

In the Consistory Court of the Diocese of Winchester

In the Parish of Bitterne

Re: The Holy Saviour

JUDGMENT

MR BRIAN GAFFNEY
REVD TONY PALMER
MR GARETH WOOD

Petitioners

-and-

(1) MR MERVYN HODKINSON
(2) MR PAUL HODKINSON
(3) MRS SUSAN HODKINSON
(4) MR THOMAS HODKINSON

Parties Opponent

1. The church of The Holy Saviour is an attractive Grade II listed building in the Victorian Gothic style, which sits on a large, not to say sprawling, site close to the centre of Bitterne. Bitterne is an ancient village which has now been incorporated into the urban area of Southampton. I have been very much assisted by a site visit on 31 July 2019, when I was shown round by representatives of the Petitioners and by the first and second Parties Opponent. Subsequently, all parties have confirmed in writing that they are happy to have the matter determined on the papers and in accordance with my order of 13 August 2019 I intend to deal with it in that way.
2. The Petitioners seek permission for a range of proposals intended, broadly, to re-order the church for the needs of present day worship and mission and to rationalise the ancillary accommodation available on the site. The petition of 7 May 2019 contains a very full schedule of works, which I would summarise as follows:
 - a. The construction of a double height extension and first floor in the church room, together with a new entrance to the west;
 - b. The insertion of a mezzanine floor at the rear of the church, containing two 'pod' rooms, storage space, and linking through to the new first floor in the church room;

- c. The construction of a curving timber framed glazed screen separating the mezzanine and area under from the main body of the church;
 - d. The removal of most of the existing furniture,¹ including the pews, and the introduction of chairs;
 - e. The laying of a new wooden floor in the main ‘worship space’;
 - f. The relocation of plaques showing the 10 commandments, Lord’s prayer and creed on the west end wall;
 - g. The relocation of the font into the north porch;
 - h. The introduction of new glazed doors;
 - i. The provision of new heating, lighting and audio-visual equipment;
 - j. The widening and resurfacing of the entrance path to the north, including the provision of lighting.
3. The four Parties Opponent maintain a vigorous objection to the scheme in general and various specific elements of it. I also have a written objection before me from the Victorian Society. On 7 May 2019, the DAC recommended approval subject to conditions requiring the submission and approval of detailed designs. Planning permission was granted for the extension to the church room by Southampton City Council on 22 March 2019.
4. In this judgment I first deal with some procedural and other objections raised by the Parties Opponent before assessing the proposals against the *Duffield* questions.² Finally, I consider the impact of the proposals on remains currently buried in the churchyard.

PROCEDURAL OBJECTIONS

5. The Parties Opponent have between them raised the following procedural objections:
- a. Only one of the Petitioners signed the Form 6 and attended the site visit.³
 - b. Tony Palmer has not yet taken up his appointment, and so cannot be a Petitioner.⁴
 - c. Notice has not been displayed correctly; it was posted in one location too high up and in another behind bars which obscure it from view.⁵
 - d. The certificate of publication of the public notice states the notice was displayed between 21 May 2019 and 20 June 2019, but was signed on 21 May 2019.⁶
 - e. The Petitioners reply was received one day late.⁷

¹ The following items are proposed to be retained: Main communion table, brass lectern, book of remembrance, two sedilia seats, two credence tables, two wooden lecterns, top half of pulpit.

² *In re Alkmund, Duffield* [2013] Fam 158, as further explained in *In re John the Baptist, Penshurst* (2015).

³ Mr Mervyn Hodkinson, 23 August 2019.

⁴ Mr Mervyn Hodkinson, 13 June 2019; Mr P and Mrs S Hodkinson 13 June 2019.

⁵ Mr Mervyn Hodkinson, 13 June 2019; Mr P and Mrs S Hodkinson 13 June 2019.

⁶ Mr P and Mrs S Hodkinson, 13 June 2019.

⁷ Mr Mervyn Hodkinson, 24 July 2019.

