30 June 2014
28 August 2014

In the Consistory Court of the Diocese of Chichester CH 34062/13

In the matter of St George, Crowhurst

Judgment

1. In or about May 2010 a panel fence was erected between the parish church of St George, Crowhurst and a neighbouring property known as Court Lodge. It was erected by Mr Michael White who, with his wife Dr Rita Joarder, is the owner of Court Lodge. They claim the fence was on their land. The rector and churchwardens took the view that it was within the churchyard. The background to this dispute is lengthy, complex and unedifying. I do not propose to infect this judgment with allegation and counter-allegation, nor a recitation of matters placed before me which are of little or no relevance to the issues I have to determine. This is amongst the most unpleasant cases that I have had the misfortune to hear and few come out of it with any credit.

2. In the petition, dated 21 December 2012, the Reverend Michael Brydon, and Messrs George Mighall and Richard Windred (hereafter the Petitioners) seek a faculty for various works which I summarise, from the Schedule of Works, as follows:
   i. The removal of the panel fence;
   ii. The erection of a wooden post and rail fence along a section of the southern boundary of the churchyard;
   iii. A direction as to the ownership of a stone retaining wall on the boundary and as to the responsibility for its maintenance;
   iv. The implementation of recommendations contained in a report from a company of tree consultants concerning trees and shrubs near the boundary.

The procedural history

3. On 11 January 2013, in the first of what was to become a series of Directions, I ordered that Mr White and Dr Joarder be notified of the proceedings. Upon service of the proceedings upon them, Particulars of Objection in Form 4 were lodged. I shall refer to Mr White and Dr Joarder as 'the Objectors' hereafter, although (as will be seen) their objection subsequently came to be withdrawn. On 3 May 2013, I made Directions for the exchange of evidence, set a date for a Pre-Trial Review, and made provision for setting the matter down for trial.

4. The pre-trial review took place on 31 July 2013. The First Petitioner acted for and on behalf of all three Petitioners. The Objectors were represented by Counsel. The Minute of Order records a measure of agreement in relation to a portion of the boundary, as signified by a blue rope which was observable during a site inspection. The precise position of the rest of this boundary remained contentious and I made further directions for the exchange of evidence and the creation of proper paginated bundles to try and introduce some order into the burgeoning volume of documentation.

5. The matter came on for trial on 10 September 2013. As at the pre-trial review, the First Petitioner spoke for the Petitioners and Counsel again appeared for the Objectors. What

took place on this date is addressed more fully in an accompanying determination on costs. For the purposes of the present narrative, it is necessary merely to record that the proceedings were stayed for the purpose of the parties exploring a negotiated settlement, consequent upon a concession made by Counsel for the Objectors that the disputed fence had not been erected on their own property. For reasons which I have not explored, the expectations of both parties that a negotiated settlement could be reached proved unduly optimistic. Following correspondence by both parties with the Registry, on 2 January 2014 I ordered the lifting of the stay and made further Directions to bring the matter on for trial. Both parties continued to correspond with the Registry, requiring the making of further case management Directions on 4 March and 11 March 2014.

6. The Objectors then made an application to withdraw the concession made on their behalf by counsel at the hearing on 10 September 2013. This application was heard on 15 May 2014. The First Objector appeared in person for himself and the Second Objector. The Petitioners were represented by a solicitor who came on the record shortly before the hearing, and came off again immediately afterwards. The Objectors' application was dismissed, and I required the First Objector to remove the panel fence by 4pm the following day, which he duly did. I required any additional evidence from either party to be filed and served by 16 June 2014. I refused to entertain an application from the Petitioners' solicitor (made without notice) for an injunction excluding the First Objector from the church and churchyard save for attendance at public worship.

7. Shortly after this hearing, on 19 May 2014 the First Objector wrote to the Registry withdrawing his and his wife's objections and agreeing to the court determining the issue of ownership of the wall, and by implication the precise location of the boundary. The Objectors thereafter ceased to be parties to the proceedings, but their documentation remained before the court for consideration as would have been the case had Particulars of Objection not been served.

