

## ST MARY THE VIRGIN, SELLING

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### JUDGMENT

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#### 1. INTRODUCTION

- 1.1. The Battle of Trafalgar is rightly regarded as one of the defining moments of modern British history. It also had a profound effect on the future of Europe and many other parts of the world as Britain established a naval supremacy which was to last for more than a century. Nelson, with his romantic life and heroic death, is part of national tradition for many British people and particularly those with naval connections.
  
- 1.2. As well as being embedded deeply in the national consciousness, the Battle of Trafalgar carries local resonances in and around the village of Selling in the Diocese of Canterbury. This is because a resident of the village, Commander Stephen Hilton (1785-1872), entered the Royal Navy

as a midshipman and, rising through the ranks, came to serve as Master's Mate on the HMS Minotaur at the Battle of Trafalgar. After the Battle, he built a house in Selling from his prize money, which is still called Trafalgar House. It is believed that another part of his prize comprised two flags. One is a Union flag which was worn by HMS Minotaur at the Battle. The other is an Austrian ensign, believed to have been taken at the Battle from the Spanish ship Neptuno. HMS Minotaur was one of the ships in Nelson's own division at Trafalgar.<sup>1</sup>

- 1.3. One hundred and twenty five years after the Battle, a local newspaper reported on 23 August 1930 that a memorial chapel had recently been dedicated at the Church of St Mary the Virgin, Selling in honour of "*Rev William and Mrs Hilton-Simpson, parents of Captain Melville Hilton-Simpson, the present owner and resident at Sole Street*", a house which had been resided in by many "*representatives*" of the Hilton family. "*At the same time*", the report continues, "*the members of the Hilton family have united in the furnishing and adornment of this memorial chapel. An altar has been provided ... and furnished with brass ornaments and handsome service books*". Details are given and then a new paragraph begins: "*In addition there have been hung in the chapel two flags that were flown at the Battle of Trafalgar....*"

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<sup>1</sup> These basic facts are agreed and I have derived much of this summary from a letter dated 14 August 2012 from the Honorary Secretary of the Society for Nautical Research ("SNR") to the Registrar. Mr. Owen adds further facts in his objection which I summarise below.

*"The dedication of the memorial chapel, the unveiling of the new tablet and the flags and the blessing of the numerous gifts presented by the family took place in the course of a special service last Sunday morning, the Archdeacon of Canterbury officiating."* Many members of the Hilton family are listed as having attended. The article then records that there *"came the unveiling and dedication ceremony by the Archdeacon ... Masters Christian and David Hilton unveiled the Union Jack and the Spanish"* (sic) *"flag respectively"*. Much of the Archdeacon's sermon is reproduced. In the course of an extended reflection on beauty, he said:

*"... parish churches – had always depended to a very great extent upon leading families. The more affluent families of high position in the parishes of England had ... naturally and properly been largely responsible for munificent gifts in the way of decorations and charities. They were reminded of this that morning. The Hilton chapel as it was now was just an instance where a great respected family who had lived long in the place had come forward to restore to ancient beauty ... one chapel - in this church. It was a precious gift, one step in the return to the old ideal of beauty which inspired those who built the church and worshipped in it."*

- 1.4. A PCC minute dated 8 April 1930 records that *"A letter from Capt Hilton-Simpson of Sole Street House was read by the Vicar"*. The offer to refurbish the chapel and contribute to heating is noted. *"He also offered two historic flags. The council accepted this munificent offer with gratitude and appreciation."* I have also been provided with the Order of Service, which is in the following terms:

# Selling Parish Church



## THE SERVICE

On Sunday, August 17<sup>th</sup>, 1930, at 11 a.m.

AT THE

## Dedication

of the

## Hilton Memorial Chapel

by the

VEN. THE ARCHDEACON OF CANTERBURY

THE

## Unveiling of the Memorial Tablet

To the Memory of  
Rev. W & MRS HILTON-SIMPSON  
THE

## Blessing of Gifts

Presented by

MEMBERS OF THE HILTON FAMILY

THE

## Unveiling of Two flags:

- (1) The UNION JACK flown from H.M.S. Minotaur, commanded by Commander Stephen Hilton
- (2) FLAG taken from Spanish Line of Battle Ship, Neptune, on 21<sup>st</sup> October, 1806 by H.M.S. Minotaur

S. RHYS WILLIAMS M.A. Vicar

- 1.5. A Faculty for the fitting up of the Hilton Chapel as a “*side chapel for services with Holy Table, cross, candlesticks, curtains, kneelers and rails and chairs etc*” was issued on 4 July 1930. A note from the DAC prepared in connection with the Petition which I am considering states:

*“The Hilton Chapel is no longer intact, the altar having had its riddle posts and hangings removed. The altar pace (or dais) appears to survive as do the kneelers. As a setting for the flags, this is no great work of art or architecture, being merely typical – if attractive – rather than an exceptional decorative ensemble; it is in any case severely compromised by the alterations and removals ... It is not known whether the parish holds any of the fittings which have been removed in store.”*

- 1.6. A further Faculty was granted on 21 January 1939 for a “*Hopton Wood stone tablet on the south chapel wall of the parish church to the memory of Claude William Hilton Simpson and Captain Melville William Hilton Simpson and also to erect a metal plaque describing the history of two flags flown at the Battle of Trafalgar*”.
- 1.7. The flags remained in the church until 1994 when they were taken to an expert conservator, Ms Judith Doré. The flags remained for many years at her home in Sandwich until sometime in 2010/11 when they were moved to Canterbury Cathedral Treasury, which is where they are today. No Faculties were sought for these removals but my predecessor, HHJ Walker CG, became aware of what had happened and, I understand,

viewed the flags at Ms Doré's home in 2010. Ms Doré reported to the Parish in 2007, concluding that the flags *"cannot be displayed either in suitable environmental conditions, or, frankly, safely, considering what they are and the value that could be placed upon them, in Selling Church anymore."*

- 1.8. The Parish began to explore the possibilities for disposal of the flags. Firstly, they sought the advice of the then Diocesan Registrar about the ownership of the flags. The Registrar discussed the matter *"on a preliminary basis"* with my predecessor and told the Parish that they were both of the view that they had a good case for ownership and informed them of the necessary formalities in the event of a disposal, including the need for a Faculty. Guidelines on *"The Sale of Church Artefacts"* which had recently been issued by the then Commissary General were sent with the advice. The Guidelines include the following:

*"In all cases, an essential step for a parish must be to obtain expert advice as to the value and artistic and historic importance of the item. It is also essential to establish the clear 'provenance' of the item: when did it come into the possession of the Church? Are any of the original donors or their descendants traceable? What are their views on the possibility of disposal?"*

The note referred to the principles set out in the case of Re St Gregory Tredington (1972) Fam 236 to which I shall return later. The Guidelines also indicated that when considering the sale of an item *"which is surplus to requirements or is too valuable to keep or use in the Church, the first port of call should be to enquire of the Cathedral Treasury whether the*

*item in question is of sufficient historic or artistic interest to be displayed in the Cathedral, on loan from the Parish. If the advice is that there is not a home for the item there, another possible avenue could be a National or local museum, which might be interested in displaying it ... Only if these avenues have been explored, or if the principal motivation is to raise money for the Church's upkeep, should a sale to a third party be considered."*

- 1.9. Unsurprisingly, in view of the long experience of the then Commissary General, these Guidelines contain excellent advice and conveniently outline the main issues which arise in this case.
- 1.10. In May 2010, the Parish accordingly obtained an expert valuation from Bonhams, the internationally renowned firm of auctioneers and valuers who specialise, inter alia, in nautical works of art. The valuation report considered the question of what the flags could reasonably be expected to fetch at auction and it was predicated on Bonhams being entrusted with the organisation of such a sale. Part of the suggested marketing strategy was to display the flags to view in America prior to sale in order to excite the "passionate" American market for all things Nelsonian. The suggested "sale estimate" was £100,000 - £150,000, notwithstanding the most recent example of a Trafalgar flag sale from the Spartiate, a companion ship to Minotaur, where £320,000 was realised at a Charles Miller auction, from an American buyer. There is a reference in the report

to *“helping to raise the necessary funding for the repair to St Mary’s roof”*.

It is convenient to refer here to a later valuation by Charles Miller, given on 30 September 2011. That valuation was £5,000 - £10,000 for the Austrian ensign and £100,000 - £150,000 for the Union flag and the relevant letter was also couched in terms which anticipated sale at auction. I do not know whether, in fact, the Parish ever contemplated merely selling the flags to the highest bidder - possibly from abroad - and it does not matter for the purposes of my decision. That is not the proposal before me.

1.11. The Diocesan Advisory Committee (“DAC”) considered the matter in June 2012, concluding that:

- *The two flags are items of national significance*
- *The NMM is the most appropriate body to conserve the flags and arrange for their permanent display*
- *The priority of the PCC in selling the flags is not to raise money for the PCC’s funds but rather to ensure that the flags are properly conserved and displayed, since the PCC is not in a position to do this.*

1.12. On 14 July 2011, HHJ Walker, by now the Deputy Commissary General, indicated that he did not require a formal DAC certificate and that the Parish could proceed with a Petition but that he would require evidence as to their contact with the Hilton family and that he *“may require Special Notice to be given to any such as remain available to contact.”* The Parish having given details of the Hilton family, the Deputy Commissary



General directed on 21 July that a notice be placed in the local newspaper. Accordingly, such a notice was published in the Faversham News, Kentish Gazette and Kentish Express on 4 August and on the church notice board. The notices simply referred to “*the disposal*” of the flags and gave no further details.