- f. There are restrictions on the use of land proposed to be sold for development, and on the number of seats that must be provided in the church.⁸
6. I do not think that any of these complaints have merit, and some are trivial in the extreme:
 - a. Mr Gaffney is authorised to sign on behalf of all three Petitioners, and there was no obligation on them all to attend the site visit. More broadly, it is clear that the proposals are not simply Mr Gaffney's project (if that is the implication) given the extensive engagement of the congregation and PCC that is demonstrated by the Petitioners documents.
 - b. Rev Tony Palmer was announced as the new Priest in Charge of Holy Saviour on 28 March 2019. The petition is dated 7 May 2019. He clearly had "a sufficient interest in the matter" to be a Petitioner per rule 5.2(2)(d) of the Faculty Jurisdiction Rules 2015 ("the Rules").
 - c. Public notice must be displayed "so that it can be read by the public" (see the Rules, rule 6.3(2)(e)). It seems to me that the notice was so displayed. If I am wrong about that, and some or all members of the public would have found it difficult to read the notice, I would have been prepared to waive the requirement for public notice to the extent that it was necessary to do so. There has been an extensive history of consultation (including a previous petition, of which public notice was given), a concurrent application for planning permission and a website notice. It seems to me that anyone who might have wanted to comment will have been well able to do so.
 - d. The copy of the certificate of publication has been re-signed by Mr Gaffney on 24 June 2019. I note that the Parties Opponent do not claim that the notice was not in fact displayed for the requisite amount of time.
 - e. The Registry has explained that the Petitioners' reply was not in fact received one day late; the appearance that it was is the result of an administrative error only. In any event, I would have granted permission for it to be received one day late had it been necessary to do so.
 - f. The financial link with redevelopment of the wider site cannot be disputed.⁹ However, proposals for redevelopment of other parts of the site are not before me and it is not for me to determine how feasible they are. As to the claimed obligation in relation to the seats, the only evidence I have of that is a reference on a plaque said to be displayed in the church. I am not persuaded that this has any relevance to the acceptability of the proposals.
7. Having dismissed the various procedural objections made by the Parties Opponent I now turn to consider the *Duffield* questions, which it seems to me form the heart of the case.

⁸ Mr Mervyn Hodkinson, 23 August 2019 and 3 September 2019.

⁹ The Design and Access Statement for the planning application describes the wider scheme of redevelopment as "intrinsically linked" with the proposed extension of the church room in its opening paragraph.

THE *DUFFIELD* QUESTIONS

What is the special architectural and/or historic interest of the listed church?

8. I have fully in mind that the church, as a Grade II listed building, is of national significance. Having considered the helpful statement of significance submitted by the Petitioners, together with comments from the Victorian Society and Church Buildings Council¹⁰, it seems to me that the significance of the church can be characterised as follows.

9. A large part of the architectural and historic interest of the building relates to the exterior. The octagonal spire is a local landmark, and the clock is recognised as a public clock by English Heritage. The overall effect of the exterior is pleasing and sitting as it does within a large and well tree'd churchyard it provides one of the few remaining visible links to the days when Bitterne was a small rural settlement. The church room, which was added in the 1990s, seems to me to detract from this significance. It relates poorly to the church and the form of its very unusual roof jars with the traditional form of the church building.

10. The form of the interior contributes to the architectural and historic interest of the church. The furnishings are generally appropriate, and some items have a degree of intrinsic architectural/artistic merit. This cannot be said for the pews, which in my view are unexceptional and of no particular merit. Furthermore I am told that the church has been frequently re-ordered¹¹ so they the furnishings as a whole do not have any added interest on account of being an intact survival of the original arrangements. Nevertheless, the overall effect has a degree of coherence and integrity in the context of the Victorian Gothic style of the building,¹² adding moderately to the overall interest of the building.

Would the proposals result in harm to the significance of the church, and if so how serious would it be?

11. Starting with the exterior of the church, it seems to me that the proposals would overall have a beneficial impact. The existing and (in my view) inappropriate church room would be replaced with a structure much more in keeping with the listed building itself. Notably, the roof form would mirror that of the church. The construction of the extension would entail the loss of one small yew tree, but the larger and more significant oak tree could be retained.¹³ To the north, widening the access will lead to the removal of two hedges, two small trees and a portion of the existing wall and ironwork. The vegetation can be re-planted and I find that no loss

¹⁰ These relate to a previous petition but have been referred to by the Petitioners in support of the current application.

¹¹ Statement of Need p10; CBC 15 March 2018.

¹² As noted by the Victorian Society, 8 June 2018

¹³ An outcome carefully assessed by the local planning authority and now accepted by most of the Parties Opponent: P, S and T Hodkinson, 27 August 2019.

of significance, or damage to the setting, of the listed building will accrue from the other removals.