8. It followed that when the matter came on for trial on 30 June 2014, some eighteen months after the petition had been lodged, and no longer formally opposed, one would have expected it to proceed in a smooth and orderly manner. On the contrary. Notwithstanding the Direction (which had been expressly sought on behalf of the Petitioners) that all additional documents and witness statements be served by 16 June, the solicitor acting for the Petitioners sought to introduce additional documents at the hearing, to adduce additional evidence beyond that contained in a witness's statement, and to call an additional witness from whom no statement had had been filed. A key witness had to be recalled to the stand some five times to deal with additional points, and the hearing had to be adjourned at one stage to allow the Petitioners' solicitor time to prepare submissions dealing with the matters raised in the Objectors' documentation. The presentation of the Petitioners' case was so disjointed that I requested they file a written note of their submissions, including comment on the fresh evidence adduced at the hearing.

The jurisdictional issue

9. The Objectors took a jurisdictional point in relation to the central issue in the case. They submitted, on their own account (and through counsel while he was instructed) that this court had no jurisdiction because the disputed fence had been erected on the Objectors' land. If their contention were correct, they maintained, it was not within the churchyard and therefore territorially outside the court's competence. Even after the concession, the jurisdictional point remained, as discussed more fully later in this judgment. Since the

conclusion of the hearing in this matter, the judgment in *Re St John the Baptist, Burford* (Oxford Consistory Court, 19 August 2014, unreported) has been handed and I am pleased to adopt with approval the reasoning and conclusions of McGregor Ch.

> **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 (5th 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, Sevayingham* [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.

10. Concern had been expressed within the current dispute about the possibility of a secular court coming to an inconsistent conclusion as to the position of the boundary in the exercise of a parallel jurisdiction. In this instance, however, the Objectors' agreement (contained in their letter of 19 May 2014) that this court conclusively determine the issue, will serve to bring finality to this long running dispute.

The boundary in question

11. The southern boundary of the churchyard runs from the road to the east of the church, follows a line beside an L-shaped former stable block in the grounds of Court Lodge and then gradually turns to run in a northerly direction at its western extremity. It was agreed at the pre-trial review that the western-most length of the southern boundary lay broadly along the line of the blue rope running from the south west corner towards the disputed area.

12. The disputed area of the southern boundary concerns a stone retaining wall which varies in height along its length. The grounds of Court Lodge are lower than the churchyard. A consequence of this is that churchgoers and other visitors can look across and into the Objectors' land, and (as I understand the position) it was in the pursuit of a greater degree of privacy that the panel fence was erected.

13. The Objectors' contention is that the stone wall is in their ownership. It is wider at its base than at its top. Their ownership extends to the entire width of the foot of wall and includes the subsoil immediately above the tapering base. There is thus a 'ribbon' of land along the southern boundary lying immediately to the north of the uppermost stone in the wall which (though 'visually' within the churchyard) is in fact within their ownership as it lies directly above the base of the wall which, they say, has its footprint on their land. Their Counsel contended in the Outline Submissions drafted on behalf of the Objectors that this ribbon extended some 10 feet towards the church. At the abortive hearing on 10 September 2014, he refined this submission suggesting that the width of the ribbon was some 12-18 inches. Thus, he conceded on behalf of the Objectors, the panel fence had not in fact been erected on the Objectors' land. Since the Objectors' application to withdraw this concession was dismissed, the court (of its own motion) on 15 May 2014 directed the immediate removal of the panel fence.

14. However, neither the Objectors' concession, nor the interlocutory order of this court, were sufficient to be dispositive of the claim. The Objectors still maintained that they owned the stone wall and the sub-soil above. However the ribbon of land which they claimed to be within their ownership was somewhat narrower than they first contended and, accordingly, the footings of the panel fence were just outside it. The Objectors' contention was that the panel fence was not erected within the consecrated churchyard, but within some other parcel of land which, by prescription, had come into the ownership of the Rector as part of his freehold. I am far from satisfied that there is a separate identifiable parcel of land between the Objectors' land and the consecrated churchyard. However, even unconsecrated land within the curtilage of a church comes within the jurisdiction of the consistory court: see section 7(1) of the Faculty Jurisdiction Measure 1964. The parcel of land, howsoever described, is clearly within the curtilage of the church: it lies about 20 feet from the porch at its main entrance and is obviously part its setting.

15. In any event, even if it were established that the wall was owned by the Objectors, the Petitioners' case was that the Objectors are under a legal obligation to maintain it. This was set out in the closing paragraphs of the Petitioners' Submissions which were put before the Court in September 2013 and part of the relief claimed in the present proceedings was a declaration as to the obligation to maintain the wall. This aspect of the Petitioners' case was abandoned when the Petitioners' solicitor opened his case at the hearing on 30 June. He conceded, on the Petitioners' behalf, that were the issue of ownership to be determined in the Petitioners' favour, they would abandon their claim for a declaration that Objectors were under a duty to maintain it.

