Neutral Citation Number [2019] EACC 1

IN THE ARCHES COURT OF CANTERBURY

SPITALFIELDS OPEN SPACE LIMITED AND OTHERS v THE GOVERNING BODY OF CHRIST CHURCH PRIMARY SCHOOL AND OTHERS (NO 2)

BETWEEN:

(1) Spitalfields Open Space
(2) Christine Whaite

Applicants for a Restoration Order & Respondents to the Application for a Confirmatory Faculty

(3) Professor Kerry Downes
(4) Martin Lane
(5) Alan Williams
(6) Jessie Sloan

Parties opponent to the Application for a Confirmatory Faculty

Appellants

– and –

(1) The Governing Body of Christ Church Primary School
(2) The Reverend Andrew Rider, Kim Gooding, William Spiring and Richard Wasserfall
(Rector, Church Wardens and former Church Warden)
(3) The London Diocesan Board for Schools
(4) London Borough of Tower Hamlets

Applicants for a Confirmatory Faculty & Respondents to an Application for a Restoration Order

Respondents to the appeal

– and –

Jonathan Garnault Ouvry

Intervener

Hearing dates: 24, 25 November 2018

Appearances:

Robert McCracken QC and Thomas Seymour of Counsel (instructed by Richard Buxton) for the Appellants and the Intervener

Morag Ellis QC and Caroline Daly of Counsel (instructed by Winckworth Sherwood LLP) for the First, Second and Third Respondents

Morag Ellis QC and Caroline Daly of Counsel (instructed by the Head of Legal Services, London Borough of Tower Hamlets) for the Fourth Respondents

APPROVED JUDGMENT (revised)

(handed down by post, 28 January 2019)

1. This appeal concerns the future of a nursery and community building ("the Nursery"). It was constructed in 2012/13 by the First Respondent, the Governing Body of Christ Church Primary School, in association with the Third Respondent, the London Diocesan Board of Schools ("the LDBS"), with funding from the Fourth Respondent, the London Borough of Tower Hamlets ("Tower Hamlets"), in the disused, but consecrated, burial ground of Christ Church, Spitalfields, as an annex to nearby Christ Church Primary School ("the school").

2. This is the second occasion on which the present composition of this court has sat to consider this matter, the first being in 2015, when we allowed an appeal from the decision of the chancellor of the London diocese (Chancellor Nigel Seed QC) who had struck out the proceedings for a restoration order as an abuse of process, *Re Christ Church, Spitalfields Burial Ground*, 24 July 2015 unreported, (2016) 18 Ecc LJ 128 ("the abuse appeal judgment").

3. The present appeal is against the decision of the acting deputy chancellor ("the deputy") of the diocese of London (Chancellor June Rodgers), 17 December 2017 ([2017] ECC Lon 1), unreported, to whom the matter was remitted following the abuse appeal. Her judgment is remarkable for its length and comprehensiveness (523 pages and 859 paragraphs) and its outspoken criticism of the parties. All references hereafter to numbers in square-brackets are to paragraphs in her judgment. It contains an exhaustive description of the history of Christ Church, Spitalfields and its burial ground, as well as of the school and the events leading up to the erection of the Nursery.

4. She was considering (along with numerous other issues which do not arise in the present appeal) three matters:

(1) whether the First Appellant, Spitalfields Open Space Limited ("SOS"), had a sufficient interest to seek a restoration order and to oppose the grant of a confirmatory faculty;
(2) whether the court had power to grant, and if so, should grant, a confirmatory faculty in respect of the Nursery;
(3) whether the court had power to make a restoration order to demolish the Nursery, and if so, should do so.

She held:

(1) that SOS did not have a sufficient interest [808];
(2) i-n the case of both a confirmatory faculty and a restoration order the court had the necessary powers [787] and [778]; and
(3) she went on to grant a confirmatory faculty and refuse to make a restoration order [806].

The present appellants are aggrieved both by the result and the tone of the judgment.

5. In the present appeal, the following issues arise:

(1) Was the deputy wrong in respect of the insufficient interest of SOS?
(2) Was she wrong to hold that there was power to make a confirmatory faculty?

(3) If not, should her finding be changed as a result of Mr Ouvry's application to intervene?
(4) If there is no power to make a confirmatory faculty, should a restoration order now be made? and
(5) If so, on what terms should it be made?

Legislation

6. The legislation with which this appeal is primarily concerned consists of the following (in chronological order):

(1) *The Disused Burial Grounds Act 1884 ("the 1884 Act").*
Section 3 provides that:

> "It shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting house, or other place of worship."

Despite the inclusion of the words "whether consecrated or not" in the definition of "burial ground" in section 2 of the 1884 Act, the effect of the Disused Burial Grounds (Amendment) Act 1981 ("the 1981 Act") is that, subject to provisions relating to the disposal of human remains contained in section 2 of the 1981 Act, the 1884 Act is now confined to consecrated disused burial grounds, that is those of the Church of England.

(2) *The Ministry of Housing and Local Government Provisional Order Confirmation (Greater London Parks and Open Spaces Act 1967 ("the 1967 Act").*
The key provision for this litigation is Article 7(1)(vi) of the Provisional Order in the Schedule, which provides that:

> "A local authority may in any open space –
> (a) provide and maintain-
> …
> (vi) centres and other facilities (whether indoors or open air) for the use of clubs, societies or organizations whose objects or activities are wholly or mainly of a recreational, social or educational character."

Under the provisos to Article 7(1), it is provided that:

> "…
> (vi) In exercising their powers under head…(vi) of subparagraph (a) of this paragraph a local authority shall satisfy themselves that they have not unfairly restricted the space available to the public for recreation in the open air in any open space."

(3) *The Care of Churches and Ecclesiastical Jurisdiction Measure 1991 ("the 1991 Measure")*.
Section 13 provides that:

> "…
> (5) Where at any time (whether before or after faculty proceedings have been instituted) it appears to the consistory court of a diocese that a person has committed, or caused or permitted the commission of, any act in relation to a church or churchyard in the diocese or any article appertaining to a church in the diocese which was unlawful under ecclesiastical law, the court may make an order ("a restoration order") requiring that person to

take such steps as the court may consider necessary, within such time as the court may specify, for the purpose of restoring the position so far as possible to that which existed immediately before the act was committed.

(6) …a restoration order under subsection (5) above may be made on an application made by the archdeacon concerned or by any other person appearing to the court to have a sufficient interest in the matter or on its own motion.

…

(8) The Court shall not make a restoration order under subsection (5) above in respect of any act unless the court is satisfied that less than six years have elapsed since the act was committed.

…"

Section 18A (which came into force on 1 April 2015) provides:

"(1) Notwithstanding section 3 of the Disused Burial Grounds Act 1884, a court may grant a faculty permitting the erection of a building on a disused burial ground otherwise than for a purpose permitted by that section, provided that one of the conditions set out in subsection (2) below is satisfied.

(2) The conditions referred to in subsection (1) above are –

(a) that no interments have taken place in the land on which the building is to stand during the period of 50 years immediately prior to the date of the petition for the faculty;

(b) that no personal representative or relative of any person whose remains have been interred in the land during that period has objected to the grant of the faculty or that any such objection has been withdrawn.

(3) The power conferred by subsection (1) above is without prejudice to any other power which the court has to authorise the erection of buildings on burial grounds."

(4) *The Ecclesiastical Jurisdiction and Care of Churches Measure 2018 ("the 2018 Measure")*.

With effect from 1 September 2018, section 18A of the 1991 Measure has been replaced by section 64 of the 2018 Measure which provides:

"(1) The consistory court of a diocese may, in spite of section 3 of the Disused Burial Grounds Act 1884 (which prohibits the erection of a building on a disused burial ground except for the purpose of enlarging a place of worship), grant a faculty permitting the erection of a building on a disused burial ground in the diocese otherwise than for the purpose specified by that section, if either of the following conditions is satisfied.

(2) The first condition is that no interments have taken place in the land on which the building is to stand during the period of 50 years preceding the date of the petition for the faculty.

(3) The second condition is that –

(a) no personal representative or relative of a person whose remains have been interred in the land during that period has objected to the grant of the faculty, or

(b) any such objection has been withdrawn.

(4) The power conferred by this section does not affect any other power which the court has to authorise the erection of a building on a burial ground."

With effect from the same date, section 13(5) and (8) of the 1991 Measure are replaced by section 72 of the 2018 Measure, which provides:

> "…
> (4) A restoration order may be made –
> (a) on an application by the archdeacon of the archdeaconry concerned,
> (b) on an application by any other person appearing to the court to have a sufficient interest in the matter, or
> (c) on the court's own motion.
> (5) The court may make a restoration order only if it is satisfied that the proceedings for the restoration order were brought no later than six years after the relevant act was committed."

The background

7. In 1729 Nicholas Hawksmoor's Christ Church, Spitalfields, magnificent both in its exterior and interior (restoration of both being completed in 2004), was consecrated, along with its substantial churchyard, lying to the south and east of the church. In 1859 the churchyard was closed for burials by Order in Council. In 1873 school buildings were erected to the south-eastern part of the churchyard, with the benefit of a faculty granted in 1869 at a time when there were no further special controls applicable. Title to the land on which the school was erected remained with the Rector.

8. In 1949 control and management of almost all of the remaining part of the churchyard was transferred to Stepney Borough Council (predecessor to Tower Hamlets), and the eastern part was laid out as children's playground and the western part as a planted garden. In 1970-71 (at a time when demolition of Christ Church, Spitalfields was under consideration by the diocese of London and Tower Hamlets) a recreation centre for children ("the recreation centre") was constructed in the centre of the churchyard, occupying the greater part of the site now occupied by the Nursery; this construction was expressly under powers conferred on Tower Hamlets by the 1967 Act. In the mid-1990s a tennis court and multi-games area were constructed on the land between the recreation centre and the school buildings, and the recreation centre became a youth and community centre, although by 2008 this had ceased to operate and the building had become derelict.

9. In 2010 discussion began for expanding the school, involving further development in the churchyard, including preparation by Museum of London Archaeology ("MOLA") of a desk study, and the initial phase of a watching brief during February and March 2011 when excavations were carried out (somewhat prematurely) in relation to the proposed foundations and drains for the Nursery, during which some disarticulated bones were found.

10. On 5 August 2011, following a planning application by the Rector and Church Wardens, the Second Respondents, as trustees of the school, conditional planning permission was granted by Tower Hamlets for demolition of the former recreation/youth centre and erection of a new "nursery and community building". The planning application was strongly opposed by residents from within and outside

Tower Hamlets. In the officers' view, however, which was adopted by members in granting permission, "the removal of the existing youth centre and erection of the proposed building is considered to enhance the setting of the grade I listed church and the Brick Lane and Fournier Street conservation area"; and although "the proposal results in the loss of 75sqm of open space, this space is not publicly accessible and is currently in an unusable state. The landscaping and design of the building would make more efficient and effective use of site and would allow for increased public access and usability of the site".

11. The officers' report described the primary archaeological interest as being:

> "the extensive burial ground associated with Christchurch, Spitalfields, which was in use from 1729 to 1859 and is anticipated to contain c. 67,000 burials. The burial ground is considered to be of high archaeological significance due to its size and the demographics of the population buried there".