- 1.13. Mr John Owen contacted the Registry on 15 August to express his concern about various aspects of procedure and, by email on 18 August, identified an omission in the public notice in that no details had been given of the name and address of the person holding the relevant documentation. As a result, a fresh public notice was posted at the church with the date for making objection extended to 15 September 2011. On 15 September, it appears that the Daily Telegraph published a letter from one Tony Beales of Bury, Lancashire. The letter said:

*"SIR – Britain's last Union flag flown by a ship at the Battle of Trafalgar is at risk. The church of St Mary the Virgin, Selling, in Kent, wants to dispose of HMS Minotaur's Union flag, brought home by Stephen Hilton, the master's mate, after the battle.*

*If this flag goes up for auction, it could be lost to an overseas private buyer, as was HMS Spartiate's flag two years ago. Also up for disposal is a second flag believed to be from the Spanish ship Neptuno, captured by the Minotaur.*

*The Hilton family have long lived at Selling, and the family gave or loaned the flags to the parish church. Either way, the intention was for the flags to remain on display in the church in the Hilton chapel.*

*The flags are an integral part of the history and heritage of the church, the parish, the Hilton family and the people*

*of Selling. They are a unique link between the people of Kent and the Battle of Trafalgar.*

*It would be a tragedy for them to be lost to future generations.”*

- 1.14. A great many objections arrived at the Registry after the publication of this letter. Many of them came from people with naval connections. The following dated 3 October 2011, from Malcolm Farrow OBE FCMI, Captain Royal Navy, President of the Flag Institute, is representative of the concerns being expressed:

*"I have been made aware of the possibility that a unique pair of original Trafalgar flags, housed in Selling church, are in danger of being sold and may consequently find their way overseas. May I respectfully express my grave concern at the risk of losing these icons of our history to the nation.*

*If my information is correct (and my sincere apologies if it is not) I beg you to consider this most carefully, or somehow to ensure that the flags remain within the United Kingdom. Perhaps I might suggest the flags could be housed in the National Maritime Museum, or maybe the Royal Naval Museum. Both places would be very suitable indeed.*

*We dismiss the importance of our history at our peril and we have very few truly historic flags in the country at all – for the obvious reasons of their frailty. Nor do we sometimes cherish the ones we have or display them to the public as other nations do. We also have few genuine relics from our greatest victory – even Nelson's flagship is significantly rebuilt.*

*The Union Flag is the symbol of our nation, our history and our future. It is what defines us as the people we are and it is good to see the nation becoming more aware of its significance and flying it proudly more often than was once the case. Historic Union Flags have a crucial part to play in the continuity of our country. No*

*historic Stars and Stripes would ever be allowed to leave the USA for example.*

*I offer you these thoughts as you deliberate what to do.”*

I have appended at Annex A1 to this Judgment a list of the names of objectors from this period, that is, after the public notice but before presentation of the Petition.

1.15. As well as objections, there were several expressions of support from residents of Selling, including the Head Teacher of the Church of England Primary School; the names of supporters are set out at Annex A2 to this Judgment. Some were concerned about the state of the flags, having recalled seeing them hanging in the church in their dilapidated state, some wanted there to be wider access to them and some were concerned about the security implications of returning them to the church and the probability that such a return would spell the end of the current practice of leaving the church unlocked.

## **2. THE PETITION**

2.1. On 27 October 2011, Martin George Webb (Priest in Charge) and Christine Mabel Jones (Churchwarden) petitioned for:

*"permission to transfer ownership of the Trafalgar Flags, in the possession of this church, to the National Maritime Museum at Greenwich."*

The Petition was supported by a copy of the unanimous resolution of the PCC passed on 18 October 2011. No DAC certificate was supplied as the then Deputy Commissary General had expressed the view in July 2011 that none was required. Notwithstanding this advice, Dr Richard Morrice, DAC Chairman, had viewed the flags with the then Commissary General and was aware of the Petition.

2.2. The Statement of Needs dealt with many aspects of the proposal as follows:

**“1. Description of the Flags**

*The Parish of St Mary the Virgin, in the village of Selling, Kent, holds two large flags from the Battle of Trafalgar. A Union Flag (2240mm x 2860mm which is 7 feet 4.18 inches x 9 feet 4.59 inches), which flew from the British ship of the line, Minotaur; and an Austrian Ensign (2350mm x 4140mm which is 7 feet 8.51 inches x 13 feet 6.99 inches), from the locker of the Spanish ship, Neptuno, which was disabled and captured by the Minotaur.*

**2. Provenance of the Flags**

*The Flags were initially in the possession of Captain Stephen Hilton, who, at the time of the battle, was Master's Mate on the Minotaur. He settled in the village of Selling, renovating and improving a dwelling which became known as Trafalgar House. The Flags were passed down his family to the Hilton-Simpsons of Sole Street House, Selling. In 1930, it was Melville Hilton-Simpson who gave them to the Parish Church of St Mary the Virgin. There are no descendants of this line of the Hilton family.*

**3. Authenticity of the Flags**

*The Flags have been attested as authentic by several authorities:*

- *Barbara Tomlinson, Curator Antiquities and vexillologist, National Maritime Museum*
- *Amy Miller, Curator, Decorative Arts and Material Culture, National Maritime Museum*
- *Nicola Yates, Textile Conservator, National Maritime Museum*
- *Judith Doré of Sandwich, Kent (now retired)*

*The main indications of authenticity are:*

- *the design of the Union Flag, which was recent, by law enacted shortly before the battle;*
- *the technical construction of the Union Flag, giving every indication of having been stitched on board ship;*
- *and most telling, the two inch strips which have been torn from one end and one corner of the Union Flag; this was customary among victorious seamen, as mementos of a momentous occasion.*

#### **4. Value of the Flags**

*The Flags have been valued by Bonham's (101 New Bond Street, London W1S 1SR), and Miller's (Charles Miller Ltd., 25 Blythe Road, London, W14 0PD), the Union Flag at between £100,000 and £150,000; the Austrian Flag at £15,000. In view of the great recent interest shown nationally; the fact that (as far as is known) this is the only Union Flag still in the United Kingdom; and the sale of a similar flag from the Spartiate in (2009) raising well above £300,000; it might be thought they could in fact be valued even higher.*

#### **5. Ownership of the Flags**

*There are several reasons to believe that the two Flags belong to the Parish Church of St Mary the Virgin, Selling, in the County of Kent, and to her parishioners and community. Not least amongst these is that in all the recent furore, when every opportunity was given, no-one has contested ownership. In addition, extant are i) the entry in the Parochial Church Council's Minute Book of 8<sup>th</sup> April 1930 detailing the gift, and ii) the front cover*

of the service sheet, from 17<sup>th</sup> August 1930, which again states that these were gifts to the church.

**6. State of the flags**

*The flags are now extremely fragile and are in need of extensive conservation work. Additionally, they have, at some point in the past, been backed with an inappropriate material and stitched all over to this backing. It needs to be removed, and the greatest degree of expertise expended to preserve for posterity such items, valuable in every way.*

**7. Removal from display**

*The two Flags hung in the Hilton Chapel, newly refurbished and renamed for the purpose, from 1930 until 1994. In this latter year, the Flags were removed because of their fragility. The Parochial Church Council understood their great responsibility in the preservation of these national treasures. They were lodged from that time with Judith Doré, a nationally known and respected conservator, in Sandwich Kent.*

**8. Principles for present action**

*It is the intention of the Parochial Church Council of St Mary's, and of the congregation and all people of the local community who have stated an interest, that:*

- *the gift of the Hiltons be honoured, and its spirit continued here in Selling, in perpetuity;*
- *the historical aspects and importance of the flags be respected for the national treasures, that they are;*
- *the human endeavour and courage, both at Trafalgar and in our armed forces in general, be celebrated and deeply respected;*
- *we obtain the very best obtainable for Hiltons, Flags, Selling and nation;*
- *we maintain an appropriate and on-going association with, and recognition of, Flags, Hiltons and Trafalgar, obvious and advertised to all, here in Selling, at the very least displaying replica flags and exhibiting*

*information concerning them and their whole history.”*

The Statement says that it would be “*most unwise*” to re-hang the flags in the Hilton Chapel, for the following reasons:

- “• *The flags are very valuable, both in pecuniary terms, and as highly prized collector’s items; housing them in a local parish church would raise the most extremely stressful need for very expensive security, which:*
  - 1. would be deleterious to the worshipping life of the community;*
  - 2. would cause a crippling financial burden, distant from the core purpose of the church;*
  - 3. would destroy our open door policy (the church is open every day, all year round, but would now have to be locked);*
  - 4. would endanger other artefacts of great value within the church (e.g. stained glass of 1308, mediaeval wall paintings), if entry for ‘steal to contract’ were tried;*
  - 5. would cause logistical problems of providing access for visiting viewers of the Flags, who would need conducting into a locked church; potentially there could be many calls upon the time of possibly only one person);*
- *a local country church is unable to provide the appropriate conditions of humidity, lighting and display for such huge artefacts; these facilities would cost enormously, and costs would continue year upon year, forever;*
- *a local country church is not able to take on the cost and responsibility of conservation and preservation of such valuable, fragile and notable articles, not having on the spot any of the prerequisites of finance, expertise and national recognition;*
- *at some future date, under another regime and under what might at present seem distant exigencies, the Flags could still be sold abroad or at auction, if they be not now lodged beyond such possibility.”*