The Petitioners' case

16. On paper at least, the Petitioners' case was surprisingly thin. The evidence comprised a 19 line witness statement from Mr Christopher Whittick (much of which consisted of his extensive qualifications); a one-page statement from Mr Michael Hall which did no more than relate annotations on the Land Registry plan to physical features on the land; an equally brief statement from Ms Frances Hamson, PCC secretary exhibiting various documents many of which were illegible; a report from Mr Tim Laddiman, a chartered arboriculturist; and a further report from Mr Stephen Harkness, consulting engineer. Various documents were also produced. At the hearing, with the leave of the court, evidence was led from Mr Richard Windred, the Third Petitioner, although no witness statement had been lodged from him.

17. Also with the leave of the court, Mr Whittick gave oral testimony extending well beyond the cursory few paragraphs of his witness statement. I therefore need to set it out rather more fully than I would otherwise, not least because of the piecemeal manner in which it was extracted as (through no fault of his own) he was recalled several times to the witness box. Mr Whittick is the Senior Archivist at East Sussex Record Office, with considerable expertise in the interpretation of archival evidence. I found him a credible, learned and helpful witness whose evidence was of great assistance to the court. His calm and measured authority, his detached analysis of contemporaneous documents and the unassuming way in which he deployed his considerable learning were impressive. Indeed his evidence was a beacon of helpful clarity in proceedings otherwise dominated by hostility and unpleasantness.

18. Mr Whittick took me first to a definition of the noun 'fence' derived from the Oxford English Dictionary: 'an enclosure or barrier (eg a hedge, wall, railing, palisade etc) along the boundary of a field, park, yard or any place it is desired to defend from intruders'. He indicated that it would be not uncommon for a stone wall to be referred to as a fence. He produced a legible version of a memorandum dated 22 May 1805 which had been exhibited to Ms Hamson's statement. It reads:

> 'The churchyard fence, opposite Court Lodge Farmhouse belonging to John Cressett Pelham Esq of Crowhurst Place was removed several feet into the churchyard in the lifetime of Henry Cresset Pelham Esq for the purpose of placing the aforesaid fence upon a firmer foundation, in consequence of this alteration two [illegible] trees are excluded belonging to the Rectory of Crowhurst.'

19. This Memorandum is signed by the then Rector and at least one churchwarden and bears a *nota bene* annotation 'The trees are adjoining to one another; the one ash, the other maple'. Mr Whittick then referred me to a copy of a post-card reproducing a landscape painting depicting Crowhurst Church and ruin. It is by an unknown local artist with the initials ACC and is dated 1847. He suggests, and I accept, that the fence in question is depicted on the top of a steep bank very close to the edge. Two trees are visible, on the southern side of the fence, closer to the viewer.

20. Mr Whittick opined that the retaining stone wall was erected in 1856. He first acquainted the court with the customary practice of 'church marks' whereby particular parishioners were responsible for maintaining particular sections of a churchyard fence. Reference had been made in the Petitioners' Submissions of September 2013 to Coke's *Institutes* (II, p 489) and William Lyndwood's *Provinciale.*

21. Mr Whittick informed me that this practice persisted particularly in Sussex. Support from this is derived from Tate, *The Parish Chest* (cited more fully below) which reads, 'for some reason, which is not apparent upon the surface, the custom of apportioning among the parishioners the repair of the churchyard fences seems to have been specially prevalent and long-lived in Sussex. [...] At Cowfield the initials of the persons responsible for repair are deeply incised on the fence.'

22. Mr Whittick took me to an 'Account of the Church Yard Fences' dating from November 1833 (apparently transcribed in 1864, as explored in his testimony) which records that all the south side and west end (except the great gates) are the responsibility of John Cressett Pelham Esq. Mr Whittick also introduced into evidence a legible copy of a

document dated 2 June 1805 which is headed 'the account of the fence round the church yard in the Parish of Crowhurst which is kept in repair by the owners of the land in the said Parish as followeth'. It then records as the fourth item on the account: 'All of the south of the west sides (except the Great Gate which belongs to the Parish) John Cressett Pelham Esq'.