Reference was made to the proposed raft foundation for the Nursery, which was "intended to cause as little damage as possible". Because, in the officers' view, there was "still the potential for the upper part of the burial sequence to be encountered at localised areas, such as the extension of the existing foundations for the new nursery building, the school extension and where services cannot follow existing routes", an archaeological condition was attached to the planning permission. This provided that:

> "No development should take place until the applicant has secured the implementation of a programme of archaeological works in accordance with a written scheme for investigation which has been submitted to and approved by the local planning authority".

12. On 8 November 2011 the Rector and Church Wardens petitioned the chancellor for a faculty. The petition was (as is now common ground) misleading in two respects. First, in answer to the question "Is the land in question consecrated?", the box marked "No" was ticked. This seems to have been an honest mistake, although with a minimum of enquiry and/or research the true position could have been established. Second, in answer to the question "Will graves, reserved grave spaces, monuments or inscriptions be interfered with?", the box marked "No" was again ticked.

13. Given that the officers' report had expressly referred to the potential for such disturbance, that the need for MOLA involvement had been recognised on that account, that some disarticulated bones had already been found, and that, as a later MOLA report (2015) expressly acknowledged, "disarticulated human bone [is] always present in the topsoil over disused burial grounds", this second misleading answer was, to say the least, reckless. In his first witness statement the Rector stated that:

> "The PCC was very aware that the Churchyard contains a vast number of human remains and although using the existing footprint means that the new building could use the existing concrete slab it was always likely that some remains might be uncovered during construction works",

so that unless the answer was not intended, it appears to have been deliberately misleading.

14. As the deputy said [346], "much of the subsequent trench warfare between the Parties in this case arose from the careless way in which the 2011 Faculty was

presented". In opening the appeal, Mr McCracken requested that, whatever else the court were to conclude, it should make clear the duty of candour lying on petitioners. It is not necessary for us to do so, since the position in law as at November 2011, was that "the works or other proposals shall be fully and accurately stated in the petition" (rule 4(1)(a) of the Faculty Jurisdiction Rules 2000 (S.I. 2000 No.2047) ("the FJR 2000")), which these proposals were not; and the standard petition form used in this case concluded "The statement in this petition, and the answers to the questions above are true to the best of the knowledge and belief of each one of us", immediately underneath which the Rector and Churchwardens each signed their names. (Whilst the wording of rule 5.4(1) of the Faculty Jurisdiction Rules 2015 S.I. 2015 No.1568 ("the FJR 2015")) is slightly different, confining the "works or proposals" to those in the schedule to the petition, a statement of the truth of "the facts stated in the petition" is still required in Form 3A in Schedule 3).

15. The only objection to the grant of a faculty came from Mrs Whaite (now the Second Appellant) on behalf of the Friends of Christ Church Spitalfields ("FCCS"), in a letter drafted with the assistance of FCCS's solicitors Herbert Smith. Nobody chose to become a party opponent, although Mrs Whaite's letter (and the petitioners' response to it) had to be taken into account by the chancellor in reaching his decision on the petition, under rule 16(6) of the FJR 2000. The recital to the faculty states that this had taken place.

16. On 17 February 2012 the chancellor issued a faculty for dismantling of the existing buildings and development of a "school and community building". A condition required that the works be carried out in accordance with the terms of the planning consent (including, therefore, the archaeological condition imposed by Tower Hamlets). The chancellor's reasons for granting the faculty included his view that:

> "the Consistory Court deals with the ecclesiastical aspect and the local planning authority deals with the neighbourhood/amenity aspect.…The objection is mainly based on "neighbourhood/amenity" grounds and effectively requests me to overrule the planning decision of the London Borough of Tower Hamlets. There are no ecclesiastical reasons for refusing this Faculty and the neighbourhood considerations have been fully examined by the Borough who has granted planning permission. It would be wrong in principle and perverse in the circumstances if I were not to grant a Faculty in this case".

17. Thus far no one (including petitioner and solicitors, Tower Hamlets, DAC, objectors, chancellor and registrar) appears to have appreciated the potential significance of the Disused Burial Grounds Act 1884 ("the 1884 Act").

18. By May 2012 the Rector and PCC had devised a burial policy to be followed if human remains were found. In July 2012 demolition of the recreation centre began, together with ground works. Almost immediately some 17 brick burial vaults were revealed, none of which were fully intact as a result of previous disturbance. Additionally, quantities of disarticulated human bone were found as trenches were dug, as well as a small, corroded lead coffin, with a large hole in the underside, the coffin plate on which indicated that it contained the remains of Philip Ouvry, who died aged fifteen days and was buried on 10 September 1767.

19. On 13 August 2012 (and without any prior notification to the diocesan registry or any search for descendants of the child) the human bones recovered from the first phase of the watching brief and some from the second phase, together with the Ouvry coffin, were placed into one of the brick burial vaults, on the periphery of the slab, and an appropriate service was performed by the Rector. Regrettably, and for unexplained reasons, the Rector's first witness statement, whilst referring to the PCC policy, made no mention of the Ouvry matter, and erroneously stated that "in fact, only disarticulated body parts were found".

20. The construction of the Nursery (including additions to the existing slab) began on 7 October 2012, and was completed in October 2013. According to a Tower Hamlets officers' report of 3 July 2013, funding was provided by Tower Hamlets in the sum of £1.477m (including £300,000 from section 106 monies).

21. Meanwhile those opposed to the development had at last appreciated that the Churchyard was consecrated, and identified the 1884 Act which appeared to prohibit the erection of the Nursery in this churchyard. In a letter of 14 September 2012, sent (shortly before the main building works commenced) to the chancellor, the registrar and to the Interim Chief Executive of Tower Hamlets (and copied to the First, Second and Third Respondents, along with others), Mrs Whaite and her co-signatories raised for the first time that the burial ground had not been deconsecrated, and that it was "unlawful to erect any building on a disused burial ground, in accordance with section 3 of the 1884 Act, unless expressly authorized to do so by statute". The letter went on to doubt whether the proposed Nursery would fall within the exemption provided by the 1967 Act. "If the proposed building is not exempt then its construction on the disused burial ground will be unlawful". The letter concluded by requesting the immediate cessation of current activities.

22. No reply having been received to the letter of 14 September 2012, its message was reinforced by a letter of 15 October 2012, sent as before to the Interim Chief Executive and the chancellor, by Richard Buxton, solicitors, instructed by Mrs Whaite and "other concerned local residents". This sought an "immediate and full response" to the points raised in the 14 September 2012 letter, and re-iterated concern about the erection of a building on a disused burial ground without statutory authorisation.

23. Only an interim letter of response was received from Tower Hamlets, until its letter of 7 March 2013, which almost conceded that the land was consecrated, but argued that "the Disused Burial Grounds Act 1884 and 1981…do not apply to consecrated land" (which was plainly wrong), and denied that Tower Hamlets was carrying out development (which was strictly true, because they were not signatories to the building contract, although the development was financed by them).

24. This provoked a reply from Mr Buxton dated 11 March 2013, stating that it was incorrect to refer to the 1884 and 1981 Acts collectively, and that the 1884 Act prohibition on erections "does apply to consecrated land." This letter was followed almost immediately by the dispatch of a pre-action protocol letter (dated 8 March 2013, but seemingly sent a few days later) from Mr Buxton, now acting on behalf of SOS, to Tower Hamlets and the First Respondent, and copied to the Second and

Third Respondents, the chancellor and others. It enclosed draft Particulars of Claim. Amongst aspects of unlawfulness complained of was:

> "Erection of the building on a disused burial ground which is consecrated is prohibited by s.3 of the 1884 Act and constitutes an indictable offence enforceable by the Common Council of London. The building does not fall within the exception to s.3" and "a faculty cannot authorise breaches of statute…Accordingly the faculty issued on 17 February 2012 was inoperative to authorise the development or the appropriation of the land to use by the School."

The school was reminded that "if it continues to carry out works on the Site, these are entirely at its own risk."

25. Only at this point did Tower Hamlets seek expert legal advice, meeting with Leading Counsel on 12 April 2013, but not receiving his advice for several months, as further information was gathered for him. Tower Hamlets eventually replied to the pre-action protocol letter on 19 July 2013, in a letter drafted by counsel. This stated that:

> "if and to the extent that the Council has permitted the erection of the New Building on a disused burial ground, the Council was authorised to do so by Article 7 of [the 1967 Act]", because "the New Building is a facility for the use of an organisation whose object or activities are of a recreational, social or educational character, namely a school nursery and community building."

26. However, the officers' report which approved the sending of this letter accepted that "no decision has been recorded formally setting out the Council's consideration and exercise of the powers under the 1967 Order", prior to the decision of 18 July 2013 by the officers to license the school governors to maintain the facility under Article 8(1) of the 1967 Act. This decision was immediately challenged by Mr Buxton. In summary, he wrote that:

> "the provision of subsidiary and limited community facilities cannot alter or disguise the fact that the predominant purpose of the new building is for occupation and use by the School which had it erected",

and that:

> "the breach of s.3 DGBA and criminal offence were committed by the School Governors and their contractors knowingly assisted by LBTH and the Rector. There is no legal basis in which, after the event, LBTH has power to make lawful the unlawful act involved in erecting the building."

27. Mr Buxton attempted unsuccessfully to get the Attorney General to intervene, failing which in September 2013 on behalf of SOS he issued proceedings for judicial review of the decision of Tower Hamlets, which were stayed by agreement on terms that there would be no use and occupation of the Nursery without prior notice. Negotiations between the parties having failed to produce a solution, on 1 August 2014 the school gave notice of intention to occupy the Nursery, which led to the issue by SOS on 21 August 2014 of an application to the chancellor for a restoration order under section 13(5) of the 1991 Measure. The delayed opening of the Nursery took place in September 2014.

28. On 15 December 2014 the chancellor held that the restoration order application was an abuse of process and granted a permanent stay; on 11 March

2015 the Dean gave permission to appeal; and on 24 July 2015 this court allowed the appeal and remitted the application for determination by a differently constituted consistory court.

29. Meanwhile on 1 April 2015 the Care of Churches and Ecclesiastical Jurisdiction (Amendment) Measure 2015 came into force which inserted the new section 18A into the 1991 Measure, allowing in certain circumstances the erection of buildings on disused burial grounds. On 19 October 2015 a petition was lodged by the Rector and Church Wardens for a confirmatory faculty under section 18A. The petition once again included the answer "no" to the question "Will the work affect graves?", although this may have been because the works were stated to have been "completed October 2013". The present Appellants became parties opponent to the petition.

30. In June and July 2016 the combined hearing of the application for a restoration order and petition for a confirmatory faculty was held before the deputy, whose final judgment (following another hearing in June 2017 and the receipt of further written submissions from the parties) was not handed down until 17 December 2017. Her conclusion was that "the balance of benefit in my judgment is firmly towards granting a confirmatory faculty and not a restoration order" [806].

31. Three issues argued before the deputy do not arise on this appeal:
(1) the significance of various agreements relating to open space and the role of the Open Spaces Act 1906 [812 to 816], on which the Dean refused permission to appeal;
(2) whether the building was rendered lawful by virtue of the 1967 Act, on which there was no cross-appeal from the deputy's finding that the Nursery fell outwith the 1967 Act [774];
(3) whether breach of the prohibition under the 1884 Act constituted "an act…which was unlawful under ecclesiastical law", so as to be capable of being subject to a restoration order under section 13 of the 1991 Measure, on which again there was no cross-appeal from the deputy's finding that this was so [778].