Noting requests from two local museums, the Statement suggested that *“they would need to rival and equal, or exceed, the best obtainable nationally.”* The Statement concluded by asking for the requisite permission for the following reasons:

- ”• the National Maritime Museum, second to none, has both the very highest levels of expertise and resources to conserve and care for vulnerable objects such as the Selling Flags;*
- if the Flags were to go to the Museum, they would receive the care that they require and would be displayed in all their glory in the forthcoming permanent gallery ‘Nelson, Navy and Nation’;*
- people from all around Britain, and indeed the world, would be able to see them and appreciate Kent’s contribution to Nelson’s great victory;*
- the National Maritime Museum holds the world’s largest Nelsonic collection, including the uniform Nelson was wearing when fatally wounded at the Battle of Trafalgar; the Union Flag would fittingly be displayed with this uniform;*
- the Museum already has a collection of objects relating to the Minotaur, including Captain’s Mansfield’s sword and medal as well as the original plans for the ship, which was built nearby in Woolwich dockyard.*

*In addition to such transfer, it is the intention of the Parochial Church Council of St Mary’s, Selling, to:*

- continue the Hilton Legacy by adapting the Hilton Chapel to house and display replica flags, and information about Flags, Hiltons, Trafalgar, and St Mary’s part in all this;*
- adapt the Hilton Chapel for enhanced and improved use by the community of Selling and the Congregation of St Mary’s, so that the Hilton Legacy can continue in perpetuity to benefit the locality; this was the original underlying intention of the Hilton-Simpsons, who turned a boiler-room into a chapel, and we very much wish to honour that intention as a fitting and living memorial to them (the Hilton Chapel is used every week by the young people of the church; improving its facilities*



- would be a benefit to them, and would be a constant reminder to youth of the great deeds of the past, and great possibilities for their future);
- *the last plank in our edifice is to agree with the National Maritime Museum that they would always show and advertise that the Flags came from and were, and still are, intimately connected with the Parish of St Mary the Virgin, Selling, Kent, and the Hilton Family; and that the Museum would always tell the full story of the Minotaur and Stephen Hilton's part in the Battle of Trafalgar."*

On the question of proceeds of sale, the Statement of Needs sets out that the Parish believes that:

- "there should be proceedings for the following reasons":*
- *only with resulting financial resources, within a properly constituted trust fund, can we continue to honour the Flags and the name of Hilton, and undertake the plans for the continuation of the Hilton Legacy in our church, through display of replica flags, and exhibiting the story of the Flags, Trafalgar and the Hiltons (subject to trust agreement one might also consider providing small replicas for close members of the Hilton family);*
  - *only with resulting financial resources, within a properly constituted trust fund, can we fulfil the Hilton Legacy by adapting and enhancing the Hilton Chapel, as outlined above, in honour of the Hilton family and the Flags;*
  - *only with resulting financial resources, within a properly constituted trust fund, can we help local children to visit the Flags in their glorious, educational and informative home at Greenwich: or support relevant and appropriate research projects.*

*Such proceeds should be sought at the highest level obtainable. Only thus can we be said to have maintained the Hilton Legacy in the village of Selling, and to have applied the greater theatre, now enjoyed by the Flags, to the people and congregation of Selling, in perpetuity. Only thus can we continue the great association between St Mary's and the Trafalgar Flags.*

*It has been suggested by a member of the Hilton family that the trustees should be the Vicar of Selling, a churchwarden and a member of the Hilton family. We, the PCC, concur with this."*

The Parish suggested the imposition of a condition to the effect that the flags be returned at no cost, to the Parish, *"should the holding institution fail or be wound up"*.

2.3. The Statement of Needs indicated that all of those who had expressed opposition, bar one, had *"given full and absolute support to the plan"* when it was explained to them, as had residents of the Parish who had *"positively stated that they do not want their church turned into a museum."*

2.4. The Petition generated further letters of objection. At the beginning of November, the Deputy Commissary General handed the Petition to me. I directed that the following bodies be specially cited under Rule 13(1) of the Faculty Jurisdiction Rules 2000:

The Church Buildings Council  
The Nelson Society  
The 1805 Club  
The Society of Antiquaries of London  
The Flag Institute  
The Society for Nautical Research

At this stage I ruled that one objection (from an academic naval historian in Australia)<sup>2</sup> was not from an “*interested person*” for the purposes of rule 16(2) of the Faculty Jurisdiction Rules 2000. The Registrar wrote, at my direction, to all the other objectors asking them to confirm whether they were resident in the parish or on the Church electoral roll (and, if not, why they considered that they had a proper interest). The procedural options and implications for sufficiently interested objectors were also explained and they were given 21 days to decide what to do. A copy of the Statement of Needs accompanied each letter so that objectors would be able to understand the true nature of the Parish’s proposal and they were informed of the special citations so that any who were members of one or more of the relevant bodies would know that they had been made aware of the Petition.

2.5. A number of objectors formally withdrew their objections in response to the Registrar’s letter. These people are listed at Annex B to this Judgment.

2.6. I directed on 2 January 2012 that the Petitioners should see all the remaining objections. I considered, from reading them, that a number, on the face of it, expressed justified concerns about difficulties experienced in gaining clear information from the Parish. I therefore urged the Petitioners to try to contact these people and in any event sought the

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<sup>2</sup> Dr Tom Lewis, Director, Darwin Military Museum who, in fact, later indicated that he thought the Parish’s proposal “*excellent*”.

Petitioners' response to the objections within 28 days. I had also requested further information from the Petitioners as to the terms of any proposed agreement with NMM and I reiterated this request.

- 2.7. The Parish acted on my Directions and, as a result, four people<sup>3</sup> formally told the Registrar that they now wished to withdraw their objections; these are listed at Annex C to this Judgment.. A typical example is the email of Mrs Julie Luzby to Mr Webb, copied to the Registrar:

*"Many thanks for you (sic) email and attached document and after reading this I can quite understand the reasons for your plans and am reassured that what you are doing is the right course of action.*

*I did jump in feet first with my objections as I mentioned at the time as I believed there was a time limit and was concerned that they would be sold overseas. Unfortunately I was unable to give any time to further research when I received the letter from the Registrar.*

*I would like to thank you for taking the time to contact me and please be assured that my objection no longer stands. I have copied this email to the Registrar for his information."*

One objector, Mr John Owen, raised concerns about this exercise on the basis that he feared that the Priest-in-Charge might have been behaving unethically. I am satisfied from the emails which I have seen, all the papers before me as well as having seen and heard from the Petitioners at the subsequent Directions Hearing, that there was no such impropriety. The Petitioners were merely giving effect to my Directions, the purpose of

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<sup>3</sup> Including Dr Tom Lewis whom I had already ruled was not an "interested person": see paragraph 2.4 above.

which was to ensure that objectors were fully aware of the true nature of the proposals, given the understandable public reaction to the Daily Telegraph letter.

2.8. In their response to objections dated 10 January 2012, the Petitioners pointed out:

- (i) that the Parish had sought advice from the DAC in relation to the flags and that the DAC had suggested that the NMM be approached;
- (ii) that Mr John Owen (who subsequently became an objector) had asked to see documentation following public notification in August 2011; Mr Owen lives in Throwley, about five miles from Selling; evidently the local and national press then became involved with the results, in terms of numbers of objections which I have already noted;
- (iii) that, following enquiries, the Parish had concluded that there are no surviving Hiltons with a legal claim to the flags; the three surviving members of the family are Jean Hilton, an elderly lady in her '90s, her son Giles, a local resident and his cousin, Nicholas, who lives in Cheshire; the two gentlemen, who had originally objected, had become supporters on being informed of the details of the proposal;

- (iv) that, in their view, the remaining objectors comprised Mr Owen, his fellow Throwley resident Mr Tim Stevens and the Faversham Society ('FS'), of which Mr Owen is a member.

Sadly, email correspondence between Mr Owen and Mr Webb appears to have generated more heat than light and some was annexed to the Petitioners' submission. I do not need to say any more about that.