23. Mr Whittick stated, and again I accept, that the customary responsibility for the maintenance of churchyard fences did not necessarily fall upon the owner of the abutting land (although in practice this was often the case) and in general terms parishioners were charged with the responsibility in proportion to the extent of their landowning in the parish, whether or not that land was contiguous with the churchyard. Hence the need to maintain accurate records. Illustrative of this, Mr Whittick drew to the court's attention to an extract from W E Tate, *The Parish Chest: A Study of the Records of Parochial Administration in England* (Cambridge University Press, 1967) a copy of which had been annexed to the Petitioners' written submissions. Headed 'Churchyard Railles', the passage reads:

> 'Either in glebe terriers or in separate documents it is quite usual to find notes of the customary obligation to repair the churchyard fence or walls, imposed proportionately upon all the lands or houses in the parish. The imposition of this liability upon tenants or freeholders seems perfectly logical if one considers that the freeholders especially often claimed special privileges in the church and the churchyard, so in common fairness accepted special responsibilities as to their maintenance and protection.'

24. Mr Whittick also drew my attention to some text appearing at the foot of the record and account dated November 1933 and transcribed in 1864 (referred to in paragraph 22 above) which sets out a resolution recording that certain lengths of fencing on the northern boundary of the churchyard were adjudged as 'totally out of repair' and the churchwardens were charged with requesting of the relevant landowners' representatives 'that the said lengths of fence be immediately repaired'. Mr Whittick relied on this document in support of his contention that the obligation of repair remained extant in 1833. He ventured, with some justification, that the obligation was treated as subsisting in 1864 otherwise it would not have been transcribed into the parish records and Vestry Book without comment. It is not without significance that one of the signatories to the 1864 entry is Thomas Papillon *qua* churchwarden. It may also be relevant that the Crowhurst estate book accounts record five days' labour to the churchyard fence on 26 March 1852 (costed at £0 8s 2d) and there are further fence related entries on 9 March 1855 (£0 16s 11½d) and 2 May 1855 (£0 3s 0d).

25. Mr Whittick made reference to the *Victorian County History of Sussex*, vol 9, and to its commentary on Crowhurst Manor at page 79. I need not recite its early history as part of the rape of Hastings, but note that by the latter part of the fifteenth century the manor had come into the ownership of the Pelham family. John Cresset Pelham died unmarried in 1838, and following a brief period of co-ownership by his heirs, Thomas Papillon succeeded to the entire freehold. It passed to his son Philip Oxenden Papillon, and in 1899 to Philip's son, Lt Col Pelham Rawstorn Papillon.

26. Mr Whittick sought to piece together the circumstances in which the stone wall came to be erected. Thomas Papillon, as patron of the living of Crowhurst and one of its churchwardens, executed a 'bond' on 23 June 1856 in the sum of £1,000 in favour of the

Rt Revd Ashhurst Turner, Bishop of Chichester. This was in relation to the demolition and rebuilding of the chancel and body of the parish church of Crowhurst and other works of repair. Only the tower was to remain. The bond records that Thomas Papillon 'has undertaken to defray the whole of the expense of such works' save in relation to the chancel, which were to be borne by the Reverend Sir Charles Harding, rector of Crowhurst.

27. Mr Whittick took me to a faculty granted on 6 June 1856, following proceedings before the Reverend John Scobell, surrogate to the Worshipful Robert Phillimore LLD, commissary of the Consistorial Episcopal Court of the Archdeaconry of Lewes, in the presence of the Deputy Registrar. The extent of disrepair is fully recorded in the faculty and the extract from the record of proceedings. The poor construction of the church is set out: for example the rafters for the roof of the nave were too short, rested on a false plate and bulged outwards on both sides. It was recorded that the south wall of the nave was cracked, having 'a settlement at the base' (which is presumably a reference to subsidence) and the 'durability of the edifice was thereby and to that extent dangered'. Drainage problems were present on the higher ground to the north of the church. The arrangement of the pews was noted as being 'incommodious as well as inadequate to the requirements of the increasing population'.