32. We have already identified the issues arising in this appeal, and we shall consider them under those headings and in that order.

(1) <u>Was the deputy wrong in respect of the insufficient interest of SOS?</u>

(a) Introduction

33. SOS (then unincorporated) seems to have come into being as a campaigning group in the early summer of 2012, following the planning permission and faculty, and before the demolition of the recreation centre. A leaflet issued by it in May 2012, seeking support for a petition objecting to the development in the churchyard, stated that SOS was:

> "supported by people in Spitalfields and beyond who are concerned about our inner city and our national cultural and physical environment. SOS has cross-party political support and is created by trustees of The Friends of Christ

Church Spitalfields who together have served the church for more than 150 years."

Commenting on this leaflet [371], the deputy said:

"….the proper constraints on charitable bodies running campaigns may have resulted in the setting up of SOS, but "created by trustees of FoCCS" implies a degree of sheltering by SOS under the cloak of respectability, and what appears to be the use of a clear device to try to get round potential charity law restraints."

34. Prior to incorporation, SOS was one of the bodies on whose behalf the letter of 14 September 2012 was sent, which first identified a breach of the 1884 Act. On 1 March 2013 SOS was incorporated as a private limited company limited by guarantee. Its Memorandum of Association of the same date showed its three directors as Mrs Whaite, Mr Vracas and Mr Dyson, later joined by a fourth director, Mr Gledhill. As the deputy observed [449], the liabilities of the members of SOS were legally limited to £1 under para 1 of its articles of association. The pre-action protocol letter of 8 March 2013 was sent by Mr Buxton, on behalf of "our client Spitalfields Open Space, a company formed by inhabitants of the parish in order to protect Spitalfields Churchyard." Thus incorporation was plainly with a view to the commencement of legal proceedings (or at least the threat of them). When the restoration application was made in August 2014, the sole applicant was SOS.

35. In the abuse appeal judgment, we noted (para 45) that the chancellor had made no finding at that stage about the status or locus of SOS to make the application for a restoration order, and that there had been no application to cross-appeal or serve a respondent's notice on this issue. Accordingly we took the view that the question of sufficiency of interest was not for determination in that appeal, and we also said (para 44) that the question of standing could not be resolved without the opportunity for evidence from the parties and the possibility of cross-examination. We also recognised (para 44) that as we had allowed an application to add Mrs Whaite and Mr Vracas (the latter now sadly deceased) as appellants, the question of SOS's standing had been rendered to some extent academic.

36. The deputy, having said that the locus of SOS had become academic, dealt with the issue very concisely [808]:

"I find that SOS was the creature of Ms Whaite, earlier with Mr Vracas. It was and is at all times a front company without assets. Having heard all the evidence I have no doubt that SOS never did have sufficient interest to become a party, and notwithstanding explanations given to me, I deplore the use of shell companies in this way, especially as the right of being an objector in a Consistory Court is a limited one."

Her reference to "explanations given to me" was to the first witness statement of Mrs Whaite (who was cross-examined, but not on this point) and to the witness statement of Mr Buxton (which was admitted without any request to cross-examine).

(b) evidence

37. In her first witness statement, Mrs Whaite explained that:

"2. SOS is a company limited by guarantee. My co-directors are Christopher Dyson, Charles Gledhill and Philip Vracas. We are

longstanding residents of Spitalfields. Christopher Dyson and Philip Vracas are committee members of the Spitalfields Society. Charles Gledhill is a trustee of the Spitalfields Historic Buildings Trust, and a member of the committees of Spitalfields Community Group and the Spitalfields Neighbourhood Planning Forum. Philip Vracas and I are parishioners of Christ Church, Spitalfields. We are both in the electoral roll of the parish although neither of us is a member of the PCC. Philip Vracas is the Parish Clerk. I have lived in Spitalfields since 1983, and have a long association with the Friends of Christ Church Spitalfields ("FCCS"), becoming a trustee in the 1980s and chairman of the trustees in 2002. Philip Vracas is a trustee and Hon Treasurer of FCCS. FCCS is a trust, established in 1976, whose object is 'the restoration and future maintenance of Christ Church Spitalfields one of the major examples of European baroque architecture'. It has raised more than £12 million for, and managed, the restoration programme for church and churchyard.

3 ….SOS is engaged in seeking to secure the preservation and reinstatement of the churchyard as an open space for the enjoyment of the public. It brings together representatives of FCCS, Spitalfields Historic Buildings Trust, the Spitalfields Society, Spitalfields Community Group and Spitalfields Neighbourhood Planning Forum. It works with and for residents and other community users of Christ Church and its churchyard and its incorporation was supported by trustees of FCCS, the Spitalfields Society, and Spitalfields Historic Buildings Trust all of whom share the aspiration and objective of securing the long term protection of the churchyard, protected and preserved as an open space for the public benefit in perpetuity. SOS is supported by members of Huguenots of Spitalfields."

38. In his witness statement of 19 July 2016, Mr Buxton stated:

"5. In my experience of many years of doing public interest litigation, it quite often happens that there are a group of interests that wish to have a collective entity. Put colloquially, in the eyes of the world they would rather than an organisation's name "put its head above the parapet" than the name(s) of individual members of the group. There can be various reasons alone or in combination for this: for example, so that one person or organisation is not targeted (sometimes literally) by the public, press, opponents, etc; to reflect the fact that there are different contributors to the funding; to reflect an existing informal grouping (unincorporated association); and to reflect the purpose of the organization which may not be immediately obvious from the name of an individual. There may be other reasons but these are the most obvious. Since April 2013 in judicial review cases the liability for opponents' costs under the CPR is £10,000 rather than £5,000, so it is less common to choose a corporate structure but sometimes it is considered "worth" the extra exposure.

6. I can, however say with confidence that these company structures are <u>not</u> at least in my experience set up to avoid adverse cost liabilities should the same transpire…..

7. The real reasons however for not setting up a shell company with that purpose is the danger for directors of being disqualified and/or other penalties for trading while the company is insolvent. There is also the very genuine reason …that the sorts of claimants we act for like to be seen to pay their debts.
8. Overall it is with respect a misapprehension that claimants form companies to be claimants in litigation to avoid adverse costs claims. Indeed in the present case when judicial review was contemplated and SOS was formed as a company it would have been cheaper for an individual (for example Mrs Whaite) to have put herself forward as an individual with an adverse costs exposure of £5,000 rather than SOS as a company. But as she has explained, SOS was (and is) a group that reflected a range of people concerned about the new building in Christ Church Spitalfields churchyard. It could (as sometimes happens) even have been that SOS put itself forward as such in unincorporated form as claimant, with joint and several responsibility of individuals for (one set of) the lower costs limit. However, while that in the end tends to pass muster in the courts, it often leads to time-consuming argument. SOS wanted to proceed sensibly and professionally.
9. So for present purposes it would be wrong to consider SOS as anything other than an entirely genuine vehicle for pursuing the litigation that has arisen in this case and indeed as a focus for efforts to settle matters by agreement."

(c) submissions

39. Although it was the Respondents who first challenged the locus of SOS, their stance is now one of neutrality. Initially they sought that this ground of appeal be struck out as academic and time-wasting. When that application was refused, they sought to have the matter confined to written representations under rule 24.6(2) of the FJR 2015. When that application was also refused, they respectfully declined to make any submissions in the matter, whether by way of skeleton argument or at the hearing, notwithstanding their acceptance that the general significance of the issue for other cases within the faculty jurisdiction might be a "compelling reason why the appeal should be heard" (see rule 22.2(b) of the FJR 2015). However, in response to a pre-hearing request from the Dean, the Respondents provided a helpful note on standing issues, including detailed reference to planning cases where, in judicial review applications, the issue of the standing of limited companies/organisations formed by local residents had been considered.

40. Beyond commending junior counsel (Mr Seymour) for his skeleton argument on the standing issue, Mr McCracken made only extremely brief submissions, suggesting that whilst there might be cases where it was appropriate to limit those who could petition for some positive action, such as erecting a monument in a church or churchyard, the position was rather different where the issue was of an environmental nature, concerned with the preservation of open space. However, whilst arguing that SOS did have a sufficient interest here, he warned against finding that SOS fell within the definition in article 2(5) of the Aarhus Convention of "non-governmental organisations promoting environmental protection". Given Mr

McCracken's known expertise in that area of environmental law, and since the issue does not arise directly in these proceedings, we say no more on that matter.

(d) legal framework

41. It is necessary to consider SOS's locus both to make a restoration order and to be a party opponent to the confirmatory faculty. In respect of the former, the test is whether, as at 20 August 2014, SOS was "any other person [other than the archdeacon] appearing to the court to have a sufficient interest in the matter" (rule 15.1(b) of the Faculty Jurisdiction Rules 2013 ("the FJR 2013")), now replaced in identical terms by rule 16.1(b) of the FJR 2015, both provisions replicating the test contained in section 13(6) of the 1991 Measure, now replaced by section 72(4) of the 2018 Measure). So far as concerns objecting to the confirmatory faculty, the relevant provision as at October 2015 when SOS objected was rule 10.2(1) of the FJR 2015 which provides that "An interested person may object to the grant of a faculty…", the categories of "interested person" being set out in rule 10.1(1). Of these, the only relevant one is "any other person or body appearing to the chancellor to have a sufficient interest in the subject matter of the petition". Thus the hurdle facing SOS in either case is identical.

42. We have not been referred to any appellate decisions in the faculty jurisdiction relating to the "sufficient interest" test. In the abuse appeal judgment, we cited (at paras 39 and 40) two old first-instance authorities (*In re St Luke's, Chelsea* [1976] Fam 295, 305 and *Hansard and Others v The Parishioners and Inhabitants of St. Matthew, Bethnal Green* (1878) 4 P.D. 46, 54), indicating that the concept of a party interested was in its origin proprietary and comparatively narrow, including in the case of an objector whether the proposal may be injurious to any person as the owner or occupier of a property in the neighbourhood. We went on to say, *obiter* at para 44, that:

> "we consider that ecclesiastical courts should generally adopt a fairly restrictive approach to sufficiency of interest; the prospect of country-wide litigation by shell companies set up for that purpose is deeply unattractive".

43. Our attention has now been drawn to a much wider range of decided cases, including decisions relating to applications for judicial review in the secular system, where the test is very similar: does the applicant have "a sufficient interest in the matter to which the application relates" (section 31(3) of the Senior Courts Act 1981)?

44. The commentary at 54.1.11 of the White Book deals with the issue of standing in judicial review proceedings as follows:

> "The question of what is a sufficient interest is a mixed question of fact and law; a question of fact and degree having regard to the relationship between the claimant and the matter to which the claim relates and all the other circumstances of the case (R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd [1982] AC 617).
>
> If a claimant has a direct personal interest in the outcome of the claim, they will normally be regarded as having a sufficient interest in the matter. The

> term interest is not given a narrow construction but includes any connection, association or interrelationship between the claimant and the matter to which the claim relates. If their interest is not direct or personal, but is a general or public interest, it will be for the courts to determine whether or not they have standing…. Claims for judicial review are often made by public interest groups established to represent particular interests or campaign on particular issues. The courts have adopted an increasingly liberal approach to questions of standing over recent years. They consider factors in deciding whether bodies have sufficient interest to bring a challenge including the merits of the challenge, the importance of vindicating the rule of law, the importance of the issue raised, the likely absence of any other responsible challenger, the nature of the breach and the role played by the group or body in respect of the issues in question (R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement [1995] 1 WLR 386).
>
> …
>
> …it is generally undesirable for the courts to consider standing in detail as a preliminary issue, since the question of sufficient interest must be taken together with the legal and factual context of the claim and whether there has been a breach or failure to carry out statutory or other public duties: see R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd [1982] AC 617."

