

In the matter of St Mary, Chithurst

And in the matter of the petition of (1) Neil Ryder and (2) Darren Stiles
on behalf of Trotton with Chithurst Parish Council

Judgment

1. This is at heart a straightforward petition: some may consider it trivial. It concerns a proposal to fell an ash tree. However experience suggests that such proposals can generate strong local feeling as was the case following the delivery of the Court's judgment in *Re St Peter, West Blatchington* [2019] ECC Chi 4, which attracted some attention in the local and national press.
2. The petition is dated 26 January 2020 and was received in the registry on 28 January 2020. The petitioners are (1) Mr Neil Ryder and (2) Mr Darren Stiles, who are, respectively the clerk to, and chairman of, Trotton with Chithurst Parish Council. It appears to be common ground that the churchyard of St Mary's church, Chithurst was closed by Order in Council on 8 August 1901 and that responsibility for its care and maintenance was subsequently passed by the Parochial Church Council (ecclesiastical) to the Parish Council (civil) pursuant to the statutory forerunner of section 215 of the Local Government Act 1972. I have been provided with a copy of the Order in Council but not of the notice of transfer but there seems to be no dispute as to its existence and effect.
3. The first petitioner has raised a number of matters in his written representations to the Court which have required a lengthier judgment than might otherwise have been the case.

Procedural history prior to the issue of petition

4. An approach was made to the Archdeacon of Horsham, inviting her to give notice that the tree may be felled without a faculty under List B: see Table 2 in Schedule 1 to the Faculty Jurisdiction Rules 2015. Item B6(2) identifies the category of the felling of a tree which (a) is dying or dead, or (b) has become dangerous. Certain restrictions are placed on the exercise of the Archdeacon's discretion where a tree preservation order is in force, and regard is to be had to the Church Buildings Council guidance, which I address more fully at paragraphs 35-37 below.
5. But it is timely to remind ourselves that the statutory power of an Archdeacon to give notice under List B is discretionary. The fact that a proposal may come within one or more of the specific matters in List B does not create a right to the issuance of List B permission. What puts this proposition beyond doubt is FJR r 3.3(5) which reads:

If the archdeacon declines to give notice under paragraph (1)(a) that a proposal may be undertaken without a faculty, the archdeacon must inform the applicants that they may, if they wish, petition the court for a faculty to authorise the proposal.

6. In short, if a matter comes within List B, the Archdeacon *may* give notice that it can be undertaken without a faculty but he or she is not obliged to do so. It is analogous to the position under the Churchyard Regulations which give parochial clergy delegated authority to permit the introduction of certain categories of memorial but does not compel them to do so. The matter is discretionary: see *Re St John the Baptist, Adel* [2016] ECC Lee 8.
7. In this instance, the ash tree in question is not dead and arguably not yet dying, and its dangerousness is contested. But even had the proposal clearly fallen within item B6(2), the Archdeacon was perfectly entitled to decline to give notice. It was already apparent that there would be local objection. Lists A and B are national provisions which replaced diocesan Lists of Minor Works, formerly called *De Minimis* provisions. They were designed to remove bureaucratic obstacles to minor and uncontentious works and provide a unified system for the whole of the Church of England. Since the proposed felling of the tree was already a contentious matter, the Archdeacon wisely refused to exercise the discretion under List B and duly informed the putative petitioners as the FJR required.
8. As I understand the position, the first petitioner made initial contact with the registry on 28 November 2019 by way of an email setting out the background.

To summarise, our parish council has responsibility for maintaining the graveyard at St Mary's church, Chithurst, as it is closed for burials. In the graveyard, there is a very large ash tree adjacent to the path into the church and with branches overhanging the (newly replaced) church roof. The ash tree has been showing signs of ill health for the last two seasons and we have consulted a variety of tree surgeons and arboricultural experts. All of them tell us the tree very definitely has ash die-back disease; it will die back from the extremities (as one can already see) and will be increasingly vulnerable to other afflictions such as honey fungus (which recently killed a nearby willow in the graveyard). As a result, the longer it is left, the more danger there will be of large branches falling on the church roof or people going in and out of the church. It will also become increasingly dangerous for a tree surgeon to climb so that the only way to take it down will be with a very large crane (which might be difficult to get across the tiny bridge on the road leading to the church).

We have discussed this with the rector and churchwardens for over a year and all of us agree the tree should therefore be taken down as soon as practicable – primarily to avoid the risk of damage or injury but also of it becoming prohibitively expensive (or even impossible) to take down safely. We have had four estimates to take the tree down now, ranging from £1,600 upwards – which is already over half of our parish council's annual income (it's a very small parish!). We are told that doing it with a crane (if we can get one down there) would cost anywhere between £3 – 5,000. The parish council has therefore decided unanimously that the tree should come down this winter – but we have now learned that this would be illegal without permission from the church authorities – hence my enquiries to the diocese.