28. Mr Whittick assisted the court by assimilating the contents of a number of documents derived in part from the Petitioners' bundle and in part from documents produced by the Objectors. He took me to estate records from the Crowhurst Estate, which seemed to suggest that construction of the stone wall began in 1856. Cumulatively these items related to labour in building a churchyard wall between May and August. I note in particular:

30 May 1856	3 days at the walen [sic] by the churchyard £0 5s 7d
13 June 1856	churchyard waling [sic] £0 16s 4d
27 June 1856	59 days churchyard waling [sic] £5 19s 10d
11 July 1856	8½ days churchyard wall £0 15s 3½d
	5 days caven [sic] the erth [sic] away at churchyard wall £0 12s 4d
22 August 1856	56 days at the road and levelling at the church £6 0s 0d

Mr Whittick indicated that 'walen' should be read as walling and that 'caven' is suggestive of caving or cutting away. His view, from which I do not demur, is that this documentation suggests that to coincide with the church being substantially rebuilt, repaired, reordered and enlarged the retaining stone wall was constructed on the southern boundary to create a lasting solution to the creeping erosion of the bank. For what it is worth, dating the construction of the wall to 1856 is consistent with the statement in paragraph 5.1 of the report of Mr Stephen Harkness dated 2 May 2012, that 'we believe the wall to be at least 150 years old'.

29. Mr Whittick's informed conjecture was that this retaining wall was constructed due to the continuing need for a 'firmer foundation', as identified in the 1805 Memorandum and the issue of subsidence or settlement recorded in the 1856 faculty proceedings. I regard this as a credible and convincing explanation, and accept it as correct on the balance of probabilities. Whilst Thomas Papillon was responsible for maintaining this section of the boundary, he went further than was required by his customary obligation by executing these engineering works. This supererogation would be consistent with his philanthropic

disposition as demonstrated, *inter alia*, by his financing of the works to the body of the church.

30. As to the various maps produced by the Petitioners and the Objectors and relied upon in their written submissions, I have derived little assistance from them. The tithe map of 1841 shows the southern boundary as, effectively, a continuation of the northern wall of the L-shaped stable block. Documents relating to the acquisition of additional land to the western edge of the churchyard throw little light on the dispute regarding the southern boundary. The general run of the boundary has never been in dispute. Indeed it seems to have been accepted that the wall constituted the boundary. The disputed ribbon of land was the consequence of the wall being wider at its foot and tapering towards the top. Following the concession made by the Objectors, the key dispute between the parties concerned the ownership of the wall. Due to the scale of the maps, including those annexed to office copy entries in the Land Registry, they could not be determinative when the width of the strip of land in question was probably narrower than the line which sought to denote it.

The Objectors' Case

31. Even though the Objectors ceased to be parties to the proceedings having withdrawn their Notice of Objection, this court is required to take into account the material which they had placed before the court and the submissions they had made. Dealing first with the preliminary point, I have already addressed the argument that the jurisdiction of the consistory court only extends to consecrated ground, the falsity of which is apparent from section 7 of the Faculty Jurisdiction Measure 1964 as discussed above.

32. Secondly, the Objectors adduced evidence and made submissions to the effect that their predecessors in title constructed the wall and maintained it. They include in their documentation a memorandum dated 10 May 1706 which seems to record a liability on the part of Mr Thomas Pelham to take care of the fence on the south side and west side of the churchyard except the great gate.

33. There is no substantial dispute that it was Thomas Papillon who caused the stone retaining wall to be erected. However, I am satisfied, having heard from Mr Whittick, that in doing so Mr Papillon acted in keeping with his customary obligation to maintain that part of the boundary of the churchyard and as a generous benefactor to the parish church in the living of which he was patron. It seems to me, looking at the evidence in the round, that Mr Papillon erected the wall on the outermost edge of the churchyard, and not on land comprising part of the Crowhurst estate, and that the continuing maintenance (such as it may have been) was consistent with the customary obligation and not an assertion of legal ownership nor an indicium of an emergent claim by way of adverse possession. I do not regard the work done to the wall in recent years by the First Objector, and his agents, as acts consistent with assertions of ownership.

34. Thirdly, there is the question of the obligation to maintain the wall. In opening his case at the final hearing, the Petitioners' representative abandoned any claim that the Objectors be declared liable to maintain the wall and stated that the PCC would be responsible for all future maintenance. This concession has spared the court the task of considering the extent to which the doctrine of 'church marks' remains extant today, upon which the evidence was scant. I understand that the Petitioners have not in fact registered the benefit of this customary practice as an overriding interest for the purposes of the Land Registration Act 2002, as they said they would in their written submissions to the court.

It also obviates the need for the court to determine whether the obligation survived the break up of the Crowhurst Estate and, if so, to which parcel or parcels of land the present day obligation might attach. I therefore need to make no findings on this, notwithstanding the helpful testimony of Mr Whittick.