45. Of the planning cases, *R v Leicestershire CC ex parte Blackfordby & Boothcare Action Group Ltd* [2001] Env LR 2 is particularly relevant. An incorporated company was set up by members of a local residents' group for the purposes of bringing the action; the Respondents were concerned that the company had been set up merely as a front, to avoid adverse costs implications. Richards J (as he then was) did not accept that an implication could be drawn that the company was set up merely as a front to avoid adverse costs implications; he went on to find that the company did have standing in light of the fact that individual members of the company had a relevant interest which the company was itself representing. It did not matter that the company itself did not have a separate interest in the matter.

46. In his skeleton argument on standing Mr Seymour drew particular attention to the availability of an order for security for costs, if the creditworthiness of the incorporated body is at issue (see rule 19.5 of the FJR 2015, applicable also to appeals, see rule 2.1(2)). As Irwin J said in *Residents Against Waste Site Ltd v Lancashire CC* [2008] Env LR 27 para 19 (limited company formed to represent objectors two days before claim for judicial review lodged):

> "If the true objection to the grant of standing to a company, formed in circumstances such as this, is the costs protection afforded to those who might otherwise have a starker choice as to whether to take legal action or not, then the proper approach must surely be to address the costs problem, rather than seek to undermine the standing of the company".

Irwin J added at para 21 that:

> "Costs are a discrete question and it is perfectly open to a defendant in this situation to make energetic attempts for adequate security before costs".

47. In granting permission to appeal the abuse decision, the Dean required substantial amounts to be paid into court as security for court costs and this court

expressly left to the consistory court the question of security for costs in respect of the substantive hearing (referred to in the abuse appeal judgment at paras 78 to 79).

(e) conclusions

48. In our view it is right in the faculty jurisdiction to treat each case where sufficiency of interest arises on its own merits, and as a question primarily of fact and degree. In that way vexatious busy-bodies with insubstantial interests can be guarded against (as did Chancellor Tattersall in *Re St Michael and All Angels, Isel*, noted at (2011) 13 Ecc LJ 248, and referred to in the abuse appeal judgment at para 41). On the other hand, given that the secular courts have adopted an increasingly liberal approach to standing in recent years, we see no reason to insist on some form of proprietary interest, nor need consistory courts be instinctively hostile to public interest groups, including those recently incorporated. On further reflection we consider that this court's *obiter* remarks concerning use of shell-companies at para 44 of the abuse appeal judgment, which appear to have influenced the deputy (who described SOS as "a front company without assets" [808]), may have been too widely expressed.

49. The factual matrix here was highly unusual, namely an apparent breach of a statutory prohibition under the 1884 Act, which in the view of Mrs Whaite and others called for the making of a restoration order, in circumstances where no one else was prepared to seek to uphold the rule of law. In these circumstances whilst Mrs Whaite and/or individual local people could have acted without use of an umbrella group, such as SOS, it was entirely reasonable for them to establish SOS and then to incorporate it. The later petition for a confirmatory faculty was (so far as we know) the first attempted use of the new section 18A, in circumstances where it was plainly arguable that the section had no application and that the petition needed to be opposed.

50. The mere fact that SOS was "the creature of Ms Whaite, earlier with Mr Vracas" [808] would not be enough to prevent it having a sufficient interest in a case such as this; and in any event the deputy appears to have ignored the facts that there were other directors (Mr Dyson and Mr Gledhill), that other bodies had supported its incorporation, and that it had a co-coordinating function, all as explained by Mrs Whaite in para 3 of her first witness statement, and unchallenged in cross-examination.

51. Accordingly, academic as our decision is to the outcome of this appeal, we unhesitatingly allow the appeal on the sufficiency of interest ground.

(2) Was the deputy wrong to hold that there was power to make a confirmatory faculty?

(a) argument

52. In para 12(d) of the abuse appeal judgment we left over for later determination the interpretation of the new section 18A of the CCM, noting that:

> "Mr Hill [who then appeared for the current Appellants] contends that the wording is inapt to cover any faculty in respect of a building which has been unlawfully erected, whereas Mr Mynors [who was then appearing for Tower Hamlets] contends that a faculty can be issued to permit the retention of such a building, although it cannot cure the illegality in the period between erection and faculty".

53. Although Miss Ellis argued strongly to the contrary, the natural meaning of the phrase "faculty permitting the erection of a building" is prospective, that is a building which is still awaiting erection. It is, however, noticeable that the full heading to section 3 of the 1884 Act ("No buildings to be erected upon disused burial grounds except for enlargement,&c.") was not repeated in the heading to section 18A (which is "Erection of buildings on disused burial grounds"). On the other hand any comfort which the Respondents might derive from this modification is removed by the express futurity of the wording of section 18A(2)(a) ("land on which the building is to stand"). Furthermore a 50 year period "immediately prior to the date of the petition for the faculty" is referred to in both section 18(2)(a) and (b), but both the start and finish of that 50 year period would be different if the petition could be for a confirmatory rather than a prospective faculty, and this would be anomalous.

54. As an alternative to her argument on statutory construction, Miss Ellis submitted that just as there was no legislative provision sanctioning the grant of confirmatory faculties, whereas it had long been generally accepted that confirmatory faculties could be granted, so, once section 18A conferred a specific power to approve the erection of a building in a disused consecrated churchyard, the general power to grant a confirmatory faculty applied. The difficulty with this argument is that if the erected building has been erected in breach of a statutory prohibition, the power to overcome that statutory prohibition by confirmatory faculty must in our view be dependent on express statutory provision, so that the question remains: does section 18A permit not merely the grant of a prospective, but also the grant of a confirmatory, faculty?

55. Initially, and consistent with Mr Seymour's skeleton argument, Mr McCracken drew a distinction between whether the new building had been erected before or after the coming into force of section 18A. If the former (as here), there was no power to grant a confirmatory faculty; if after, then since the new building could have been permitted by faculty under section 18A, if only a petition had been sought, then there was a power to legitimise the building for the future by grant of a confirmatory faculty. However, early in his opening submissions, Mr McCracken abandoned this distinction, and accepted that any power to grant a faculty, whether prospective or confirmatory, could only be derived from statute, and in this case from section 18A, which, given its prospective wording, did not and could not authorise any confirmatory faculty.

(b) analysis

56. If one looks to the wording of the 1981 Act (which appears to have influenced the wording of both section 18A(1) and (2)), the language is prospective. Section 1(1)(a) provides that "…subject to subsection (2) of this Act a building may be erected on a disused burial ground…", and proviso (b) refers to "the period of fifty

years immediately before the proposal to erect a building thereon". Similarly section 1(2) of the 1981 Act refers to the giving of "Notice of any proposal to erect a building on land on which human remains are interred". The language of section 2(1) of the 1981 Act is equally clear ("Where any human remains are interred in such land no building shall be erected upon it otherwise than….").

57. The mischief at which section 18A was aimed appears from the facts of *Re St Peter in the East,* noted at (2014) 166 Ecc LJ 248, judgment delivered on 19 September 2013. This case appears to have been the immediate trigger for the introduction of section 18A. The (then) deputy chancellor of Oxford diocese refused a faculty for the introduction to a disused consecrated churchyard of a greenhouse, gardener's office and tool shed and store (para 61), having pointed out at para 31 that:

> "The consistory court…has no power to grant a faculty authorising proposals that would amount to the commission of an unlawful act. It therefore follows that a faculty cannot be granted to authorise any proposals contained in the petition that would, if implemented, infringe section 3 of the 1884 Act. (See *In re St Luke's Chelsea* [1976] Fam 295, 312G.)"

At paras 64 to 65, he observed:

> "I consider the outcome of this petition to be unsatisfactory…The fact that a number of elements of the proposals (which would represent significant improvements to the churchyard) cannot be authorised is entirely because of the prohibition imposed by section 3 of the 1884 Act. Were it not for that statutory prohibition I would have granted a faculty for the proposals in their entirety.
>
> …It is not at all clear that the Act serves a useful purpose…Unfortunately the [Disused Burial Grounds (Amendment)] Act 1981] does not apply to any consecrated ground so that it is of no assistance to the petitioners."

Then at para 67, following a reference by counsel to the possibility of section 3 of the 1884 Act being modified by forthcoming legislation, the deputy chancellor said:

> "It remains to be seen whether the 1884 Act will be modified by forthcoming legislation",

which is, of course, what happened, almost immediately thereafter. The mischief identified in *St Peter in the East* entirely concerned prospective buildings, and had nothing to do with previously erected, unlawful buildings.

58. The only legislative materials to which our attention has been drawn are the Legislative Committee of the General Synod's Comments and Explanations relating to the proposed section 18A which were placed before the Ecclesiastical Committee of Parliament, the Minutes of Proceedings before that committee on 11 December 2014, and the 234th Report of the committee. Assuming (without deciding) that any of these materials is admissible on the question of statutory construction, we find nothing in them to suggest that the proposed section 18A was intended to empower the approval by faculty of previously erected buildings.

59. No argument or conclusions in relation to the literal construction of section 18A is to be found in the deputy's judgment. Of counsel who argued this aspect of the case before her, only Mr Seymour was instructed on the present appeal, but he assures us that he did advance an argument along the lines of that which we have found compelling. All that appears in [786] and [787] is as follows, under the sub-

heading “Is Section 4 retrospective so as to require the making of a restoration order now?”:

> “There was much discussion before me whether the new power [that is the power under section 18A] was retrospective and it was submitted on behalf of the Open Space Parties that it could not be under conventional principles of statutory interpretation. I agree. But that submission misses the point: as a restoration order is discretionary, the fact that as of now the Court could authorise afresh the building of a structure such as the new building in these circumstances, *may* be relevant to the exercise of my discretion as to whether to make a restoration order now…In other words, there is no legal basis for saying that this Court is required by law to make a restoration order…
>
> It is also well established that past breaches of faculty control may be rendered lawful for the future only by grant of a confirmatory faculty [citing *St Mary, Balham* [1978] 1 All ER 993, 995 to 996)].
>
> …
>
> It is to be stressed that a confirmatory faculty is thus not retrospective. It requires looking at the facts afresh as of the date of its granting….As the Court now has power to grant a faculty to permit the erection of a building on a consecrated disused burial ground, it is open to me to grant a confirmatory faculty if I am persuaded on the merits.”

60. This approach, as counsel before us agreed, simply assumed that, as a result of the enactment of section 18A, there was a power to grant a confirmatory faculty to authorise the retention of the Nursery, without investigating the source of such a power. We consider that approach to have been erroneous, and that such power could only derive from section 18A, which, properly interpreted, confers no such power.

(c) retrospectivity

61. In the skeleton arguments of the parties, and in the oral argument before us, much time was spent on the issue of retrospectivity, namely if section 18A did, properly interpreted, confer a power to grant a confirmatory faculty overriding the prohibition under the 1884 Act, could such a confirmatory faculty be granted in respect of a building, such as the Nursery, erected before section 18A came into force? The Appellants answer “no”, invoking the presumption against retrospectivity; the Respondents answer “yes”, referring to the absence of any unfairness in the present circumstances. Since in our view the wording of section 18A refers solely to the future erection of a building and is not expressed to authorise retention of a pre-existing building, it is not necessary for this court to express a concluded view on this hypothetical matter.