We initially hoped we could get permission via a List B application. However, the next-door neighbour to the church (Sarah Miles, the elderly actress) is objecting passionately to the tree being taken down, so the archdeacon is not willing to allow the list B procedure. [...] The diocese advises that a full faculty could take 3-4 months but our parish council is not prepared to take the risk of waiting this long on health and safety grounds, so the purpose of this email is to ask for an interim faculty. Obviously if this is refused, and it is therefore illegal for us to proceed without the long wait for a full faculty, we will advise our insurance company that we have done all we legally can but we now consider the risk to be the church authorities' responsibility. We will also consider any extra costs in taking the tree down later, should the delay result in it becoming too dangerous to climb, to be your liability.

I should say, and I know that the local benefice will bear this out, that our parish council (PC) has been as generous as possible towards the two churches in our parish: I do the clerk's job for

nothing so that the PC can use the notional clerk's salary to pay for maintenance of both churchyards (ie beyond our legal responsibility for the closed graveyard area at St Mary's); we have raised funds to pay for a variety of equipment to make the churches useful for community events and we organise these events with proceeds all going to the benefice; we work hard to keep a village fete going, with all proceeds to the benefice, etc. We are not, therefore, a civil PC at war with our church counterparts; we are a responsible civil body that works closely with them but is trying to avoid danger to people and church property without leaving it to the stage where we are no longer able to afford the necessary work and have no option but to close the church on safety grounds.

9. This enquiry was referred to me, and I gave directions which were promptly communicated to the first petitioner by email. His enquiry to the registry came in shortly after 10 am and he had his answer just after 2 pm the same day. I mention this chronology simply to put into context the first petitioner's subsequent allegations of delay. The Court's directions of 28 November were as follows:

As I understand the position, the large ash tree with which the PCC is concerned is not subject to a tree preservation order. That being the case, the PCC is at liberty to authorise its felling subject to obtaining a faculty. I am satisfied that the interests of health and safety are sufficient for me to direct dispensing with public notice, under FJR r 6.7. The parish have, entirely properly, informed me that a neighbour (Miss Sarah Miles) objects to the felling of the tree. She is to be given notice that the Court is now seized of the matter and is minded to authorise the felling of the tree. However, the Court is prepared to allow Miss Miles 14 days within which to make written representations as to why the tree should not be felled. They should be sent to the Registry with a copy to the secretary to the PCC and the parish council. In the meantime, I require the parish council to collate the professional advice it has received. I will review the matter in 14 days, and if the evidence is sufficient to satisfy the Court that a faculty should issue for the immediate felling of the tree, the Court will so direct. The Court would welcome any observations that the DAC is able to make.¹

10. In an undated letter, which followed the issuing of the Court's directions, the first petitioner wrote to Miss Miles informing her that the Court had afforded her 14 days within which to make representations and stating they should be sent to the registry by 18 December 2019. On 13 December 2019, the matter was referred to me for further directions in the light of letters of objection from Miss Miles and a Mr Ian Hollis, both of Chithurst Manor. By return, I directed that each of the two objectors be put to their election under FJR, r 10 and be supplied with a Form 5 to be completed if either wished to become a party opponent.
11. Further, in the light of a second letter of objection being received by the registry, I revisited my direction dispensing with public notice, and directed that it happen immediately, but with a reduced response period of 14 days, rather than the conventional 28 days. I had in mind the overriding objective in FJR r 1.1, and the Court's duty to manage cases under FJR r 1.4.
12. In an email dated 13 December 2019, the first petitioner was informed by the registry of the Court's direction in respect of public notice. He was also advised that the matter needed to be put on a formal footing with the lodging of a petition, and was provided with Forms 3A and 1A for completion.

¹ Certain references in these Directions to the PCC ought to have been to the Parish Council. It would not appear that anyone was misled by this error on my part, arising from the haste in which the directions were given.

