is one and the same as the northern face of the northern range."
56. Mr Davies goes on to say that he recalls in the mid-1950s looking in through the windows of the northern range while standing in the churchyard. His recollection is that there were at least two windows that faced out onto the churchyard.
57. Mr Davies was cross-examined but nothing he said detracted from the cogency or reliability of the evidence contained in his witness statement.
58. I observed the cornerstones referred to by Mr Davies when the court inspected the boundary. I also observed evidence of the former existence of windows on the Warwick Hall side of the wall. These had been bricked up on the churchyard side.
59. The way in which the land has been used in relation to this section of the boundary wall – in particular that the wall was penetrated by windows of the former northern

range of Warwick Hall – strongly indicates that the wall stands on land exclusively belonging to Warwick Hall. There is nothing to suggest that the boundary was changed when the north range of buildings was demolished in 1962 and work carried out to the boundary wall as a result of that.

60. The remaining part of the boundary wall to the east of the section just referred to is of the same thickness and simply continues along the same line until it reaches the river Windrush. As it continues along the same line, and there is no evidence before the court of acts of ownership in respect of it that are indicative of its standing on land forming part of the churchyard, it is more likely than not that it too stands on land belonging exclusively to Warwick Hall.
61. On the basis of all the evidence which has been adduced and having inspected the churchyard, the site of Warwick Hall and the boundary wall itself, I have concluded that on the balance of probabilities the wall between the churchyard and Warwick Hall belongs exclusively to the parochial church council as the owners of Warwick Hall and that it does not stand on any land forming part of the churchyard or any unconsecrated curtilage of the church. I have therefore concluded that the boundary between the churchyard and Warwick Hall lies immediately to the north of the boundary wall.
62. Accordingly I hold that the boundary wall is not within this court's jurisdiction and that the works that the Petitioners propose to carry out to it do not require the authority of a faculty.
63. I therefore allow the Petitioners' application to omit "alterations to churchyard wall" from the Petition.
64. It follows that the issues raised by the Parties Opponent that are set out in paragraphs 22 to 25 above fall away.

#### *Remaining matters*

65. The merits of the Petitioners' plans for the extension of Warwick Hall in planning and listed building terms are not for this court to determine. Warwick Hall is entirely outside this court's jurisdiction. This court, is however, properly concerned with any changes that the Petitioners wish to make within the boundary of the churchyard that are associated with those plans.
66. It therefore remains for me to determine whether to permit the following:
  - removal of two trees;
  - relocation of memorials;
  - removal and rebuilding of gate post;
  - resurfacing of path.

#### *The case for the Parties Opponent*

67. The Parties Opponent, both in their particulars of objection and in their evidence to the court, have very clearly set out why they do not consider the proposed alterations to the churchyard should be permitted. Both are residents of Burford of long standing. Mrs Mortimer is a former member of West Oxfordshire District Council where she served on the planning committee. She is an art historian, portrait painter

and sculptor. Mr Mortimer has been a journalist and a senior official in the United Nations. He is a Distinguished Fellow of All Souls' College, Oxford.

68. Mr and Mrs Mortimer have very helpfully explained – both in their witness statements which they adopted when sworn and in their oral evidence – that they are not opposed in principle to the extension of Warwick Hall and accept that the Petitioners have good reasons for wishing to carry out such works. They say that they “can even see the advantage in having an entrance to the new hall from the north side of the churchyard”.
69. They consider, however, that the proposed demolition and reconstruction of substantial parts of the boundary wall would amount to unjustifiable harm to the wall which they argue is a historic and archaeologically significant structure within the curtilage of – and by virtue of section 1(5) of the Planning (Listed Buildings and Conservation Areas) 1990 to be treated as part of – a grade I listed building. For the reasons I have given above in relation to the location of the boundary between the churchyard and Warwick Hall, I do not consider that the wall is within the curtilage of the church and that this aspect of the case for the Parties Opponent therefore falls away.
70. But that is not their only concern. They are particularly concerned about what Mrs Mortimer describes in her witness statement (at paragraph 7) as “the great increase in particular of commercial usage of the churchyard, in the form of delivery of catering supplies both to the café (a new feature of the building), and also for other social events, audio equipment, goods for sale at vintage and other fairs, removal of rubbish etc.”. Mr and Mrs Mortimer argue that this will change the quiet rural character of the church and its setting.
71. They have therefore suggested an alternative approach to the extension plans. This would involve leaving the boundary wall largely intact, inserting the new main entrance into the back addition of Warwick Hall closer to the churchyard gate thereby resulting in a shorter resurfaced path, and retaining the existing front door of Warwick Hall in use as a service entrance with the addition of a goods scissor-lift to facilitate deliveries from Church Green.
72. They argue that the removal of a lime tree from the avenue of lime trees in the churchyard is an unnecessary alteration to this feature of the churchyard and conservation area.
73. They have produced a helpful sketch plan showing their alternative proposal. This has been commented on in expert evidence by Lucy Zanetti ARB who was called by the Parties Opponent with the court's permission. Her undisputed evidence is that the alternative plan suggested by the Parties Opponent would meet the requirements of building regulations, good practice for disabled access and the National Planning Policy Framework, that the proposed scissor lift would make the Church Green entrance suitable for bringing goods and equipment in and out of the hall, and that both the Church Green entrance and the main entrance proposed by the Parties Opponent would be acceptable as a fire escape.
74. Mr and Mrs Mortimer are supported by Mr Hugo Ashton, Chairman of the Burford Festival, who was called and gave evidence. His principal concern was with the proposed new access to Warwick Hall through the churchyard which he said would result in noise and disturbance and would impact on the peaceful enjoyment of the