35. Fourthly, the Objectors seek to rely on the 'hedge ditch' presumption, or more accurately the legal presumption that a wall erected by a landowner on his own land remains in the ownership of the landowner. Title in a wall follows title in the land on which it is constructed: *Jones v Read* (1876) 10 Ir R Ch 315. However, in the factual circumstances as I have found them to be, this principle comes to the aid of the Petitioners. Since my finding is that the stone wall was built on rectorial land, it follows that it was and remains part of the rector's freehold.

36. Fifthly, the Objectors assert that the stone wall was built on land belonging to their predecessors in title. They point to the fact that a fence (the presumed boundary) was nearer to the church than the position where the wall was erected. However, this is to ignore the matters raised by Mr Whittick, which I accept, evidenced by the memorandum of 1805 recording the moving of the fence to a firmer footing

Conclusions

37. After an unusually prolix judgment in what has been a factually and procedurally complex case, I come now to my conclusion on the heads of relief still pursued by the Petitioners which I take in the order in which they appear in the Schedule of Works.

1(a) Removal of panel fence

38. This fence was removed by the First Objector following the interlocutory order of the court to that effect. No order is therefore required.

1(b) Erection of a wooden post and rail fence

39. The Petitioners sought to revise and enlarge this aspect of the petition, and to do so in accordance with discussions which had been taking place within mediated conversations with the Objectors. I was informed by the Petitioners' solicitor that these seemed to be bearing fruit in the days immediately before the hearing. I was not told – nor would it have been proper of the court to enquire – what had transpired within the ongoing mediation. Unless and until a concluded agreement is reached the process of mediation is privileged and confidential. However, Robert Frost's adage that 'good fences make good neighbours' is not diminished when one of the neighbours happens to be an ecclesiastical corporation sole. I was told by Mr Richard Windred, the Third Petitioner, in giving oral testimony at the hearing, that the intention of the PCC (in fulfilment of its duty under Canon F13) is to erect a wooden post and rail fence from the south western corner following the line of the blue rope currently *in situ* and running along the top of the wall (inset sufficiently to secure a firm footing) as far as the denser undergrowth beyond the exposed area where the panel fence had previously stood. He described the fence as being of chest height (4½ feet) styled to match the 'Sussex fencing' at the front of the church with sheep mesh in the bottom portion for 'health and safety' reasons. Within the fence line, Mr Windred stated, would be planted a double width yew hedge to provide a solid barrier. He indicated that there would be an 18 inch space between the two rows, and that the hedge would grow to a height of 6 feet over five years providing privacy for Court Lodge.

40. I am content to order the erection of such a fence and the planting of such a hedge but, having been told by the solicitor representing the Petitioners at the time of the hearing that the mediation was continuing and mindful that it may well have now concluded during the time taken to produce this judgment, I propose reserving the precise wording of this aspect of the faculty until I have heard from the Petitioners and Objectors as to the final outcome of the mediation. As the parties must continue to live together, it is far better for the precise nature of the fence and hedge to be agreed or determined at this stage and not require either the Petitioners or the Objectors to lodge a fresh petition or seek a variation to the faculty issued pursuant to the current one.

Direction as to ownership of stone wall and responsibility for maintenance

41. In the light of my findings on the oral and documentary evidence, I declare the stone wall at the southern boundary of the churchyard to be owned by the First Petitioner being within the churchyard and therefore part of the incumbent's freehold. In the light of the Petitioners' concession and voluntary assumption of responsibility, I declare that the responsibility for its maintenance lies with the Parochial Church Council. I specifically draw the attention of the Petitioners to the comments of Mr Stephen Harkness in section 6 of his report. His recommendations, particularly with regard to the rebedding of the upper two courses and the reconstruction of an 8 metre stretch which has bulged had the air of urgency when they were reported in May 2012 and are doubtless even more pressing now.

Maintenance of trees and shrubs

42. The routine maintenance of trees and shrubs does not require a faculty, and it is unfortunate that whilst these proceedings have been extant, the recommendations contained in the arboriculturist's report have not been implemented. Now the dispute has been determined, I encourage the Petitioners to attend to these matters as a priority. I note the destabilising effect of root growth on the integrity of the wall and remind the Petitioners, and through them, their insurers, of their potential liability were the wall to fail.