13. It should be noted that had an interim faculty been granted, it would have been on condition that a confirmatory faculty be sought within a specified time thereafter in accordance with FJR r 15.3(3), whereupon the statutory lodgement fee would become payable in any event. It seems from subsequent representations that the first petitioner may not have been aware of this because on 18 December 2019, he chose to email the assistant secretary to the DAC in the following terms:

It looks like daylight robbery for the church to charge us nearly £300 (10% of our annual income) to do some maintenance to their churchyard that we consider to be essential to keep their roof and church-goers safe! [emphasis in original]

14. I interpose to record that in a subsequent email to Parish Council members, the first petitioner suggested that ‘the diocese’ had taken action ‘firmly chucking our issue into the laps of the lawyers in London’. This is inaccurate and misleading, as it was the first petitioner himself on behalf of the Parish Council who had chosen to initiate legal process in the Consistory Court of the Diocese seeking an interim faculty for the felling of the tree.
15. The registry wrote to Miss Miles and Mr Hollis on 16 December 2019 in accordance with the provisions of FJR r 10. The latter responded on behalf of both of them declining to become parties opponent and asking instead that their letters of 10 December 2019 and 11 December 2019, respectively, be taken into account. I afforded the first petitioner the opportunity to respond to the matters raised by Miss Miles and Mr Hollis. This was received at the Registry on 28 January 2020.

Public Notice

16. As noted at paragraph 11 above, on 13 December 2019 I directed that public notice be displayed immediately but for a reduced period of 14 days. The first petitioner did not carry out my direction for the immediate display of public notice. He chose instead to wait until 22 January 2020. By way of explanation the first petitioner stated in a later email that he did not know whether he had authority from the Parish Council to do so, and was unclear whether the Parochial Church Council would also be a petitioner.
17. More concerning is the original Certificate of Publication which appears on the reverse of the Form 4A Public Notice. It bears the first petitioner’s signature over the date 6 February, but must have been signed prior to that date because the completed version was delivered to the registry on 28 January 2020.
18. It is self-evident that a Certificate of Publication cannot properly be completed and signed until the period of display has expired. It is impossible to predict whether a notice might be blown away, obscured by other documentation, or removed or defaced by a third party. A premature certificate is aspirational only and cannot be probative of future eventualities. The explanatory note on the foot of the Certificate of Publication makes this plain.

The public notice (or a copy) with a completed certificate of publication must be returned to the diocesan registrar once the period for the display of the notice has expired. [emphasis added]

19. Accordingly, I directed that a further Certificate of Publication be executed and lodged. As the time for the receipt of objections was not due to expire until 7 February 2020, no

determination of the petition could be made until that after that date. A further (and this time accurate) Certificate of Publication was received in the registry on 10 February 2020. The matter was then referred to me for decision.

The petitioners' case

20. The fullest articulation of the petitioners' case is to be found in a letter from the first petitioner dated 28 January 2020. This contains much of the information which had been sought in the Court's directions of 28 November 2019. It also contains detailed responses to the two letters of objection. In addition, in circumstances summarised below, the petitioners provided written representations dated 9 February 2020 in response to the observations made by the DAC.
21. Whilst the petitioners do not rely on an expert report as such, the Appendix B to the petitioners' submissions of 28 January 2020 comprises emails from various persons concerning the state of the ash tree and recommendations in relation to it.
 - i. Dr Martin Dobson dated 17 March 2019 reproduced in full at paragraph 32 below;
 - ii. Mark Carter, registered consultant of the Institute of Chartered Foresters, dated 23 September 2019;
 - iii. Mark Alexander of Came & Company Local Council Insurance, dated 1 October 2019.

In addition there is an email from the Diocesan Church Buildings and Pastoral Reorganisation Officer dated 6 November 2019 which concerns procedural matters not relevant for present purposes.

22. Put shortly, the petitioners contend that the tree in question is clearly infected by ash die-back, that it has very little chance of recovery, and that it is likely to start dropping large branches or falling down altogether in the next few years. It will become dangerous to climb within a shorter timescale such that it would require a crane for the felling process, as to which there are difficulties with access. The parish council agreed unanimously on 13 November 2019 that it should be felled as soon as possible, ahead of the next nesting season.
23. The first petitioner rejects the objectors' submissions that the Parish Council is unconcerned about environmental matters, and denies emphatically that any representation was given that the Council agreed to be bound by Dr Dobson's recommendation. He also denies that the churchyard was neglected. He says that the approach of the Council was careful and deliberative, and could not be described as 'forging ahead with gusto' as Mr Hollis suggested. He says that the offer of a financial indemnity did not influence the Council's decision as it was taken on the basis that 'the chances of the tree surviving were vanishingly low'.
24. The first petitioner states, presumably on behalf of the whole Parish Council:
 - ... in our view, Ms Miles and Mr Hollis have taken a vexatious approach to this matter and we are determined to do what is in the best interests of all residents and is consistent with our responsibilities – both moral and legal. We are aware that Mr Hollis has been very actively trying to recruit support for his cause but has, to our knowledge, not persuaded a single other resident to object to our decision.