churchyard. He was also concerned about the increased pressure on parking in Church Green. He supported the alternative proposal suggested by the Parties Opponent and explained how the internal arrangements could be changed to facilitate this.

75. In his submissions for the Parties Opponent, Mr Fookes argued that their alternative proposal would separate service delivery from visitors to the hall thereby resulting in the overall impact on the churchyard being mitigated by reduced footfall within the churchyard. Their alternative proposals would also result in a shorter passage from the church to the hall and in a tree being saved.

*The case for the Petitioners*

76. The Petitioners relied on the evidence of Mr Coombs (the Vicar), Mr David Finlay (the architect), Ian Brown (who is one of the Petitioners and whose evidence I have already been referred to), Mr Ian Johnson and Mr Keith Davies (whose evidence I have already referred to).
77. Mr Coombs's witness statement contains evidence of significant increases in the numbers attending the 11 o'clock Sunday service. In 2007 the figure for average attendance was 89; in 2013 it was 142. The parish have a five year plan covering the years 2010-2015 and have set themselves the target of doubling in size by 2015. The proposals for the redevelopment of Warwick Hall flow from that plan.
78. The existing Warwick Hall is considered to be hindering the parish's aspirations. The facilities are inadequate for the existing church purposes and limit the prospects for expanding them. Access to the hall involves leaving the churchyard and going out into Church Green. There is often a bottle neck at the entrance to the hall. The plans for the hall are intended to solve these problems. It is also intended that the extended hall should accommodate a day centre for the elderly and other community activities. Making the hall available in this way is intended to be a "tangible sign of our commitment to our community". It is Mr Coombs's view that the parish cannot fulfil its vision for the church and community with their existing facilities which are jeopardising its future growth and health.
79. Mr Coombs accepts that the proposed new main entrance may increase pedestrian traffic through the churchyard but he says that this part of the churchyard is already busy because it lies near the path from the churchyard gate to the church and is therefore used by the large number of visitors who come to the church (estimated at nearly 100,000 a year). He accepts that the proposed new path will take pedestrians about 30 metres to the west of the churchyard gate before they enter the new hall but says that this represents only a small proportion of the area of the churchyard and that 90% of the churchyard would be left undisturbed for those seeking peace and tranquillity. He points out that an earlier set of proposals were modified to take account of comments and objections that had been received and refers to attempts he has made to conciliate those who have concerns about the proposals.
80. In his witness statement, Mr Finlay, the architect, describes the project brief he was given and how conservation issues were approached. He discusses the impact of the proposals on the churchyard. He states, "it is not anticipated that the movement of people from Church Green to the front door of the new Warwick Hall will have a detrimental effect on the churchyard and it is certainly not the case that there will be a loss of tranquillity". He explains the rationale for the creation of the new main

entrance to Warwick Hall in a section of his statement concerned with access. The proposed new entrance “has the added benefit of allowing the rest of the building to be planned much more efficiently as you arrive at the heart of the building and users can access all parts of the building without having to pass through other spaces. By locating it centrally you avoid creating a bottle neck of people travelling up and down a very long ramped corridor. It was always seen as critical that the various parts of the building could work independently and at the same time.”

