

ALL SAINTS, ISLEY WALTON

DIOCESE OF LEICESTER

IN THE MATTER OF THE FELLING OF TWO LIME TREES

CHANCELLOR'S DETERMINATION

PURSUANT TO FACULTY JURISDICTION RULES r.3.8(1)

1. This matter concerns the felling of two mature lime trees in the south-west of the churchyard of All Saints church, Isley Walton. In some relevant externally provided reports the trees are referred to as "T1" and "T2" and that form is adopted here for ease of distinguishing between the two adjacent trees.
2. This decision is not made pursuant to a formal application. Instead this matter is before me because it has been drawn to my attention that on 10 February 2022 a tree was felled pursuant to a List B consent previously granted by the Archdeacon of Loughborough (the "Archdeacon") on 14 June 2020. The bases upon which a tree may be felled pursuant to a List B consent are limited. Beyond the situations prescribed in List B, the felling of a tree in a churchyard requires a faculty. A formal complaint has been made against the Archdeacon on the basis that her consent was given in error because the condition of the tree did not fall within the qualifying requirements for her determination under List B. Accordingly it is alleged that the tree has been felled without the requisite permission. This engages the jurisdiction of the Consistory Court (under Faculty Jurisdiction Rules 2015 ("FJR") rule 3.8(1)) as it is for me to determine whether the matter did or did not require a faculty. If a faculty was required I also need to consider what, if any, remedial steps are appropriate. Those are the questions which are the subject of this determination.
3. In the interests of proportionality and the saving of time and costs, all those interested in the outcome of this determination, in particular the Archdeacon, Mrs Val Spalton and the churchwardens of All Saints, have been consulted as to whether they consent to my review and determination proceeding without a hearing. There has been unanimous consent to a purely written determination.

Background and facts:

4. On 22 May 2020, Leicestershire County Council Forestry and Arboricultural Group published a Tree Report and Tree Schedule (the “Leicestershire CC Report”, or simply the “Report”, and the “Leicestershire CC Schedule”, or simply the “Schedule”, respectively). The Arboricultural Group had been invited by the PCC to prepare its report as part of a tree health and safety survey carried out on 30 and 31 December 2019. As part of the survey T1 and T2 were inspected from ground level including a close visual inspection of their external features.

5. The Leicestershire CC Report included the following relevant statements:

“...The trees have reached maturity, but due to structural failings and declining health neither is expected to reach the anticipated lifespan for the species.

T1 – The tree has been heavily reduced in size (pollard). The tree has reacted to the pruning work by producing a prolific amount of overly competitive branches; pockets of decay appear to have formed at the pruning wounds. There is a significant column of decay within the tree’s main stem; a fungal bracket and open cavity can be found approximately 4 metres above ground level...The fungal bracket appeared like that of a Ganoderma species – no samples were collected or sent for further analysis.

An assessment with ladder, hammer and probe was carried out of the trunk: The probe met with nominal resistance, indicating heavily decayed wood fibres. There was an exceedingly hollow resonance to the wood when using a sounding hammer, indicating an extensive cavity. I would suggest the cavity and area of decaying wood extends vertically for around 2.5 metres (including the cavity opening) and across most of the trunk’s horizontal plane. Very little structurally supportive wood remains in the infected area.

T2 - The tree has been heavily reduced in size (pollard). It has reacted to the pruning work by producing a prolific amount of overly competitive branches, pockets of decay appear to have formed at the pruning wound.

There is reasonable concern regarding the adjacent boundary wall and possible damage by the trees. The wall had partially collapsed prior to the tree inspection. A visual assessment of surface material was made...no surface roots were obvious or identified. It should be noted this is not comprehensive as [no] soil or other material was...excavated. It is quite plausible that there will be acting against the structure of the wall – the wall is in reasonably close to the trees and is within the anticipated root zone for trees of this age, size and species.

It is outside the scope of this report or my area of expertise to provide comment or analysis on built structures, or to confirm that the trees are a default or primary cause of instability in the wall. Such comment should be provided by a structural engineer. However it is reasonable to assume that the trees will be having an influence on the built structure and surrounding soils.

Given the declining health and structural integrity of T1 it would be appropriate to consider removing the trees. This would then reduce strain upon the wall and facilitate or ease rebuilding of the wall.