He then accuses ‘the diocese’ of putting the complaints of two residents ahead of the duties and concerns of the Parish Council, and of preventing the Council from carrying out its duty of maintaining the churchyard.

25. The first petitioner indicates in his written submissions of 9 February 2020, that the DAC’s assessment was based on selective documentation. He quotes from a publication of the Tree Council indicating that trees affected by ash die back ‘can become unstable and dangerous very quickly.’ It points to dangers both to passers-by and to professionals working on affected trees. The first petitioner demands, in a letter directed to the Registry Clerk, ‘If you refuse our application ... we will obviously need written notice of this decision and of your acceptance of responsibility for the tree thereafter’. He seems unaware that a written judgment is delivered in contested petitions irrespective of the outcome. I can conceive of no legal basis by which liability might attach to the registry or to the Consistory Court as the first petitioner seems to suggest.
26. The first petitioner then lists five threatened courses of action on the part of the Parish Council. His submission reads as follow:

Since [refusal] would also call into question our competence to make the necessary decisions on the responsible maintenance of the churchyard, we would also ask you to provide clear instructions on what we are and are not allowed to do without your permission. We will then be unable to take any further action until our next council meeting (on 11 March), so as to give residents due notice of our discussion. At that meeting, members of our environmental and finance committees have suggested that we consider the following responses:

1. Placing a notice at the entrance to the churchyard warning the public that we consider the churchyard dangerous and that they enter at their own risk. The notice would make it clear that our application to fell the tree had been blocked by the church authorities and that we now consider them responsible for its fate.
2. Informing our insurance company that we have done all we can but have not been allowed to take the course we consider safe. This should ensure that we would not be responsible for any financial damages should the tree fall on the church roof or on people using the churchyard. They might then wish to take this up with you directly.
3. Taking legal advice on how to avoid corporate negligence or manslaughter charges against our councillors should the tree cause death or injury, and on how to transfer to the church authorities any costs of further arboriculturalist inspections and of increases in the cost of removing the tree if the delay causes it to become too dangerous to climb.
4. Asking our MP to call for a review of the legislation making parish councils responsible for the maintenance of closed churchyards but not giving them the necessary powers to do what they consider necessary to keep them safe for users and the public.
5. Warning residents that our precept (and therefore their council tax charges) will have to rise not just to cover the cost of felling the tree – which they were expecting – but also to cover legal advice and other costs as a result of your refusal of the application. This could well result in resistance to any further voluntary support by the parish council for the local churches – including our past willingness to pay for the maintenance of the churchyard at Trotton (which is not closed) and to allow all income from our annual fete and other events to go to the benefice.

27. The first petitioner’s written representations conclude with the following:

I very much hope you will now come to the same conclusion as we have: that it would be madness to put the (perfectly understandable but irresponsible) obsessions of one tree-lover and her lodger ahead of the safety of the public.

The objectors' case

28. The objectors' case is set out in Miss Miles' letter of 10 December 2019, and that of Mr Hollis dated 11 December 2019. In addition there is with the papers a letter of 15 September 2019 sent by Miss Miles to the first petitioner suggesting the Council had reneged on an agreement for there to be an arboriculturalist maintaining a professional watching brief at her expense. Also there is a short email thread in November 2019 recording exchanges between Miss Miles and the assistant DAC secretary, again suggesting the Council had gone back on its word.
29. Miss Miles lives at Chithurst Manor, which neighbours the churchyard. Her principal letter calls for a change in mind set which sees thousands of trees being felled on a daily basis for health and safety reasons. She states:

This change of mind-set has to happen swiftly, as trees (sadly not saplings for their first twenty years) are the lungs of the planet.

Everyone thought Prince Charles was mad talking to plants, but now science has caught up and proved him right. Trees and plants feel love and pain just as we do.

I paid for one of the top tree experts in the land to come and give us his expertise ... because the parish council told us that they would abide by his advice. The council went back on their word, (in church), leaving me with the bill.