(3) If not, should the deputy’s finding be changed as a result of Mr Ouvry’s application to intervene?

(a) permission to intervene

62. Mr Ouvry’s application to intervene raises a free-standing argument as to why a confirmatory faculty could not be granted, based on section 18A(2)(b). He seeks to rely on four matters:

(1) the fact that the remains of his distant relative, Philip Ouvry, were interred on the land on which the Nursery stands in August 2012;
(2) that this was within the period of 50 years prior to the date of the petition for a confirmatory faculty;
(3) that he objects to the grant of the confirmatory faculty; and
(4) that his objection has not been withdrawn.

63. The application to intervene was made very late, on 24 August 2018, 2 years and 10 months after the date of the petition for a confirmatory faculty, and nine months after the date of the acting deputy chancellor's judgment. Although details relating to the finding and disposal of Philip Ouvry's coffin were contained in the voluminous bundles before the deputy, it is common ground that no reference was made to it by anyone, deputy, counsel or witnesses, during the course of the first-instance hearing.

64. Mrs Whaite only chanced upon these details when reviewing materials in mid-August 2018 in preparation for the appeal; she then traced and contacted Mr Ouvry on 21 August, and suggested the possibility of his intervention in the forthcoming appeal. His witness statement, the content of which is unchallenged, is that:

> "it has only very recently come to my attention that a member of my family was reburied in Christ Church churchyard in August 2012, when his coffin was found during building works",

and that he objects to the grant of a faculty because:

> "the construction of a building in the vicinity of my relative let alone on top of his new grave is wholly inappropriate".

65. Were the application to raise new issues under section 18A(2) made by Mrs Whaite herself, or any of the Appellants, it would undoubtedly be refused, being matters which could readily have been raised before the deputy. Miss Ellis contends that similarly the application by Mr Ouvry to intervene should be refused permission (see rule 27.7(1) of the FJR 2015), since, notwithstanding the sufficiency of Mr Ouvry's interest in the subject matter of the appeal under rule 27.7(1)(e), he must be assumed to have known of the proceedings below and should therefore have objected to the petition at an earlier stage. She correctly points out that Mr Ouvry's witness statement does not expressly aver that he knew nothing of those proceedings.

66. However, Mr Ouvry is a retired partner in a leading firm of solicitors in Westminster, and it would have been a grave breach of his duty of candour to the court if he were to have deliberately concealed such knowledge. Moreover he is not a local resident, but lives in Blackheath in south London, so that we can see no reason why he should have been aware of this litigation, much less of any disturbance to his relative's coffin (of which it is conceded that he knew nothing until informed by Mrs Whaite on 21 August 2018). Mr Ouvry attended the second day of the appeal hearing, and Miss Ellis was offered, but declined, the opportunity to cross-examine him on his witness statement. Accordingly we decline to find anything abusive about his application to intervene. Although at Miss Ellis' request, we deferred any conclusion at the outset of the appeal hearing, we are satisfied that Mr Ouvry should have permission to intervene.

67. Because of the conclusion we have already reached in relation to the absence of power under section 18A to grant a confirmatory faculty, it is not strictly necessary for us to reach any conclusions in relation to section 18A(2)(b). Nevertheless out of respect to the arguments addressed to us, and the possibility that similar issues may arise in other cases, we set them out and then summarise the views we have reached, and this may have relevance to the final determination as to costs.

(b) facts and issues

68. One might have supposed that the "personal representative or relative of any person whose remains have been interred" would be someone who had met or had some form of close relationship with the person whose remains had been interred, thus giving rise to the right to enter an overriding objection to the grant of a faculty. Section 18A(2)(a) and (b) were clearly modelled on provisos (a) and (b) in section 1 of the 1981 Act; but whereas section 9 of the 1981 Act contains a restrictive definition of "relative", reading, as amended, in relation to any person whose remains are interred:

> "a spouse or civil partner, parent or grand-parent, or child or grandchild, including a legitimated child, and any person who is, or is the child of, a brother, sister, uncle or aunt",

there is no interpretation section applying to "relative" in section 18A(2), nor is "relative" defined in Schedule 1 to the Interpretation Act 1978. Accordingly, given the evidence of Mr Ouvry that Philip Ouvry was "the younger brother of my great great great grandfather Peter Aime Ouvry", Philip was plainly the intervener's relative for the purposes of section 18(A)(2)(b). The contrary was not argued by Miss Ellis.

69. According to the Rector's report of 13 August 2012 "for the PCC and Diocese of London" on "the Reburial of human remains" in the churchyard, all the disturbed human remains, including Philip Ouvry's coffin, were placed into an underground vaulted family tomb, uncovered during the excavation work, "within the curtilage of the planned slab foundation for the new children's centre/foundation stage building, thus ensuring maximum security for the life span of the new building." Then, they were covered with a further layer of ballast, and "a service of reburial was conducted by the rector". The form of service "for the re-burial of remains" formed an appendix to his report.

70. The Respondents argued that section 18A(2) was not triggered by this re-burial for three reasons. First, because the re-burial site was not "in the land on which the building is to stand" (see section 18A(2)(a)), which is "the land" for the purposes of section 18A(2)(b), but rather lay just outside the easternmost wall of the Nursery. Second, because the re-burial of a person previously buried in the same churchyard was not an "interment" for the purpose of section 18A(2). Third, because there was a reasonable doubt whether the deceased's remains were still in the coffin when it was reburied.

(c) the land

71. On the first matter, an accompanied inspection of the site (as provided for by rule 20.1 of the FJR, as applied to appeals by rule 2.1(2)) was necessary to resolve this dispute, which took place on the morning of the second day of the hearing. All

were agreed as to the precise place of re-burial, under a mat immediately outside the main entrance to the Nursery, and beneath a sloping canopy which extended several metres to the east of the Nursery building and formed part of its main roof. It appeared highly likely that the slab foundation for the Nursery extended over the re-burial site. Assessing the facts as best we can, we find that the coffin was reburied on land falling within section 18A(2).

(d) interment

72. The carefully researched argument advanced in the skeleton argument of Miss Ellis and Miss Daly is that, both theologically and as a matter of law, an interment is not synonymous with a re-interment. Consequently, the re-interment of Philip's coffin does not permit an objection under section 18(A)(2)(b); rather the position is that condition (a) under section 18(A)(2) is fulfilled in that no interment has taken place on the land during the 50 year period prior to the petition for the confirmatory faculty.

73. Dealing with the theological and consequent liturgical position, the Rector in an additional witness statement explained as follows:

> "The wording of the liturgy I used on 13th August 2012 at the re-burial service was carefully chosen to be appropriate to what was happening. The section headed Committal is based on the authorized form of funeral service but the wording was deliberately amended. The funeral service includes the Commendation when the soul of the departed person is commended to God: "*We entrust N into your keeping*" and then the Committal where the body of the departed is laid to rest: "*We have entrusted N to God's mercy and now we commit his/her body to the ground earth to earth, ashes to ashes, dust to dust*". In this case, the souls of those unknown persons whose disarticulated remains had been found would have been entrusted to God in the years before closure of the churchyard in 1859 and the soul of Philip Ouvry would have been entrusted to God at his funeral service in 1767. I therefore amended the wording of the authorised form of service to: "*The church has entrusted our brothers and sisters to God's mercy*" and then continued "*we re-commit their mortal remains to the ground*". It was clearly not a funeral service and in my mind there was and is a significant difference between a burial or interment at a funeral service and this re-burial or re-interment."

74. Intriguing as this theological analysis is, we do not consider that the interpretation of section 18A(2) turns on the form of service conducted, nor on the particular point at which the deceased person's soul was entrusted to God. Moreover, were this to be in issue, it would be necessary for this court to transfer the appeal to the Court of Ecclesiastical Causes Reserved, under rule 24.5(1) of the FJR 2015. More apposite to what we need to determine is the decision in relation to section 3 of the Burial Act 1853 ("the 1853 Act") in *In re St Mary's, Barnes* [1982] 1 WLR 531, Southwark consistory court, approved *obiter* by this court in *Re St. Michael and All Angels, Tettenhall Regis* [1996] Fam 44, on which Miss Ellis and Miss Daly rely.

75. Section 3 of the 1853 Act ("the 1853 Act"), which relates to Orders made for the discontinuance of burials, provides:

> "It shall not be lawful, after the time mentioned in any such Order in Council for the discontinuance of burials, to bury the dead in any church, chapel, churchyard, or burial place, or elsewhere, within the parts to which such Order extends, or in the burial grounds or places of burial (as the case may be) in which burials have by any such Order been ordered to be discontinued, except as in this Act or in such Order excepted; and every person who shall, after such time as aforesaid, bury any body, or in anywise act or assist in the burial of any body contrary to this enactment shall be guilty of a misdemeanor [sic]."

76. In *In re St Mary, Barnes* it was held that it would not be an offence to re-inter human remains which had been disturbed in a burial place subject to an order. As Chancellor Moore reasoned at 534C-E:

> "One difficulty is that, if such remains are to be re-interred in this burial ground, consideration must be given to the terms of the Burial Act 1853 under which the burial ground was closed and further burials forbidden. Does such a prohibition preclude an order for the re-interment of remains disturbed in the same burial ground? The Act is silent on this point and, so far as I know, no judicial decision has been given. But I am persuaded by Mr Davies that *the Act was aimed at fresh burials and not the replacement of remains already interred in the same location*. Force is given to this argument by the fact that the Act is, and is expressed to be, for the protection of public health and that cannot be adversely affected by mere re-interment. I, therefore, hold that the Act has, in this case, no application" (italics added).

77. In *Re St Michael and All Angels, Tettenhall Regis* [1996] Fam 44,47E-F, this court said:

> "Although the matter is not directly in issue before us, we have considered the decision of Garth Moore Ch in *In re St Mary's, Barnes*…We agree for the reasons there stated that *the prohibition placed on burials in closed burial grounds by section 3 of the Burial Act 1853 does not apply to the replacement of human remains already interred in the same burial ground*. Therefore, if a faculty had been granted in the present case, any human remains disturbed pursuant thereto could have been reinterred elsewhere in the burial ground, subject only to such conditions as the faculty might itself have imposed" (italics added).

78. The Respondents argue that just as the ecclesiastical jurisdiction has quite properly approached the replacement of human remains already interred in the same burial ground in a distinct manner from initial burial or interment, so this approach must apply to section 18A(2). Against this, Mr McCracken drew our attention to the fact that section 3 of the 1853 Act was a criminal provision, to be narrowly construed, unlike section 18A(2); and to the fact that section 18A(2) was not expressly for the protection of public health, though he conceded that that might be part of its rationale. He also sought to engage the court with the question of mass re-interments resulting from a major infrastructure project, such as HS2, where the re-interment would come from a different burial ground, but should, so he contended, enjoy the full protection of section 18A(2) if the place of re-interment became a disused burial ground within a relatively short period. His reserve position was that the narrow interpretation of burial *In re St Mary's, Barnes* was wrong.