12. The changes to the interior are more marked. The introduction of the glazed screen and mezzanine floor would make a dramatic change at the western end of the church, which would also change how the whole is experienced. Furthermore, the changes to the fixtures, flooring and doors constitute a fairly radical departure from the current position.
13. I am not concerned simply to identify changes to the building, however great they may be. I have to consider the impact of those changes on significance. The changes would detract from the contribution the interior currently makes to the overall significance of the building by virtue of its coherence and integrity. This harm would arise from a combination of (1) the introduction of the mezzanine and associated screen, which changes the overall form of the interior (2) the removal of most if not all of the furniture, particularly the pews and (3) the changes to the floor covering. Mr Thomas Hodkinson complains that if “the pews are removed and wooden flooring placed over the stone floor the church will look and feel like a concert hall”.¹⁴ I am inclined to agree with him.
14. I do not find anything particularly harmful in the form of the new mezzanine and glazed/wooden screen. The Victorian Society complain that it fails to “pay any regard to the inherently orthogonal configuration and layout of the historic structure”.¹⁵ The Petitioners, in their reply, point out that it has “an overtly modern design”, and that it has specifically been given a curved rather than orthogonal footprint for just that reason. I commend the Petitioners for their integrity and boldness in not seeking to disguise the modernity of the screen and mezzanine. They clearly are modern insertions into the historic buildings (albeit reversible ones) and I do not think there would be any merit in trying to hide that fact.
15. Similarly, I do not find anything harmful in the introduction of glazed doors (and fears that such doors may be vandalised seem to me to be somewhat speculative). In fact, they would enable a greater appreciation of the significance of the building by the public by opening up views of the interior. The contribution of the original north door will not be lost as it will be retained in situ. The font will remain in the church, in my judgment, will be appropriately and reverently positioned, and will be kept in a suitable environment. I do not find any harm to the listed building here, nor any contravention of the canons.
16. Overall, therefore, I find a minor benefit as far as the exterior is concerned, where the majority of the architectural and historic interest is to be found, in my view. I have

¹⁴ 13 June 2019.

¹⁵ Victorian Society, 28 June 2019.

also found a degree of harm to the interior, which would not reach the threshold of ‘serious’ harm referred to in *Duffield*. I go on to consider whether the harm is justified.

How clear and convincing is the justification and does it outweigh the harm?

17. The justification for the proposals, it seems to me, is essentially threefold:
 - a. First, to fit the church building for the needs of modern, flexible worship;
 - b. Second, to provide for increased missional use of the church building, making it the central focus of the site;
 - c. Third, to rationalise the accommodation on the overall site.
18. Each of these three aims is supported by the Petitioners’ Statement of Needs and other supporting documents. The different strands are also intertwined. For example, consolidating activities in the church building itself will draw more attention to the link between the missional activities carried out on the site and the church. And expanding the missional use of the church offers an obvious opportunity to avoid the current duplication of facilities across two buildings. For these reasons I do not think that refurbishment of the church hall, or use of the nearby URC halls, is a credible alternative to the proposals before me.
19. In order, then, to meet these three interlinked objectives, it is necessary to provide extra space in the church. The Victorian Society have queried the introduction of a mezzanine level, and point out that the ancillary accommodation could be located in a larger extension. The difficulty with that suggestion is that the site of the church is heavily constrained with graves and trees such that a larger extension would not be feasible. Furthermore, it might well begin to detract from the significance of the exterior, which I have found to be the main contributor to the significance of the whole. The insertion of the mezzanine level is therefore necessary to secure the aims described above.
20. The justification provided, then, supports the proposals taken as a whole. The question, which I must now answer, is whether it provides sufficient support for them in the context of the harm I identified above.
21. I find that the proposals for external changes (under which heading I include the new glass doors) are easily justified by the Petitioners. As I have found that those elements do not cause harm to the significance of the listed building, but in fact a minor benefit, the test to be applied is the normal ‘presumption in favour of things as they stand’. That test is met here – subject to the consideration of issues relating to buried remains, which I consider further below.
22. In respect of the internal elements, I find the balancing exercise more difficult. In summary I find that the justification *almost* outweighs the harm. I can break this finding down as follows. The mezzanine and screen are so directly necessary to all

the elements of the project that I find they are justified. Furthermore, the removal of the pews and other furnishings is necessary to provide for a more flexible approach to worship, and as I stated above the furnishings do not make a large contribution to the special interest of the building. Provided they are replaced by high quality, timber chairs I find the removal of the pews and other furnishings justified.