She then makes certain allegations of neglect in the maintenance of the churchyard, which are not relevant to the disposal of the petition, and concludes with a plea directed to the Court:

I pray that whoever you are, you will really look at this through the eyes of the new mind-set coming because this Ash tree has another decade of life in it yet, if you have the wisdom to grant it. Just look at it's [*vii*] canopy. Wonderful! Once we see deterioration within the canopy then we will act. BUT PLEASE NOT YET! [emphasis in the original]

30. Accompanying the letter of objection is a poem authored by Miss Miles in 2014 which is a lavish encomium to the Chithurst Ash Tree. The second stanza reads:

Beside my Ash Tree
my Love You Tree,
caressed in 300 years
of infinite knowing,
my insides begin glowing
and self-importance disappears

31. Mr Hollis also lives at Chithurst Manor. His letter speaks of the concern, which he shares with Miss Miles, for the preservation of 'that magnificent specimen of an ash tree situate in the graveyard at Chithurst'. He refers to the content of a report of Dr Martin Dobson, an expert arboriculturalist, which he says is 'agreed' albeit he does not specify by whom. He states that a site meeting was arranged at very short notice attended by three representatives of the Parish Council, it having been agreed in advance that they would be bound by Dr Dobson's findings and recommendations. He states.

Dr Dobson made it absolutely clear that whilst the tree had ash die back, it was early stages and that the tree did not pose any risk and, more particularly, in terms of ongoing health and safety viz visiting worshippers etc, the Council would be well advised to have in place a watching brief on the general

health of the tree. In this regard an annual check was recommended and the regularity of checks would quite naturally be determined on an ongoing basis.

One can imagine our utter dismay and disbelief when the parish council a few days later voted unanimously to have the tree felled.

Much of the remainder of the letter is directed to complaints regarding the conduct of the Parish Council and of individual councillors, rather than to the merits of the specific proposal contained in the petition.

32. Miss Miles' letter referred a 'top tree expert'. As nothing was enclosed with the letter (as it suggested), I directed the registrar to enquire after the missing document. Mr Hollis duly supplied a thread which included an email of 17 March 2019 from Dr Martin Dobson BSc (Hons) Biol, DPhil, FArborA, MEWI, Registered Consultant of the Arboricultural Association directed to the first petitioner (which was already with the court papers). It reads as follows:

The ash tree in question is suffering from ash dieback (*Hymenoscyphus fraxineus* – formerly *Chalara fraxinea*) which is evident from dieback of tips of branches. It was difficult to tell how far advanced the dieback was as the tree was not in leaf at the time of my inspection (22nd February 2019). From ground level I was able to reach a number of low branches and found that there were some live buds, which means that the tree will come into leaf again next year. It is likely that the tree's appearance will deteriorate progressively over the next few years (fewer leaves and an increase in dead branches) although it is possible that the tree will hold its own for some time.

Clearly, decreased leaf area will reduce photosynthetic capacity and that in turn can weaken the tree making it more susceptible to other pathogens such as honey fungus (healthy ash trees are usually resistant to honey fungus). However, at the time of my inspection there was no sign of honey fungus infection – no dead bark and no hollow sound when the trunk was tapped.

Infection with ash dieback does not cause ash trees to become unstable. It is only secondary infection with honey fungus and other decay organisms that can result in instability and since I could identify no other pathogens I consider that the tree poses no unreasonable risk of failure by uprooting or snapping.

If it is desired to retain the tree for as long as possible then I consider that its health should be inspected each year in about August and management should be reviewed after the inspection. It is very probable that in the long-term the tree will need to be removed and therefore it would be worth keeping a reserve in the parish council's funds to cover that.

The Diocesan Advisory Committee

33. In the Court's directions of 28 November 2019, I indicated that the Court would be assisted by any observations the DAC was able to make. Notwithstanding its heavy agenda, the DAC made time to consider the matter at its meeting on 5 December 2019. This resulted in a Notification of Advice dated 17 December 2019 which did not recommend the proposed felling. The DAC secretary included a covering letter which set out a very full minute of the Committee's discussions. It refers to a report (although does not identify which) from which it quotes that '... it is very probable that in the long-term the tree will need to be removed ...' but also says that 'it is possible that the tree will hold its own for some time'. The DAC did not consider that on balance that there was sufficient evidence that the tree poses a health and safety risk at this time but it may need to be felled at some time in the future. There was a split in the voting of the DAC: 6 for 'not recommending' and 5 for 'not objecting'. None supported recommending the proposal.

34. Due to an oversight, neither the DAC Notification of Advice nor the minute were sent to the petitioners for comment, so I afforded them the opportunity of so doing. The first petitioner replied promptly with written submissions dated 9 February 2020.

Church Buildings Council

35. The Church Buildings Council has provided *Guidance to PCCs on the Planting, Felling, Lopping and Topping of Trees in Churchyards (2016)*, pursuant to section 6(3) of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, now replaced by section 51(3) of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018.
36. Much of this helpful guidance is supplemental to the List B provisions, with expansive definitions provided of terms such as ‘dying’, ‘dead’ and ‘dangerous’. These are of limited relevance in the present proceedings in which List B is not invoked. The guidance reminds us that about six people are killed each year by falling trees or branches, and states that PCC members may be held personally liable. Liability will similarly attach to Parish Councils where the responsibility for maintaining churchyard has been transferred.
37. The CBC recommends that PCCs, and by implication Parish Councils, should record its approach to trees in its general Risk Management Policy. It continues:

This should include an assessment of the public’s frequency of proximity to trees. For example, people are more exposed to trees on a highway or public footpath than to those at the back of a churchyard.