79. We agree with the Respondents that section 18A(2) should not be interpreted as giving scope for objections to a confirmatory faculty based on the re-interment of the long-deceased Philip Ouvry; and that the coherent reasoning in *In re St Mary's, Barnes* (although based on different wording in a different statute) encourages a similarly narrow reading of interments within the sub-section, so as to exclude re-interments of bodies or human remains originally interred within the same burial ground. We prefer to leave Mr McCracken's HS2 example to be argued and decided in a case where those facts arise.

(e) body

80. In respect of the Ouvry application, the Respondents therefore do not need their third argument, based on evidence that there were two holes in the lid of the coffin, the coffin was not airtight, and that the base of the coffin at the foot end had been perforated, so that the intervener cannot prove that there was any longer a body or human remains in it when the coffin was removed and reburied. Given that at the time of reburial all must have believed that the coffin contained human remains, we would have regarded this as too tenuous a basis for excluding the application of section 18A(2).

(f) conclusion

81. In summary, therefore, if there had otherwise been a power to grant a confirmatory faculty, then on the facts of this case the power would not have been ousted by application of section 18A(2)(b).

(g) other matters

82. There is a further matter relating to the timing of the intervention upon which we should comment, although the matter was not raised by any of the parties. An objection under section 18A(2) to the grant of a faculty needs to be made before the grant of a faculty under section 18A; and if not made before the grant, it cannot thereafter found an appeal against any faculty granted.

83. Section 25(1) of the Burial Act 1857 provides:

> "It is an offence for a body or any human remains which have been interred in a place of burial to be removed unless one of the conditions listed in subsection (2) is complied with".

The first of the three conditions in section 25(2) is that:

> "the body or remains is or are removed in accordance with a faculty granted by the court".

84. In her additional witness statement concerning the proposed intervention, Mrs Whaite drew attention to the (undisputed) fact that no such faculty had been granted in respect of the disturbance of human remains in this churchyard brought about by the building works for the Nursery. In their skeleton argument Miss Ellis and Miss Daly contend that, given that Philip Ouvry's coffin had plainly already been removed

from its original place of burial some time prior to its discovery in 2012, the necessary elements of the offence under section 25 are not established.

85. We do not find it necessary or appropriate for us to make any ruling on this matter (which formed no part of the grounds of appeal), but we do draw the attention of all those involved in under-ground works in burial grounds to the likelihood that human remains will be encountered and disturbed, and that the matter needs immediately to be drawn to the attention of the diocesan registrar, so that appropriate steps can be authorised by the chancellor, whether by faculty or more commonly by directions. Unfortunately that did not occur in this case; instead, as stated above, the chancellor was informed in the original petition that there would be no disturbance of graves, and received no notification of the disturbance of Philip Ouvry's coffin nor of its re-interment.

(4) If there is no power to make a confirmatory faculty, should a Restoration Order now be made?

(a) introduction

86. This issue was described Mr McCracken at the outset and in his closing as the real substantive issue.

87. The parties are now agreed that the erection of the Nursery was an act in relation to a churchyard which was unlawful under ecclesiastical law so that the deputy was correct in holding that she had jurisdiction to make a restoration order under section 13(5) of the 1991 Measure at a time when less than six years had elapsed since the October 2012 start on building the Nursery (see section 13(8)). Because she considered (wrongly as we have held) that she had power to grant a confirmatory faculty, and on a balance of factors, she declined to make a restoration order [806].

88. There being no suggestion that a new hearing be ordered in relation to the making of a restoration order, that decision now falls to this court exercising "all the powers of the lower court" (see rule 29.8(1) of the FJR 2015). Both parties agreed that it was irrelevant that more than six years had now elapsed, and we consider that this would have been the position even in the absence of the amended limitation provision contained in section 72(5) of the 2018 Measure.

89. The jurisdiction under section 13(5) of the 1991 Measure (or section 72(3) of the 2018 Measure) is discretionary (in both cases "may make an order"), and accordingly the Respondents' starting position is that, despite the unlawful act, no order should be made. The Nursery is fulfilling a valuable function for children in its locality and for the local community who use it out of hours. It is a building with planning permission, considered then to be an improvement on what it replaced, both architecturally in itself, but also in relation to the setting of the Grade I church. Miss Ellis prays in aid the words of Dr Louise Vaughan, described [805] as "a GP in Bethnal Green, a regular worshipper at Christ Church, and a resident with her child at Christ Church School" whose letter, also recited at [805], ended:

> "I am unable to comprehend how the value of heritage and the letter of the law, both clearly immensely valuable, eclipse human need".

(b) conduct of the Respondents

90. Unsurprisingly, the Appellants' starting point is [780], where the deputy answered her own question ("If this had come to me prior to 1st April 2015, would the Court have issued a Restoration Order to require demolition of the new building?") in unhesitating terms:

> "……prior to 1st April 2015 in a straight forward [sic] case of a substantial structure flagrantly erected upon a consecrated disused burial ground in breach of Section 3 of the *Disused Burial Grounds Act* 1884, where action was taken promptly, this Court did have jurisdiction to make a restoration order requiring the demolition of the new building and not re-building the old building, and there would have been powerful reasons for the Court in exercising its discretion to require demolition of the illegally erected structure. Indeed, it is difficult to see what other outcome on those premises could have been possible here."

91. The deputy, in successive paragraphs, addressed the conduct of the Respondents. Her criticism was most severe of Tower Hamlets [801]:

> "the really serious and substantial matter of conduct against LBTH is that LBTH having a legal department and all the necessary resources participated in the breach of the prohibition in the 1884 Act, when LBTH should have known better. That misconduct is compounded by the failure of LBTH to call a witness from their Legal Department to explain their conduct. That failure is the most serious misconduct of any of the Building Parties and the closest to contumacious behavior. I hold it just falls short of that".

92. Tower Hamlets had responsibilities under the 1884 Act, which can be traced back to section 56 of the Metropolitan Board of Works (Various Powers) Act 1885. As stated in vol. 24 of *Halsbury's Laws* (5th ed, 2010), which deals with "Cremation and Burial", para 1327:

> "**Enforcement in Greater London of provisions as to building.** The duty of enforcing the observance of the [1884 Act] in Greater London and taking any necessary proceedings to prevent the violation of its provisions rests with the Common Council of the City of London and the London borough councils."

93. Mr McCracken urges us to find that Tower Hamlets' conduct was indeed contumacious, particularly considering that, despite being expressly put on notice about section 3 of the 1884 Act and its relevance to the proposed erection of the Nursery by Mrs Whaite's letter of 14 September 2012, followed up by Mr Buxton's letter of 15 October 2012, no attempt to seek expert legal advice was taken until they received Mr Buxton's pre-action protocol letter of 8 March 2013 and his advice does not appear to have been received until late June. As at 15 October 2012 the works had only begun the previous week, at a time when Tower Hamlets, although not a party to the building contract, could readily have called for a temporary cessation of the building. They then (admittedly it would seem on counsel's advice) sought to rely on the 1967 Act, whereas even their own counsel now accept that the acting deputy judge was correct to reject that argument [774].

94. In our judgment, the conduct of Tower Hamlets was reckless and flagrant, though we share the deputy's view that it fell just short of contumacious.

95. The Rector and Church Wardens were also not parties to the building contract, but they were school governors and trustees of the school and the Rector was the freeholder of the churchyard [29]. Their conduct overall was described as careless by the deputy judge, and the Rector's carelessness in filling in forms as "appalling, and worse continuing" [798].

96. We consider that on this occasion the deputy should have gone further. We have already described aspects of the form filling as reckless and, so it would seem, deliberately misleading. Further, from the time of Mrs Whaite's letter of 14 September 2012 (which was copied to the three of them [396]), the Rector and Church Wardens knew of the allegation that the building works which had not yet started were in breach of section 3 of the 1884 Act, and of the request for an immediate cessation of current activities, yet they took no steps whatever to obtain legal advice or seek to stop the start of the works. This we consider to have been reckless and flagrant misconduct.

97. The building contract was entered into by the Governing Body "in association with the LDBS", although signed by the Governing Body. Whatever the legal niceties, both the Governing Body and the LDBS were sent copies of Mrs Whaite's letter of 14 September 2012 [396], and therefore not only should have been aware of the legal issue under section 3 of the 1884 Act, as the deputy said [799] and [800], but actually were so alerted in time to stop the start of the works. Again, in our judgment the breach was reckless and flagrant misconduct in both cases.

98. Accordingly whilst due allowance must always be made for those "not learned in the law", to use the deputy's phrase at [798] and [799], on the facts of this case the conduct of the Respondents was extraordinarily cavalier. It is this deliberate, knowing defiance of the law which strengthens the Appellants' argument about the importance of the rule of law.

99. This defiance is the more serious because, whatever the reservations in 2013 of the then Attorney General about whether section 3 of the 1884 Act created a criminal offence [495], there is case-law (*R v Kenyon* (1901) JP Reports 30) which indicates an acceptance that it did so, including the strongly expressed view of Lindley LJ in *In Re Ponsford and Newport District School Board* [1894] 1 Ch 454,465. The act we are here dealing with was no mere breach of a technical requirement, but a serious and knowing breach of the law.

100. As pithily expressed in Mr Seymour's skeleton argument in reply:

> "…there is a public interest in public Acts of Parliament being obeyed. In *A.-G.v Wimbledon House Estate Company, Limited* [1904] 2 Ch.34, where a statutory prohibition on erecting buildings [under the Public Health (Building in Streets) Act 1888] was coupled with a penalty measured by its continuance, the Court held at [44] that a mandatory injunction was the only means of protecting the public (there being no remedy in damages or otherwise), notwithstanding the wrongdoers having been convicted and fined. The present case is *a fortiori*, there being no statutory penalty."

101. In the *Wimbledon House* case, in the same para, Farwell J also stated:

> "The Attorney-General has brought to the Court the fact that there has been a clear and deliberate breach of the duty imposed by a public statute, and in my opinion the mandatory injunction follows as a matter of course…"

The breach of section 3 of the 1884 Act which is the subject of the present appeal is also "clear", but falls just short of being "deliberate".

(c) conduct of the Appellants

102. At [780], in the passage already set out above, the deputy referred to the situation where an applicant for a restoration order acted promptly. There are indications in her judgment that she considered that those seeking a restoration order had delayed, being, in her phrase, "prepared to strike but not to wound" [429] (a reversal, as Mr McCracken pointed out, of Alexander Pope's epigram, "willing to wound, and yet afraid to strike"). We do not share her view. It was not in the least surprising, or blameworthy, that the champions of open space did not rush to the courts for an injunction; and her criticism of them for writing to the Attorney General rather than telephoning the police [471] was not justified. Very soon after their discovery of the 1884 Act, they drew it to everyone's attention in very clear terms.

103. Where a building has been erected in flagrant breach of a legal restriction, the position in private law is clear. In *Mortimer v Bailey* [2005] 2 P & CR 9, para 35, where the judge at first instance had granted a mandatory injunction for breach of covenant, Peter Gibson LJ said, in refusing the appeal:

> "I would not characterise what occurred in this case as the claimants standing by while the extension was built. I accept that the claimants were slow to seek an interim injunction and left it far too late, and, as I have said, such delay is a relevant consideration in the exercise of discretion whether to grant a final injunction. But very shortly after work commenced, and with the completion of the extension still two months away, the defendants had been warned by the claimants that if the construction continued proceedings would be brought against them. They knew when buying The Old Barn that they were doing so with the burden of the covenant. They chose to rely on the advice of their legal advisers and to proceed with the construction. In so doing they took a gamble that it was unreasonable for the claimants to have refused consent. They lost that gamble.
>
> ……
>
> The conduct of the claimants cannot in my judgment be said to have been unconscionable, having promptly put the defendants on notice, as they did, of their intention to take proceedings. That conduct in no way disentitled them from obtaining the equitable relief of a mandatory injunction to enforce their rights."