It would be possible to reduce T1 to a height where the risk of collapse posed by the cavity is negated, i.e. reduce the tree to a height of 3-5 metres tall. This would leave little more than a stump and would remove the tree's visual amenity. Retaining the stump would provide a habitat for flora and fauna. A replacement tree could be planted in the same place, providing the stump is removed.

A reduction in the size of T2 should be considered. As a minimum a repeat of previous works is required. However, if T1 is removed or reduced it could expose T2 to a greater level of wind strain. As such I would suggest reducing T2 by a further 2-4 metres below the old pruning wounds, to a point from which the tree may recover.”

6. The Leicestershire CC Schedule provided relevantly as follows in respect of T1:

*“Recommendation: Section fell
 Stump chip”*

7. And in respect of T2:

“Recommendation: Re-pollard”

8. Following receipt of the Leicestershire CC Report and Schedule the PCC met on 28 May 2020 and voted unanimously to fell both trees and replant with yews. On 29 May the Incumbent contacted the Archdeacon regarding the consents believed to be required to give effect to the works the PCC had voted for.
9. On 4 June 2020, the Archdeacon contacted the DAC Secretary and a List B application was submitted. The DAC’s advice recommending a condition that a record should be kept in the log-book was added to the Online Faculty System on the same day and on 14 June 2020 the Archdeacon granted List B consent for the felling of both trees.
10. The trees were not felled immediately. I have not been provided with a detailed history of what followed and the reasons for the timings, events and interventions which have happened. However, I understand from the documents before me that, in January 2021, T1 was felled and T2 was re-pollarded. Subsequently, on 10 February 2022, T2 was felled.
11. On the eve of the felling of T2, Val Spalton (the “Complainant”), who lives in a property neighbouring the church, contacted the Registry and the Archdeacon regarding what she understood to be the imminent felling of T2. Mrs Spalton said that the tree should not be felled and referred to an earlier report from a firm of consulting engineers, Ward Cole, dated 18 September 2017 (the “Ward Cole Report”). The Ward Cole Report is not a report by an arboriculturalist but by a structural engineer, Adrian Dempster, who states that his advice had been sought following concerns expressed “...*about the condition of the churchyard wall in the southwest corner...on the effect of the two mature lime trees, growing close by, were having on the wall and on appropriate future action.*”
12. The Ward Cole Report is relatively short and high-level in content, but it contains some detail on the recommended engineering and masonry steps to effect repairs to the damaged areas of the wall. No description of Mr Dempster’s expertise or qualification to opine in respect of works to trees is provided in the Report but in respect of the two lime trees he nonetheless said this:

“...the roots of the trees are likely to have had an adverse effect on the wall to the south but I consider that the subsoil in this area will have reached a state of equilibrium and any severe pruning or cutting down of the trees could result in swelling of the ground which may cause further damage. I recommend that the low growth only around the bases of each tree should be removed.”

13. The Ward Cole Report does not appear to have been included in the documents provided to the Archdeacon as part of the List B application. Upon being referred to it and notified of Mrs Spalton’s objection to the felling of T2, the Archdeacon properly took time to read the Ward Cole Report alongside re-reading the later documentation including the more contemporaneous Leicestershire CC Report and Schedule. I am informed by the Registry that the Archdeacon replied to Mrs Spalton that having done so she found that the basis upon which her List B consent had been granted remained valid and that the felling of the tree was to proceed as permitted. T2 was then felled the following day.
14. This matter came to my attention when I was informed that a disciplinary complaint was imminently to be lodged against the Archdeacon by the Complainant. I understand that this has now taken place. I do not know in any detail what the grounds of complaint are and I have no involvement with that entirely separate process. But it was made clear to me that a central issue was whether or not the List B consent granted by the Archdeacon had been the appropriate procedure in this case or whether the felling of the lime trees was in fact a matter which ought to have proceeded by way of a petition for faculty.

The Court’s directions to date

15. On 11 March 2022, I issued the following directions under r3.8(2) FJR:

- (1) The Registry shall provide to the Applicant, the Archdeacon and the Complainant a list of documents currently available on the OFS in order that they may understand the scope of the information currently before the Court (copies of individual listed documents to be made available at the parties’ request); and
- (2) Within 28 days thereafter the Applicant, the Archdeacon and the Complainant may provide to the Court, via the Diocesan Registry (i) further written representations they

wish to make, if any and (ii) further documents for the purposes of assisting the Court in its decision-making, if any;

together with associated further directions regarding dealing with the matter on paper and the future provision of costs information in the event that there was any request for a hearing.