The Parochial Church Council

38. Since legal responsibility for the maintenance of the churchyard has been passed to the Parish Council, the views of the PCC are of less direct relevance, and certainly are not determinative of the matter. From the papers it seems that the PCC is in favour of the felling of the tree, and is grateful to the Parish Council for taking the initiative in relation to the health and safety risk in a timely manner. A resolution was passed unanimously by the PCC at a meeting convened on 1 December 2019 in the following terms:

The PCC of Rogate with Terwick and Trotton with Chithurst agree that the advice given and the concern of the Parish Council of Trotton responsible for the upkeep of the closed churchyard of St Mary’s, Chithurst that an ash tree (with die back) in said churchyard should be removed as soon as feasible under the time presented to us, due to health and safety concerns, and having taken due notice of said objection of Sarah Miles of Chithurst Manor.

39. Since then, the PCC has properly stepped back and allowed the faculty case to proceed at the pace dictated by the petitioners who have been in the driving seat throughout. I get the impression that the Reverend Edward Doyle, incumbent, has been much exercised by the pastoral consequences of the current dispute between the Parish Council and the two objectors and is anxious for healing when the matter has been resolved. The PCC has properly declined to pay the lodgement fee in respect of the current petition as this would be a misuse of their charitable funds: legal responsibility for the maintenance of the churchyard rests with the Parish Council, and this includes the fees prescribed for obtaining statutory consents, such as a faculty.

Procedural complaints

40. Before turning to the merits of the case, I need to say something about the first petitioner's complaints regarding process which he has made strongly and repeatedly in the correspondence. Whether he speaks on behalf of the Parish Council or in his personal capacity is unclear. Whichever it may be, I consider his complaints to be entirely misplaced and based upon a complete misapprehension as to nature of the faculty jurisdiction, and the careful manner in which it balances the interests of petitioners and objectors. His criticisms cannot go unremarked upon.
41. He complains first that 'Ms Miles and Mr Hollis have taken a vexatious approach to this matter'. With respect, that is a matter for the Court and not for him. Local residents have a right to voice objections within the faculty process, as they have with planning, licensing and certain other matters. It is the price we pay for living in a democracy, where due process and the rule of law are part of the inalienable rights enjoyed by all citizens. It is unfortunate that a clerk to an organ of democratic government such as a Parish Council should appear not to appreciate this.
42. Further, the first petitioner complains 'that the diocese has put the complaints of two residents, whose lack of perspective is clear from their complaint, ahead of a parish council that has done its very best ... to maintain this graveyard responsibly'. It is unclear who the first petitioner intends to criticise by using the umbrella term 'the diocese'. He may not realise that the Consistory Court is wholly independent of the diocese, as is the Chancellor, being the judge of the Court. The Archdeacon acted entirely properly in declining to give permission under List B. The DAC gave proper advice as to procedure, and expedited its Notification of Advice. The registry responded swiftly and appropriately to the first petitioner's requests. The Court gave directions within hours of them being sought. It indicated its willingness to deal with the matter promptly by way of interim faculty. When the level of local opposition became obvious, it sought to accommodate the first petitioner by foreshortening the public notice period.
43. The first petitioner's email to the registry on 28 January 2020 refers to 'the Christmas break' as being one of the reasons for taking a 'fair time' to comply with the Court's directions. I remind him, as I do all litigants, that the Chichester Consistory Court functions all year round. The first petitioner states that he was advised (but it does not state by whom) that the Council might have to wait for six months for the faculty to be granted. It should have been obvious to the first petitioner from the directions given by the Court that everything possible was being done to expedite the matter. As it happens, the Court has delivered its judgment within four working days of receipt of the Certificate of Publication of the Public Notice. The first petitioner would be hard pressed to find another court – civil or ecclesiastical – able and willing to respond so speedily. If it transpires that the timing of this decision means that the tree cannot be felled until the end of the nesting season, the first petitioner will need to look much closer to home should he wish to apportion blame.
44. It is unclear why the Parish Council was contemplating putting a notice at the entrance to the churchyard which would 'make it clear that [its] application to fell the tree had been blocked by the church authorities'. Wittingly or otherwise, the first petitioner seems to have misinformed the Council. What he should have reported was that the petition was pending and would be expedited, the Court having abridged public notice. The first petitioner knew,

or ought reasonably to have known, that had the Court's directions been followed the matter could have been determined by the end of last year.