81. Mr Johnson’s witness statement provides evidence as to the current financial position of the project. The parochial church council has so far raised or been pledged £3,057,710 towards the expected final building cost for the redevelopment of £3,400,000. A plan is in place to raise the remaining £342,290. Provision is in place to ensure that cashflow needs are met. The parochial church council is satisfied that the ongoing costs of the hall could be met without difficulty.
82. Mr White is a member of Burford town council and is currently the Mayor of Burford. His witness statement explains that Warwick Hall was leased to the town council until 2012 subject to it being available for church use. He describes it as having been the “hub of community activity”, there being nowhere else in the town to accommodate many of the community activities for which it has been used. He states that the hall has become dilapidated and that its facilities are inadequate. The town council are in favour of the plans for its redevelopment. There are no plans to lease the new hall to the town council but it is understood that it will be made available to the town, its institutions and residents.

#### *The test to be applied*

83. As a result of my holding that the boundary wall is not within the churchyard and that this court is not therefore concerned with proposed changes to a listed building, the guidelines set out in *Re St Alkmund, Duffield* that are concerned with listed buildings are not applicable. The test that is applicable in relation to the proposals that affect the churchyard is the test set out by Lord Penzance in *Peek v Trower* [1881] P 21 at 27:

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; and if you cannot shew this to the court, at least shew the court that a majority of those for whose worship the church exists desires the alterations which you propose.

As a matter of principle, the same considerations as apply to a church must also apply to the case of a churchyard.

#### *Application of the test*

84. The Petitioners’ proposals in respect of the churchyard are ancillary to their proposals for the hall. Their proposals taken as a whole are expressly intended to make things better than they are, to make the hall more convenient, more fit for the accommodation of the parishioners (a body of persons much more extensive than just those who worship in the church), more suitable, more appropriate and more adequate to its purpose as a church hall, both in terms of the needs of the church and of the

wider community. It is clear from the evidence, particularly that of Mr Coombs, that implementing the proposals would have the effect of meeting those intentions. Indeed, the Parties Opponent do not disagree in principle; but they say that the Petitioners' objectives can better be met in a different way.

85. It may be that there are alternative ways of achieving those objectives – there nearly always will be in such cases. The differences between the Petitioners' proposals and the suggested alternative of the Parties Opponent are really quite limited. I accept Mr Johnson's submission that the question before the court is whether the Petitioners' proposals should be permitted. The existence of an alternative would only be material if the court found that the Petitioners' proposals were harmful in a way that the alternative proposals were not, such that the harmful proposals could not therefore be justified.
86. I accept that the Petitioners' proposals will increase the amount of pedestrian traffic in the part of the churchyard between the churchyard gate and the new main entrance to Warwick Hall. But I do not accept that the churchyard will be harmed as a result. The desirability of ensuring the tranquillity of a churchyard is to a certain extent a subjective matter. Some people like more tranquillity than others. Assuming that the court should proceed on the basis that preserving the tranquillity of the churchyard is desirable, while I accept that the Petitioners' proposals would result in increased pedestrian traffic through the churchyard gate and over part of the churchyard, I do not consider that the overall tranquillity of the churchyard would be significantly interfered with. I accept Mr Coombs's evidence that the part of the churchyard that would be affected by the Petitioners' proposals is already somewhat busy as a result of the large number of visitors who come to the church. But more significantly, I accept that the great majority of the churchyard – and in particular the large area of churchyard to the north of the church – will be entirely unaffected by the proposals.
87. To the extent that the tranquillity of one part of the churchyard will be affected, I consider that it is justified by the advantage of the main entrance to the extended hall being relocated to the churchyard, thereby more closely associating the hall, and the activity that is proposed to take place within it, with the church. Such a clear association is of obvious benefit in terms of the mission of the church, both as regards those who attend services and related activities, and as regards the standing of the church within the wider community. The specific location proposed for the new main entrance will, for the reasons advanced by the Petitioners and explained in the witness statement of Mr Finlay, be a considerable improvement on the current arrangement for access to Warwick Hall. In particular, Mr Finlay has explained, in relation to the proposed internal layout of the redeveloped hall, why the main entrance should be where the Petitioners propose. I find that explanation convincing.
88. It became clear at the hearing that what is described in the Petition as "resurfacing of path" is intended to encompass the widening of the path between the churchyard gate and the new main entrance so that its width extends to a maximum of one metre, and the creation of a paved apron immediately in front of the new main entrance to Warwick Hall. While it would have been better if the Petition had made this clear, I do not think that it is necessary in this case to insist that the Petitioners apply to amend the Petition. A path leading to the new main entrance to Warwick Hall and a paved apron immediately in front of it are ancillary to the purposes already identified as justifying the proposed location for that entrance and will themselves result in the better accommodation of the needs of the parishioners.