16. Pursuant to those directions I have received and carefully reviewed the following:

16.1. All materials provided to the Archdeacon via the OFS for the List B Application;

16.2. The DAC's Advice (simply recording the log-book proviso);

16.3. The Archdeacon's List B Consent;

16.4. A letter dated 29 March 2020 from the Complainant setting out the basis upon which she believes the Archdeacon has erred in her conclusion that the felling of the trees was a matter capable of being dealt with under List B; and

16.5. An exchange of emails dated 11–14 March 2022 between an All Saints churchwarden and a representative of the tree surgery firm, Stockley Park Tree Services, who performed the felling of T2 on 10 February 2022.

17. The Archdeacon, the Complainant and the parish were also put on notice that "*I...intend to make a formal decision under the [FJR] as to whether or not this matter required a faculty. If I decide that it did require a faculty I will also give appropriate directions to enable me to consider whether or not to grant a faculty for the works retrospectively, together with any appropriate conditions.*" I consider that I have, in fact, now been provided with sufficient information to enable me to determine both the question of whether a faculty was required in this case and to determine whether or not to grant a faculty, and on what terms (subject to any further representations that the parties may wish to make). This is dealt with in further detail below.

18. Against this background I have considered the limited questions of whether the felling of the trees, or either of them, was properly a List B matter or whether there ought to have been a petition for faculty, and whether any further steps are necessary and/or appropriate in view of the outcome of that decision.

Legal framework:

19. List B of The Faculty Jurisdiction (Amendment) Rules 2019 prescribes works which may be carried out without a faculty if an archdeacon has been consulted on the proposal and has given notice in writing that it may be undertaken without a faculty (together with any conditions specified or added by the archdeacon). The relevant part relating to the felling of trees without a faculty is B7(2). It permits the archdeacon to give consent to:

*“(2) The felling of a tree –
(a) that is dying or dead; or
(b) has become dangerous.”*

20. The specified conditions relating to B7(2) are:

“In the case of any tree in respect of which a tree preservation order is in force or which is in a conservation area, section 206 of the Town and Country Planning Act 1990 (which provides for the planting of replacement trees) is complied with

Regard is had to the guidance issued by the Church Buildings Council as to the planting, felling, lopping and topping of trees in churchyards.”

(For the avoidance of doubt there was no tree preservation order in force in respect of T1 or T2 and they were not situated in a conservation area.)

21. As to the guidance issued by the CBC referred to in the specified conditions of B7(2), the CBC’s “Works to Trees in Churchyards” document states:

“A ‘dying’ tree is one that is rapid decline and is expected to be dead within one or two years. In these circumstances, the tree may well be suffering from pests or disease. An old tree, in slow decline, is not a ‘dying’ tree under the Rules. Indeed, ancient or veteran trees can be more beautiful, more historically significant and more biodiverse than a young or

middle-aged tree. With care, they can continue living for decades. The archdeacon should be consulted before any work is undertaken on these significant trees and expert arboricultural advice obtained. A 'dead' tree has no life in it. Even if defoliated, however, it may not be dead; take time to monitor and ascertain the state of the tree.

A 'dangerous' tree poses an immediate and serious danger, which may mean that there is not the time to go through the full faculty process before dealing with any threat. A tree may suddenly pose an immediate and substantial risk of harm to people or property, for example, after a storm. Whenever possible, the archdeacon and, where relevant, the LPA should be contacted before any work is done. Where there is concern about hazards from significant trees, the balance of risks and benefits should be assessed and various mitigation strategies considered. For instance, having secured safety, investigate the options for the future management of the tree, which could range from felling to partial retention, with more frequent inspections and fencing."