43. A faculty will therefore issue in accordance with these conclusions. A determination on costs accompanies this judgment. These proceedings have been unedifying from the outset and have been conducted by both sides in a less than charitable manner. I trust that now the underlying matter has been conclusively determined, all concerned can put this sorry saga behind them and live together in a atmosphere of mutual respect and neighbourly tolerance.

The Worshipful Mark Hill QC
Chancellor of the Diocese of Chichester

28 August 2014

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In the Consistory Court of the Diocese of Chichester CH 34062/13

In the matter of St George, Crowhurst

Judgment on Costs

1. At the conclusion of the hearing of this matter on 30 June 2014, I suggested that the Petitioners pause and reflect before making any application for costs. I was mindful that a process of mediation was under way and that in all boundary disputes, the parties have to continue to live together long after the caravan of litigation has moved on. The Petitioners decided to make an application and written submissions were received under cover of a letter dated 8 July 2014. Accordingly it falls for me to determine it. In giving leave to the Objectors to withdraw their Notice of Objection, I specifically reserved the Court's jurisdiction on the issue of costs. For reasons which will become apparent, I have not considered it necessary to solicit representations from the Objectors.

2. I referred the Petitioners to the *Guidance on the Award of Costs in Faculty Proceedings*, produced by the Ecclesiastical Judges Association and available on the Chichester Diocesan website. They chose to make no reference to it in their written submissions.

3. The Petitioners seek no 'party and party' costs. However they ask the Court to order that the Objectors pay some or all of the Court Fees. In relation to this, the *Guidance* says as follows:

> *5.2 These costs arise as part of the process of obtaining a faculty and should be budgeted for by prospective petitioners in estimating the overall cost of the works for which a faculty is to be sought. As a general rule the petitioners will be ordered to pay the court fees even when they are successful in obtaining a faculty in opposed proceedings.*
>
> *5.3 An order that the whole or part of the court fees, or particular court fees, should be paid by an objector or objectors is unlikely to be made, unless there is clear evidence of "unreasonable behaviour" by an objector or objectors, which has unnecessarily added to the procedural costs prior to the hearing.*

4. The onus on the Petitioners, if they are to persuade the court to take the unusual course of ordering Objectors to make a contribution towards the Court Fees, is to satisfy the court that there is clear evidence of (1) unreasonable behaviour on the Objectors' part and (2) that such unreasonable behaviour has unnecessarily added to the procedural costs.

5. Having considered the Petitioners' written submissions, I struggle to understand the basis upon which they allege that the Objectors have behaved unreasonably. I quote verbatim from their submissions:

> Following the decision in the St Peter and St Paul case, the Objectors should be liable for the court costs from the time they lodged an objection to the time of its withdrawal. As demonstrated by the height of the redundant papers in front of the Chancellor they had clearly generated a vast amount of unnecessary work and their conduct had been patently unreasonable.

6. I assume that this is a reference to *Re St Peter and St Paul, Scrayingham* [1992] 1 WLR 187. However I cannot see how, in this instance, the conduct of the Objectors (even if it were

considered unreasonable) made any material difference to the costs of the proceedings. A good proportion of the multi-faceted case was devoted to the issue of the obligation to maintain the wall which the Petitioners asserted should fall on the Objectors. This was abandoned when the case was opened at the final hearing on 30 June. Indeed the Petitioners so marshalled their 'evidence' that their case was likely to have failed up until the moment it was shored up by the oral testimony of Mr Whittick adduced with the leave of the Court at the final hearing. I can see no instance of unreasonable behaviour on the part of the Objectors which has unnecessarily added to the costs. The one exception to this is the application to withdraw the concession which was dismissed. In this regard the Objectors were ordered to pay the costs of and occasioned by that application, assessed in the sum of £798.60 which I gather has already been paid in full.

7. It is suggested by the Petitioners that they suffered an injustice at the hands of the Court because of the adjournment of proceedings on 10 September 2013. Complaint is made that 'the Court without any prior notice or warning to the Petitioners, had permitted Counsel for the Objectors to file additional submissions and evidence under the guise of a 'Reading Note'. The suggestion that in some way the Court was complicit or underhand in the late filing of submissions or evidence is unworthy. The court at no stage gave permission for these matters to be adduced. The Petitioners' solicitor is well aware of this because at the hearing on 15 May 2014 he specifically made reference to these items on the basis that their status and admissibility had NOT been ruled upon at any earlier hearing and he invited the court to make a ruling. This accords with what was said by the PCC secretary to the registrar in a letter date-stamped 16 December 2013: 'we would like please the status of [the] reading note to be determined and, if the additional arguments and evidence it introduced are to be admitted, then confirmation that our evidential response to [counsel] may also stand'.