104. .At para 41 Jacob J added:

> "Where there is doubt as to whether a restrictive covenant applies, or whether consent under a restrictive covenant is being unreasonably withheld, the prudent party will get the matter sorted out before starting building, as could have been done in this case. If he takes a chance, then it will require very

strong circumstances where, if the chance having been taken and lost, an injunction will be withheld."

105. Complaint is made by the Appellants that this, and other similar cases, though cited to the deputy were not referred to in her judgment.

(d) factors against demolition

106. Should the position be treated differently where the building is so relatively large, has been erected at considerable public expense, indubitably confers benefits on its users, and will be expensive to demolish (a figure in excess of £93,000 is mentioned at [804])? Those are factors which properly weigh against making a restoration order, and we are very mindful of them. The deputy also considered that retaining the Nursery would result in "benefit to Christ Church in that it would promote worship and mission" [805], though the argument here is somewhat tenuous.

107. Although little reliance was placed on the matter by Miss Ellis, it is right to take into account that at the time of the grant of the 2012 faculty, neither the diocesan registrar nor chancellor identified the potential implication of the 1884 Act (nor was it drawn to their attention by anybody); and that Mrs Whaite's letter of 14 September 2012 (the first reference to the 1884 Act) was addressed not merely to Tower Hamlets, but also to the chancellor himself. At that stage it was still open to the chancellor, in exercise of his power under rule 33(1) or (2) of the FJR 2000 (now rules 20.2(2) and 20.3(1) of the FJR 2015), to set aside the 2012 faculty if it appeared to him "just and expedient to do so". A great deal of time and expense would have been saved had some action been taken by the chancellor at that stage, before the erection of the Nursery began, to acknowledge the breach of the 1884 Act which that faculty had, albeit inadvertently, sanctioned.

(e) open space considerations

108. The 1884 Act was one of a series of measures at the close of the nineteenth century and in the early years of the twentieth aimed at the preservation of open space, particularly in urban areas. These included the Town Gardens Protection Act 1863, the Metropolitan Commons Act 1866, the Commons Act 1876, the Corporation of London (Open Spaces) Act 1878, the Metropolitan Open Spaces Act 1881, the Open Spaces Act 1887, the Commons Act 1899, the Open Spaces Act 1906 and the National Trust Act 1907. The protection and enjoyment as open space of burial grounds was an important element in this series (for example, section 4 of the Open Spaces Act 1887 extended the scope of burial ground in section 2 of the 1884 Act, and sections 6 and 9 to 12 of the Open Spaces Act 1906 are all concerned with burial grounds).

109. As the Earl of Halsbury LC said in *Paddington BC v AG and Boyce* [1906] AC 1,4:

"It is very obvious, I think, that what was intended to be done was to keep this closed burial ground from being used as a building ground, to keep it as a place of exercise, ventilation, recreation and what not, -- to prevent anything

being done in the nature of building which will interfere with or restrict the free and open use of these spaces as constituted under the statute".

Immediately following citation of this passage, the authors of Newsom's *Faculty Jurisdiction of the Church of England* (2nd ed., 1993) p.165 state:

> "Whatever may have been the original context of the D.B.G.A 1884, the amendments of the Open Spaces Act 1887 place it among the open spaces legislation".

110. Mr McCracken reminded us of the value of such open space, particularly for those of modest means, and even if not superficially idyllic or justifying an elegiac description; and of the role of open space in what he described as "spiritual well being", invoking the final lines of Philip Larkin's well-known poem, *Church Going*, which articulate the importance of both churchyards and churches to non-worshippers:

> "A serious house on serious earth it is,
> ……
> And that much never can be obsolete,
> Since someone will forever be surprising
> A hunger in himself to be more serious,
> And gravitating with it to this ground,
> Which, he once heard, was proper to grow wise in,
> If only that so many dead lie round."

More prosaically, Mr McCracken also stressed the shortage of open space in urban areas such as Spitalfields.

111. On our site visit he drew our attention to the noisiness of the western part of this churchyard, immediately adjoining busy Commercial Street, compared to the quieter areas of the churchyard further east, including the location of the Nursery itself. Whilst much of the churchyard was, at present, lamentably maintained (described by the deputy as "a long standing and festering management nightmare" [804]), there is potential public benefit in returning the area of the Nursery to open space, although it had not been so for many years. We accept that demolition alone will not render the site available for public access, hence the significance of the undertaking to which we refer below.

(f) setting of the listed church

112. Mr McCracken also placed emphasis on the damage caused to the setting of the Grade I church by the erection, close to it and intrusive in some views of the church. It is accepted by Miss Ellis that the effect on the setting of the church is a relevant consideration to the exercise of discretion under section 13(5), although she argued (and we agree) that since neither the erection of the Nursery nor its removal would be works to a listed building, the "framework or guidelines" promulgated by this court in *St Alkmund, Duffield* [2013] Fam. 158, 200 do not apply, contrary to the approach followed by the deputy at [788] to [795]. It is not, however, in dispute that a less than substantial adverse effect on the setting of a heritage asset of exceptional worth may constitute a substantial objection (*East Northamptonshire DC v SSCLG* [2014] EWCA Civ 137; [2015] 1 WLR 45, paras 28 to 29).

113. Professor Kerry Downes, Emeritus Professor at the University of Reading, is one of the Appellants in this case, described by the deputy as "an expert and author on the work of Hawksmoor" [719] and "the leading authority" [802]. He gave evidence below that "the southernmost aspect [of the church], incorporating the historic churchyard can be legitimately regarded as the most important aspect, along with the view of the western façade which also incorporates a view of the churchyard" [722]. Although Professor Downes' view caused the deputy to "struggle" [722], and she regarded his supporting "commentary" to be "somewhat special pleading to endeavour to talk up the alleged importance of the view from the graveyard" [736], we find no reason to depart from his expert opinion. On the other hand, whilst the Nursery is in our opinion sited regrettably close to the church, it was described by the deputy as "innocuous in itself and with some visual merits at the lowest" [795]. We were unanimous in finding it to be both more carefully designed and, with its low roof, less intrusive than we had supposed prior to our visit.

114. What then is our conclusion on effect on the setting of the church? We consider that the deputy's overall assessment that removal of the Nursery would bring "some benefit to the setting of Christ Church but only marginally" [804] was to underrate the detrimental effect of the Nursery on the setting of this exceptional listed building, and its overall significance, and this therefore is a factor pointing towards the making of a restoration order.

(g) further consents

115. If a likely outcome of removal would simply be a new planning permission and a new faculty to erect a replacement Nursery under section 18A's successor, section 64 of the 2018 Measure, then this, in the phrase used in the Respondents' skeleton argument, would provide "a powerful disincentive to make a Restoration Order requiring its removal". Here we place much less weight than Miss Ellis would have us do on the 2011 planning permission, because, as Mr McCracken repeatedly reminded us, the analysis of harm to the Grade I listed building was at that time complicated by the existence on site of the unsatisfactory and decaying former Recreation Centre. The open space considerations would also be different now.

116. Whilst on any new planning application the decision will be for members of the local planning authority, advised by their officers, we think it unlikely that the erection of a new Nursery in the churchyard and so close to the Grade I listed church would be held compatible with the duty under section 66(1) of the Town and Country Planning Act 1990, as interpreted in *East Northamptonshire,* and it is almost inevitable that Historic England would object. Even were planning permission to be granted, we do not consider it by any means inevitable that a faculty would be granted under section 64 for anything but a much smaller, and therefore less intrusive building, and sited further from the church. Therefore consideration of further consents does not influence our decision.

(h) conclusion on exercise of discretion

117. We are mindful of Mr McCracken's exhortation to us that an appeal court should not allow its sense of what appears to be expedient in the instant case before it to lead it into making a decision which encourages unlawful behaviour in the

future. We doubt that a decision not to make a removal order would in fact lead to a repetition of the form of unlawfulness that has occurred here. Nevertheless, when we take into account the flagrancy of the unlawful act, the prompt and coherent way in which Mrs Whaite and others sought to stop the building programme at its outset and were ignored, as well as the potential markedly to improve the setting of the listed church and ensure that this disused burial ground will be available as potential open space, we conclude, albeit with some regret, that a restoration order should be made despite the cost and disruption this will necessarily involve.

(5) On what terms should the restoration order be made?.

(a) introduction

118. It is no longer contested, as it appears to have been before the deputy, that the phrase "restoring the position so far as possible to that which existed before the [unlawful] act was committed" in section 13(5) of the 1991 Measure (now minimally modified in section 72(3) of the 2018 Measure to read "restoring the position so far as possible to what it was immediately before the act was committed") need not be read "in a narrow and technical manner" [779]; and does not require re-erection of the former Recreation Centre. Accordingly, the restoration order can lawfully be confined to steps necessary for the demolition of the Nursery so far as it stands above the slightly extended slab.

119. Section 13(5) of the 1991 Measure includes the words "within such time as the court may specify", which are almost the same as those in section 72(3) of the 2018 Measure ("within such time as the court specifies"). Obviously the length of the appropriate period will depend on all the circumstances of the individual case.

(b) submissions

120. In his skeleton argument in reply Mr Seymour suggested that there should be:
> "an appropriate timescale for compliance such as 12 months or the end of the school year; or if required, a period of say 2 years allowing an ampler period for the School to make any internal adjustments".

In his opening Mr McCracken initially shared his junior's position on time-scale, but he disclaimed "an irredentist position" on that.

121. In their skeleton argument, Miss Ellis and Miss Daly invited the court to defer the effect of any restoration order "until at least 2043". No rationale was offered for this, but we assume that a 30 year life is considered about right for a building completed in 2013. Mr McCracken, whilst preferring a much shorter period, argued that if the court were to accept the 2043 date, this should be subject to two conditions: (1) if the Nursery ceased to be used by the school, demolition should then follow immediately, so that the site could not be sold on as a valuable development site; (2) any such suspension should be conditional on a scheme of access being designed and implemented in consultation with the Friends of Christ Church and the Spitalfields Society and other relevant bodies, subject to the approval of the chancellor, so that the area to the east of the Nursery should outside school hours be open to the public. He referred us to [735], where the possibility of such access was mentioned by the deputy.

122. The wording of section 13(5), and section 42(3), does not expressly refer to the imposition of conditions; and even were such a power to be implied, we doubt a condition could lawfully be imposed to require, against the will of the Respondents, a condition along the lines of Mr McCracken's condition (2). This is a matter on which Mr McCracken did not pursue legal argument, but reserved the Appellants' position in the event of a further appeal to the Privy Council. So far as Mr McCracken's condition (1), we recognise the desirability of such a limitation, and see no problem to the matter being addressed otherwise than by a condition, so that the restoration order would come into effect either at a specified date or on the Nursery ceasing to be used by the school, whichever first occurred.