Discussion:

T1

22. As regards T1, the description provided in the Leicestershire CC Report (above) identifies significant decay, an extensive infected area and "...very little structurally supportive wood [remaining] in the infected area...". The report refers to the "declining health" of T1, to the risk of collapse and indicates that it was appropriate to consider removing it. Although the Report does not identify a time span for the remaining life of the tree (other than indicating at the outset that neither T1 nor T 2 are expected to reach the anticipated life span for the species), it is sufficiently clear from the observations and diagnostic elements of the Report, and the conclusion that Leicestershire CC reach as regards T1's removal, that it was reasonable to conclude that the tree was in "rapid decline" such that it was appropriate for it to be removed. Indeed the Leicestershire CC Schedule recommends the appropriate works for T1 as being "Section Fell" to be undertaken as Priority 1 level works (i.e. works to be completed within 3 months of receipt of the Leicestershire CC Report).
23. In reaching this conclusion I note that the overall approach adopted in the Report to the management of the trees appears to be careful and relatively conservative (for example an alternative to felling for T1 (substantial reduction in height) is also considered although

ultimately rejected on grounds of loss of visual amenity and achieving little practical difference to removal in terms of simply leaving a stump; in addition decay was also found in T2 but a different approach to management was advised in respect of that tree). Given the care and conservatism of the recommended interventions, the Report's conclusion as to the extent of decay in T1, the lack of any indication that there was any solution which would result in recovery by the tree (to be contrasted with the conclusions drawn in the Report as regards T2) and the ultimate recommendation in the Schedule that it be section felled in my view supports a conclusion that T1 was a "dying" tree within the prescribed terms of List B, as amplified in the CBC's guidance.

24. It follows that I conclude that the Archdeacon's conclusion that the matter fell within List B was correct and her decision that T1 should be felled (following the arboriculturalist's recommendation) was appropriate.

T2

25. As to T2, the Report reaches more limited conclusions. In the preface to the Report it is noted that neither tree is expected to reach the anticipated lifespan for the species. Specifically in relation to T2 the Report states that pockets of decay at the pruning wound have been identified and that is the limit of the Report's conclusion specifically relating to health of T2. The Report later states that "*A reduction in the size of T2 should be considered. As a minimum a repeat of previous work is required...*". It goes on to note that the removal of T1 would be likely to expose T2 to greater wind strain. In order to deal with that possibility the Report recommends going further than the previous work and "*reducing T2 by a further 2-4 metres below the old pruning wounds, to a point from which the tree may recover*" (although I note that the work ultimately recommended in the Schedule is simply to "Re-pollard" at "Priority Level 3" (i.e. recommended to be completed within 12 months of receipt of the Leicestershire CC Report)).

26. The fact that the report recommends significant reduction of T2 "*to a point from which the tree may recover*", although expressed conditionally rather than definitively, nonetheless leads me to conclude on the balance of probabilities that the tree was not "dying" within the meaning of List B(7) and the associated CBC Guidance. The anticipated recovery of the tree following recommended reduction works is inconsistent with the relevant definition of "dying" provided by that Guidance, namely "*in rapid decline and is expected*

to be dead within one or two years". Rather it indicates ongoing vitality on the part of the tree.

27. I note that in communicating to the Archdeacon by email on 29 May 2020 reporting the outcome of the PCC vote about the works to the trees, the Incumbent (drawing on an earlier communication from a churchwarden) stated that the Report said that T2 "*should either be pollarded or felled*". This is incorrect. The Report does not contain any recommendation for the felling of T2. Only reduction of size by re-pollarding is recommended.
28. Based on the content of the Leicestershire CC Report and Schedule alone, although the inspection had revealed that T2 showed evidence of decay, there is insufficient material to support a conclusion that T2 was "dead" or "dying" within the meaning of Schedule B1 as explained in the supporting CBC Guidance. It follows that any decision to fell T2 ought, therefore, to have been the subject of a petition for faculty.
29. For the avoidance of doubt there is nothing in the materials before me to support an analysis that List B consent was appropriate in respect of T2 on any other basis, for example because T2 had become "dangerous" per B7(2)(b). I note the following relevant points: the terms of the List B consent refer to "*two lime trees that are damaging the churchyard wall*"; the 29 May 2020 email from the Incumbent to the Archdeacon refers specifically to prevention of damage to the wall by felling or pollarding T2 and indeed the Report itself refers to "*...reasonable concern regarding the adjacent boundary wall and possible damage caused by the trees...*" and concludes that "*...it is reasonable to assume that the trees will be having an influence on the built structure and surrounding soils*"¹. However, these formulations indicating possible structural damage to a wall contain nothing to indicate an acute or serious risk and as such fall short of the description of a dangerous tree suitable for List B consent as identified in the CBC Guidance. The Guidance states: *A 'dangerous' tree poses an immediate and serious danger, which may mean that there is not the time to go through the full faculty process before dealing with any threat. A tree may suddenly pose an immediate and substantial risk of harm to people or property, for example, after a storm.*"

¹ Subject to the fact that the Report caveats this as follows: "*It is outside the scope of this report or my area of expertise to provide comment or analysis on built structures, or to confirm that the trees are a default or primary cause of instability in the wall.*"

30. It follows that I am unable to conclude that the felling of T2 was properly within List B as at June 2020 when the permission was originally granted.