2.9. Despite this summary, it is important to note two other email responses to the Petitioners' communication. The first of these was from Justin Reay FSA FRHistS who, amongst many other qualifications, is a tutor in naval history at the University of Oxford; he is also a Council Member of the Society for Nautical Research and editor of that Society's on-line forum. He had objected in September 2011 and then written to the Registrar in November 2011, having read the Statement of Needs, saying that he had "*no substantive objection*". In November, he maintained his objection, essentially because of concerns about a possible gap between the Parish's financial expectations and NMM's financial resources. He also commented on the unhelpful way in which matters had unfolded in Summer 2011. In a detailed and well considered email, he reiterated the concerns expressed in November, summarising them as follows:

- "• *that the museum is required to create, as soon as is practicable, replica flags of an appropriate size, reproduction quality and material and to donate these free of charge to Selling PCC;*

- *that the Museum creates and installs equipment to hang the replica flags in the church appropriately, and at no charge donates text display cases and reference material regarding the history of the flags and their original donation to the church, including a printed pamphlet;*
- *that the Museum maintains the replica flags and display cases at no charge for a period to be agreed – say 25 years;*
- *that the Museum has a hyperlink on its Collections website to a relevant page on the Church's or Parish Council's website."*

He concluded by offering to assist in writing notes to accompany the display of the proposed replica flags. The second email was from Arthur Percival<sup>4</sup> stating that he did not wish to withdraw his objection. He responded specifically to paragraphs 9 and 11 of the Statement of Needs:

- (a) because he saw no evidence of a full investigation of costs/grants for retention; and
- (b) taking issue with the Parish's distaste for the Church being "*turned into a Museum*" on the basis that "*Church furnishings, monuments, stained flags and other features are faithful reflections of the way in which their parishes, and the practice of the Christian faith, have changed over the years and make it easier to understand, and often (as in the case of Selling) enjoy them*".

He concluded: "*The flags, if displayed alongside other Nelsonia at the NMM, would be of interest. But they would be out of their context and of far less interest than at Selling, where they would make the key point that*

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<sup>4</sup> Member of the FS and representative later in the proceedings of the Faversham Museum

*to the important victory at Trafalgar contributions came from throughout the land.”*

2.10. On 19 January 2012,<sup>5</sup> Dr Kevin Fewster, the Director of NMM, wrote to the Registrar. The most material points are as follows:

- (a) the Union flag was flown at the Battle, Nelson having specifically ordered on 10 October 1805: *“When in presence of an Enemy, all the ships under my command are to bear White Colours and a Union Jack is to be suspended from the fore-topgallant stay”*;
- (b) the Austrian ensign is believed to have come from the Neptuno, the Spanish Warship jointly captured by Minotaur and Spartiate; *“it is highly likely that it was obtained on board Neptuno possibly directly from the ship’s flag locker as a prize. The flag also demonstrated the truly international nature of Trafalgar and the mesh of alliances and dynastic connections that it encompassed”*;
- (c) both flags were the prizes of Stephen Hilton, in accordance with common practice among warrant officers at the time;
- (d) NMM recognises the importance, in view of (c) above, of keeping the two flags together;
- (e) NMM is working on a major new permanent gallery entitled *“Navy, Nation and Nelson”* scheduled to open in 2013; its aim is *“to explore the Royal Navy, and its relationship with Britain, from the*

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<sup>5</sup> The letter is inaccurately dated 2011, but the contents make it clear that this was a seasonal slip.



*Glorious Revolution of 1688 to the Napoleonic Wars. The gallery will reveal the realities of naval warfare and life afloat, and will demonstrate the profound influence of naval events on British national identity ... The Union flag of the Minotaur would be an extraordinary addition for our visitors. ... Nelson's victory at the Battle of Trafalgar will form the centrepiece of the gallery's displays ... the Museum has especially rich resources, including: the uniform worn by Nelson (and an array of his personal possessions); celebrated paintings by West, Devis, Dighton and others; weapons and projectiles used during the battle; first-hand accounts and letters written soon after. The flag would make a compelling focus ... it would capture the symbolism of navy and nation, and could be displayed with the magnificent presentation sword and gold medal awarded to the Captain of the Minotaur, Charles Mansfield, following the action. The Austrian ensign is also of great interest, and could be featured through our 'collections online' web pages, as well as having significant potential for research in its own right";*

- (f) noting local concerns, Dr Fewster said that NMM's own concern is "the long-term preservation of these historically and nationally significant flags, particularly as the Union Jack is the last surviving flag of that type from Trafalgar left in the UK". NMM would, in addition to the purchase price of £150,000 for the two flags

*“provisionally agreed”*, pay for reproduction flags to hang in the Hilton Chapel;

- (g) the flags, as large-scale textiles in an increasingly fragile condition, require both *“immediate conservation before they can be displayed”* and *“an ongoing conservation plan”*; appended to the letter is a detailed condition assessment and proposed treatment report from textile conservator Nicola Yates at NMM; due to their condition, the flags would not be on permanent display but, as a National Museum, NMM is required to make all stored objects available to the public on request;
- (h) fundraising could not commence in advance of a formal offer;
- (i) a copy of NMM’s *“Guidance for Potential Donors and Vendors”* was attached; this note explains that gifts with conditions are not preferred because of physical limitations on space, conservation constraints due to fragility/unsuitability for permanent display, some items being collected solely for their research value and the rolling and themed programme of displays.

2.11. Pausing there, it should be noted that I have treated all objectors bar one<sup>6</sup> as though they were *“interested persons”* in practice. Strictly speaking, some of them may not satisfy the statutory requirements but it seemed to me, given the national significance of the items at issue, that I should give objectors the benefit of the doubt in cases where it was impossible or

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<sup>6</sup> Tim Lewis – see above.

difficult to tell whether they met the statutory requirements (because, for example, the use of email addresses or the concise terms of the objection hindered the task). I have, in practice, taken all representations into account, including those predating the Petition which cannot, on any view, constitute objections to it, endeavouring to set out the main issues raised by means of specimen references and a general statement of the points in play. Nevertheless, I have not had regard to the numbers of representations, in themselves; it is often observed, and I agree, that neither a sound nor a bad point improves with repetition. My approach to this exceptional case cannot, and is not intended to, set a precedent as to my or other Chancellors' approaches in other cases to the identification of *"interested persons"*.

- 2.12. Secondly, I had not, by this stage, yet decided whether or not I could determine the Petition without an oral hearing. In approaching this question, I had regard to the guidance of Gray QC Ch in Re St James's, New Malden [1994] Fam 44 and particularly bore in mind the national cultural significance of the items concerned. None of the objectors had indicated that they wished to become a Party Opponent. Clearly, the responses of the Citation Bodies were an important factor to bear in mind when making the decision about mode of disposal of the Petition. The Nelson Society, Church Buildings Council, Flag Institute, 1805 Society, Society of Antiquaries of London and Society for Nautical Research all responded to the Registrar's letter of 8 November 2012. None of them

objected in principle to sale to the NMM, though some expressed caveats about public display/access at the Museum. The Society of Antiquaries in particular raised the question of making provision for local visits on occasional loans from the NMM and made the following interesting philosophical point:

*"The hanging of 'trophy' flags in churches has a number of meanings: it can be seen as a tribute to bravery, an act of religious dedication, or the acknowledgement of God's deliverance and protection – or all of these. These flags, on acceptance by the Church and their positioning in the chapel, are thereby dedicated to God, despite the fact that their receipt by the Church happened 125 years after the event they commemorate. We consider that the Diocesan Authorities should assure themselves that the proposals to adapt the Hilton chapel within the Church are an appropriate way of discharging these responsibilities if the decision is taken to permit the flags to be disposed of to another body."*

In July I viewed the flags at the Cathedral Treasury in company with the Archdeacon of Maidstone and Cathedral officials. Whilst I am not qualified to assess the condition of the flags myself, I observed that they are very fragile (particularly the Union Flag) and, to a lay observer, surprisingly large.

- 2.13. It seemed to me at this stage that good progress had been made in terms of refining the issues by ensuring that all objectors and relevant interest groups were aware of the true nature of the proposal. I was also clearer about what the NMM was offering in terms of conservation and display,

even more so after it had replied<sup>7</sup> to certain practical questions which I raised via the Registry concerning price, funding, conditions, security and display policy. Nevertheless I decided to hold a Directions Hearing, having regard to the following matters:

- (a) the presence of objections which, despite lack of responses to the Registry, had to be treated as outstanding (because not expressly withdrawn);
- (b) the important points of qualification in the Citation Bodies' responses;
- (c) the need for clear resolution of the Hilton family's position and the related question of property in the flags;
- (d) the rigorous nature of the Tredington test;
- (e) the interesting questions about local and national interests in heritage objects;
- (f) related issues of curatorial policy;
- (g) the tremendous historical, cultural and emotional significance of the flags themselves.

The Registry notified all of the objectors who had not expressly withdrawn as well as the Citation Bodies. Notice of the Directions Hearing was given in the Press.

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<sup>7</sup> In August 2012

2.14. The Directions Hearing was held on 12 September 2012 and was attended by the Revd Martin Webb, the Venerable Stephen Taylor, Archdeacon of Maidstone, Dr Richard Morrice and Mr Ian Dodd (Chairman and Secretary respectively of the DAC), Mrs Cressida Williams (of Canterbury Cathedral Archives), Dr Kevin Fewster, Ms Amy Miller and Ms Nicola Yates (respectively, Director, Curator of Decorative Arts and Material Culture and Textile Conservator of NMM), Messrs Giles and Jeremy Hilton, Lt Cdr Simon Hughes, Mr John Owen and Mr Richard Shuttleworth (objectors). Each group or person briefly explained their position in respect of the Petition and there was useful discussion of the approach to central issues in the case. I attach a copy of the resulting order at Annex D. In essence, I was to be provided with further information and submissions to enable me:

- (a) to decide whether or not it would be necessary to hold an oral hearing; and
- (b) to assist in determining the Petition.