(c) proposed undertaking

123. Whatever may be the position in respect of the imposition of conditions, there is nothing to prevent the Respondents from offering the court an undertaking in respect of access during such period as precedes the time set for demolition of the Nursery. Rule 16.9 of the FJR 2015 provides:

> "(1) In any proceedings for an injunction or restoration order the court may accept an undertaking from the person against whom the proceedings have been brought.
> (2) In paragraph (1) an undertaking is an undertaking to do or not do a specified act.
> (3) The court may decline to accept an undertaking.
> (4) If the court accepts an undertaking it must require the party giving the undertaking to make a signed statement to the effect that the party understands the terms of the undertaking and the consequences of failing to comply with it.
> (5) An undertaking to do an act must state the time within which the act is to be done."

124. By the close of the hearing the parties had begun without prejudice discussions with a view to the offering by the Respondents of an undertaking, in agreed terms if possible, which this court would then take into account in considering the length of the appropriate period of suspension.

125. The court has now received:

(a) a signed undertaking ("the first undertaking") from the Governing Body, the Rector and Church Wardens, dated 20 January 2019, replacing two previous versions ;
(b) various explanatory letters from the Respondents' solicitors;
(c) a signed undertaking ("the second undertaking") from Tower Hamlets, dated 15 January 2019;
(d) two letters from Tower Hamlets; and
(e) various responses from the Appellants' solicitor (together with a letter from SOS).

126. A plan attached to both undertakings shows five areas, defined as:

> "A- that area immediately to the east of Commercial Street coloured green;

B- that area between area A and the [Nursery], coloured blue;
C- that area of hard-standing between the church and the [Nursery] coloured yellow;
D- that area to the east of the [Nursery] and between the Tennis Court and The rear of the Fournier Street properties, to the west of the original School boundary, coloured orange;
E- that area known as the Tennis Court, coloured red".

127. The first undertaking is to make Areas A-C available for access to the public. In brief, Area A would remain available for public access during day light hours. Areas B and C would, within one year of the later of either the grant of planning permission and the grant of a faculty, be laid out according to a garden design approved after local consultation and then amalgamated with Area A, and become available for public access during the same hours (subject to the exclusion of a defined maximum area adjoining the Nursery on health and safeguarding grounds). This undertaking in respect of Areas B and C forms also part of the second undertaking, and the second undertaking is to make funding available for the garden works to Areas B and C.

128. The first undertaking also states the Rector and the PCC would within the next year enter into a new management agreement under the Open Spaces Act 1906 with Tower Hamlets, covering Areas A, B and C, subject to the grant of a faculty upon completion of the landscaping works to areas B and C. This also forms part of the second undertaking.

129. The first undertaking provides that, whilst there would be no general public access to Areas D and E, Area E would continue to be available for playing tennis out of school hours during term time and all day during the school holidays, through a booking system managed by the Church Office, with access via Area D (with no separate use of Area D save for this access). Additionally, the public would henceforth be permitted by arrangement with the Church Office to view the profile of the church from Areas D and E during the same hours as Area E could be used for tennis, and access to Area E would also be available for this purpose on two advertised open days each year.

130. The first undertaking provides for the establishment within the next three months of a new advisory body to consider all matters relating to the churchyard, consisting of the Rector, the Church Wardens, and representatives of the school, Tower Hamlets and relevant organisations with an interest in the churchyard. The second undertaking is to appoint a representative to any such advisory body.

131. The arrangements in the undertakings would continue in place throughout the life of the Nursery and thereafter, subject to any variation ordered by the consistory court. The first undertaking provides that, in the event that the Nursery is demolished and subject to the grant of planning permission and a faculty, the land on which the Nursery stood, together with its playground and curtilage, would, within one year from demolition, be laid out and incorporated into Area B and would also be subject to the management agreement with Tower Hamlets. The second undertaking provides that Tower Hamlets would, in those circumstances, enter into a variation of the management agreement to include this enlarged area.

132. The terms of the first undertaking incorporate a number of concessions in respect of matters in initial correspondence from the Appellants' solicitor. The Appellants remain, however, particularly concerned in relation to Areas D and E, and consider that these areas should be subject to the same open space management as Areas A, B and C, especially following demolition of the Nursery. They seek to raise issues concerning lack of any faculty authorising school use of Areas D and E, along with various arguments canvassed before the deputy concerning open space trusts over those areas. They also suggest that the advisory body's remit should include those areas, and that the advisory body should be "be established and run by a neutral entity, most obviously the LB Tower Hamlets". SOS (amongst various other points) question the powers of Tower Hamlets to be party to the second undertaking, if the 1949 Management Agreement has been terminated; state that the trustees of the school, rather than its Governors, should be parties to the first undertaking; seek explanation why an advisory body would be established, rather than "a special vehicle company floated to take over management of the disused burial ground"; and complain that there was not fuller discussion between the parties in relation to the terms of the undertakings.

(d) the position in the light of the proposed undertaking

133. Regardless of the undertaking, so short a period as 2 years would not in our view allow time for a replacement nursery/community building to be constructed, given the need to find another site, obtain all necessary consents, including funding, and for construction and fitting out. Realism and the public interest demand a longer period. There must be sufficient time to explore all options for a replacement nursery and community building, to obtain all necessary consents (including funding), and leave sufficient time for construction and fitting out. For this we consider that a minimum period of five years would be needed. However, even in the light of the proposed undertaking, we consider that a suspension until 2043 would be far too long. Notwithstanding the undoubted public benefit that the Nursery brings, to allow so long a period would sanction illegality, and could indirectly encourage unlawful acts, or acts which parties are aware might arguably be unlawful acts (as was the position of the Respondents from September 2012).

134. We understand the reluctance of the Respondents to make available for general public access Areas D and E, to the east of the Nursery, which are very much part of the present curtilage of the school, whether or not the Nursery remains in position. As pointed out in a letter from the Respondents' solicitor, the deputy held [830-843] that the land on which the Nursery stands and the land to the east (Areas D and E) were excluded from the 1949 Management Agreement by the 2009 Agreement and therefore no public rights have existed thereon since 2009; nor has there been any general public access to those areas since then.

135. We decline the repeated invitation of the Appellants that we re-open the question of authorised use of, and claimed public access rights to, these areas which would take this court into issues ranging beyond the limited grounds on which permission to appeal were granted by the Dean. However, we recognise that the proposed undertaking in respect of the tennis court on Area E involves little change from the present situation, and is thus of only limited weight in relation to the period

of any suspension, although we welcome the new opportunity by arrangement to view the church profile from Area E.

136. The principal issue, therefore, concerns the impact (and any associated public benefit) in relation to what is offered on the land to the west of the Nursery, and in respect of the site of the Nursery following its demolition. Here the position in respect of Area A will remain the same. But in respect of areas B and C there would be guaranteed public access during day light hours, and funding is now assured, subject to planning permission and faculty, for Areas B and C to be landscaped and thus "amalgamated" with Area A, to use the word in both undertakings. This would be a significant public benefit, though much less than that hoped for by the Appellants, as would the establishment of the proposed new advisory body.

137. There is also, in our view, considerable public benefit in the proposal for the future landscaping and public use of the site of the Nursery and its curtilage, following demolition of the Nursery, a matter on which, in the absence of the undertaking, there would be no certainty and a likelihood of continued dispute between the parties. We appreciate that the second undertaking does not guarantee funding for this (by contrast to the position in respect of Areas B and C).

138. Both undertakings are offered on the basis that they are "to be taken into account in the event that a Restoration Order is made but is suspended or deferred for a specified period". We consider it appropriate for the court to accept, under rule 16.9(1) of the FJR 2015, both undertakings in the terms in which they have been offered, and their terms encourage us to depart from the pessimistic view of the deputy [804] that:

> "A restoration order would so long as the area of the new building was returned to open space simply restore a long standing and festering management nightmare."

It is this court's belief that there will now be mechanisms to prevent such a sad occurrence, and in any event there is the, thus far it would seem unrecognised, enforceable duty under Canon F13 to keep the churchyard "in such an orderly and decent manner as becomes consecrated ground".

139. We have therefore decided that the minimum period of five years from now to which we referred above could and should be extended to one of ten years, that is, to the end of January 2029 (unless the use ceases before then, in which case the Nursery must then be demolished forthwith). We recognise that an extension to the end of January 2029 is markedly shorter than the end-date of 2043 originally proposed by the Respondents. However, by January 2029, the Nursery will have functioned for 13 years, so that the public money spent will not have been entirely wasted, even though there will inevitably be substantial costs in dismantling the building and clearing the site.

(6) Disposal

140. For the reasons set out above, the Order made by the deputy will be set aside, and the Appellants (including SOS whom we have held to have a sufficient interest both to oppose the confirmatory faculty and to apply for a restoration order)

are entitled to a restoration order, which must be complied with before 1 February 2029, or earlier if the present use ceases before then.

141. We invite the parties to submit, within 28 days of handing down of this judgment, a draft (preferably agreed) order of the court allowing the appeal; and incorporating the restoration order, based on Form 18 in Schedule 3 to the FJR 2015, making reference in the preamble to the restoration order to the fact that both the Governing Body, the Rector and Church Wardens, and also Tower Hamlets, have entered into undertakings, the terms of which shall be annexed to the restoration order. There will be liberty to apply.

(7) Costs

142. The deputy ordered that there should be no order of costs inter partes, but that the court costs should be borne by the Respondents, divided in a particular way [866]. In granting permission to appeal, the Dean ordered that no one should seek on appeal to vary that order.

143. So far as the costs of the appeal relating to the confirmatory faculty and the restoration order, the parties have agreed to be responsible for their own costs. This then leaves to be decided:

(1) The court costs relating to the confirmatory faculty and the restoration order, which prima facie fall to be paid by the Respondents since they have lost on both issues.

(2) The parties' costs of the standing issue, and the associated court costs, which were left for determination in the light of this court's judgment. Prima facie these both also fall to be paid by the Respondents since, whilst remaining neutral on the issue, they did not consent to judgment thereon, and since it was they who raised the standing issue at the outset of this litigation.

(3) The parties' costs of the Ouvry intervention and the associated court costs, which have not been the subject of any previous court order (save as to the costs of the making of the application). This was a dispute between the Intervener and the Respondents only, and prima facie both the Respondents' and the court's costs fall to be paid by the Intervener since his intervention failed.

144. The parties within 14 days of the handing down of this judgment shall submit a draft (preferably agreed) costs order, taking into account, but not being bound by, the observations in the previous paragraph, and dividing responsibility for any costs where appropriate.

(8) Final observations

145. This highly unusual litigation arose from a misunderstanding of the relevant law which ought never to have occurred, and from a failure of the Respondents to pause their construction programme when the prohibition in the 1884 Act was first identified by the Appellants in September 2012. It has been a bitterly fought battle, and we realise from recent correspondence in relation to the undertakings that the Appellants' concern about the legal status of Areas D and E remains unabated. Sadly, it will take time for the wounds to heal on both sides. Nevertheless this court,

which is very mindful of the role of all churches as local centres of worship and mission (see now section 35 of the 2018 Measure), welcomes what appeared, during the hearing of the appeal, to be the first, if very tentative, steps towards a rapprochement between the parties; and we hope that in due course the quality of the provision and management of the churchyard in which the Nursery is currently situated may equal that which we observed within the church itself during our visit.

28 January 2019

CHARLES GEORGE QC
Dean of the Arches

GEOFFREY TATTERSALL QC
Chancellor

DAVID PITTAWAY QC
Chancellor