Subsequent history

31. The remedial steps authorised by the List B consent in June 2020 were not acted upon immediately (I note also the timing priority recommended for T1 in the Leicestershire CC Report and Schedule was not observed). I do not know the circumstances of the delay but I take note of the impact that COVID and successive lockdowns had on many planned works during this period. It was not until January 2021 that practical action was taken. At that stage there was an exchange of email correspondence, on 7 January 2021, between the churchwarden, John Shields, and the Complainant, where Mr Shields wrote: “...*First tree is to be felled. Second is to be reduced to 4 metres below the previous pollard...*”. The Complainant replied “...*It does appear to be the recommendation of the tree report from Leicestershire County Council Forestry and Arboricultural Group to re-pollard the tree closest to the west boundary rather than to fell. We’ll wait to see what transpires.*”

32. I also note that, in his email, Mr Shields alerted the Complainant to the fact that the tree surgeon undertaking the works in January would be able to make a more in-depth assessment of the state of T2 when he carried them out. He said “*Tom is fairly confident that this will be OK, but, if more rotten than is evident at present he will let us know and a further decision can be taken.*” This, in my view, is important because of the limitations of the Leicestershire CC Report. That Report was founded upon a “...*survey...conducted from ground level...a close visual inspection of the external features of all significant trees on the site*” plus, in the case of T1 “*An assessment with ladder, hammer and probe...carried out of the trunk...*”. No doubt this was an appropriate, thorough and careful inspection. However more accurate intelligence as to the health and prospects of T2 was likely to be elicited when the tree was actually worked upon giving visual access to its interior.

33. I do not have details as to the sequence of events and the accompanying decision-making which followed this email exchange. Despite their resolution to fell both trees and the Archdeacon’s purported List B permission for those works, at some point between June 2020 and January 2021 the PCC evidently decided, initially at least, to follow the recommendations contained in the Leicestershire CC Report and fell T1 but merely to re-

pollard T2. This, I note, was not work specifically within the scope of the List B consent which permitted the “felling” of T2. Given the events which followed nothing much turns on this in practical terms and it may, in any event, be felt that it was a logical conclusion to reach that the lesser work of re-pollarding was encompassed within the purported permission for the more serious work of felling T2 such that it was not felt necessary to seek any modification to the purported consent.

34. Following the re-pollarding of T2 in January 2021, a further decision was evidently reached that these works were insufficient and that T2 should in fact be felled. Again, I do not know by whom, how or when the decision to fell T2 was reached. However an after-the-event email dated 11 March 2022 from the churchwarden, John Shields, to the tree surgery (Stockley Park Tree Services) who carried out the pollarding work in January 2021 states this: *“At the time of doing the work, your men on site said the tree was starting to rot at the bottom and so there was no doubt it should be taken down.”* This was confirmed in writing, together with accompanying photographs, by an email from Henry Hall of Stockley Park Tree Services on 14 March 2022. Regarding T2 Mr Hall stated: *“The lime tree that was taken down on the 10/02/2022 at Isley Walton All Saints Church was [in my opinion] unsafe to remain due to the amount of rot present at the base of the tree and in various cavities throughout the tree. Especially because the tree is in a public space and the church would be liable if it did come down and cause any damage or injury.”*

35. As set out in the history I have rehearsed above I am informed that, on 9 February 2022, the Complainant had become aware that T2 was to be felled and had contacted the Registry and the Archdeacon directly. She provided them with the Ward Cole Report and, on the basis of that report, asserted that T2 should not be felled. I am further informed that the Archdeacon read and considered the Ward Cole Report alongside later documentation including the Leicestershire CC Report and stated that she found the basis upon which List B consent had been granted remained valid and that the felling of T2 may proceed as planned.

36. I do not know what else, besides the Ward Cole Report and the Leicestershire CC Report and Schedule, the Archdeacon was provided with. In any event it does not appear that any fresh List B consent was granted, or any amendment made to the existing purported List B consent of 14 June 2020. Rather there was a reaffirmation that the existing purported

consent remained valid on the basis on which it had been granted in 2020. It follows that the felling of T2 which then ensued took place without proper permission because I have found the 14 June 2020 List B consent (as far as T2 is concerned) had been granted in error.