2.15. At the Directions Hearing I asked whether any of those who were present were requesting an oral hearing and they all confirmed that they were content for me to consider the Petition on the Papers before me. The Society for Nautical Research had advised by letter dated 14 August 2012 that it saw no need to attend the Directions Hearing but sought to put some matters “*on record*” which pointed, in its view, to “*the overwhelming desirability of transferring the Selling Trafalgar flags to the*

*care and custody of the NMM”: their national importance, need to be kept together and displayed, their fragility and need for expert conservation.”*

None of the other Citation Bodies saw the need to attend either. In view of this greater measure of common ground and the submissions of the participants following the Directions Hearing, I was confident that I had full information<sup>8</sup> and that it would serve no useful purpose for me to hear live evidence. In particular I saw no need for cross examination and whilst oral submissions on ownership of the flags would doubtless have been helpful, I did not consider them essential. Having regard to the inevitable extra delay, trouble and expense that would be involved in a hearing, I concluded that I would deal with the matter on the written material. I was also influenced by the good natured character of the Directions Hearing and the evident reassurance which objectors felt that matters were being considered on a proper basis. This last point was important, in view of initial fears to the contrary which had been expressed by objectors previously.

### 3. **SUBMISSIONS AFTER THE DIRECTIONS HEARING**

#### 3.1. The Hilton Family

3.1.1. I requested a family tree to be prepared and Mr Owen obliged with a comprehensive genealogy in many parts. In essence, however, Stephen Hilton died in 1872 at Trafalgar House in Selling leaving no will but a widow and nine children. One of Stephen’s elder brothers, Henry, lived

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<sup>8</sup> Subject to one matter – the terms of the proposed Trust – to which I shall return later.

at Sole Street, Selling and was the great grandfather of Melville William Hilton, who was born in 1881 and whose father and grandfather were both clergymen, the grandfather (Stephen Hilton's nephew) having been born at Selling in 1810.

3.1.2. Giles and the brothers Nicholas and Jeremy Hilton are distant cousins and descended from another of Stephen Hilton's elder brothers, Giles. Despite the Parish's submissions on the point<sup>9</sup>, it seems probable to me that there are descendants of Stephen Hilton alive, but it appears from the family trees produced by Mr Owen that at least those who are known about live in Australia and Canada. None has declared any interest in these proceedings, despite their wide publicity and the fact that objections have come in from as far afield as Australia and the United States.

3.1.3. Mr Nicholas Hilton wrote on behalf of himself, his cousin Giles and his brother Jeremy, making the following points:

- (i) that the heritage, origin and authenticity of the flags is not in dispute;
- (ii) that the flags need to be properly cared for, restored and kept secure and the family agrees with the Parish that the best place for the flags would be the NMM;

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<sup>9</sup> Summarised at paragraph 2.8(iii) above



- (iii) that they do not accept that the flags were transferred (to use a neutral word) to the Parish on quite the same basis as the liturgical gifts and they point to the subtly different terms used in the Order of Service and newspaper report, neither of which refers in terms to the flags as gifts;
- (iv) irrespective of point (iii), they want the flags to be able to move to NMM *“without further delay and in a manner acceptable to all sides”* though they feel *“uncomfortable”* with any money coming from NMM over and above the costs of renovation, replica flags/permanent exhibition at St Mary’s Church and *“some sort of pledge to cover the costs of school visits from the parish to the NMM”*.

Therefore, although Mr Nicholas Hilton had objected on 12 September 2011 on behalf of himself, his father, his uncle, his two sisters, his brother and his four sons, I understand from his submission, and from what his brother Jeremy said at the Directions Hearing, that their initial fears have been allayed as a result of learning of the true nature of the proposals. Mr Giles Hilton, likewise, objected on 15 September 2011 on behalf of himself and six family members but I understand their position now to be covered by Mr Nicholas Hilton’s letters of 8 and 10 October 2012.

### 3.2. Chatham Historic Dockyard Museum

- 3.2.1. There were suggestions in some of the objections to the proposal that the flags ought to go to the Chatham Historic Dockyard Museum.

Accordingly, I asked for written clarification of its position. By letter to the Registrar dated 24 September 2012 the Museum made it clear that it would be beyond its remit to accept the flags although it might be happy to consider any possible future loan. It supports the NMM's proposals, having discussed the matter with Dr Fewster.

### 3.3. NMM's Timetable for Fundraising

3.3.1. At the Directions Hearing, I asked NMM to clarify this matter and it undertook, by letter to the Registrar dated 3 October 2012, to raise the purchase monies "*within six months of the Church formally agreeing to offer the flags for sale to us*". At the Directions Hearing, Dr Fewster made it clear that he did not envisage encountering difficulties in raising the money. NMM has not objected to the principle of payment.

### 3.4. Faversham Society ("FS")

3.4.1. Mr Richard Shuttleworth of the FS attended the Directions Hearing with Mr John Owen, as I understood it, in a supporting role to Mr Owen. At the Directions Hearing, Mr Owen made it clear that as part of his objection he wished me to consider the option of local display of the flags. The two contenders as venues were the Historic Dockyard Museum at Chatham, which I have dealt with above, and the Fleur de Lis Heritage Centre, Museum and Gallery ("Faversham Museum") which is operated by the FS. Accordingly, I asked firstly for confirmation that the FS and the Museum would, in fact, be willing to take the flags and secondly for

details of the Museum itself and its proposed arrangements for the flags. In a helpful submission from Mr Arthur Percival, MBE, MA, DLitt, FSA, FAHI, the FS described the Faversham Museum. It is based in historic buildings in one of the town's main streets consisting of a former public house and two adjoining properties. The submission continues:

*"The displays focus on local industries or historical events such as brick making, brewing, the manufacture of gunpowder and the Second World War. The volunteer workforce has advice from a museum professional, as we aspire to proper museum standards. The museum secured accreditation in 2011, which conforms its professionalism and is essential for obtaining further funds from HLF and other bodies for acquisitions, new displays and further expansion. With the aid of HLF money a new museum entrance was opened this year by HRH The Duke of Gloucester and an education coordinator, also funded by HLF, was appointed.*

*Although much outstanding material connected with Faversham has already passed to national institutions, notably the spectacular gold jewellery from a Jutish cemetery within a matter of metres from the museum (now in the British Museum) it has been possible to repatriate a number of items that seemed lost for ever. Perhaps the most striking is an elegant Georgian shop front that was acquired in the early 20<sup>th</sup> century from the Market Place by the Art Institute of Chicago which has now returned it. Having an established museum made this possible. The museum though still needs more outstanding objects to make it really effective which is why these flags with their local connections are so important.*

*Occupying essentially domestic buildings means that many of the society's larger items are not on exhibition and it is not possible at present to consider taking on the display of the exceptionally fascinating Graveney Boat which is currently in storage with the National Maritime Museum (see p.34 no 14 of The History of Faversham in a 50 objects).*

*To solve this severe space limitation, plans are currently being developed to acquire the now redundant large late 1950s sorting shed/garage of the Post Office which backs onto the present museum premises. This scheme is likely to take five to ten years to bring to fruition. The new display space that will meet the appropriate standards of environmental control, security and display would also allow for instance the display of material from the Town Archives which includes a near contemporary copy of Magna Carta. If the Society acquires the Hilton flags it would envisage displaying them in this new extension to the museum.*

*The Society recognises that it may not win the argument to halt the sale of the flags but if it does not, it must take steps to keep the flags in the Faversham area. It would therefore like the opportunity to raise the necessary funds to purchase and conserve the flags with a view to lending them in the interim to another museum such the National Maritime Museum until the new display space is available. If it fails to raise the necessary funds within 12 months then it accepts that the sale to the National Maritime Museum may go ahead. Twelve months may seem a long time but, given the length of time it can take for grant-giving bodies to make decisions, this is necessary.*

*Until the Society knows that the flags are available for purchase it cannot reasonably approach national funding bodies such as the Arts Council/V&A Purchase Fund or the Heritage Lottery Fund or private well wishers. It is however confident that the great importance of these flags to the heritage of Faversham and the step-change impact of their acquisition on the museum would ensure successful fundraising.”*

On my subsequent site visit, I was able to see all these features, enjoy the displays and meet some of the members of the FS and those who run the Museum. I undertook an inspection of the ex post office shed/garage, which had to be restricted to an external view because the FS do not own the building at present.

### 3.5. Mr John Owen

3.5.1. It is convenient to summarise Mr Owen's objection here. He indicated in his family tree submission that he stood by his objection dated 21 November 2011. Mr Owen is a longstanding resident in the Benefice of which Selling, along with Throwley, (where he serves on the PCC) and three other parishes forms part. He is also a Fellow of the Society of Antiquaries and a noted, published local historian of, amongst others, the Hilton family; in 2005, he curated an exhibition of *"Faversham and the Great French War 1793-1815"*. Irrespective of the inclusive approach which I have taken to objections in this case, Mr Owen is plainly an *"interested person"*. He opposes *"both the disposal of and disposal for remuneration of the two Hilton Trafalgar Flags"*, believing that *"the Selling PCC has produced no evidence of need to dispose for remuneration of the flags and will do the reputation of the Anglican Church great harm in selling them"*. The detailed reasons in support of his objection were attached to his letter under the following headings.