89. The removal and rebuilding of the gate post is also ancillary to the general proposals and similar considerations apply to it.
90. Likewise, the temporary relocation of monuments and the permanent relocation of one footstone next to its headstone are ancillary to the main purposes which are to the advantage of the parishioners generally. I am satisfied that the requirements of section 3 of the Faculty Jurisdiction Measure 1964 as to the taking of reasonable steps to obtain the consent of the owners are satisfied and that the court has jurisdiction under that section to authorise the proposals so far as they affect the monuments in question.
91. While, as Mr Fookes established in cross-examination, the Petitioners were wrong in their assertion that the lime tree (one of the two trees that they propose to remove) was towards the end of its natural life, I accept that they have nevertheless made out the case for removing it. While it is not essential to remove it in order to provide for the new access to Warwick Hall, I accept that it will be more convenient if it is removed. It is not subject to a tree preservation order and there is no other reason to conclude that it is of particularly significant amenity value.

#### *Planning permission*

92. There may – for reasons set out by Mr Fookes – be some discrepancies as to the details of what has received planning permission and the particular matters in respect of which the Petitioners seek a faculty. Mr Johnson was able to assist with a number of points in that regard. The path is to be widened so that it is up to a metre wide. It is not intended that there should be vehicular access to the churchyard after the completion of the works. No authority is currently sought for the introduction of any lighting in the churchyard. There is currently no intention to seek authority for a site compound to be set up in the churchyard.
93. However, that does not dispose of all the points raised by Mr Fookes. In particular, Mr Fookes submitted that there was currently no planning permission for the work to the path and he pointed out that the planning permission included a condition which would prevent the removal of any trees. It also transpired at the hearing that the Petitioners have reconsidered the proposal to demolish and reconstruct the boundary wall and now favour retaining as much of it as possible within the wall of the extended hall.
94. There is, of course, no rule of law that prevents a faculty being granted prior to the grant of planning permission for proposals which also require such permission. It is true that it is the normal practice of consistory courts to require planning permission to have been granted before a decision is taken on a faculty petition in respect of works which require planning permission. But as my predecessor, Dr Bursell, explained in *Re Radcliffe Infirmary Burial Ground* [2011] PTSR 1508, this approach is tempered by common sense and any faculty, if granted, can always be made conditional upon the grant of planning permission.
95. Given that this Petition has been fully argued at a hearing in open court and that planning permission has clearly been granted for the great majority of the project, I do not consider that it is necessary or desirable to defer a decision on the petition to await further details of planning permission. A condition attached to the faculty is capable of dealing with the need to establish that planning permission has been obtained for all of the aspects of the proposals.

## *Licence*

96. Mr Fookes has also raised the issue that the Petitioners have not sought the grant by faculty of a licence providing the parochial church council, as the beneficial owners of Warwick Hall, with a secure legal means of access through the churchyard to the new main entrance of the Hall. Mr Johnson confirmed that they did not seek the grant of such a licence.
97. While the creation of a new private entrance into a churchyard requires the authority of a faculty, I do not consider that the parochial church council are in an analogous position in that regard to a neighbouring private landowner. A parochial church council is a statutory body whose functions include co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical and the care and maintenance of the churchyard (sections 2 and 4, Parochial Church Councils (Powers) Measure 1956).
98. Moreover, as Newsom Ch noted in *Re St Mary, Aldermary* [1985] Fam 101, 103 –

It often happens that those in charge of churches and churchyards, especially in towns, are happy to allow facilities of this sort [sc. access over a churchyard as a means of fire escape] to their neighbours ... informally as good neighbours. Such an arrangement can be formalised and it does no harm provided that it is easily terminable; but it should be sanctioned by faculty.

It is true that Mr Coombs cannot – either on his own behalf or on behalf of his successors – grant a licence to the parochial church council and their licensees to use the churchyard as a means of access to Warwick Hall without the authority of a faculty. But, as Newsom Ch observed, he can informally allow them to do so. There is no reason to believe that he or his successors will refuse to allow such access and every reason to believe that they will do so. In theory, the parochial church council are proceeding at their own risk if they do not have a formal right of access in the form of a licence under faculty; but the risk seems to me to be a remote one. And in any event, it is their risk and one that Mr Johnson says they are content to live with.