37. However, to the extent that this is problematic it is ultimately an error of procedure rather than substance. The events which have happened and the materials before me reveal that as at the date of the felling of T2 (10 February 2022) there were in fact grounds which would have been sufficient for the Archdeacon to conclude at that stage that T2 was dying and/or dangerous within the meaning of List B (Stockley Park Tree Services referred to T2 as “*unsafe to remain*”). This I take from the assessment of the tree surgeons who carried out the re-pollarding in January 2021 and advised on site at that stage that there was rot at the base of the tree and other decay elsewhere which, in the experience of those working on the tree, rendered it unsafe and that it should be felled.

38. This conclusion does not, in my view, cure the defect in the earlier purported grant of List B consent for T2 upon which the felling actually proceeded. However it does mean that the end result is one which could permissibly have been reached without a faculty.

39. In these circumstances I propose to regularise the position by granting (of my own motion, pursuant to FJR rule 18.3(2)) a confirmatory faculty² retrospectively permitting the felling of T2. I would intend any such grant to be made conditional upon a number of steps intended to ensure that the future treatment of the remaining stump, the adjacent wall, the memorials in the south-west corner of the churchyard and any future planting are properly reviewed and attended to (this is discussed further below).

40. Any of the notified parties who wishes to make submissions on this proposal, including that I should make a different order, or as to the appropriate terms of any order, should provide written submissions by email to the Registry within 7 days of the date of circulation of this judgment.

41. My reasons for proceeding in this way are as follows.

² In terms of receipt of DAC advice before granting this faculty, I note that the matter has already been before the DAC for the purposes of the original List B consideration. In the event that that is insufficient for the purposes of granting a faculty, FJR r7.2(3)(b) allows me to grant this faculty (with retrospective effect granted of my own motion) without DAC advice in situations of urgency. I find that there is urgency in this case given the commencement of a complaint process against the Archdeacon which requires my prompt determination of the matters referred to in this decision as a preliminary step in that associated process.

42. There is cogent evidence before me that T2 was either dying and/or dangerous (either of which would have provided a proper basis for the Archdeacon to grant a List B consent at the point of her review for the Complainant on 9 February 2022 and the subsequent felling on 10 February 2022). The cogent evidence I refer to is the opinion of the tree surgeons who effected the re-pollarding and subsequent re-felling as to the extent and location of decay, the likely effects of that and the fact that in their experience the tree was unsafe. That evidence was (a) more up to date than the Leicestershire CC Report; (b) was based on an inspection of the interior of the tree; (c) is supported by the sensible and conservative sequence of events which took place, namely an initial decision to limit the works to T2 to re-pollarding and only upon those more limited works being completed and the tree evaluated in its reduced state was there a conclusion that it needed to be felled; (d) was the considered opinion of an experienced tree surgery practice. I have seen nothing to gainsay the tree surgeon's contemporaneous, informed conclusion that T2 posed a risk of harm to people and property (and here I also note the earlier warning contained in the Leicestershire CC Report that the felling of T1 left T2 more exposed to the impact of wind than it had been previously).
43. I draw a distinction between these points and the evidence that is offered to me by the Complainant in support of an argument that T2 ought not to have been felled. In support of that argument I am referred to the 2017 Ward Cole Report. First, I note that this Report makes no assessment of the condition of T1 and T2. Secondly, it is not, as far as I am aware, a report by an arboriculturalist or otherwise experienced tree surgeon. Ward Cole is a firm of consulting structural engineers. Thirdly, it is substantially out of date (inspection of the site was carried out in September 2017) and therefore takes no account of any changes of the impact of the trees on the wall or deterioration of the condition of the trees themselves. Fourthly, although the Ward Cole Report draws an adverse conclusion from a structural engineer's perspective as to the likely effects in 2017 of severe pruning or cutting down T1 and/or T2, namely swelling of the ground which might cause further damage to the south-west wall, it takes no account of the fact that the same consequences could equally well follow if either of the trees fell, for example, in a strong wind (and it made no assessment of decay or general state of health to enable that risk to be taken account of).