8. It is now said that the First Petitioner wished to proceed on 10 September 2013 without the evidence of Mr Whittick. However, were he to have made a formal application to do so, it would almost inevitably have been refused, since the Objectors wished to cross-examine Mr Whittick and they not been informed in advance of the Petitioners' intention not to call him. To deny them that right would have given them powerful grounds to appeal the determination to the Court of Arches. In any event, it will now be readily apparent from the judgment in this case that the petition would have been dismissed had it not been for the evidence of Mr Whittick, not merely his witness statement but his additional oral testimony. So the adjournment on 10 September 2013 ultimately saved the Petitioners the additional expense of having to start fresh proceedings and pursue them to judgment.

9. It should be recalled that events moved swiftly and informally on the morning of 10 September 2013 and the 'game-changer' was the unexpected concession made by Counsel for the Objectors that the panel fence had not been erected on the Objectors' land. This concession having been made, I enquired whether the respective parties would see merit in adjourning the matter to seek an amicable mediated settlement. Both said they did and on that basis the proceedings were stayed with the concurrence of the Petitioners and the Objectors. The fact that a settlement proved illusory and that after some months both parties sought to have the stay lifted does not detract from the consensual nature of the stay which was imposed on the proceedings.

10. Finally, the Petitioners say that 'if the paid officers of the Court feel that a charitable concession is appropriate then the Court has the power to mitigate its fees'. The only

paid officers of the court are the registrar and the registry clerk and the Petitioners have not pointed me to any authority empowering me to disallow or otherwise mitigate their fees. The criticism of these paid officers seems to be that they were aware that the Petitioners did not intend to call Mr Whittick and failed to advise them of the imprudence of such a course. However, the registrar had advised the Petitioners that he could not offer legal advice to litigants and both he and I had counselled the Petitioners to engage the services of a specialist ecclesiastical solicitor. I anticipate that the time expended by the registrar and registry clerk in these proceedings will be significantly in excess of that for which recovery will be made by way of court fees. The Petitioners have not particularised any reason to justify why the registrar or registry clerk should be penalised.

11. The Petitioners, wisely in my opinion, have not invited me to waive any part of my fees. They may have intended to do so in the mistaken belief that I was a paid officer of the court. Even if the chancellor were a paid officer of the court (which, since he exercises a judicial function he is not) I can see nothing in the submissions of the Petitioners to justify such a course.

12. Perhaps it would help if I added a few words of general advice to others in the diocese likely to be petitioners in complex cases. First, they must budget for the costs of a contested hearing. Secondly they should at least consider engaging a specialist ecclesiastical lawyer: acting in person, or engaging the services of a non-expert on a *pro bono* basis is generally a false economy. Thirdly there is a long-standing duty on parties to work together within the litigation process. Rule 1.4(1)(2)(a) of the Faculty Jurisdiction Rules 2013 post-dates the issue of this petition but constitute a re-statement of the previous position. It talks of the court 'encouraging the parties and any other persons concerned in the proceedings to co-operate with each other (i) in the conduct of the proceedings, and (ii) in resolving, as far as possible, matters that are in dispute between them'.

13. I was concerned to note that the solicitor who acted for the Petitioners on 15 May 2014 and again on 30 June 2014 (but who strangely took himself off the record at all other times) refused to speak to the First Objector in the precincts of the court on 15 May on the basis, so he said, of historical hostile animus between the two men. I have refrained from naming the particular solicitor either within the substantive judgment or this separate determination on costs to save him personal and professional embarrassment. However, it seems to me that if a solicitor has personal reasons which prevent him from communicating with a litigant-in-person, the proper course is to decline to accept the instructions, rather than to accept them and then place himself in breach of his duty to the court.

14. In all the circumstances, I can see no reason in this case to depart from the general rule as fully rehearsed in the *Guidance* that the court fees arising in this petition will be borne by the Petitioners, save and excepting those in relation to the hearing on 15 May 2014, which have been assessed and paid by Objectors. The fees will include a correspondence fee for the registrar.

The Worshipful Mark Hill QC
Chancellor of the Diocese of Chichester

28 August 2014