23. Where I find more difficulty is with the proposed wooden floor in the nave and aisles. Together with the removal of the pews, this change will be responsible in large part for the change in the character of the interior from something that is coherent with its overall Victorian Gothic style to something more resembling a “concert hall”, as Mr Thomas Hodgkinson puts it. I am attracted by the Victorian Society’s suggestion¹⁶ that the historic paved stone floor should be “preserved and left uncovered” with the pew plinths replaced with a good quality hard floor – preferably, I would add, in stone. Given the number of new spaces in the church and church room (which I gather will be carpeted) I do not think that having a stone floor in the main worship space will present an insuperable obstacle to flexible, missional use. However, it will help to retain a greater sense of the historic character of the listed building. On this, revised, basis I am content that the justification will outweigh the less than serious harm I have identified.
24. Finally, I should say a word about other items of furniture. I agree with the Victorian Society that the poppy headed stalls ought to be retained in the church, and will impose a condition to that effect. I understand a number of the items proposed for removal have been given ‘in memoriam’. I do not think that in itself is a reason to retain them, if they have ceased to be useful. Nevertheless, I appreciate the evident pastoral sensitivity the Petitioners have shown to the relatives of those commemorated in this way, and the efforts they have made to accommodate the reasonable requests of those relatives. I expect them to continue that process, and they are obviously at liberty to retain any items which are authorised for removal by faculty. I will also impose a condition to the effect that before any such items are disposed of they should be offered to the relatives of those commemorated.

BURIED REMAINS

25. The Parties Opponent have raised a number of issues which relate to remains buried in the churchyard, both in the vicinity of the extension and more broadly. There was a concern at one stage that the grave of the late Mr John Hodgkinson (the great, great grandfather of the First and Second Parties Opponent, and great, great, great grandfather of the Fourth Party Opponent), which lies beneath the existing church room, would be disturbed by the works.¹⁷ However, the Petitioners have subsequently clarified in their reply that (despite some contradictory statements in the

¹⁶ 8 June 2018 – these comments related to the previous application but have been reiterated in the context of the current one.

¹⁷ Mervyn Hodgkinson, 13 June 2019; P and S Hodgkinson, 13 June 2019; Thomas Hodgkinson 13 June 2019.

supporting materials) the existing building will be demolished and the foundations will be left untouched. I am satisfied by this explanation.

26. Similarly, the Parties Opponent raise a concern about the effect of scaffolding on Mr John Hodkinson's grave and upon a site for the internment of ashes.¹⁸ The Petitioners assure me that the scaffolding will be sensitively designed and required not to impact on graves.¹⁹ I will make this a condition of the faculty.
27. The Petitioners acknowledge that the construction of the extension to the church room will result in the need to move four gravestones. This is perhaps the one aspect of the faculty application which has not attracted any objection, and I do not see any harm in it given the age of the memorials in question.
28. Of more sensitivity is the proposal to move various sets of buried remains. The first task is to identify exactly what is proposed, which is difficult. The Petitioners have obtained a ground penetrating survey of the area to the south of the current church room, and claim that there are five possible/probably burials there. The remains are proposed to be moved further under the extension so that they can remain in the same area. Furthermore, the remains of Ann and Charles Duffin, located just by the south east corner of the existing church room, may need to be moved slightly to accommodate the footings of the new building.
29. The Parties Opponent claim that construction of the extension will disturb up to 100 graves over 100 years old.²⁰ I do not know what the exact source of this claim is (the Hampshire Records Office is mentioned) but it sounds extraordinary and quite at odds with the results of the ground penetrating survey. They also claim that there are graves in an area between extension and church which is to be built on.²¹ This area was not subject to a ground penetrating survey so I work on the basis that there may well be burials in that area.
30. The next question, having ascertained the number of burials affected or potentially affected, is to assess whether the proposal is justified and acceptable. The presumption, where Christian burial is concerned, is one of permanence, as Mr Mervyn Hodkinson has observed, requiring exceptional circumstances to justify exhumation.
31. A number of burials may be affected by the proposals. However, the level of disturbance to those burials is limited. The remains will be repositioned only slightly.

¹⁸ Mervyn Hodkinson, 13 June 2019.