44. I therefore consider that the tree surgeon's contemporaneous evaluation of T2 provides a more reliable and accurate assessment than the Ward Cole Report. This leads me to conclude, drawing on the tree surgeon's assessment, that T2 was dying and/or dangerous and ought to be felled on either of those bases.
45. Further, or alternatively, the evidence provides a sound basis for me to conclude that, under the wider scheme of considerations permitted to the Chancellor in the case of works to trees falling outside List B, the trees ought to be felled even if not dying or dangerous within the meaning of List B and the CBC Guidance.
46. In reaching this alternative conclusion I note that the Ward Cole Report and the Leicestershire CC Report (properly acknowledging the caveats and limitations of each) provide clear indications that "...the roots of the trees are likely to have had an adverse effect on the wall to the south..." (Ward Cole Report in 2017) and "...There is reasonable concern regarding the adjacent boundary wall and possible damage caused by the trees...It is quite plausible that there will be acting against the structure of the wall – the wall is in reasonably close to the trees and is within the anticipated root zone for trees of this age, size and species...it is reasonable to assume that the trees will be having an influence on the built structure and surrounding soils..." (Leicestershire CC Report in 2020).
47. I note that the Ward Cole Report concludes that despite the adverse effects the subsoil was likely to have reached equilibrium and would be disturbed by felling or severe pruning. I also take account of the fact that the Leicestershire CC Report explicitly noted the limitations of its scope of assessment in respect of damage to the wall. Nonetheless it is telling that both Reports saw fit to confirm the likelihood that the trees had had a negative effect on the structure of the wall. The Leicestershire CC Report noted that by 2020 "*The wall had partially collapsed prior to the tree inspection*". It seems to me that there is a clear indication from both Reports that, on the balance of probabilities, the trees were causing or had already caused significant (i.e. to the point of the partial collapse of the structure) damage to the wall. Further I note that the Leicestershire CC Report confirms that removal (in the context of T1 in that Report) would "...reduce strain upon the wall and facilitate or ease rebuilding of the wall."
48. I conclude from the matters above that, by logical extension of the Leicestershire CC Report conclusions as to removal of T1, removal of T2 is likely to have further reduced strain upon

the wall and would facilitate any future repair or replacement works that might be considered. This is an additional reason in favour of felling T2 which falls outside the List B permitted considerations but is, in my view, a matter I should take into account in reaching my conclusions as to the issue of a faculty.

49. The risk of potential ground swelling (which is cited in the Ward Cole Report as the reason not to remove the trees as a solution to the wall damage) as the soil rehydrates following removal is, in my judgment, outweighed by the risk of danger by leaving an unsafe tree in situ. Amelioration of the impact of any ground swelling on existing and future structures in the affected area will be important and I will include consideration of this in the conditions to the propose grant of faculty below.

Conclusion

50. This case involves a procedural error in the grant of a List B consent in respect of T2 only in June 2020. This has had no detrimental impact in practical terms because at the point at which T2 was felled pursuant to the incorrectly issued 2020 List B consent, the circumstances which existed would have justified the grant of such consent in any event. Moreover (and to the extent that there is any error in my conclusion that a List B consent to felling T2 would have been appropriate based on the information available by February 2022), the procedural error is capable of being regularised by faculty granting retrospective permission for the works which were justified for the reasons I have set out above.
51. In terms of the formal parts of the faculty which I propose to grant, the works having already been carried out it will be unnecessary to set any time for completion of the works. In my judgment it will, however, be appropriate in this case to make the grant conditional upon the following:
- 51.1. Any necessary updates to the logbook should be carried out to reflect the works that have taken place;
- 51.2. An arboriculturalist or experienced tree surgeon should review the remains of T1 and T2 and, within 4 weeks of [*the date of the communication of this determination*], provide written recommendations (which may be in the form of an email) to the PCC and the Diocesan Environmental Advisor of the DAC (alternatively

any appropriately composed environmental sub-committee of the DAC) for the treatment of the stumps and remains, including (but not limited to) consideration of (i) whether stump grinding/extraction/removal is recommended; (ii) the environmental impact of any recommended steps; (iii) whether re-planting of any tree(s) to replace T1 and T2 is recommended and if so with which species and in which locations, together with any other relevant considerations;

51.3. A report by the church's inspecting architect (or, if so advised by the inspecting architect, a structural engineer) should be produced within 3 months of receipt of the written recommendations at (2) above. The report should review structures in all areas of the churchyard likely to be, or have been, affected by T1 and/or T2 and their felling (including but not limited to the south-west wall and the memorials in the south west corner of the churchyard) and, taking account of the recommendations provided pursuant to (1) above together with any comment provided to the PCC and structural engineer by the Diocesan Advisor in respect of them, should provide to the PCC recommendations for the amelioration and/or prevention and/or reversal of the effects of any ground swelling caused, or likely to be caused, by the felling of T1 and T2.