#### Historical Background of the Flags

In addition to the history set out above, Mr Owen states that in 1907 the flags were in the possession of Lt Col William Wilfred Cordeaux who was married to one of Stephen Hilton's granddaughters. They died in 1926 leaving a married daughter whose descendants now live in Canada and the West of England. He notes that no Faculty was granted for the

hanging of the flags. He records the following PCC minute dated 28 June 1937:

*"The Trafalgar flags have been sent away for re-mounting, repair and putting in safe condition ... the cost is £21 ... Mrs Hilton-Simpson is putting the affair before the Hilton family to find if they would make a further gift to the church..."*

Mr Owen notes the absence of the term "*gift*" in connection with the flags in the 1930 newspaper report and refers to a letter dated 1 December 1938 from the wife of Capt Hilton-Simpson saying that "*the flags were presented to the church by members of the Hilton family*".

#### Statement of Significance of the Flags

Mr Owen notes the rarity and national significance of the flags but he states that they are "*an integral and original part of the chapel*" as conceived by the family and agreed by both the Registrar<sup>10</sup> and the Selling PCC of the 1930s. "*They were given to furnish the new chapel in the 1930s at the same time as the other fittings*". He points out the addition in 1990 of additions to the chapel in memory of David Hilton. Returning to the flags themselves, he describes them as a war memorial to the 600,000 Englishmen who died in the Great French Wars from 1795-1815 as well as adding interest to the church's role as a "*local heritage centre*".

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<sup>10</sup> Presumably a reference to the Commissary General though, as noted above, there was no Faculty for the flags.

### Need to dispose of the Hilton Flags

Mr Owen disputes the need for disposal of the flags on grounds of their condition. Commenting on Ms Doré's recommendation of £8,000 worth of work, he notes that the Parish gives no evidence of attempts to raise that money nor of any exploration of modern methods of display. He does not accept that retention would be deleterious to the worshipping life of the community and disputes the realistic necessity of insuring for full value. He questions whether NMM would have the flags permanently on display and disputes the need for more community space in the church.

### Needs to dispose of the Flags for Remuneration

Mr Owen raises an objection of principle to the Anglican Church receiving money, indirectly from the taxpayer, via the NMM. He sees such a proposal as adding to the Church's "*ethical dilemmas of wealth and faith*" and he fears that such arrangements encourage other churches to sell their treasures, apparently feeling that the reception of treasures by the Cathedral treasury is also, to some extent, responsible. He suggests that Selling is a wealthy parish, with a successful track record at fundraising and he doubts their commitment to "*honouring the Hilton legacy*".

## 3.6. Petitioners

- 3.6.1. The Petitioners point to references to the Hiltons' "*munificence*" in the 1930 PCC minute and the use of the word "*presented*" in the 1938 letter. They also rely on the general heading in the Order of Service, the

*"Blessing of Gifts"* and the neutral terminology of the newspaper report. Apparently the Hilton family was approached in 1994 asking the Hilton family if they would contribute financially towards the conservation of the flags but the request was declined. They comment that the Hilton family had never disputed ownership before the suggestion to that effect in their latest submission. The submission states that legal advice was taken after the Directions Hearing and that it was in the following terms:

*"There is no doubt that possession of the flags was transferred to the church in 1930.*

*On the question of title, nothing seems to point away from a view that title was also then transferred, and the following point towards it:*

*The flags were to be installed in the church and that would tend to transfer ownership unless the contrary was made plain*

*A letter from the previous owner's widow in 1938 calls them a gift*

*The church put up a plaque about them with no suggestion that they were other than the church's property*

*There was no intervening suggestion that they were not the church's property"*

For some reason, the provenance of that advice is not given, which is less than helpful.

3.6.2. Lastly, in response to my request, Heads of Terms for a trust to be set up with the proceeds of any sale to NMM are proposed as follows:

***"i. Trustees to be at least:***

- *The incumbent, or priest-in-charge, or clergyman or clergywoman responsible for the parish of Selling, Kent*
- *Two churchwardens*
- *A member of the Hilton family in addition:*



- *as the Trust is mainly of an educational and community nature, it may be desirable to add the headteacher of the local school (whilst such school exists), and the leader of the Junior Church (whilst such Junior Church exists)*
- ii. The trust to be called ‘The Hilton Trafalgar Trust’**
- iii. The purposes of the Trust to be:**
- *the promotion of the education of those living in Selling (or attending Selling School, particularly those in full-time education and where this includes the history of Britain and the story of Trafalgar*
  - *the benefit of Selling’s youth, socially, recreationally, and spiritually, in line with the church’s mission*
  - *the continuation of the association of Selling Church with Trafalgar*
  - *the consideration of requests for aid with research into the flags themselves and the aspects of Trafalgar which they represent”*

#### **4. LEGAL PRINCIPLES**

- 4.1. A Faculty is required for the removal of any article from a church even where the article has been put into the church without a Faculty: Halsbury’s Laws of England (5<sup>th</sup> end) para 1081. Therefore I do not regard the absence of a Faculty in respect of the placing of the flags in the church as of any legal or evidential significance.
- 4.2. Newsom QC, the then Deputy Dean of the Arches, dealt with matters of title and considerations relevant to the sale of church property in Re Tredington. At 799B-C of the Judgment he said:

*"First, had the chancellor jurisdiction to grant a faculty for a sale? In my judgment, the law is clear that he had. The legal title to the flagons, as with other goods of the church in the parish, is vested in the churchwardens, who are, as Sir William Blackstone said, 1 Bl.Comm., 8th ed. (1778), p. 394, ". . . taken, in favour of the church, to be for some purposes a kind of corporation at the common law," their purpose being, as he observed, at p. 471, "for the conservation of the goods of the parish." Sir Robert Phillimore, Dean of the Arches, in his work of authority on The Ecclesiastical Law of the Church of England, 1st ed. (1873), vol. II, said, at p. 1797:*

*"... by the laws of England, the goods belonging to a church may be aliened; yet the churchwardens alone cannot dispose of them, without the consent of the parish: and a gift of such goods by them without the consent of the sidemen or vestry is void. There have been cases in which a faculty has been obtained for selling certain goods, such as pictures, belonging to the church."*

*and he said, at p. 1792: "A faculty may be granted to sell ornaments or utensils found to be unnecessary, as in the case of old bells when a new peal is set up, and the like." These passages recognise that while church goods are not in the ordinary way in commerce or available for sale and purchase, yet the churchwardens with the consent of the vestry (now the parochial church council) and the authority of a faculty may sell them or even give them away. Without such consent and authority the churchwardens cannot pass the legal interest which is vested in them. To obtain a faculty some good and sufficient ground must be proved. In the case of a sale, one of the grounds suggested by Sir Robert Phillimore is redundancy. It is not an essential ground or the only possible ground. But some special reason is required if goods which were given to be used in specie are to be converted into money. This is not a jurisdiction to authorise changes of investment. Like all faculties, of course, this kind is a matter for the chancellor's judicial discretion, and the evidence will mainly be directed to helping him with its exercise."*

4.3. In Re St Anne's, Wrenthorpe [1994] 2 WLR 338, Collier QC Ch had to consider the fate of many items of church furnishing which would be rendered redundant by a proposed re-ordering. Several of these items had been given as family memorials. On the issue of principle, Collier QC Ch reviewed the legal position whereby the movable goods of a church are vested in the churchwardens and held that *“the items in question are not held by the petitioners as custodians or as trustees. They are the owners of the items but their rights to dispose of the items are at the discretion of this court, which can permit or refuse disposal, and if it permits disposal it can impose terms as to the disposition.”* While that decision is not binding on me, I consider that it accords with the principles laid down by the Court of Arches in Re Tredington and I regard it as persuasive. I do not consider that the absence of national public interest in the items in Re Wrenthorpe affects the relevance of the principle to this case. National interest is a matter which affects the exercise of my discretion rather than the question of the Petitioners' powers of disposal.

4.4. Collier QC Ch had regard to the role of the church as a local centre of mission and worship and it is settled that this is also a material consideration in the exercise of my discretion. I shall return to this matter in due course.

## 5. **FINDINGS**

### 5.1. Ownership of the Flags

5.1.1. There was no express deed or other formal record made at the time of the transfer. In these circumstances, I must draw inferences from the contemporaneous evidence. That evidence comprises, firstly, the PCC Minute; it certainly supports the interpretation that the PCC understood the Hiltons to be making a gift of the flags. The whole surrounding scheme of re-ordering coupled with gifts of liturgical articles can most sensibly be interpreted as part of a project in which the flags featured prominently. I accept Mr Owen's point that the PCC minute might be seen as, essentially, a self-serving statement but no contrary evidence is put forward either by the family or Mr Owen. The Order of Service seems to me to be equivocal. I take the point that the "*Blessing of Gifts*" appears to be a separate sub-heading from "*Unveiling of Two flags*" but this is not necessarily conclusive. The flags were not to be devoted to liturgical purposes and it is understandable that they would not have been blessed in the same way as altar frontals and so forth. The extract from the Archdeacon's sermon, like the PCC minutes, seems to proceed on the basis of an act of giving by the family. The letter of 1938 corroborates the inference of a gift, by use of the term "*presented*". Viewed against this background, it is entirely understandable that the family did not regard themselves as being under any financial obligation when they were approached in 1994. Accordingly, I find that the flags were given to the Parish in 1930 by Capt Hilton-Simpson.