The law

45. Trees in churchyards are subject both to the faculty jurisdiction and to secular control. The latter imposes restrictions in relation to those specific trees which are subject to a tree preservation order (TPO). Consent from the local authority is required for the felling, lopping and topping of such trees. Further, trees (whether subject to a TPO or not) may contribute to the character or appearance of a conservation area.
46. The ash tree which is the subject of the current petition is not subject to a TPO, nor is the church within a conservation area. The DAC Notification of Advice expresses the opinion that the felling of the tree is not likely to affect 'the character of the church as a building of a special architectural or historic interest'.
47. I am aware that certain chancellors have adopted the so-called *Duffield* framework in determining petitions relating to trees. I am not convinced that the Court of Arches in *Re St Alkmund, Duffield* [2013] Fam 158 necessarily intended its guidelines to extend beyond changes to listed church buildings, as opposed to their settings. The questions themselves speak of the character of the building, and no more expansive definition is given or implied. However I need not decide this matter in order to dispose of the current petition and I expressly leave it open.
48. The approach which seems to me most apposite is as follows. Where the legislature has seen fit to put in place a sophisticated parallel system for identifying trees worthy of protection and the securing of secular consents before any work is undertaken in relation to such trees, the Consistory Court should operate a light touch oversight. However, there will be occasions where individual trees or a cluster positively contribute towards the setting of a church such that the Court should be astute to protect that setting. In such instance, a like approach to that commended in *Duffield* may well be appropriate. I have in mind, for example, ancient or historic yews as in *Re All Saints, Marcham* [2020] ECC Oxf 1.
49. In the absence of such special features, the Court's approach should be the ordinary presumption against change, with the burden of proof on the petitioners to demonstrate to the civil standard that the works should be carried out.
50. I respectfully adopt the observations of Ormondroyd Ch in *Re St. Mary Mapledurwell* [2019] ECC Win 1:

9. [The Consistory Court] ... will look at matters in a broader perspective which acknowledges that trees are living parts of God's good creation, which have value for that reason regardless of their utility to human beings. This is particularly so if, as appears to have been the case here, the trees provide a habitat for other species. More specifically, trees may form an important part of the character and appearance of the churchyard. Yew trees in particular have long been associated with churchyards (although the reasons for this association are somewhat obscure) and the presence of mature yew trees in a churchyard is accordingly of some historical and cultural value in itself. I have already mentioned, above, the link that mature trees provide to past generations who have cared for the site.

10. For all these reasons the court will require clear and convincing justification if the felling of churchyard trees is proposed, together with an explanation of why pruning is not an acceptable alternative.

51. The issue for the Court to decide is whether there is a clear and convincing justification for the felling of the ash tree which forms the subject of the petition.

Merits

52. So I come at last to the merits. The petitioners' case is that the tree poses a present risk and needs to be felled. The objectors concede that the tree is diseased but argue that the time has not yet come when health and safety concerns are such as to require it to be cut down.

53. I consider it unjustified and inappropriate for the first petitioner to classify the objectors' position as 'vexatious' and 'irresponsible'. Their observations are sincerely held and reasonable, as evidenced by the support to be found for them within the DAC's Notification of Advice and attached Minute. I consider that Miss Miles and Mr Hollis have, in places, overstated their case and I do not accept that an agreement was reached whereby Dr Dobson's opinion would be considered as binding. On that I prefer the evidence of the first petitioner. In addition, even had the Parish Council agreed to be bound by whatever Dr Dobson recommended, the terms of his email are far less clear and dogmatic than Miss Miles and Mr Hollis have claimed.

54. The Court is grateful for the DAC's input, but I again emphasise (as there is still a widespread popular misunderstanding), that as the Committee's name makes plain, its role is 'advisory'. It does not, so far as I am aware, have any particular specialist expertise in arboriculture or tree surgery. The DAC has helpfully formed a view on the material before it. However the Court cannot abrogate its function to the DAC and, in any event, has the benefit of a greater volume of documentation than did the DAC.

55. Dr Dobson did not identify the presence of honey fungus at the time of his inspection nearly a year ago and considered that 'the tree poses no unreasonable risk of failure by uprooting or snapping'. He continued:

If it is desired to retain the tree for as long as possible then I consider that its health should be inspected each year in about August and management should be reviewed after the inspection. It is very probable that in the long-term the tree will need to be removed and therefore it would be worth keeping a reserve in the parish council's funds to cover that.