52. Any further works deemed necessary following receipt of the recommendations and reports referred to above may then be considered by the PCC and dealt with by separate faculty or appropriate alternative consent.

53. There will be no order as to costs.

Lyndsey de Mestre QC

Chancellor of the Diocese of Leicester

6 May 2022

ADDENDUM

1. The Registry has received, within time, a 9 page letter dated 15 May 2022 from Mrs Spalton pursuant to the directions contained in paragraph 40 above (allowing the notified parties 7 days to make any submissions on the outcome and proposed conditions I have set out above). No other submissions have been received.
2. I have taken into account all of the matters raised in Mrs Spalton's letter. The vast majority of the points she raises are directed at the process by which the original consent was given by the Archdeacon. The majority of those points are matters which are the subject of a separate complaint against the Archdeacon.
3. I am grateful to Mrs Spalton for the provision of some factual corrections. I have paid careful attention to all that she has raised and in particular note that paragraph 1 of my determination should refer to "south east and south west", rather than simply "south west". For the avoidance of doubt, this does not affect my conclusion as to the adverse effects the trees have had on the boundary wall and the likely reduction of strain on the wall by their felling, per paragraphs 46 to 48 of the determination.
4. Mrs Spalton has provided further detail, too, explaining that it was in fact a Tom Odom of George Walker (Tree Care) Ltd who felled T1 and inspected and pollarded T2 in 2021, rather than Stockley Park Tree Services. She states that comments made by Mr Shields³ in his email dated 11 March 2022 relate to observations made by the subsequently employed sub-contractor, Stockley Park Tree Services, at the date of felling, rather than comments made at the earlier stage of pollarding T2. This requires modification in particular to paragraphs 37 and 42 of my determination to reflect the fact that there were grounds for felling but it appears that those would not have been known to the Archdeacon prior to the date of felling on 10 February 2022, as the matters I have been referred to are statements by arborists on site at the time of felling, rather than any made by those conducting the earlier exercise of pollarding of T2. For the avoidance of doubt, this is evidence of a further

³ A member of the PCC rather than a church warden.

error of procedure but does not affect the conclusion that at the date of felling of T2 there were grounds which would have been sufficient for the Archdeacon to conclude that felling was appropriate and that the end result is one which could permissibly have been reached without a faculty.

5. I have taken Mrs Spalton's letter into account in the ways in which I have set out. However, nothing in it causes me to depart from the conclusions set out in my determination. Furthermore, I am not concerned with any aspect of complaint against the Archdeacon or, in this case, any other, wider, issues referred to by Mrs Spalton relating to governance or maintenance of the church. The only question I am concerned with is the question of whether or not a faculty was required for the tree felling which took place. I have concluded (above) that it was in respect of T2.
6. As regards the reports I have ordered by way of conditions to the faculty granted with retrospective effect, I have considered Mrs Spalton's submissions on the detail of those. Taking her points into consideration I consider it appropriate to modify the condition set at paragraph 51.2 by deletion of reference to "or experienced tree surgeon" and the inclusion of a requirement that the arboriculturalist should be informed as to any applications of herbicide that have been made to the stumps of T1 and/or T2 since their felling.
7. Furthermore, I am satisfied that as a person with an interest in the matters covered by the conditions, Mrs Spalton should be provided with copies of the reports which are produced. I will include a direction that copies of those shall be provided to Mrs Spalton within 7 days of their receipt⁴. I would like to make absolutely clear that in doing so I do not intend to invite continued debate or encourage any further costly, time-consuming and potentially divisive action. Rather, I hope and expect that all concerned will move forwards in a spirit of cooperation in dealing with any recommendations made in the reports I have ordered.

Lyndsey de Mestre QC

25 May 2022

⁴ I will provide a copy of finalised wording of the conditions to the Registry under separate cover. I will also slightly extend the period of the arboriculturalist's report to 8 weeks rather than 4 in order to allow for pre-existing diary commitments.