5.1.2. Mr Owen raised a question at the Directions Hearing about Capt Hilton-Simpson's own claim to the flags and as to their provenance. As to the former, I regard it as very significant that so many members of the Hilton family attended the service at which the flags were unveiled. As to the latter, the NMM is entirely satisfied that the flags are genuine. Dr Fewster points to the significance of their being together, which is consistent with the nationalities and alliances involved at the Battle. The condition surveys also describe, and I saw, the reduced state of the Union flag. Apparently the reason for this is that sailors would – more or less unofficially – have taken small 'trophy' pieces of the flag as mementos of such a famous victory. Moreover, there is no ground for suggesting that the Hilton family en masse practised some sort of deceit upon the Parish and the public by letting people suppose that the flags were from the Battle of Trafalgar when, in fact, they were not or there was a doubt about that fact.

5.2. Where should the Flags live?

5.2.1. It seems to me that there are the following options when considering what should become of the flags:

- A - Remain in the Cathedral Treasury
- B - Return to Selling Church
- C - Go to the NMM

D - Go somewhere (possibly the NMM) until the Faversham Museum is physically able to accommodate them.

5.2.2. Option A is not, I think, regarded by anybody as desirable. It is certainly not an outcome which the Cathedral Treasury seeks. That was made clear at the Directions Hearing. The Union flag is 88.19" x 112.79" in size and the Austrian ensign is larger (being complete) at 92.52" x 162.22". . The Treasury compiled brief condition reports on the flags, noting, as did Ms Doré, signs of damage, wear and dirt in both cases. The Union flag is fraying on its leading edge, probably due to its having been cut in the manner described above. There have been some attempts at repair in the past, both flags having apparently been stitched into cotton net in an effort at strengthening. The flags are both suffering from some distortion due to the way in which they were previously hung in the church. At present, the flags are stored in accordance with best practice, in acid free tissue rolled on an acid free cardboard tube. The Treasury has nowhere to display the flags and does not employ conservators who specialise in restoring and curating such artefacts. Despite the meticulous and professional care which the Treasury staff have demonstrated, I am satisfied that the Treasury is not an appropriate long term home for the flags.

- 5.2.3. Option B now seems to command little support. The Petitioners and the parishioners who made their views known to the Court do not feel that they can care for the flags properly. Ms Doré and Ms Yates (NMM's Textile Conservator) agree that both flags, although generally sound, require cleaning following careful removal from their cotton net backings. Obviously, this is highly skilled and specialised work. All the experts who have examined the flags point to soiling and puckering as a direct result of the years spent suspended from the chapel roof.
- 5.2.4. To mount the flags and cover them with glass would produce solid displays of large proportions. The chapel is not large and I agree with the Parish that it could not accommodate such a method of display.
- 5.2.5. I visited the church, unannounced and unaccompanied, one day in the summer of 2012, taking advantage of the “*open door*” policy. It struck me as a fascinating building which is beautifully cared for and a lovely place for quiet prayer and reflection for visitors and parishioners who, like me, could just turn up and enter the church. I agree with those parishioners who see the practice of leaving the church unlocked as a valuable contribution to the life and witness of the church. It seems to me almost inevitable that that policy would have to go in the event of any attempt to insure the flags against theft or damage. I think that being forced to lock the door would be a real loss to the life of the parish and in relation to the church as a “*local heritage centre*”, as Mr Owen puts it.

5.2.6. I was, nevertheless, impressed by the points which the Society of Antiquaries and Messrs Owen and Percival made about the important cultural, historical, community and memorial significance of hanging such objects in churches. In this case, however, it is clear to me that the church is not a suitable home and that the long term conservation and survival of the flags would not be served by sending them back there. I have given some, though little, weight, to the absence of a conservation plan at present under Option B because I suspect that the funds for the necessary work might well be forthcoming following the publicity which this Petition has attracted. I have also weighed the loss of significance to the Grade 1 listed church itself. The listing description briefly notes the presence of the flags within an extended description of the building's architectural features. Moreover, I accept the DAC's advice that the loss of significance is mitigated by the fact that the chapel has undergone other changes since its dedication and that the hanging of replica flags would also go some way to mitigate that loss. Some explanatory notes, as envisaged by Mr Leay, which could be made available in the church, would also be helpful.

5.2.7. Reviewing these findings in the light of Re Tredington, I conclude:

- (a) that the Petitioners are entitled to divest themselves of the flags subject to obtaining the permission of the Court



- (b) that maintaining the status quo (Option A – Cathedral Treasury) is not in the interests of the church, the flags, the Treasury, the parishioners or the wider public
- (c) that reverting to the pre-1994 position (Option B – return to the church) is not the right answer either; I am quite satisfied that this option is not in the best interests of the flags and hence would not best serve the interests of the wider public; the loss of significance for the listed building, which I do not consider to be substantial for the reasons set out above, is, in my judgment, outweighed by the disadvantages for the flags and for the mission of the church in Selling.

5.2.8. The justification for disposal in this case is wholly different from that in Re Tredington but I do not understand Newsom QC Ch to have suggested that the categories of justification were limited to the examples which he considered in his judgment (financial crisis, lack of liturgical need or supporting other needy churches). I am convinced that the flags require a suitable long term home to ensure their conservation and am equally convinced that Selling church is not such a home.

5.2.9. Option C – go to NMM – The NMM's credentials as expert conservators and curators of naval history are beyond dispute. As a National Museum, NMM operates under statutory powers and constraints which mean, in particular, that the flags would be held permanently. Entry to the

Museum is free. On my site visit, I was shown round the Museum site including the gallery where it is proposed to stage the “*Navy, Nation and Nelson*” display. There would be plenty of room to accommodate the Union flag alongside such items as Nelson’s uniform and the famous painting “*The Death of Nelson*” by Arthur William Devis. The Museum’s other naval collections are, naturally, extensive and expertly curated and the whole site benefits from thorough round-the-clock security systems. I met Ms Yates and observed some of her outstanding textile conservation work.

5.2.10. The Austrian flag would probably be kept for much of the time in the Museum’s archive and I visited the environmentally controlled secure store where it would be housed. As explained above, NMM would be obliged to make it available for viewing upon request and under suitable supervision. It would also form part of the Museum’s on line archive and the staff explained that the acquisition and restoration of the flags would be publicised on line. The NMM is part of a World Heritage Site inscribed for its architectural, historic, scientific and maritime interest and the historic and modern buildings which it occupies are of outstanding quality.

5.2.11. I have no doubt that the NMM could offer a safe and fitting home for the flags in the immediate and long term. It is a world class institution which is able to employ expert staff of the highest calibre. The new display is planned to open later this year and would coincide with completion of the

restoration work. At that point, the Union flag would go on display. Whilst the staff could not guarantee that it would always be on display, because of the need to check its condition and so forth as well as to fit in with any particular themed displays, they confidently expected that, like Nelson's uniform, it would be so popular with members of the public that such occasions would be rare. While the Austrian flag would be likely to be in store for much of the time, it was possible that it would form a part of displays on occasions and it might be available for loan from time to time under strictly supervised conditions.

5.2.12. Option D – Faversham Museum – Obviously the Faversham Museum is a very different institution from the NMM. Direct comparisons would be invidious and unhelpful. Faversham Museum is a well planned, stocked and run centre for displaying and educating its visitors about local heritage. Based on the former Fleur de Lis Public House, it comprises many galleries in an engaging warren of rooms and passages extending back to a small garden at the rear. It offers a fascinating, educational and entertaining trip for the visitor at a modest charge.

5.2.13. There is no room to display the flags at present although the FS and the Museum staff wish to acquire a redundant building comprising a large shed, at the Post Office sorting office premises, to the rear of the Museum's site. The shed is a utilitarian structure with an asbestos roof, about the size of a modern agricultural hay barn. It would be large

enough to contain the flags and many other exhibits too. There are aspirations, for example, to house a replica of the Graveney Boat<sup>11</sup> there.

5.2.14. The Museum is staffed and run by a devoted and knowledgeable staff of volunteers, including the eminent Mr Percival, who worked for the Victoria and Albert Museum before his retirement. Security arrangements are in place.

5.2.15. There is no doubt in my mind about the commitment, enthusiasm and goodwill of the FS and those involved with the Museum. I recognise that the flags have a particular connection with Selling, a village which is close to Faversham and within its historic sphere of influence. I also recognise that local people may well feel a sense of 'ownership' of the flags as part of a shared community heritage. Such values would be to some extent met by removal of the flags the short distance to Faversham. The Faversham Museum, however, does not employ staff who could restore the flags. Moreover, it is not in a position to accommodate the flags now and the timescale for bringing forward the new building is uncertain. Significant physical works of conversion would be required, there is no planning permission in place for change of use and, at the date of my site visit in November 2012, the shed had not been acquired. The FS therefore suggest that the flags go somewhere else, possibly NMM, for an indefinite period until all these points are resolved.