56. The first petitioner states, and I see no reason to doubt, that honey fungus has since been identified either on the tree or in its vicinity. The risk of failure, accordingly, is enhanced.

57. It seems to me that the Parish Council has identified a serious risk which is real – not fanciful – and which would result in serious personal injury (or worse) and/or damage to the the grade I listed church building. The risk is not immediate: were it so, the Court would have granted an emergency interim faculty on health and safety grounds. Instead the petition has been expedited but within a time frame which has allowed arguments for and against felling to be properly advanced and carefully considered.

58. Assessing the evidence in the round, and giving due weight to the DAC Notification of Advice, I have come to the conclusion that the petitioners' case is made out. I am satisfied

on the balance of probabilities that there is a clear and convincing justification for the felling of the ash tree. The tree is diseased. Its remaining safe life is limited. Were it to fail, the consequences could be serious. The Parish Council has the resources to fell the tree now, but may not have them in the future should the tree deteriorate to the extent that a crane would be required. It is unclear whether a crane could gain access to the churchyard. There is no suggestion that the tree contributes in any meaningful way to the setting of the church or that its removal would be detrimental to the aesthetic. And even if there were, the countervailing arguments concerning disease and public safety would prevail.

59. Parish Councils function on limited budgets and are local decision makers. Principles of subsidiarity dictate the appropriate level at which decisions should legitimately be made. The Consistory Court should be slow to interfere with careful and responsible decisions made by Parish Councils who carry the legal liability for maintaining churchyards. Of course, local residents must have a right of objection – that is fundamental to the principle of due process which lies at the heart of the faculty jurisdiction. And an onus then falls on petitioners to discharge the burden of proof which falls on them. But provided a Parish Council has made a careful and well-informed decision, the Court should afford that decision due weight and exercise an appropriate degree of deference.
60. In the circumstances I am satisfied that the petitioners have made out their case to the required standard.
61. Had I adopted the *Duffield* framework, I would have determined the first question in the negative, namely that the proposed felling of the ash tree would not result in harm to the significance of the church as a building of special architectural or historic interests. The listing statement is very short: ‘Dedication unknown. Chancel with west bell-turret and west porch. C11 with later windows. Modern porch.’ No mention is made of the churchyard. I would then have determined the petition in the same way and for the same reasons as I have in the preceding paragraphs without recourse to the harm/justification analysis in questions 3, 4 and 5.

Disposal

62. For reasons given above, I direct that a faculty may pass the seal. As with all faculties it is *permissive*. It allows the petitioners to carry out the works if they wish, but it does not compel them to do so. It is a matter for their discretion as the body responsible for the maintenance of the churchyard. The faculty will be subject to the following conditions:
- i. That it will remain in force for five years whereafter it will lapse;
 - ii. That the felling of the tree be carried out by a trained tree surgeon;
 - iii. That the petitioners satisfy themselves that the tree surgeon has in place adequate public liability insurance;
 - iv. That the felling takes place outside the nesting season. It is an offence under the Wildlife and Countryside Act 1981 to disturb birds while they are nesting, building a nest, or in or near a nest that contains their young.
 - v. That a replacement tree or trees of a suitable native species be planted in the churchyard within twelve months of the felling of the tree, at a location approved by the incumbent, or in default by the Archdeacon of Horsham.

There will be liberty to the petitioners to apply.

Costs

63. As is the practice with the faculty jurisdiction, the court fees are payable by the petitioners. Those fees will be higher than usual in part due to the objections of neighbours, but that is something which petitioners can and should expect, being part of the statutory process embodying democratic concepts of fairness. But in large measure the matter has become controversial and protracted due to the first petitioner not following the Court's directions with regard to public notice and making repeated *ad hominem* criticisms of unnamed diocesan employees and the staff at the registry, all of which have been found to be ill-founded, and most rooted in a fundamental misapprehension of the legal process which the petitioners chose to invoke. This judgment has been lengthened as a consequence.
64. The first petitioner has stated that even though the Parish Council paid the lodgement fee, they propose to recoup it by reducing the financial support they give to the parish church. That would be unfortunate. I am pleased to record the first petitioner's unpaid service to the community as clerk to the Parish Council, and the generosity of the Council to the parish church. It would be regrettable if the parish church and congregation were to be penalized because the first petitioner misunderstood the nature of the faculty jurisdiction and unwisely conducted these proceedings in such a way as to drive up the court costs rather than keep them to a minimum.

The Worshipful Mark Hill QC
Chancellor of the Diocese of Chichester

13 February 2020