99. For the above reasons, I do not consider that the parochial church council need the authority of a faculty to create an entrance into the churchyard. And I do not consider that the fact that they have not sought and obtained a faculty granting them a licence affording access across the churchyard to Warwick Hall means that this court should, in the exercise of its discretion, not grant a faculty authorising the works in respect of which the parochial church council have petitioned the court. In the highly unlikely event that an incumbent of St John the Baptist, Burford did refuse the parochial church council and their licensees access across the churchyard to Warwick Hall, it would be open to the parochial church council at that stage to petition this court seeking the grant of a licence which this court would have jurisdiction to grant even if the incumbent were opposed.

## *Restriction on use of hall in conveyance*

100. Mr Fookes also takes the point that the conveyance of Warwick Hall to the parochial church council contains an agreement between the parochial church council and the Diocesan Authority that the property will be used by the parochial church council for the purposes of a “church hall” or “any other ecclesiastical purpose within the meaning of the [Parochial Church Councils (Powers)] Measure [1956] connected with



the said parish”. He argues that at least some of the proposed community uses would amount to a breach of this agreement and that that is a matter that this court should take into account in deciding whether to exercise its discretion in the Petitioners’ favour.

101. I do not think it is necessary to give any consideration to the question of whether any of the proposed uses do not amount to “ecclesiastical purposes” (a term which is left undefined in the 1956 Measure) because I am satisfied that all of the proposed uses, including the community uses, amount to using the building as a church hall. It is normal for church halls to be used for community purposes. Such use – save for exceptional cases, for example, if the use amounted to an commercial activity that had nothing to do with the mission of the church – would almost always amount to use of the building as a church hall. The activities of the church are not limited to worship and ancillary activity. As section 2(1) of the 1956 Measure recognises, “the whole mission of the church” includes its “pastoral, evangelistic, social and ecumenical” mission. Community use of a church hall is encompassed within that “whole mission” and is entirely consistent with the use of a building as a church hall.

### *Conclusion*

102. I am satisfied that the Petitioners have discharged the burden on them, as set out in *Peek v Trower*, to establish that they should be permitted to make the proposed changes to the churchyard and that there are no other factors which should result in the court declining to exercise its discretion in their favour.
103. Accordingly, I decree that a faculty shall issue authorising the following works:
- i. removal of the two trees identified on plan 35G;
  - ii. the temporary relocation, during the carrying out of the works, of 5 memorials and the permanent relocation to its headstone of one footstone, as indicated on plan 35G;
  - iii. removal and rebuilding of gate post as indicated on plan 35G;
  - iv. resurfacing of the path, including widening it up to a maximum of one metre and the construction of a paved apron immediately in front of the new main entrance to Warwick Hall, as indicated on plan 34F.
104. The faculty will be subject to the following conditions:
- i. To the extent that they require planning permission and such permission has not yet been granted, the works authorised by the faculty are not to be undertaken until planning permission has been granted in respect of them.
  - ii. To the extent that any works authorised by the faculty are prohibited by a condition attached to a grant of planning permission which the Petitioners intend to implement, such works are not to be undertaken until any such condition is discharged or varied so as to permit the works.
  - iii. Following the completion of the works, no part of the churchyard is to be used for vehicular access to Warwick Hall.
  - iv. The Diocesan Archaeological Adviser must be consulted and the advice of an archaeologist obtained on the level of observation and recording that is appropriate, and its likely cost, and such observation and recording is to be carried out.

- v. A photographic record and measured drawings of the parts of the churchyard affected by the works must be made before the works are begun and copies deposited with the Diocesan Advisory Committee and the County Archives.
  - vi. If any articulated human remains are discovered, all work in the immediate area of the remains must cease forthwith, the remains must not be removed or otherwise interfered with, and the Petitioners must apply to the court for directions as soon as possible.
  - vii. If any disarticulated human remains are discovered they must be reverently reburied as soon as reasonably practicable.
  - viii. If any artefact or ecofact is discovered, it must not be removed from the churchyard without further Order of the court or an order of the Archdeacon under section 21 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991.
105. If any question arises as to whether conditions i or ii are met, or whether the works have been completed for the purposes of condition iii, it is to be referred to the court for determination. (For the avoidance of doubt, the parties have liberty to apply to the court for further directions as to the implementation of conditions i - iii.)
106. The court fees payable under the Ecclesiastical Judges, Legal Officers and Others (Fees) Order 2013 (S.I. 2013/1922) are to be paid by the Petitioners in an amount to be set out in a further Order.
107. There is to be no Order as to costs between the parties.
108. These Orders as to costs are provisional Orders under rule 18.1(3) of the Faculty Jurisdiction Rules 2013 and will come into effect after the expiry of the period of 21 days beginning on the day this judgment is handed down unless within that period a party makes written representations to the court as to why either Order should not be made.