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<sup>11</sup> The original of this Viking artefact is currently held in storage at the NMM.

5.2.16. I do not regard Option D as satisfactory. Apart from anything else, there is no evidence to show that NMM would be prepared to co-operate as the FS propose. More fundamentally, in my judgment, these flags ought to be displayed on the “*national stage*” and in an institution where they can be maintained and monitored to the highest possible standard. That consideration outweighs the claims of their undoubted local interest and significance.

5.2.17. I therefore conclude that disposal to the NMM is justified by the necessity of ensuring proper care for the flags in the future. It is also desirable to divest the Parish of responsibility for the physical safety and condition of the flags. I have not given weight in reaching this conclusion to the possible use of the Hilton Chapel for youth work purposes in the church. That is not because I would not endorse such a project, rather it is because it seems to me that it is, at the moment, at too early a stage to be taken into account. This Judgment will not set a precedent as a matter of law and it is not intended to provide any other kind of encouragement to parishes to dispose of treasures. This case is exceptional and the high threshold set out in Re Tredington and the Commisary General’s guidelines is met by the necessity which I have identified.

## 6. **TERMS OF DISPOSAL**

- 6.1. The remaining issues concern the terms upon which disposal to the NMM should take place. Naturally all that I have to consider at present are Heads of Terms. These Terms include substantial consideration of £150,000 for the Union flag and £25,000 for the Austrian flag, together with the provision by NMM of replica flags. The sums are in line with the expert valuations and the NMM, as I have said, is content with those terms and does not envisage difficulties about raising the money.
- 6.2. It is not proposed that the Parish receive an unfettered 'windfall'. As noted above, the plan is to set up a charity with educational and social objects geared towards benefitting the young people of Selling and emphasising historical education and research particularly concerned with the Battle of Trafalgar. This proposal seems thoroughly satisfactory to me and the further proposal for a member of the Hilton family to be a Trustee would be a creative way of preserving the link with the family. These proposed arrangements are appropriate and, in my judgment, could give rise to no sensible criticism of the Parish or the wider Anglican Church.
- 6.3. I do not consider it necessary or desirable to impose further conditions on the transfer. It follows from all that I have recorded above that I find that the NMM can be trusted to use its own judgment as custodian of the flags. The statutory regime under which the National Museums operate includes safeguards against disposal and I recognise the reasons behind

the NMM's general policy of not making acquisitions upon conditions as to future curatorial decisions.

- 6.4. I should like a representative of the Hilton family and the DAC to be involved in discussions about the precise nature of the proposed duplicates and I shall need to approve the proposal before the Faculty is issued. It will be necessary for a contract and a trust deed to be drawn up and submitted to the Registry before a Faculty passes the seal but I indicate now that, subject to those matters, I am prepared in principle to grant the Petition. The costs of the Petition shall be paid by the Parish and may be paid out of the proceeds of sale and the Trust deed will therefore cover the remainder of the proceeds.

MORAG ELLIS QC  
St. David's Day 2013

## ANNEX A 1.

### List of names of objectors to the original Notice in August 2011

Adamy, Marina  
Adams, Tom  
Alderton, John  
Armstrong, Gail  
Barnes, Anthony  
Barrett, Mark  
Bathgate, Kester  
Beales, Tony  
Blandford, Sally  
Bowden, Mark  
Brister, Robert  
Brown, David  
Brown, Wendolyn  
Bryans, Patrick  
Burns, David  
Campbell, David  
Carter, Gill  
Cross, Alan  
Evans, Martin  
Fischer, Timothy  
Foy-Taysum, Kate  
Grahame, Tim  
Gray Drew  
Grieve, Derek  
Harding, Andrew  
Harris, Melvyn  
Haydon, John  
Hill, Michael  
Hilton, Giles (on behalf of himself and 6 family members)  
Hilton, Nicholas (on behalf of himself and 14 family members)  
Hogben, John  
Hughes, Simon  
Innes, Roderick  
Jeavons, Ian  
Jeavons, Janet  
Kettlewell, Nick  
Knapp, Martin



Knowles, Anna  
Lee, Clinton  
Lewcock, John  
Lewis, Tom  
Livesey, Jacqui  
Luzby, Julie  
Macdonald, Alistair  
Mansfield, Clifford  
May, Lester  
McCarthy, Helen  
Merrett, B  
Morrey, Maxine  
Northeast, A  
Owen, John  
Parslow, Edward  
Percival, Arthur  
Pettitt, Paul  
Potez, Richard  
Powell, Maurice  
Reay, Justin  
Redman, Philip  
Rickard, Chris  
Robertson, I  
Scott, Frank  
Shuttleworth, Richard  
Slope, Tony  
Slope, Eileen  
Snelling, Liz  
Snow, Peter  
Stevens, Timothy  
Swan, Peter  
Welland, Christopher  
West, Janet  
White, G  
Whitaker, G  
Whittick, Christopher  
Williams, Derek  
Wilshire, Tony  
Wright, Karen  
The Faversham Society (Parry, Jenny)  
The Flag Institute (Farrow, Malcom)  
The Nelson Society (Slope, Nick)

The objections in summary concerned:

- disposal of rare national heritage
- sale of such items
- parting with them overseas
- historical importance to the nation and the Royal Navy
- inability of church to dispose of them
- desirability of being preserved for public display

## ANNEX A 2.

### List of names of supporters to the original Notice

Ashley, Peter  
Badmin, Judith  
Broadbridge, Deborah  
Buckthorpe, R  
Champion, Yvonne  
Duncan, J  
Duncan, P  
Dyer, Kristina  
Evans, Dennis  
Farmer, Gaille  
Gardiner, Ian  
Garner, John  
Gunn, Eric  
Gunn, Anne  
Howard, Alison  
Hutton, M  
Jones, Helen  
de Lira, Lidia  
Murdoch, M  
Serisier, Shelley  
Stacey, Nicholas  
Stacey, Anne  
Swire, Barnaby  
Taylor, Christopher  
Thomas, Elizabeth  
Villiers, Charles  
Vinson, Susan  
Waller, Alison  
Wallis, Dick  
Whinney, G  
Wimlett, Mary

The supporters in summary referred to

- the inappropriateness of the church for displaying the flags
- Museum being a better location for them (in particular the National Maritime Museum)

## ANNEX A 3

List of names of persons who wrote further letters of objection following the issue of the Petition for a Faculty. There were no new objections – these names also appear at A1 above.

Owen, John

Percival, Arthur

Stevens, Timothy

Reay, Justin

The Faversham Society (Parry, Jenny)

## ANNEX B

List of names of objectors who formally withdrew their objection in response to the Diocesan Registrar's letter of 9<sup>th</sup> November 2011

Adams, Tom  
Barnes, Anthony  
Bathgate, Kester  
Bowden, Mark  
Brister, Robert  
Brown, David  
Brown, Wendolyn  
Carter, Gill  
Cross, Alan  
Harding, Andrew  
Haydon, John  
Hogben, John  
Innes, Roderick  
Jeavons, Ian  
Jeavons, Janet  
May, Lester  
Merret, B  
Morrey, Maxine  
Potez, Richard  
Powell, Maurice  
Redman, Philip  
Rickard, Chris  
Robertson, I  
White, G  
Whitaker, G

## ANNEX C

List of names of objectors who formally withdrew their objection following the directions given by the Commissary General of 2nd January 2012

Alderton, John

Luzby, Julie

Parslow, Edward

Shuttleworth, Richard

## ANNEX D

Objectors remaining after 2<sup>nd</sup> January, 2012

(Those who formally continued their objection, entered qualified objections, did not notify the Registry of withdrawal but contacted Mr. Webb, or who made no further comment after January 2012)

Adamy, Marina  
Armstrong, Gail  
Barrett, Mark  
Beales, Tony  
Blandford, Sally  
Bryans, Patrick  
Burns, David  
Campbell, David  
Evans, Martin  
Fischer, Timothy  
Foy-Taysum, Kate  
Grahame, Tim  
Gray, Drew  
Grieve, Derek  
Harris, Melvyn  
Hill, Michael  
Hilton, Giles (on behalf of himself and 6 family members)  
Hilton, Nicholas (on behalf of himself and 14 family members)  
Hughes, Simon  
Kettlewell, Nick  
Knapp, Martin  
Knowles, Anna  
Lee, Clinton  
Lewcock, John  
Lewis, Tom  
Livesey, Jacqui  
Macdonald, Alistair  
Mansfield, Clifford  
McCarthy, Helen  
Northeast, A  
Owen, John  
Percival, Arthur  
Pettit, Paul  
Reay, Justin  
Scott, Frank  
Slope, Tony

Slope, Eileen  
Snelling, Liz  
Snow, Peter  
Stevens, Timothy  
Swan, Peter  
Welland, Christopher  
West, Janet  
Whittick, Christopher  
Williams, Derek  
Wilshire, Tony  
Wright, Karen  
The Faversham Society (Parry, Jenny)  
The Flag Institute (Farrow, Malcom)  
The Nelson Society (Slope, Nick)



## CITATION BODIES

1805 Club  
Church Buildings Council  
Flag Institute  
Nelson Society  
Society for Nautical Research  
Society of Antiquaries of London