¹⁹ Petitioners' Reply to M Hodkinson.

²⁰ Mervyn Hodkinson, 13 June 2019.

²¹ Mervyn Hodkinson, 21 July 2019, and pointed out on site visit.

They appear to be of some antiquity. There are no memorials recording the majority of the graves and no living relatives have objected to the proposals.

32. Given the slight degree to which the remains will be moved, I am not convinced that the permanence of those burials can realistically be said to have been disturbed – any more than it is by the re-use of an area of a churchyard for burials which has already been used in that way once before. However, to the extent that the presumption of permanence is engaged and has to be displaced I am also satisfied that sufficiently exceptional circumstances exist in this case to do so. The extension to the church room is small and fully justified by threefold justification identified at paragraph 17 above. Although *some* of those aims could be met by refurbishment of the church hall, as Mr Mervyn Hodkinson points out, all could not be. I am therefore content to permit any disturbance to human remains required to carry out the proposals.
33. Looking to the effect on the churchyard more widely, there is concern about access to graves during construction being prevented by tree protection fencing.²² The Petitioners have confirmed that gates will be provided to allow such access.²³ The notices referred to by Mr Mervyn Hodkinson²⁴ relate to construction activities and do not prohibit access to visit a grave.
34. Finally, the contractors' compound is to be sited in a location which contains graves.²⁵ The Petitioners claim that the same area is used for the storage of churchyard maintenance machinery. That seems to me to be somewhat disingenuous, as the plans with the petition make clear that a larger area is to be used, including an area with burials beneath. Nevertheless, there are no memorials and no objections from any relatives, and a contractors' compound is required somewhere if the proposals are to go ahead at all. As such, this temporary use of a small part of the churchyard seems to me to be justified.
35. I am therefore prepared to grant a faculty, subject to various conditions which I set out below. I allowed the parties to have sight of this judgment in draft and invited any applications for costs orders. None have been received. The parties will therefore pay their own costs and the court costs will be borne by the Petitioners.

CONDITIONS

36. Concerns have been raised about the use of an access route for construction traffic around the north and west side of the church.²⁶ The Petitioners have confirmed that

²² Mervyn Hodkinson, 13 June 2019.

²³ Petitioners Reply to P and S Hodkinson.

²⁴ 23 August 2019.

²⁵ Mervyn Hodkinson, 13 June 2019.

²⁶ Mervyn Hodkinson, 13 June 2019.

access will not be allowed by this route.²⁷ The construction method statement should be prepared in the light of this acknowledgment.

37. The following conditions will be attached to the faculty:
- a. Works shall not commence until the Petitioners have submitted a statement to the court confirming the total estimated cost of the works.
 - b. Before works to the interior of the church commence, a detailed design shall be submitted to the court for approval, in consultation with the DAC, Victorian Society and Parties Opponent. The details shall include specifications of the materials and furnishings to be used. The proposals shall then be carried out in accordance with the approved details.
 - c. Notwithstanding the indication on the approved plans, the nave and aisles shall not be provided with a new wood floor; the existing stone floor shall be left exposed. The treatment of the areas currently occupied by pew platforms shall be approved as part of the detailed design.
 - d. Notwithstanding any indications on documents submitted with the Petition, the poppy headed stalls shall be retained in the church. The location of these retained stalls shall be approved as part of the detailed design.
 - e. Before works commence, a construction method statement shall be agreed with the DAC, or, in default of agreement, submitted to the court for approval. The construction method statement shall include details of proposed scaffold construction demonstrating sensitivity to graves and memorials and shall also include details of how access to graves is to be maintained during construction.
 - f. Any items which have been given to the church in memory of a deceased person shall be offered to the relatives of the deceased before they are disposed of.
 - g. Any human remains uncovered are to be reburied carefully and reverently as close as possible to the place they are discovered and in any event within the footprint of the development.
 - h. The Petitioners shall plant a tree in the churchyard to replace the one felled on construction of the extension. The species and location of the new tree shall be agreed with the DAC, or, in default of agreement, submitted to the court for approval.
 - i. The hedges and trees removed in widening the access shall be replanted on either side of the new access. The species used shall be agreed with the DAC, or, in default of agreement, submitted to the court for approval.

Matthew Cain Ormondroyd
Chancellor

24 October 2019

²⁷ Petitioners' Reply to M Hodkinson,